THE EMPIRICAL TURN IN INTERNATIONAL LEGAL SCHOLARSHIP

*By Gregory Shaffer and Tom Ginsburg**

There is a new empirical turn in international legal scholarship. Building on decades of theoretical work in law and social science, a new generation of empirical studies is elaborating on how international law works in different contexts. The theoretical debate over whether international law matters is a stale one. What matters now is the study of the conditions under which international law is formed and has effects. International law is the product of specific forces and factors; it accomplishes its ends under particular conditions. The trend toward empirical study has expanded through the efforts of scholars in multiple disciplines, with legal scholars playing central roles independently and as collaborators in generating new empirical work.[1] Legal scholars are also now pressed to be increasingly sophisticated consumers of this work. It is time to take stock and evaluate this new generation of multidisciplinary, multimethod empirical scholarship.

The empirical turn is not atheoretical, but it generally is not aimed at building grand metatheory. Instead, it focuses on midrange theorizing concerning the *conditions* under which international law (IL) is formed and those under which it has effects in different contexts, aiming to explain variation. We thus call it *conditional IL theory*. By building theory from empirical study, it involves what one of us has called an "emergent analytics"—that is, analytics that oscillate between empirical findings, abstract theorizing, real-world testing, and back again.[2] In this way, scholars help narrow the gap between abstract theory, empirical research, and the world of practice. Theoretical engagement becomes part of a dynamic, recurrent, interactive process with empirical assessment of international law in action. As social theorist Robert Merton wrote, "empirical research goes far beyond the passive role of verifying and testing theory: it

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[1] This recognition was manifested in the American Society of International Law's award of its 2010 book prize to Beth Simmons's pathbreaking empirical study of international human rights law. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS—INTERNATIONAL LAW IN DOMESTIC POLITICS (2009). It is also noteworthy that ASIL's 2010 Annual Meeting was the first to include a panel, "Empirical Approaches to International Law," specifically addressing this new direction in international legal scholarship. The Society's executive director participated.

[2] *See* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61 (2009).

does more than confirm or refute hypotheses. Research plays an active role: . . . It initiates, it reformulates, it deflects, and it clarifies theory."[3]

The shift toward the empirical study of international law is not completely new, to be sure. The new generation of social-science approaches to the study of international law has its echoes in an earlier tradition of skeptical and functional international legal scholarship.[4] It has its forebearers, to a certain extent, in the New Haven School of policy science of Myres McDougal and Harold Lasswell,[5] which grew out of American legal realism (although that school was critiqued for not following up on the empirical work that it prescribed),[6] and some work of the legal process school, such as that of Abram and Antonia Chayes.[7] More generally, since international legal scholars have long been concerned with enhancing the effectiveness of international law, they have been particularly attuned to case studies of international law's role.[8]

It is nonetheless fair to say that much of traditional international legal scholarship focused on formal law and normative prescription, paying special attention to the International Court of Justice (ICJ). This scholarship tended to *assume*, rather than examine, the efficacy of international law and cooperation, and to bemoan instances in which international legal institutions were unable to constrain power or affect domestic practice. A search through all

[3] ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 157 (1968) (emphasis omitted); *see also* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 308 (2006) ("the role of theory in an interactive, theoretically informed, context-specific analysis").

[4] As Hans Morgenthau aptly put it in 1940, in the legal realist tradition,

> [t]he science of international law, as well as the social sciences in general, are still awaiting their Newton, their Leibniz, their Faraday, their Carnot, their Maxwell, and their Hertz. To expect the contemporaneous lawyer to be an "engineer" or "technician" of the law means to expect Edison before Faraday, Wright before Carnot, Marconi before Maxwell and Hertz. And this is certainly a futile expectation. The great task which lies before the social sciences is to prepare the work of the latter so that the former can build upon it.

Hans Morgenthau., *Positivism, Functionalism and International Law*, 34 AJIL 260, 284 (1940); *see also* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964); WOLFGANG FRIEDMANN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES: CASE STUDIES AND ANALYSES OF RECENT TRENDS (1971); Wolfgang Friedmann, *Some Impacts of Social Organization on International Law*, 50 AJIL 475 (1956).

[5] *See, e.g.*, 1 HAROLD D. LASSWELL & MYRES SMITH MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY, at xxi (1992) (noting that, for them, "the most viable conception of law . . . as revived by the American Legal Realists [is] that of a process of authoritative decision by which the members of a community clarify and secure their common interests"); Myres Smith McDougal, *Law and Power*, 46 AJIL 102 (1952).

[6] *See, e.g.*, Gray Dorsey, *Agora: McDougal-Lasswell Redux: The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AJIL 41, 49 (1988) ("Julius Stone pointed out that in none of these studies did McDougal and associates make the comprehensive empirical investigation that they specify for the scholars who are charged with building the world public order." Citing JULIUS STONE, VISIONS OF WORLD ORDER 29 (1984)); Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AJIL 60, 63 (1972) ("[I]t is hardly surprising that McDougal is a great advocate, at least at the verbal level, of expanding the use of findings from the social sciences in legal analysis. What is somewhat surprising, however, is that McDougal's substantive contributions to the achievement of this objective are *not* particularly impressive and that the opportunities for introducing findings from the social sciences far outdistance their actual introduction in his own work.").

[7] ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1974); ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

[8] *See* W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984) (but critiquing mainstream international legal scholarship for focusing on the fantasy world of "cases" rather than on "incidents" in which law plays a normative role without states bringing a matter before a court).

the volumes of the *American Journal of International Law* shows that until the last few years (after the *AJIL*'s centennial issues), the *AJIL* published little to no empirical work.[9]

The tendency, until recently, for international legal scholarship to be aloof to empirical methods is reflected in the concept of "method" used in the *AJIL*'s 1999 *Symposium on Method in International Law*. Not one contribution in the symposium addressed method in a social science sense, suggesting a significant gap between legal and social science scholarship. Rather, the alternative "methods" all involved theoretical and analytical claims. The introductory essay of the symposium issue, "A Prospectus for Readers," first distinguished method (or analytic frame) from what it called "methodology," noting (from a legalist perspective) that "methodology of legal research" consists of the "ways to identify and locate primary and secondary resources."[10] The essay then introduced seven theoretical and analytic frameworks, each of which was represented in one of the subsequent articles, which covered "legal positivism," international relations (IR) theory, law and economics, the Yale school of "policy-oriented jurisprudence," the "new international legal process," critical reflections, and feminist methods, respectively.[11] The issue concluded with an essay entitled "The Method Is the Message."[12]

For social scientists, however, theory (or analytic framework) and method, although interrelated, are distinct from one another. Rather than understanding "method" as "message," social scientists view method as the use of methodological tools to assess how, and under what conditions, international law works in practice. Theory, in other words, must not supplant the rigorous empirical examination of practice, and thus the testing of theory. From the perspective of conditional IL theory, the topics addressed by the theories of earlier generations are best pursued through midlevel, empirically grounded work regarding particular international law contexts.

For purposes of this article, *empirical work* involves the systematic use of qualitative or quantitative methods. While some references to an empirical turn in legal scholarship appear to refer to only quantitative work, ignoring work using other empirical methods, we consciously aim to be more ecumenical in our coverage.[13] We thus do not limit our review and assessment to systematic work based on causal inference, although we highlight work in this vein. Rather we

[9] *But see, e.g.*, Samuel A. Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AJIL 444, 455, 477 (1969) (presenting tables of frequency of citation of General Assembly resolutions); Kathryn B. Doherty, *Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes Toward the International Legal Order*, 62 AJIL 335, 335–36 (1968); John King Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AJIL 372 (1980); Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AJIL 231(1997) (using, for example, a logistic regression to assess implementation of European Union environmental directives).

[10] *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AJIL 291, 292 (1999) (citing SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984)). The authors likely meant to use the term "sources," which is that used by Rosenne. Ratner and Slaughter distinguish "methodology" from "method." They cite Philip Allott for the proposition that "methods . . . refer to the structure of their argumentation, in particular its logical discourse." *Id.* at 292.

[11] This symposium issue was followed by an edited volume entitled *The Methods of International Law*, in which a new contribution was added that addressed Third World approaches to international law. *See* Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, *in* THE METHODS OF INTERNATIONAL LAW 185 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

[12] *See* Anne-Marie Slaughter & Steven Ratner, *The Method Is the Message*, 93 AJIL 410 (1999).

[13] *See generally* Elizabeth Mertz & Mark Suchman, *A New Legal Empiricism: Assessing ELS and NLR*, 6 ANN. REV. L. & SOC. SCI., 555 (2010) (comparing the "empirical legal studies" movement with its journal, the *Journal of Empirical Legal Studies*, which is almost exclusively quantitative, and the "new legal realist" movement, which is more ecumenical).

include references to work using ethnography/participant observation, systematic interviewing, historical process tracing, analytic narratives, surveys, content analysis, and large-N, quantitative statistical analysis. These various methods are sometimes privileged by particular disciplines, such as anthropology, economics, geography, political science, and sociology, but each of them offers a particular perspective on international law in action.

Empirical work is conventionally divided into studies using quantitative and qualitative methods, each of which has its strengths and deficiencies, thus involving tradeoffs. In many cases, scholars take multimethod approaches that combine quantitative and qualitative methods to support their claims. Since the relative advantages have been assessed elsewhere,[14] we will summarize briefly as follows.

The power of quantitative methods is an ability to test hypotheses in a rigorous manner against large quantities of data using statistical techniques and control variables. The major challenges for these methods involve measurement and causal inference. Reducing complex social realities to indicators and measures that can be used in statistical analysis is often difficult. Furthermore, even if measurement challenges can be resolved, producing a research design to draw causal inferences can involve as much art as science. Quantitative methods, however, do allow the use of more refined data-collection techniques and control variables to help to determine the relevance of different factors in explaining international law developments and their impact.

Qualitative work, by contrast, offers the advantage of paying closer attention to dynamic social contexts, as it often involves field work and interviews. One challenge is that the findings from qualitative work tend to be less generalizable because they are context specific. Yet what these studies lose in terms of parsimony (that is, in terms of causal inference that is clearly specified and that can therefore be formulated in an equation and tested statistically) also makes them more grounded in specific social contexts that numerical data do not adequately capture. In addition, qualitative work may be viewed as untrustworthy because it reflects the normative predispositions of the observer or those the researcher interviews. However, techniques are available to help control for researcher bias. One such method is triangulation, which enables the researcher to "compare[] different kinds of data from different sources to see whether they corroborate each other";[15] for example, the researcher can interview those who have opposing interests in respect of the issue at stake, and who come from different backgrounds, and can combine interviews with ethnographic observation, while consciously aiming to retain a neutral perspective from a reflective distance. Venturing into the field to conduct qualitative research, moreover, provides a concrete opportunity to assess one's presuppositions.

The use of quantitative or qualitative methods will often depend on the question posed. Quantitative approaches will be relatively more pertinent for macro-questions, such as the impact of a World Trade Organization (WTO) judicial decision on imports,[16] the effect of

[14] *See, e.g.*, RESEARCHING SOCIETY AND CULTURE (Clive Seale ed., 2000); HENRY BRADY & DAVID COLLIER, RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS (2d ed. 2010); GARY KING, ROBERT KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994); ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW (2009); DELBERT MILLER & NEIL SALKIND, HANDBOOK OF RESEARCH DESIGN AND SOCIAL MEASUREMENT (6th ed. 2002); ANDREW SAYER, METHODS IN SOCIAL SCIENCE (2d ed. 1992).

[15] *See* RESEARCHING SOCIETY AND CULTURE, *supra* note 14, at 231.

[16] *See* Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 REV. ECON. & STAT. 811 (2004).

human rights law on human rights practices,[17] or the impact of bilateral investment treaties on investment.[18] Qualitative approaches are especially well suited for assessing the mechanisms of behavioral change, allowing the researcher to understand the particular channels through which legal rules affect individuals, organizations, and states. Qualitative work is also important for generating theory that quantitative work can test.

Notwithstanding the relative benefits of these methodological tools, the international arena presents special methodological challenges and also sometimes requires distinctive research strategies (to be discussed later). Overall, the current, new wave of international legal scholarship takes the reach and efficacy of international law as empirical matters to be assessed. They are to be neither assumed (as in traditional doctrinal scholarship) nor explained away as unimportant (as in the realist tradition of IR).

This article is organized in five parts. Part I assesses the reasons for, and evidence of, the current empirical trend, some critiques of this trend, and responses to those critiques. Part II examines cross-cutting studies of the growing empirical literature on international treaties and tribunals. In addition to discussing some work that focuses on particular tribunals, we introduce some broader work on the choice of legal instruments and the operation of tribunals—which helps set the stage for part III.

Part III turns to five discrete substantive areas of international law: international human rights law; criminal law and the law of war; trade law; investment law; and environmental law. These areas are selected to be broadly representative, though we recognize others could be included just as well. In each case we address what is distinctive about each problem area—a crucial step for conditional IL theorizing—and survey and assess the state of empirical work in that area. We focus on two organizing questions: (1) how is international law produced, and (2) under what conditions does international law matter? Broadly speaking, the first question engages the causes of, and influences on, international legal phenomena, whereas the second addresses consequences. By disaggregating our review of international law into different functional domains organized under these two questions, we can highlight and explain both variation and patterns that shed light on critical normative questions.

Drawing from our survey and analysis of empirical scholarship, part IV and the conclusion represent a preliminary effort to construct a conditional IL theory regarding how, and the conditions under which, international law works. They highlight the importance of work that mediates between theory building and the empirical assessment of practice. Such work, we contend, is central for addressing the normative issues at stake.

I. EXPLANATION OF THE EMPIRICAL TURN: CRITIQUES AND SOME RESPONSES

What explains the empirical trend in the study of international law? This scholarly trend, in our view, is driven by the increased role of international law in global governance and, in turn, by the increased attention that other disciplines have given to international law as a subject of study. The end of the Cold War, the fall of the Berlin Wall, and economic and cultural globalization have created new demand for international law and facilitated its realization. The

[17] *See* SIMMONS, *supra* note 1, and part III on Human Rights.

[18] *See* part III on International Investment Law.

proliferation of international law, in other words, can be viewed as the product of a changed structural context, greater ideological convergence, and greater functional need.

These developments in the world spurred developments in social science theory, with renewed interest in international law. The previous dearth of empirical work on international law reflected, in particular, the enduring importance of the realist tradition in IR scholarship. For classical and structural realists, state power determines outcomes on the international stage, and international law is "epiphenomenal," deemed to have no independent causal impact on outcomes.[19] While realism is still an important paradigm and has been applied forcefully to international law in recent years,[20] the mainstream of IR scholarship now reflects the rational choice, institutionalist tradition associated with Robert Keohane and the constructivist insights associated with John Ruggie and Alexander Wendt.[21]

Under both rational choice and constructivist theories, international law plays potentially important roles that merit careful empirical inquiry. In the rational institutionalist paradigm, international institutions facilitate state cooperation by reducing the transaction costs of negotiating international agreements with multiple parties, and by promoting compliance with them through monitoring and enforcement.[22] This work has complemented that of economists, who have begun to study the role of institutions at the international level, whether to understand and improve the supply of global public goods[23] or to facilitate the resolution of other cooperation and coordination challenges.[24] Constructivists, by contrast, focus on the role of international institutions in exercising normative power and in shaping states' and other actors' perceptions of problems, solutions, and interests.[25] In other words, under rational institutionalist theory, international law serves critical functional purposes, and under constructivist theory, it wields normative authority. In both cases, these theories validate the promise of international law to shape world order.

Sociologically oriented approaches to law and globalization, such as world polity, postcolonial, and law-and-development theory, also have been increasingly influential in international legal scholarship, in parallel with IR approaches.[26] World polity theory addresses how international legal scripts operate as conveyors of globalized cultural norms, leading to convergence and thus compliance. The world polity approach has been empirically developed by the sociologists John Meyer, John Boli, and Elizabeth Boyle, among others, regarding human

[19] *See* Richard Steinberg & Jonathan Zasloff, *Power and International Law*, 100 AJIL 64 (2006).

[20] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). For a modified realist position, see Steinberg & Zasloff, *supra* note 19.

[21] ROBERT KEOHANE, AFTER HEGEMONY (1984); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); John G. Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855 (1998).

[22] Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AJIL 47 (2012).

[23] PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul, Pedro Conceição, Katell Le Goulven & Ronald U. Mendoza eds., 2003); TODD SANDLER, GLOBAL COLLECTIVE ACTION (2004).

[24] THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960).

[25] *See, e.g.*, Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743, 743 (2001).

[26] For a nice overview, see Terence Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006).

rights and neoliberal economic issues, and has been used to support theory building in international law by Ryan Goodman and Derek Jinks.[27] Postcolonial theory examines the interaction of global legal norms and domestic systems in developing countries and has been studied empirically using ethnographic methods by anthropologists, such as Sally Merry regarding women's rights issues, both at the international and domestic levels.[28] In addition, socio-legal scholars have empirically studied the diffusion of legal models through international institutions, contributing to law-and-development theory.[29]

In view of the increasing number of articles on international law topics published in flagship journals of the various social sciences, it is evident that these disciplines are giving ever more attention to international law. To provide a sample of this trend across disciplines, we reviewed all of the publications from 1980 to 2010 of *International Organization*, the flagship journal in the discipline of IR; *Law and Social Inquiry*, the flagship journal published by the American Bar Foundation for the multidisciplinary study of law, with a particular emphasis on the sociology of law; and the *Journal of Legal Studies*, a flagship journal for the multidisciplinary study of law that focuses on law and economics.[30] *International Organization* published a single article on law and courts in the 1980s, but twenty-six in the 2000s, constituting 9 percent of all articles published during the decade.[31] *Law and Social Inquiry* increased its publication of articles on international and transnational law topics over fourfold during that same period, from 2.2 percent (1980–90) to 10 percent (2000–10) of the total articles published in the journal. We see an even more dramatic trend at the *Journal of Legal Studies*, which did not publish an article on international law before 2000 (though it did include a small number of comparative law articles) but published twenty-four in the 2000s.[32] We note these data to show, in particular, the increased attention that these disciplines give to international law. Yet our review of this work also confirms that much of it is empirical and uses quantitative and qualitative methods to assess how international law works in practice.

Although the empirical trend of scholarship on international law first developed primarily outside of traditional law reviews, it has since migrated into them, including the *American Journal of International Law*. In the 1990s and 2000s, the *AJIL* increasingly published articles and

[27] *See* John W. Meyer, *The World Polity and the Authority of the Nation-State, in* STUDIES OF THE MODERN WORLD-SYSTEM 109 (Albert J. Bergesen ed., 1980); Martha Finnemore, *Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence, in* CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, at 149 (John Boli & George M. Thomas eds., 1999); ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY (2002); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (forthcoming).

[28] *See* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006). Third World Approaches to International Law come out of postcolonial studies and include the work of ASIL's 2010 Grotius Lecturer, Antony Anghie. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

[29] *See* TERENCE HALLIDAY & BRUCE CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS (2009); KATHARINA PISTOR & PHILIP WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995 (1999).

[30] Data are available in an online appendix at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444448.

[31] The number of articles on treaties more than tripled during the same period, and the combined percentage of articles on law and treaties increased over fivefold from 4.32 percent (1980–89) to 10.88 percent (1990–99) to 22.91 percent (2000–09).

[32] *The Journal of Law, Economics and Organization*, the other law and economics journal with a strong empirical focus, has been less willing to publish international law articles, with less than 1 percent (2 of 233) articles on the topic published since 2000, and none beforehand.

book reviews that challenged international law theories and prescriptions for their lack of an empirical basis, and that called for sustained empirical analysis.[33] Since 2007, the *AJIL* has published an increasing number of original empirical studies, of which we count at least six.[34]

In many cases, legal academics are engaging in cross-disciplinary collaborations. Legal scholars bring greater internal knowledge of how particular international legal institutions operate, and collaborate with social scientists skilled at deploying increasingly sophisticated empirical tools. These collaborations again reflect both the increased interest of other disciplines in the study of international law, and the interest of international legal scholars in the methods used by these other disciplines.[35]

The increased empirical attention given to international law is also supported by technical developments and funding opportunities that facilitate data gathering and analysis. A major development has been the rapid increase in the power of statistical packages. Operations that, twenty years ago, would have required many hours on mainframe computers can now be performed in a matter of seconds on individual personal computers. This development has

[33] For an excellent piece using empirical support, see Steinberg, *supra* note 9. A brief sampling of such calls for empirical work includes Jeffrey L. Dunoff & Joel P. Trachtman, *Symposium on Method In International Law: The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394, 394–95 (1999) ("While law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor)."); Thomas M. Franck, *Centennial Essay in Honor of the 100th Anniversary of the AJIL and the ASIL: The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium,* 100 AJIL 88, 96 (2006) ("To address that issue, it becomes necessary to resort to a kind of legal empiricism: to ask how many states, in how many situations of disputation, currently discredit the law pertaining to the use of force in word and deed?"); and Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581, 605–06 (2005) ("No matter which theoretical approach one favors, the empirical impact of different structures should be understood. Yet the dearth of research on this topic makes any such claims tentative."). For an earlier critique in a similar vein, see Gordon B. Baldwin, Book Review, 57 AJIL 976 (1963) (reviewing INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE) ("International law study today suffers from the scarcity of empirical research."). We find increasing calls for empirical work particularly in reviews of books on international law. *See also* José E. Alvarez, Book Review,102 AJIL 909, 913 (2008) (reviewing GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007)) ("Also missing is any more general empirical effort to demonstrate such bias in the many public arbitral decisions issued to date."); Daniel Bodansky, Book Review, 99 AJIL 280, 283 (2005) (reviewing EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE (2002)) ("Like most international lawyers, however, Benvenisti appears more comfortable with legal doctrine than with systematic empirical research."); Jide Nzelibe, Book Review, 103 AJIL 619, 620 (2009) (reviewing JOEL TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008)) ("[Trachtman] cautions that many of his empirical assumptions about how states behave should not be taken at face value. Throughout the book he frets about the need to subject his principal claims, as well as those of competing approaches, to rigorous empirical testing."); Beth A. Simmons, Book Review, 103 AJIL 388, 391 (2009) (reviewing MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW (2008)) ("This last claim is tough to sustain empirically, and while it is asserted vigorously in the critique of Goldsmith and Posner and restated in various ways throughout the book, evidence of the impact of legal rules and justifications on behavior is not systematically adduced.").

[34] Since 2007, this *Journal* has published Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AJIL 1 (2007). *See also* Laurence R. Helfer, Karen Alter & M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AJIL 1 (2009); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AJIL 1, 1 (2010); Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AJIL 436 (2010); Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Regulating Role of the Political Branches in the Transnational Prosecution of International Crimes,* 105 AJIL 1 (2011); Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AJIL 647, 649 (2009); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AJIL 107 (2006) (systematically reviewing and synthesizing existing empirical work so as to build empirically grounded theoretical claims on the law of international humanitarian intervention, and challenging conventional arguments that legalizing humanitarian intervention will necessarily lead to more, exacerbated international armed conflicts because humanitarian justifications will be used as pretexts).

[35] On political science, see Hafner-Burton et al., *supra* note 22.

enabled large-N analyses of ever increasing sophistication and rigor, and has increased demand for the production of databases. In addition, increased funding opportunities have played a role in spurring the trend. The National Science Foundation (NSF), whose budget has gone up sevenfold since 1983, has become a major source of funding for the social sciences.[36]

Beyond its role in theoretical development, the empirical turn has important normative advantages. First, as legal realists have long maintained, the empirical study of law helps to unpack assumptions, whether concerning law's legitimacy or its benevolent impact. For example, the legal realists were interested in the biases existing within legal doctrine.[37] To unpack potential bias, scholars have empirically assessed what lies behind international law's formation. Second, empirical work has practical implications for international lawyers wishing to understand what works, permitting them to reassess international law and institutions. International law's normativity is aimed at changing behavior, so it only makes sense to assess international law empirically regarding the conditions of its effectiveness.[38]

Positivist social scientists have argued that since "ought implies can," a thorough, grounded account of what international law *can* accomplish under different conditions might inform our understanding of when and how it *ought* to be invoked.[39] Normative legal arguments depend on assumptions about the state of the world and the likely outcome of alternative legal rules. Empirical scholarship provides a set of tools to refine understandings of institutional design and practice so as to enhance international legal institutions' effectiveness. Conditional IL theory nonetheless cautions against simplistic copying of mechanisms from one context or issue area to another, and thus takes a midlevel orientation that is appropriately cautious in drawing conclusions.

The empirical project has been the object of strong critiques, most notably for its risk of reductionism and scientism.[40] In international law Martti Koskenniemi has arguably been the most outspoken. As he writes, "these new realists, in their hubris, believe in the power of their predictive and explanatory matrices . . . . But since expert systems are no less indeterminate than law, this move only institutionalizes an anti-political, technical mindset."[41] Critiques also come from neoconservatives bent on changing underlying contexts. For example, the journalist Ron Suskind recalls a response of an administration official:

[36] National Science Foundation, Fiscal Year 2011 Budget Request, *at* http://www.nsf.gov/about/budget/fy2011/index.jsp. For example, each of us has received multiple NSF grants for quantitative and qualitative empirical work, providing time and resources for engaging on empirical questions.

[37] Nourse & Shaffer, *supra* note 2.

[38] *See* DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 35 (2010) ("interest in the issue of effectiveness . . . has resulted from the increasing interaction between international lawyers and political scientists, as well as the turn toward empiricism in many areas of legal scholarship").

[39] For an interesting assessment of the selective invocation of international law and other norms by the International Committee of the Red Cross (ICRC), see Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT'L L. 459 (2011) (building from numerous interviews and a year of participant observation at the ICRC offices in Geneva).

[40] *See, e.g.*, Nourse & Shaffer, *supra* note 2, at 117–19 ("[T]here are also the related risks of scientism. . . . One of the grave dangers of a 'your science is better than my science' approach is the risk that it hides important (and perhaps false) normative claims through the very categories it chooses. . . . If the categories one uses in a study are themselves biased, inaccurate, or false, then the statistical form will simply add a veneer of legitimacy and power to what might be entirely false. Eugenics is the classic example of this kind of process.").

[41] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 30 (2007); *see also* Guglielmo Verdirame, Review Essay, *'The Divided West': International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553, 558–61 (2007).

> The aide said that guys like me were "in what we call the reality-based community," which he defined as people who "believe that solutions emerge from your judicious study of discernible reality." I nodded and murmured something about enlightenment principles and empiricism. He cut me off. "That's not the way the world really works anymore," he continued. "We're an empire now, and when we act, we create our own reality. And while you're studying that reality—judiciously, as you will—we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do."[42]

Certainly, the empirical project is not without its critics (and risks), but that is not to say that the criticism cannot be met, and strongly. The tremendous human and financial toll of the second Iraq war can be seen as resulting from the anti-empirical bent of its perpetrators, as well as the failure to comply with international law and international legal procedures. In response to critiques from the left that empirical scholarship is reductive and conservative, serving to embed the status quo, conditional IL theory specifically aims to avoid the reductionism of normative analysis that fails to look at context. It is grounded in philosophical pragmatism, which maintains that we intervene in an uncertain world and must assess empirically the impact of previous interventions and use that information to determine what is desirable and possible in any new context.[43] To give one example, as Thomas Carothers wrote regarding sanctions applied against Haiti in the early 1990s, which were intended to advance the development of an international legal norm of democracy:

> The international community's response to the 1991 coup in Haiti is often cited as an example of the positive new solidarity and forcefulness of the international (or at least the inter-American) community with respect to democracy. Unfortunately, the real effect of that response to date has been to worsen the lives of most Haitians. . . .
>
> . . . .
>
> The current advocacy of a democracy norm is important in international law, but it is based on a superficial empirical account of world events. It says, in a sense, "Look, there is a democratic tide, now here is the new principle of law that we propose to go with it." In fact, the reality is much more complex, much more muddled. A legal analysis must take on the complexities of the empirical reality and at every turn fold them into the doctrinal analysis, if it is to get beyond a simple Panglossian view of the world—if it is to avoid being relegated to the long list of discarded utopian projects that litter the past of international law.[44]

We need, in other words, conditional IL theory that builds from empirical assessments of context.

Scholarship develops in cycles.[45] In some periods, it may emphasize theory; in others it may move to a greater focus on empirics. The empirical turn in the study of international law may

[42] Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAGAZINE, Oct. 17, 2004, at 44.

[43] Nourse & Shaffer, *supra* note 2, at 84–85, 88, 112–21.

[44] Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 ASIL PROC. 261, 266–67 (1992).

[45] David J. Bederman, Book Review, 100 AJIL 490, 490 (2006) (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) ("[i]n actuality, of course, we have seen a cyclical pattern of scholarship in this field"); David M. Trubek & John Esser, *"Critical Empiricism" and American Critical Legal Studies: Paradox, Program, or Pandora's Box?*, 12 GERMAN L.J. 115, 119 (2011) (referring to "cycles of legal scholarship").

be viewed as part of a cycle, yet we believe it will also leave its imprint on the study of international law. It provides the hope of checking those who fail to take account of empirical context in invoking or failing to invoke international law.

II. CROSS-CUTTING WORK: THE DESIGN AND ROLE OF LEGAL INSTRUMENTS AND TRIBUNALS

The new empirical program is sufficiently broad and deep that no one article can survey its entirety. Our approach is to be illustrative rather than comprehensive, while at the same time identifying themes that engage much of the empirical work. The growing legalization and judicialization of international politics have led to increased legal ordering and enhanced cooperation across borders. A foundational question for empirical work, then, is to understand the modalities of legal ordering. When states choose to cooperate, they have choices over whether to use a written instrument and, if so, over the form and legal nature of that instrument. They also have the choice of creating new institutions to develop norms, monitor compliance, and resolve disputes. In this part we consider cross-cutting empirical work on both the design of instruments such as treaties and the use of legal institutions such as tribunals, respectively addressing the "legalization" and "judicialization" of IR. In each case, we note where more empirical work would be helpful.

The Form and Legal Nature of the Instrument: Customary International Law, Treaties, and Soft Law

States have numerous ways of cooperating; treaties are only one mechanism. Much of international law traditionally arose not from legal instruments, but through state practice, giving rise to customary international law, which is state practice under a sense of legal obligation.[46] This source of international law has been subject to much theoretical speculation and critique,[47] but relatively little empirical work examines the extent and manner in which norms of customary international law (or, for that matter, general principles of law) are used to inform debates. Many believe that reference to customary international law is in decline,[48] but whether the decline is only a relative one in relation to treaties—and not an absolute one—has not been empirically assessed.

[46] *See, e.g.*, Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AJIL 313, 315 (1908) ("The rules of the present international law are to a great extent not written rules, but based on custom.").

[47] *Cf.* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 218 (2008) (role of reputation in compliance with customary international law); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640 (2000) (challenging the "faulty premise . . . that CIL . . . influences national behavior"); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541, 542 (2005) (contending that "CIL rules may modify the payoffs associated with relevant behavior and thereby affect behavior through self-interest").

[48] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 119 (2005) ("modern international relations have made the treaty a more important tool, relative to CIL, than it has been in the past"); CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 34 (1965) (arguing that customary international law has become less important than treaties).

We thus need more empirical analysis of how customary international law is formed and has effects.[49] One strategy may be to focus attention on the briefs of states. Customary international legal norms are often invoked, but we lack empirical analysis of how often claims based on them are sustained. Systematic study of the foundations that states assert (especially with regard to custom) for their legal claims and that tribunals use in reaching their findings would be helpful and might contribute to more rigor in legal practice. Such an approach requires tracing the emergence and evolution of particular customary rules, and also attention to those claims of custom that are not recognized as binding rules. Such work, in turn, might help to reinvigorate customary law and provide a vantage point for proposing doctrinal modifications.[50] Indeed, without any real sense of the scope of use of customary international law, it is hard to assess its operation and efficacy.

By contrast, the last decade has seen considerable empirical work on treaties. From existing empirical work, we discern at least five important points. These points regard the (1) changing nature of international law as reflected in treaties, (2) reasons that states choose different types of treaties, (3) choice between legally binding treaties and "soft law," (4) inclusion of specific types of arrangements in treaties such as flexibility mechanisms and the delegation of dispute settlement, and (5) impact of treaties compared to other forms of ordering.

First, scholars are documenting the increasing use of international treaties to govern IR,[51] which can be viewed as a turn to contract (as opposed to custom and natural law), although universal treaties such as the UN Charter have also been viewed in constitutional, rather than contractual, terms.[52] The overall number of multilateral treaties registered with the UN secretary general has increased by 400 percent in "just over two decades."[53] Empirical work has examined changes in the subject matter of these treaties. John Gamble and colleagues have used a database of almost six thousand treaties signed over the last 350 years (Comprehensive Statistical Database of Multilateral Treaties) to document an increasing human-centric turn in treaties, as international law extends to address individuals and not just sovereign states.[54] They and others also observe an increasing regulatory orientation in international treaties, as

[49] For one good study see Roozbeh Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates,* 21 EUR. J. INT'L L. 173 (2010) (arguing for enhanced role of tribunals in formation of customary international law). *See also* Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law,* 2008 U. ILL. L. REV. 201 (2008) (discussing the impact of customary international law in national practice); Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 L. SOC. REV. 271 (2009) (empirical case study of the impact abroad of invoking customary international law before U.S. courts).

[50] Curtis Bradley & Mitu Gulati, *Withdrawing from Customary International Law,* 120 YALE L.J. 202 (2010). See also symposium on this issue in 21 DUKE J. COMP. & INT'L L. 1 (Fall 2010).

[51] John King Gamble, Charlotte Ku & Chris Strayer, *Human-Centric International Law: A Model and a Search for Empirical Indicators,* 14 TUL. J. INT'L & COMP. L. 61, 72 (2005) ("The metaphor of a rising tide seems appropriate.").

[52] *See, e.g.*, BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY (2009); RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

[53] Jonathan D. Greenberg, *Does Power Trump Law?,* 55 STAN. LAW. REV. 1789, 1790 (2003) (emphasis omitted) (comparing figures from 1979 to roughly 2002).

[54] Gamble et al., *supra* note 51, at 61–80.

lawmaking extends in scope to many administrative regulatory domains.[55] International legal scholars, for example, have noted greater levels of treaty making in such diverse areas as agrobiotechnology, the environment, food security, investment, and labor.[56]

Second, scholars are examining differences in states' choices between multilateral and bilateral treaties. Thomas Miles and Eric Posner have created a database of over 50,000 treaties to examine which states enter into particular types of treaties and their reasons for doing so. They find that "older, less corrupt and (again) larger states . . . enter into more bilateral treaties and 'closed' multilateral treaties," whereas small states are relatively more likely to join "universal multilateral treaties."[57] They explain these findings from a rational choice perspective that takes into account differential benefits and costs, especially the transaction costs involved in joining different types of treaties. Larger states have more resources at their disposal to devote to treaty making, and can tailor their commitments to their needs more efficiently.

Third, scholars have addressed the choice of legally binding instruments compared to informal "soft law" agreements.[58] The use of soft law instruments is expanding significantly in light of the growing role of transgovernmental networks, international organizations, and nonstate actors, giving rise to what are sometimes called transnational legal arrangements.[59] Although numerous interesting case studies involving soft law are available,[60] systematic research

[55] *Id.* at 72 ("there has been a significant expansion in the range of activities governed by multilateral treaties, with the greatest increase occurring in the economic sphere"); Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321 (2011).

[56] *Cf.* DENISE DEGARMO, INTERNATIONAL ENVIRONMENTAL TREATIES AND STATE BEHAVIOR (2004); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 338 (2007) ("During the past two decades, the number of investment treaties has tripled."); Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 700 (2006) (noting increase in number of International Labour Organization agreements); Andy Stewart, Book Note, 43 STAN. J. INT'L L. 332, 341 (2007) (reviewing BIOTECHNOLOGY AND INTERNATIONAL LAW (Francesco Franciono & Tullio Scovazzi eds., 2006)) (noting the "increase in the number of treaties addressing food security and agrobiotechnology").

[57] Thomas Miles & Eric A. Posner, *Which States Enter into Treaties, and Why?* 2 (University of Chicago Law School, Law and Economics, Working Paper No. 420, 2008).

[58] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).

[59] *Cf.* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009); Gregory Shaffer, *Transnational Legal Process and State Change: Opportunities and Constraints*, LAW & SOC. INQUIRY (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612401. On the role of actors other than states, see ANNE-MARIE SLAUGHTER, THE NEW WORLD ORDER (2004); José E. Alvarez, *International Organizations: Then and Now*, 100 AJIL 324 (2006); Benjamin Cashore, Elizabeth Egan, Graeme Auld & Deanna Newsom, *Revising Theories of Non-state Market Driven (NSMD) Governance: Lessons from the Finnish Forest Certification Experience*, 17 GLOBAL ENVT'L POL. 1 (2007); Errol Meidinger, *Multi-interest Self-Governance Through Global Product Certification Programmes*, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2008); and Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

[60] *See, e.g.*, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2004); John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, *in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 3, 9 (John J. Kirton & Michael J. Trebilcock

regarding their use and effects remains at an early stage. It is worth noting, however, that Stefan Voigt has recently used a database created by the U.S. Department of State pursuant to the Case-Zablocki Act to assess the use of "informal international agreements," which, under the act, are those that do not involve approval by the U.S. Congress.[61] Based on a database of 2289 informal agreements concluded by the United States between 1981 and 2010, he finds the following: the number of informal agreements increased dramatically from the mid-1990s through 2006, but has since dropped significantly; roughly two-thirds of these agreements concern only three policy areas (the military, science and technology, and aid); over 90 percent of these agreements are bilateral; and around 40 percent are concluded by a U.S. actor other than the president or secretary of state. He also finds that these agreements were especially common with bordering states, which he suggests is due to the greater frequency of interaction with them. He concludes that much more empirical work is needed on the use of informal agreements, especially by states other than the United States.

Fourth, scholars are increasingly producing large-N databases regarding treaties to assess the use of different types of provisions in them. Barbara Koremenos uses a random sample of treaties to assess how states deal with uncertainty through treaties, and finds that states respond to uncertainty through limiting the duration of treaties and including escape clauses under which the stringency of treaty obligations is relaxed.[62] Koremenos also uses this database to assess when and why states choose to delegate issues, and finds that states are more likely to include dispute settlement provisions in treaties when they face complex cooperation problems characterized by uncertainty, incentives to defect, or time inconsistency.[63] These findings, she argues, support a rationalist view that states engage in delegation to resolve these particular types of challenges.

Fifth and finally, we need empirical work studying the impact of treaties, compared to other forms of ordering, on state behavior, and assessing whether different domains of international law vary in line with conditional IL theory. Existing quantitative studies, for example, have yet to address systematically the impact of treaty design features on state and other-party behavior (though we do discuss some quantitative and qualitative studies in our coverage of particular domains of international law).

One empirical issue that has been addressed in relation to treaties is that of selection effects. George Downs, David Rocke, and Peter Barsoom point out that adducing impact from

eds., 2004); Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L.& POL. 591 (2000) (an empirical study building from interviews and participant observation regarding the use of soft law in the office of the high commissioner on national minorities of the Organization for Security and Cooperation in Europe); Shaffer & Pollack, *supra* note 58.

[61] Stefan Voigt, *The Economics of Informal International Law—an Empirical Assessment, in* INFORMAL INTERNATIONAL LAW: MAPPING THE ACTION AND TESTING CONCEPTS OF ACCOUNTABILITY AND EFFECTIVENESS 16 (Joost Pauwelyn, Ramses Wesssel & Jan Wouters eds., forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1835963. The act, however, exempts informal agreements that relate to specified military activities, have a national security classification, involve coordination between postal administration and aviation agencies, or related to anticrime and counternarcotics policies.

[62] Barbara Koremenos, *Contracting Around International Uncertainty,* 99 AM. POL. SCI. REV. 549 (2005).

[63] *See also* Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?,* 71 LAW & CONTEMP. PROBS. 151 (2008); Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?,* 36 J. LEGAL STUD.189 (2007).

becoming a party to treaties is difficult because states have control over the obligations that they accept; high levels of compliance do not therefore imply that the treaties are having an independent effect on behavior. [64] To illustrate, consider the debate, prompted by Beth Simmons' work, over compliance with the international law of money. Her analysis of Article VIII of the International Monetary Fund treaty showed a high level of compliance.[65] Factors enhancing compliance included, notably, a strong regional effect, suggesting that behavior was driven by regional dynamics. A state's "rule of law" orientation (as measured by a variable for political risk analysis) was also important, whereas general regime features like democracy or dictatorship did not seem to affect compliance. She contends that reputation concerns and competitive market forces explain patterns of compliance.

In an important follow-up, Jana Von Stein uses a statistical selection model to estimate the treaty commitment's effect on state behavior independent of all sources of selection.[66] She finds that failing to control for the sources of selection leads one to overstate considerably the effect of an Article VIII commitment on compliant behavior. She concludes that states began their compliant behavior before signing the treaty because of the extensive requirements to become a party. She contends that this behavior casts doubt on the argument that an Article VIII obligation serves as a constraining mechanism that raises the reputational costs that a state will pay if it reneges. Instead, she sees the treaty as a screening device that signals to markets a party's future policy intentions. We believe that Simmons's contribution withstands the critique in this particular case, however, because anticipatory effects are nonetheless effects, and the use of time lags in assessing data can address the point about selection effects.[67] That said, the issue of selection effects, along with endogeneity and reverse causation, is a common, cross-cutting one with which scholars focusing on compliance must grapple.[68]

[64] George Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG 379 (1996).

[65] Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money*, 25 YALE J. INT'L L. 323 (2000).

[66] Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005).

[67] *See* Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM. POL. SCI. REV. 623 (2005) (arguing that the effects of Article VIII declarations are robust to a number of selection models, including matching techniques that try to mimic quasi-experiments). *Cf.* Joseph Grieco, Christopher F. Gelpi & T. Camber Warren, *When Preferences and Commitments Collide: The Effect of Relative Partisan Shifts on International Treaty Compliance*, 63 INT'L ORG. 341 (2009) (providing evidence that state preferences change based on partisan shifts in the executive branch and that these changes reduce the constraining effects of Article VIII, although Article VIII continues to exercise significant causal effects even in the face of relative shifts in executive partisan orientation); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-surrender Agreements*, 101 AM. POL. SCI. REV. 573, 573 (2007) (using creative methodology to find that many parties to the Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, refused to enter bilateral nonsurrender agreements with the United States because of the importance of keeping commitments, concluding that "international commitments do not just screen states; they also constrain").

[68] Technically, *endogeneity* refers to a correlation between a measure of an independent variable and the error term in a regression on the dependent variable. It has many possible causes, one of which is reverse causation—a situation in which changes in the dependent variable cause changes in the independent (explanatory) variable. This occurrence is problematic because the standard assumption is that causality goes from the independent variable to the dependent variable.

International Tribunals

A second cross-cutting issue is the creation of legal institutions. In this section we briefly turn to empirical work on the operation of international tribunals, which have assumed an increasingly important role over the last two decades, as international law (to a certain extent) has become judicialized.[69] Judicialization does not necessarily mean, however, that state interests are ignored, especially if judges exercise bias in their decision making in favor of their own states or those with similar orientations. Similarly, it also does not mean that tribunals have an independent effect on behavior. Conditional IL theory is needed to assess both the conditions under which tribunals are more likely to operate independently and the conditions under which they are more likely to shape behavior and structure understandings of international obligations.

Recent years have seen an increased number of international tribunals having distinct jurisdiction over specific areas, such as trade, human rights, the law of the sea, investment, and territorial disputes. In contrast to the mid-1980s, when only a handful of standing international courts were in place, twenty-five such courts have been identified, as of this writing, by the Project on International Courts and Tribunals.[70] This development has spurred empirical analyses.[71]

One major topic of debate regards whether these tribunals can be considered "independent" in some sense. Skeptics argue that international tribunals are simply agents of the states that create them, and are of minor importance.[72] Others argue that international courts actually do play important roles, if not as central as the doctrinalists might wish.[73] In the 1990s, this question first received extensive attention in relation to the European Court of Justice (ECJ).[74]

The independence of international judges—and thus their role in shaping and applying international law—is an important empirical question. A small, but increasingly sophisticated, literature has begun to address it. In some ways, independence is easier to analyze at the international level than at the national one because judges are typically nominated by state parties to an international agreement, and one can test if such judges favor their own states. A relatively straightforward hypothesis of how tribunals produce international law is that judges will favor their own states when given a chance. Appointing-state participation in a case is somewhat easier to measure than the comparable independent variable at the national level, in which studies

[69] We briefly cover empirical work on other international institutions, such as standard-setting bodies, elsewhere. *See* Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?*, in OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 753 (Peter Cane & Herbert Kritzer eds., 2011).

[70] Included are twelve international courts and arbitral bodies, nine regional bodies, and four hybrid criminal courts involving a mix of domestic and international judges.

[71] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); JOHN HAGAN, JUSTICE IN THE BALKANS (2003); DANIEL TERRIS, CESARE ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (2007); Eric Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007).

[72] *See, e.g.*, Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

[73] Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005). See also the WTO scholarship assessed in part III below.

[74] See discussion in Hafner-Burton et al., *supra* note 22.

tend to use proxies for political preferences (for example, in the United States, the party of the appointing president) to investigate variations in judicial voting.[75] If international judges systematically vote in support of the state parties that appointed them, the evidence would suggest that they are less likely to adopt independent roles based on their own views in interpreting the law's meaning over time.

Empirical research has reached different results regarding the independence of judges from the states that appoint them. Using a multivariate analysis to study the International Court of Justice, Posner and de Figuierdo find that judges rarely vote against their home states and that they favor states whose wealth level is close to that of their own states.[76] Posner and de Figuierdo also show connections, although weaker ones, between judges' voting patterns and the political or cultural similarities of the states involved in particular disputes. Eric Voeten takes a similar approach in his comprehensive analysis of voting patterns on the European Court of Human Rights but, in contrast to the previous study, concludes that judges on this court generally exercise judicial independence.[77] He also finds that career backgrounds make a difference, with former diplomats being more supportive of national governments,[78] and that ad hoc judges who sit on only a single case show greater support for their national governments.[79] From the perspective of conditional IL theory, these contrasts arguably reflect differences between the courts being studied. The European Court of Human Rights has jurisdiction only over European states, and all its judges are also European. Those states are more homogeneous in their interests and views than either the overall body of UN members or the judges sitting on the ICJ. Also, since each party to a dispute before the ICJ is permitted to select one judge (as in an arbitral proceeding),[80] there is some expectation that these judges will be loyal to their home states.

Although much work on international tribunals comes out of IR scholarship and, taking a rationalist orientation, looks at the interests of states, judges, and other actors in conditioning tribunals' roles and effects, considerable sociological work on international tribunals has also been undertaken. This latter work is based on extensive fieldwork and examines the development of international tribunals over time and the new legal fields in which they play a part. Some of this work focuses on the role of individual agents in light of broader contests within the legal profession, using frameworks influenced by Pierre Bourdieu regarding the role of professional and social capital in constructing law.[81] More ethnographic work on international

[75] We nonetheless note that in international disputes involving private parties (such as investment arbitration), class, career incentives, and ideological orientation could also matter, complicating the analysis, particularly in light of the relatively small number of decisions.

[76] Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005). Although they find no evidence of regional bias, they have few data regarding this last issue because of the lack of participation of two-thirds of the UN membership.

[77] Eric Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

[78] *See also* Fred J. Bruinsma, *The Room at the Top: Separate Opinions in Grand Chambers of the ECHR (1998–2006)*, 28 RECHT DER WERKELIJKHEID 7 (2007).

[79] Voeten, *supra* note 77, at 425.

[80] Ginsburg & McAdams, *supra* note 73. For example, Article 31(2) of the ICJ Statute provides: "If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5." Article 31 (3) provides: "If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article."

[81] DEZALAY & GARTH, *supra* note 71.

tribunals would help to round out the picture of judicial motivation in issuing rulings, shaping procedure, and generating jurisprudential doctrine. It would complement the quantitative research program on the independence of international judges from their appointing states.

A second central question regarding international tribunals as actors is whether (and the conditions under which) they affect the production, consolidation, and application of international law—and thus policy outcomes. Without such an assessment, it is hard to engage in informed institutional design, either in reforming existing tribunals or in establishing future bodies. Empirical studies, which help us to understand the contexts in which international tribunals are likely to be effective, form an important part of conditional IL theorizing. Ginsburg and Richard McAdams, for example, conduct a quantitative analysis of ICJ decision making to illustrate the "expressive" function of international adjudication.[82] They find that the ICJ, frequently lacking effective sanctioning power, is most effective when, rather than imposing solutions, it facilitates coordination between the parties by creating a focal point—that is, a reference point that helps to coordinate expectations even in the absence of agreement. The ICJ is relatively effective in helping states coordinate their behavior in low-stakes conflicts such as border disputes, but less effective when armed conflict has already broken out and the states have little incentive to back down. Similarly, Todd Allee and Paul Huth use a database on territorial disputes to examine the conditions under which states resort to international legal rulings.[83] They focus on domestic audience costs as a central factor. When leaders think that concessions will generate political costs, they use international rulings to provide political cover in reaching a settlement. The judicial decision provides a new focal point that helps leaders resolve conflicting positions, in part by reducing countervailing domestic political pressures.

In a related vein, a growing body of empirical work illuminates the role of domestic institutions in affecting the success of international adjudication. In studies of the ECJ, Karen Alter explains how the Court's decisions have dynamically mobilized domestic actors, such as businesses and national judges in lower courts (in contrast to appellate and supreme court judges).[84] This dynamic process helped to consolidate European integration because businesses brought European Community–based legal claims to domestic courts, whose judges referred legal questions to the ECJ and issued rulings in light of the ECJ's responses. More recently, in a study of the Andean Tribunal of Justice, Laurence Helfer, Alter, and Florencia Guerzovich assess how "islands" of effective international adjudication can arise. During its first quarter-century, the Tribunal issued more than 1400 decisions—over 90 percent of which concern intellectual property—making it the third most active international tribunal, behind only the ECJ and European Court of Human Rights.[85] Using a multimethod approach involving fieldwork and

[82] Ginsburg & McAdams, *supra* note 73; *see also* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

[83] Todd Allee & Paul Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Political Cover*, 100 AM. POL. SCI. REV. 219 (2006).

[84] KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); *see also* Laurence R. Helfer & Karen J. Alter, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT'L ORG. 563 (2010) (comparing ECJ and Andean tribunal).

[85] Helfer et al., *supra* note 34.

quantitative analysis, they attribute the success of the intellectual property "island" to the relative demand from particular domestic institutions (in this case, intellectual property agencies), as compared to others. These two studies demonstrate the value of looking at domestic actors' incentives to harness international tribunals' decisions.[86]

In sum, the empirical study of tribunals in different disciplines is flourishing in light of the increasing judicialization of IR. Our focus in this section has been on some broad issues concerning international tribunals, their judges, and the domestic impact of the tribunals' decisions. We now turn to additional empirical studies regarding five different domains of international law.

III. Empirical Studies of Substantive Areas of International Law

The growth of empirical work on international law reflects the proliferation and fragmentation of international law into an array of different substantive domains involving multiple subject-specific international organizations. While this growth of international institutional forms has called into question international law's coherence, it has served diverse functional purposes, and invites empirical assessment regarding our two organizing questions for this section: how is each domain of international law produced, and how and under what conditions does each domain of law matter? A central reason for this domain-specific trend in empirical work is that the production and impact of international law varies in light of the different conditions present in particular domains. This basic point was recognized early by Wolfgang Friedmann in his foundational treatise *The Changing Structure of International Law*, where he differentiated between the traditional international law of "co-existence" and the growth of new international law that addresses particular functional aims in particular domains.[87] The fragmentation of international law reflects the varying contexts that states, firms, and individuals confront in advancing particular goals. Much of the new turn to empirical work has thus focused on domain-specific questions. Domain-specific analyses have the advantages of being close to the ground and being capable of isolating features that might operate only in particular contexts. While generalizing from any specific domain can be risky, the following series of domain-specific analyses can, in the aggregate, help to provide an overall picture of how international law works under different conditions, and why it works differently in discrete areas.

Human Rights

International human rights law operates in a distinct context. Unlike the other areas of law we address below, it does not involve collective-action problems or material externalities between states. It thus does not present, from the perspective of strategic game theory, a situation that can be helpfully analyzed in terms of the prisoner's dilemma, battle of the sexes, or other coordination games.[88] Rationalist scholars might thus contend that we should see no

[86] *See also* GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) (discussing the catalyzing role of private interests in WTO interstate litigation).

[87] FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, *supra* note 4.

[88] The prisoner's dilemma game is a "collaborative game," in which different parties have mutual interests in collaborating but face incentives not to do so because of fear of noncooperation by the other party. In contrast, the game of battle of the sexes is a "coordination game" in which the parties wish to cooperate but under different terms. For example, a husband and a wife may wish to vacation with each other, but one prefers the mountains and the other

impact of international human rights treaties and that international human rights treaties just reflect "cheap talk."[89] It is consequently of great importance for those advancing human rights norms to determine whether international human rights law actually does matter and, if so, how and under what conditions.

Louis Henkin famously observed that almost all states observe almost all their obligations almost all of the time.[90] Downs, Rocke, and Barsoom pointed out that this observation tells us little about the power of international law because states may be selecting those obligations with which it is easy to comply.[91] This observation is reflected in the large number of reservations made in human rights treaties, as opposed to other areas of international law such as criminal, trade, investment, and environmental law, all covered below.[92] Moreover, even the Henkin conjecture about compliance has not been fully verified. Indeed, it does not seem to hold true in some areas, and human rights law has been a central topic of debate in this regard. Emilia Powell and Jeffrey Staton, for example, show that nearly 80 percent of the states ratifying the Convention Against Torture violated the agreement in the year of ratification.[93] Powell and Staton's piece is part of an especially important debate concerning the efficacy of the human rights instruments that emerged in the aftermath of World War II. Indeed, most empirical work on human rights law seeks to directly address the question of whether interventional human rights law matters. Yet the related issue of why states sign and ratify international human rights treaties in the first instance has also received some empirical attention.

How human rights law is produced. Most scholars agree that states ratify human rights treaties primarily for expressive reasons—which differs from the other contexts we discuss below and helps to make sense of the gap between widespread accession to global human rights instruments and state practice, with little to no international enforcement of these instruments. Both rationalist and constructivist scholars have advanced and empirically tested expressive theories regarding ratification. The world polity school contends that states enter into international human rights treaties to signal their adherence to global cultural norms, variably stylized as "universal," "modern," and "advanced"; these scholars maintain that treaties expressively reflect and convey a global acculturation process.[94] Rationalists such as Oona Hathaway and Beth Simmons provide quantitative evidence indicating that, although states indeed ratify international human rights treaties for expressive reasons, those states having independent domestic legal enforcement mechanisms are more likely to ratify such treaties if they believe

the seaside. See discussion in Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982).

[89] *See* GOLDSMITH & POSNER, *supra* note 20.

[90] LOUIS HENKIN, HOW NATIONS BEHAVE (1979).

[91] Downs et al., *supra* note 64.

[92] *See, e.g.*, Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1641 (2005) (noting that states have ratified human rights treaties with "dozens of legally dubious reservations"); Laurence Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 YALE J. INT'L L. 367 (2006).

[93] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85; *see* Emilia Powell & Jeffrey Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUDIES Q. 149 (2009); *see also* Michael Gilligan & Nathaniel Nesbitt, *Do Norms Reduce Torture?*, 38 J. LEGAL STUD. 445 (2009) (using the percentage of states in the world that are party to the Convention Against Torture as a proxy for the emerging anti-torture norm; using that proxy to predict torture levels from the date of the Convention's being opened for signature in 1985, to 2003; and finding no support for the proposition that the anti-torture norm reduces torture over time).

[94] John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State*, 43 AM. SOC. REV. 797 (1978); GOODMAN & JINKS, *supra* note 27; BOYLE, *supra* note 27; Meyer, *supra* note 27.

in the norms and can comply with them at a reasonable cost.[95] That is, states with independent judicial systems are aware that ratification of such a treaty can have consequences through claims brought before their domestic courts. In parallel, Andrew Moravcsik contends that, from a liberal internationalist variant of a rationalist perspective, human rights treaties are ratified by newly established democracies to "lock in" domestic human rights policies through making international law commitments.[96] Domestic human rights policies can thus become more difficult to reverse.

Hathaway launched a wave of new empirical work with her counterintuitive finding that states that ratify human rights treaties are more likely, on average, to violate the agreements.[97] One explanation is an expressive one. She maintains that offending states aim to deflect international political pressure to reform by signaling an intention to improve human rights practices through treaty ratification.[98] By contrast, states with independent domestic legal enforcement mechanisms, but with generally good human rights protections, are less likely to ratify human rights treaties if they are concerned that they might not fulfill all of the obligations under the treaty.[99] In later work, Hathaway provides evidence showing that states' decisions to commit to, and comply with, human rights treaties are indeed influenced by the likelihood of domestic legal enforcement of the treaty's terms and by the collateral consequences of treaty commitment.[100] Using hazard analysis to test states' willingness to ratify key human rights treaties, she finds robust empirical support for these propositions.[101]

While states alone ratify treaties, nonstate actors are central to the development of human rights norms, and scholars have documented their key roles. It was nonstate actors, for example, that were central to the struggle against slavery during the nineteenth century.[102] Their work led not only to the 1926 Convention to Suppress the Slave Trade and Slavery, but also to the

[95] SIMMONS, *supra* note 1; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002).

[96] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000) (finding support for his claims through close examination of the creation and evolution of the post–World War II European human rights regime under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221).

[97] Hathaway, *supra* note 95; *see also* Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115 (2008).

[98] A recent analysis by Peter Rosendorff and James Hollyer turns this argument on its head, arguing that offenders from authoritarian regimes ratify, knowing that they will incur international costs, as a signal to domestic opponents about the government's willingness to repress. James Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-compliance*, Q. J. POL. SCI. (forthcoming), *available at* https://files.nyu.edu/bpr1/public/papers/papers.htm.

[99] This legalism can be overcome when sufficient concern is placed on international perceptions. *See* A. W. Brian Simpson, *Britain and the Genocide Convention*, 2003 BRIT. Y.B. INT'L L. 5 (case study of the reasons behind British accession to the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. NO. 91-B (1970), 78 UNTS 277).

[100] Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007).

[101] Hazard analysis is a statistical tool that focuses attention on the duration of a phenomenon of interest and the factors that lead to change. JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING: A GUIDE FOR SOCIAL SCIENTISTS (2004).

[102] Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 191–92 (1997) (describing efforts of nongovernmental organizations (NGOs) to abolish slavery); Joseph S. Nye Jr., *The Information Revolution and the Paradox of American Power*, 97 ASIL PROC. 67, 70 (2003) ("Transnational religious organizations opposed to slavery date back to 1775.").

broad acceptance of the view that the prohibition of slavery is a *jus cogens* norm.[103] More recently, scholars have documented the role of women's groups in advancing women's rights, leading to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,[104] and the role of children's rights groups in promoting the 1989 Convention on the Rights of the Child.[105] Understanding the dynamics that allow some groups to succeed using particular normative frames, whereas others do not, is an important area for further exploration.[106]

How and under what conditions international human rights law matters. Most empirical scholarship continues to revolve around the fundamental question of whether and under what conditions international human rights treaties make a difference for those ratifying them. Scholars have highlighted the conditions that affect compliance with international human rights norms. Understanding these links has normative implications for those seeking to advance the human rights project.

One emerging theme in this literature is that effective human rights protection requires domestic institutions, so that accession is more likely to improve performance in democracies than in autocracies. The engagement of civil society, in particular, appears critical. Linda Keith uses a relatively simple model to show that judicial independence is positively correlated with human rights protection around the world.[107] Eric Neumayer uses a more sophisticated modeling approach to show that ratification of human rights instruments improves protections within states with democratic institutions and a strong civil society.[108]

Because the nature of the state and of the institutions within it affects whether international law matters, one potential problem with empirical studies is the use of overinclusive samples.

[103] Sept. 25, 1926, 46 Stat. 2183, 60 LNTS 253; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987) (listing prohibition on slavery as *jus cogens*).

[104] Dec. 18, 1979, 1249 UNTS 13; *see* MARILOU MCPHEDRAN, SUSAN BAZILLI, MOANA ERICKSON & ANDREW BYRNES, THE FIRST CEDAW IMPACT STUDY: FINAL REPORT 25 (2000) (finding that CEDAW would not have been adopted without the work of NGOs); *see also* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 166–84 (1998) (describing how networks of NGOs took up the issue of violence against women).

[105] Nov. 20, 1989, 1577 UNTS 3; *see* Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137 (1990) (describing involvement of NGOs as shown in UN and NGO documents); *see also* Jean Grugel & Enrique Peruzzotti, *Grounding Global Norms in Domestic Politics: Advocacy Coalitions and the Convention on the Rights of the Child in Argentina*, 42 J. LATIN AM. STUD. 29 (2010) (describing activists' role in promoting children's rights in Argentina); Jean Grugel & Enrique Peruzzotti, *Claiming Rights Under Global Governance: Children's Rights in Argentina*, 13 GLOBAL GOVERNANCE 199 (2007) (describing a case study of the impact of the Convention on the Rights of the Child on domestic advocacy in Argentina).

[106] *Cf.* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003) (the National Association for the Advancement of Colored People was unable to advance a human rights agenda before the United Nations—which resulted in the launching of the Civil Rights Movement without the social and economic rights focus that it needed to achieve black equality); KECK & SIKKINK, *supra* note 104, at 184 (noting how incorporation of women's issues into a "'rights' frame, or master frame supplement[ed] the 'discrimination' frame of the 1979 women's convention and the 'development' frame in the women in development debate").

[107] Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195 (2002).

[108] Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 49 J. CONFLICT RESOL. 925 (2005); *cf.* SIMMONS, *supra* note 1; Hathaway, *supra* note 95; Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483 (2001); Linda C. Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999).

In a subtle, book-length treatment, Simmons takes the important methodological step of disaggregating the sample of states so as to exclude both false positives (states that ratify treaties without intending to comply) and false negatives (states that need not ratify treaties to credibly enforce human rights guarantees).[109] She notes, "in civil and political rights, a treaty's greatest impact is likely to be found not in the stable extremes of democracy and autocracy, but in the mass of nations with institutions in flux, where citizens potentially have both the motive and the means to succeed in demanding their rights."[110] She finds that, for this middle group of states (after excluding the outliers), ratification of human rights instruments is associated with positive improvements in rights protection, with key intervening variables being domestic mobilization and domestic judicial enforcement.

For the middle group of states, she finds that human rights treaties shape executive agendas, provide support for litigation of human rights issues before domestic courts, and spark domestic popular mobilization. She summarizes her own extensive quantitative work, coupled with some qualitative studies, as follows: "Human rights outcomes are highly contingent on the nature of domestic demands, institutions and capacities."[111] International human rights treaties, in other words, provide leverage for domestic mobilization to improve outcomes, but do not, on their own, work well in the absence of domestic mobilization. This finding is consistent with other empirical studies that stress the role of civil society mobilization in domestic settings if international human rights law is to be implemented effectively.[112] Indeed, the existence of civil society organizations is a central variable for sociologists working in the world polity tradition; studies find that diffusion processes work, though subject to particular local conditions in which "modern" norms are more likely to take hold.[113]

The emphasis on the mediating power of domestic institutions and civil society groups illustrates that the effects of human rights treaties can be indirect and take multiple channels. In an important ethnographic study, Sally Merry investigates the links between the global production and local appropriation of human rights law affecting gender violence in five states in the Asia-Pacific region, focusing on the roles of UN conferences, transnational NGO activism, and other transnational exchanges of ideas and practices.[114] She highlights "the role of activists who serve as intermediaries between different sets of cultural understandings of gender, violence, and justice"[115] and who appropriate international legal norms for local ends. Merry's work finds that international human rights law is more likely to matter where nonstate actors operate effectively as intermediaries to convey and adapt human rights norms to address

[109] SIMMONS, *supra* note 1.

[110] *Id.* at 155.

[111] *Id.* at 373.

[112] *See, e.g.*, Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678 (2011) (examining why soft international and transnational legal norms often trigger major national legal reforms, despite the strong constraints that domestic constituencies impose on leaders of democratic states); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005).

[113] *See, e.g.*, BOYLE, *supra* note 27 (using a combination of quantitative and qualitative methods to investigate how actors at the international, national, and local levels affect policies and practices on female circumcision).

[114] MERRY, *supra* note 28.

[115] Sally Engel Merry, *Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 OSGOODE HALL L.J. 53, 55 (2006).

particular domestic contexts. These processes of local adaptation constitute forms of indigenization and bricolage, or what might be called "localized globalisms."[116]

In a world of international legal fragmentation, areas of international law can complement or counter each other's influences within states.[117] International economic law and policy, for example, can potentially impede or foster human rights improvements.[118] Actors may sometimes use different regimes of international law to compete for influence. Scholars have empirically examined these processes and evaluated the outcomes. Boyle and Minzee Kim, for example, use quantitative methods to assess the relative impact across over seventy low-income and middle-income developing countries of conflicting human rights and neoliberal development norms adopted over a twenty-year period in human rights treaties and structural adjustment agreements, respectively.[119] Their study finds that the human rights norm of universal primary education won out, in significant part, through the operation of transnational NGOs that harnessed the legitimacy of these norms.

The questions of whether, when, and how human rights agreements and norms make a difference will remain important, with much still to be studied. But the work to date has significantly advanced conditional IL theory. We see four major challenges for this literature. First, the field needs to follow Simmons's approach of disaggregating large-N analysis, discarding outliers that either ratify international human rights agreements with no intention of enforcing them (Zimbabwe), or comply with international human rights provisions without any need for ratifying them (United States). The actual impact of the instruments is likely to be seen at the margins—for states in the middle. Second, the field needs better measures for human rights outcomes, which is the dependent variable in quantitative research. Much of the existing quantitative work relies on subjective indicators of human rights violations. The U.S. Department of State annual reports, for example, are attractive because of their breadth and their longitudinal coverage, but are subject to some political biases. A small, but important, literature on the challenges of measuring human rights has coalesced and is likely to produce incremental improvements in the indicators used in evaluating human rights performance.[120] Producing new indicators is difficult, but all the standard indicators of human rights abuses have their

[116] *See also* YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS (2002) (regarding the adoption of global human rights and neoliberal economic prescriptions in Latin America).

[117] Shaffer & Pollack, *supra* note 58.

[118] *Cf.* RODWAN ABOUHARB & DAVID CINGRANELLI, HUMAN RIGHTS AND STRUCTURAL ADJUSTMENT (2008) (finding that entry into structural adjustment agreements with the World Bank has a negative impact on human rights protections); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005) (showing that international linkages in the form of preferential trade agreements can improve human rights practices).

[119] Minzee Kim, Elizabeth Boyle & Kristin Haltinner, *Neoliberalism, Transnational Education Norms, and Education Spending in the Developing World, 1983–2004*, LAW & SOC. INQUIRY (forthcoming 2012).

[120] David L. Cingarelli & David L. Richards, *The Quantitative Study of Human Rights Violations*, *in* THE ENCYCLOPEDIA OF HUMAN RIGHTS (David P. Forsyth ed., 2009), *at* https://umdrive.memphis.edu/drich1/public/POLS%203320%20Spring%20(2008)/Cingranelli_%20Richards_Quantitative_Study_of_Human_Rights_Violations.pdf; TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS (2010); *see also* Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance* (Institute for International Law and Justice Working Paper No. 2010/2, 2011) (discussing how indicators have been used in global governance and how the use of indicators has the potential to alter the nature of global governance). For an earlier work, see HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT (Thomas B. Jabine & Richard P. Claude eds., 1992).

flaws. Third, many empirical studies use ratification as a binary variable to capture participation in international human rights regimes. But surely participation is not an all-or-nothing matter; state participation comes in different degrees and modalities. Thinking carefully about the independent variable will be important for future work trying to capture the impact of international regimes. Finally, a combination of quantitative methods and case studies involving sustained fieldwork would be helpful in further assessing the mechanisms through which, and the conditions under which, international human rights law matters. The scholarship we have discussed represents a step in the right direction.[121]

International Criminal and Humanitarian Law

The problem faced in international criminal law (ICL) and international humanitarian law (IHL) is more complex than that of human rights law. On the one hand, ICL and IHL have, in part, the same overarching goal as human rights law in expressing norms of proper conduct.[122] On the other, ICL and IHL often involve issues of reciprocity regarding adversaries' treatment of each other's troops—leading to prisoner's dilemma situations. For instrumentally oriented theorists, states and their armed forces, in an effort to ensure that their own combat forces and civilians are treated humanely, use international law to codify reciprocal understandings.[123] Also unlike human rights law, some crimes in ICL, such as piracy on the high seas, involve collective-action problems. ICL and IHL differ as well from the areas of law that we cover in subsequent subsections—international trade, investment, and environmental law—in that ICL and IHL often involve matters affecting state survival or elite struggles for power. In such matters of "high politics," law can play a more subordinate role. As a result, normative dilemmas over the appropriate use of international law compared to other political alternatives become especially salient, highlighting the need for conditional IL theory.

The explosive growth of international institutions to regulate the conduct of armed conflict—including the expansion of ICL—has been one of the major developments of the past two decades. Nearly fifty years after Nuremberg, the international community created two major ad hoc international tribunals, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia (ICTY), followed by the standing International Criminal Court, as well as ad hoc tribunals for the Lockerbie bombing, the assassination of former Lebanese prime minister Rafik al Hariri, and war crimes committed in Sierra Leone. These developments have spurred policy disputes with major normative implications, giving rise to empirical scholarship in support of contending claims. A central claim of the anti-impunity movement, from Nuremberg onward, has been that criminal prosecutions for grave

[121] Ryan Goodman, Derek Jinks & Andrew K. Woods, *Social Science and Human Rights*, *in* UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman, Derek Jinks & Andrew Woods eds., forthcoming 2012).

[122] *See, e.g.*, Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE J. INT'L L. 1, 51 (2010) (describing IHL's "expressive force" as its "single source of strength"); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 460 (2007) ("Efforts to revise IHL must consider not only the probable effect of proposed new rules on incentive structures but also their expressive dimensions."); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 44 (2007) ("[i]nternational criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions").

[123] *See, e.g.*, James D. Morrow, *When Do States Follow the Laws of War?,* 101 AM. POL. SCI. REV. 559, 566 (2007).

violations of human rights will have a significant deterrent effect, will facilitate democratic transitions, and will help shape collective memories in ways more conducive to enduring peace.[124] This claim needs to be empirically examined, however, in light of different conditions that may affect desired outcomes.

How ICL and IHL are produced. Most of the empirical work regarding why IHL and ICL are produced builds from historical, qualitative case studies.[125] In the 1990s, France, the United Kingdom, and the United States, working through the UN Security Council, pushed together for the creation of ad hoc international tribunals. The United States, however, resisted the creation of the International Criminal Court, which was supported by European states and many others, including Canada.

Empirical studies have examined the various alliances between states, NGOs, and international organizations that worked to create these new tribunals.[126] This empirical work has been central in challenging state-centric theories of international behavior, and illustrates the significant theoretical payoffs for the qualitative empirical work we describe. ICL and IHL have been produced through the work of individuals, NGOs, and states, with private actors and particular events often being the catalysts.[127] The role of Henry Dunant, a Swiss businessman, in founding the International Committee of the Red Cross in 1863 and lobbying states to create the 1864 (Geneva) Convention for the Amelioration of the Condition of the Wounded in Armies in the Field is well documented.[128] The Red Cross has continued to be an active drafter and proponent of the subsequent Geneva and Hague Conventions and their protocols.[129] Dunant acted as a precursor to later prominent figures in IHL, such as Rafael Lemkin regarding the crime of genocide. NGOs also acted as catalysts for the Ottawa Convention, adopted in

[124] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AJIL 7, 9 (2001) ("The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations."); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 410 (2000) ("The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts.").

[125] *See, e.g.*, Michel Veuthey, *From Solferino to Kosovo: The Contribution of International Humanitarian Law to International Security*, *in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS 212–13 (John Carey, William V. Dunlap & R. John Pritchard eds., 2003) (describing events that led to particular changes in international humanitarian law).

[126] *See, e.g.*, MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 22–47 (2005) (describing involvement of NGOs and other actors in campaign for the International Criminal Court); WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE 318–23 (2001) (describing process leading up to establishment of ICTY).

[127] *See, e.g.*, Bohunka O. Goldstein, *Implementation of International Humanitarian Law by Diplomacy, Official and Non-governmental*, *in* INTERNATIONAL HUMANITARIAN LAW, *supra* note 125, at 161, 176–77 (describing International Campaign to Ban Landmines (launched by sixteen NGOs) and NGO Coalition for an International Criminal Court); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 243 (2000) (describing events leading to changes in IHL); Veuthey, *supra* note 118.

[128] Aug. 22, 1864, *reprinted in* THE LAWS OF ARMED CONFLICTS 279 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988); *see, e.g.*, Christopher J. Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 15, 22 (Dieter Fleck ed., 2d ed. 2008) (briefly describing Dunant's involvement with IHL); CAROLINE MOOREHEAD, DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS (1999).

[129] François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT'L L. 191, 191 (2004) ("Notwithstanding its private-initiative origins, the International Committee of the Red Cross . . . has been the main driving force behind the development of international humanitarian law for 140 years."); Finnemore, *supra* note 27 (exploring the role of the ICRC in establishing and codifying the principles in the Geneva Conventions); Ratner, *supra* note 39.

the wake of the 1997 International Campaign to Ban Landmines, for which the campaign (with its leader Jody Williams) won the 1997 Nobel Peace Prize.[130]

Scholars have paid particular attention to the inner workings of international criminal tribunals and the factors leading to the elaboration of this field of law over the last decades. Given its status as the most mature and productive of the international criminal tribunals, much attention has focused on the ICTY. The sociologist John Hagan examined the underlying conditions pursuant to which the charismatic chief prosecutor Louise Arbour, supported by a specific institutional context, strategically chose key cases and worked the media to establish the ICTY's legitimacy and help build the field of ICL.[131] This work highlights the contingent and transformative role that individuals can play on the international plane. Hagan, Ron Levi, and Gabrielle Ferrales subsequently conducted further field interviews, participant observation, and a two-wave survey of ICTY employees to assess changes in the Tribunal in light of shifts in U.S. policy toward it under the Bush administration, as mediated by internal organizational dynamics.[132] They found a decline in work satisfaction and a drop in morale resulting from a loss of a sense of organizational relevance—which impede the Tribunal's work. This study should prompt theorists to examine more carefully how organizational behavior can be affected by relations between the organization in question and external constituencies (the United States in this case). A similar literature is emerging on the International Criminal Court, although the results must be considered preliminary in view of the small number of cases that the Court has handled to date.[133]

Relatively few studies have examined national court prosecutions of international crimes—which can serve as a substitute for international institutional enforcement. In one comprehensive study, however, Maximo Langer shows that national prosecutions based on universal jurisdiction are relatively rare and subject to political checks, and that they consequently focus on defendants from states that are less likely to generate significant political costs for the prosecuting state.[134] Similarly, Eugene Kontorovich and Steven Art study the incidence of universal jurisdiction in prosecutions for piracies committed over a twelve-year period (1998–2009) and find that extra-national prosecution occurs in only 1.47 percent of the cases, reflecting severe

[130] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, 19 ILM 1530 (1997). Richard Price shows how international civil society, in the form of the global coalition against the use of land mines, successfully reframed the issue of land mines from a military to a humanitarian issue and thereby changed the norms and behavior of the vast majority of the world's states, which signed an international convention to ban the use of antipersonnel mines in 1997. Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613 (1998). The treaty, which entered into force on March 1, 1999, has 157 parties as of November 29, 2011. *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en.

[131] JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMINALS IN THE HAGUE TRIBUNAL 93–131 (2003).

[132] John Hagan, Ron Levi & Gabrielle Ferrales, *Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia*, 31 LAW & SOC. INQUIRY 585 (2006).

[133] *Cf.* Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33 (2009) (using discourse analysis to show a change in framing at a critical turning point in the negotiations when majorities shifted away from the great powers' positions, suggesting the role of persuasion); Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Court: The Negotiating Process*, 93 AJIL 2 (1999); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L. ORG. 225 (2010) (applying a rationalist approach).

[134] Langer, *supra* note 34.

collective-action problems.[135] These findings suggest why states might turn to international machinery to overcome such difficulties. They also illustrate both the power of empirical work to inform normative debates and the risks in simply assuming that domestic systems provide an effective substitute for international law.

How and under what conditions ICL and IHL matter. The empirical evidence suggests that the impact of ICL enforcement should be broken down in terms of long-term and short-term effects under different conditions. Regarding long-term effects, the evidence indicates that Nuremberg had an important educative effect on reconstituting German national identity.[136] International criminal tribunals, in other words, can potentially serve a long-term educative purpose, affecting national reconciliation efforts and, over time, collective memories of the past, thereby having an impact on future interstate relations. Scholars have also empirically shown that the development of domestic criminal law and legal institutions has significantly reduced violence within states over time. It remains to be seen, however, whether the recent rise of ICL and ICL institutions—under very different conditions of legitimacy from those of domestic courts—will have long-term deterrent effects, especially in situations involving civil conflict.[137]

A group of realist scholars have used case studies to suggest that prosecuting war crimes may have perverse consequences, possibly spurring leaders and insurgents to resist negotiations to cease combat because of fear of prosecution.[138] They contend that such criminal prosecutions could lead to exacerbated human rights violations. While much empirical work in the arena of ICL and transitional justice is case specific, making generalization difficult, some scholars have engaged in broader, cross-national studies. Jack Snyder and Leslie Vinjamuri, two scholars in the field of international security, survey the claims of proponents of international prosecution and, in a study of thirty-two cases of civil war, find that prosecution according to universal standards is often not helpful in reducing violations.[139] They also find that credible amnesties are generally associated with better outcomes. Similarly, Julian Ku and Jide Nzelibe review data gathered on the fates of African coup participants for the period 1955–2003 and find that coup leaders in Africa are unlikely to be deterred by the threat of prosecution before

[135] Kontorovich & Art, *supra* note 34.

[136] Susanne Karstedt, *Coming to Terms with the Past in Germany After 1945 and 1989: Public Judgments on Procedures and Justice*, 20 LAW & POL'Y 15 (1998).

[137] See, for example, studies of more recent intrastate conflicts, such as MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey M. Weinstein eds., 2004) (finding that "international or local trials may have little relevance to reconciliation in post-war countries," so that "coordinated multi-systemic strategies must be implemented if social repair is to occur"); Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM RTS. Q. 573 (2002) (building from an interview-based study of Bosnians and arguing that for any society to reconstitute in a peaceful fashion, alternative interventions have to be implemented together with war crimes trials); James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271 (2005) (finding that the ICTY had only a limited effect on improving relations among Bosnia's ethnic groups); and David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-conflict Justice*, 31 HUM. RTS. Q. 592 (2009) (surveying the scant empirical evidence on transnational justice and finding little support for the proposition that truth telling harms individuals or that it satisfies victims' need for justice).

[138] Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003).

[139] Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5 (2003–04).

an international criminal tribunal and that such prosecution could rather exacerbate atrocities by reducing the incentives of perpetrators to engage in peace negotiations.[140]

Numerous other studies, however—both case specific and general—suggest that using criminal trials for human rights abuses has had positive effects, which vary depending on their timing and use. Worth noting in this context is that ICL is often linked, directly or indirectly, with the use of transitional justice mechanisms within states, such as criminal trials, truth commissions, and the barring of individuals from future public employment. The literature on ICL consequently overlaps with the broader literature on transitional justice following civil conflicts. The best work in this area adopts a careful, nuanced approach, instead of making stark, either/or judgments. Sikkink and Carrie Walling stress the importance of examining the conditions under which criminal trials can contribute to improving human rights.[141] Based on a survey of truth commissions and human rights trials in 192 states, the two researchers find that amnesties and trials for human rights violations are typically used in combination over time; for example, if earlier amnesties erode, they are sometimes replaced by trials. It is consequently wrong to analyze amnesties and trials as if they were mutually exclusive.

The impact of ICL may depend, in part, on perceptions of its legitimacy. Some relevant empirical literature has addressed whether the outcomes of the ICTY's trials have been biased. James Meernik and Kimi King find no evidence that the Tribunal was treating Serbs more harshly than other defendants, partially allaying concerns of "victor's justice."[142] Meernik likewise finds that the presence on a panel of more judges from NATO states is associated with higher rates of acquittal, and no higher levels of sentencing.[143] From a constructivist perspective, such apparent exercises of impartiality could help to legitimize an international court, empowering it as an actor in constructing the emerging field of ICL. Yet in research relevant to the claims of backlash against the ICTY and its appointed task, Hagan and Sanja Ivonic have conducted surveys among people of various ethnicities in the former Yugoslavia, and they find compelling evidence of local influences on views toward the trial of war criminals. They find, for example, that "Serbs in Belgrade are distinctive in insisting that war criminals be tried in their places of origin, while Serbs in Sarajevo and Vukovar agree with other groups in these settings that war criminals should be tried in the settings where their crimes occurred."[144]

Finally, it is crucial to identify the channels through which IHL affects the conduct of war. One obvious channel is its internalization by militaries. In examining how American military lawyers internalize the values of international human rights and humanitarian law, Laura Dickinson has engaged in extensive interviewing of military lawyers and notes the importance of

[140] Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

[141] Kathryn Sikkink & Carrie B. Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427 (2007); *see also* Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,* 54 INT'L STUD. Q. 939 (2010) (examining one hundred transitional states during the period 1980–2004, and finding that "countries with human rights trials after transition have better human rights practices than countries without trials").

[142] James Meernik & Kimi King, *The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis*, 16 LEIDEN J. INT'L L. 717 (2003).

[143] James Meernik, *Victor's Justice or the Law: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 J. CONFLICT RESOL. 140 (2003).

[144] John Hagan & Sanja Kutnjak Ivković, *War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond*, 605 ANNALS AM. ACAD. POL. & SOC. SCI.130, 149–50 (2006).

organizational culture and structure.[145] Parallel studies of other militaries would inform practical efforts to advance compliance.

Overall, given the conflicting claims regarding the impact of ICL and IHL, further empirical work will be required to assess the conditions under which they are more likely to have positive effects. From our assessment of the empirical evidence, it appears that the impact varies as a function of different conditions, such as the level and nature of the civil conflict, the timing of the trial in relation to the conflict, and whether a state is on the road to democratization.[146] Scholars also need to assess empirically the impact of factors such as the location of trials and the identity of those conducting them.

International Trade Law

International trade law, unlike international human rights law, is based on the mechanism of reciprocity; one state provides trade concessions to others in return for concessions of reciprocal value.[147] In addition, it involves prisoner's dilemma situations since each of the parties to an agreement has an incentive to defect while the others comply, potentially making all of them worse off if none comply. The predominant theory among economists is that states agree to international trade law in order to resolve the prisoner's dilemma[148]—in particular, by providing mechanisms for monitoring and enforcement. International trade law, moreover, unlike ICL and IHL, typically involves issues of lower politics than state security, civil conflict, and the use of force—which enhances the prospects for compliance if effective institutions can be created.

[145] Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AJIL 1 (2010); Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 NYU J. INT'L L. & POL. 355 (2010). In both cases, she builds from a series of interviews of U.S. military lawyers in the Judge Advocate General Corps operating in Iraq. *See also* LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE (2010). For quantitative studies on the impact of the law of war, see WARD THOMAS, THE ETHICS OF DESTRUCTION: NORMS AND FORCE IN INTERNATIONAL RELATIONS (2001) (arguing that self-imposed limitations of international law and custom are often crucial to determining how and when force is used in international relations); James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559 (2007) (finding that ratification of treaties does not affect the behavior of nondemocracies, but does for democracies); and Benjamin Valentino, Paul Huth & Sarah Croco, *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POL. 339 (2006) (finding no evidence that signatories of the Hague or Geneva Conventions of 1907 and 1949 killed fewer civilians than did nonsignatories or that democratic signatories killed fewer than others).

[146] *See also* Oskar Thoms, James Ron & Roland Paris, Does Transitional Justice Work? Perspectives from Empirical Social Science (2008) (unpublished manuscript) (providing a useful overview of the empirical debates) (on file with authors).

[147] JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 217 (2000).

[148] *See* KYLE BAGWELL & ROBERT STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM 3 (2002); Christain Broda, Nuno Limao & David Weinstein, *Optimal Tariffs and Market Power: The Evidence*, 98 AM. ECON. REV. 2032 (2008) (using new empirical data and techniques to provide evidence supportive of the terms-of-trade theory). Giovanni Maggi and Andrés Rodríguez-Clare provide a complementary theory within economics, according to which governments are motivated to sign trade agreements by the desire to make credible commitments in relation to domestic industrial lobbies. Giovanni Maggi & Andrés Rodríguez-Clare, *A Political-Economy Theory of Trade Agreements*, 97 AM. ECON. REV. 1374 (2007) (predicting "that trade liberalization is deeper when capital is more mobile across sectors, and when governments are more politically motivated"); *see also* Edward Mansfield & Eric Reinhardt, *International Institutions and the Volatility of International Trade*, 62 INT'L ORG. 621 (2008) (finding that joining international trade institutions reduces trade volatility and thus increases predictability and economic stability for both states and economic actors).

Nonetheless, power does matter in the production of international trade law, both in setting the terms of cooperation and in enforcing these terms; states with larger markets can threaten to withdraw access to their markets if other states do not agree to the rules that they prefer or if they do not comply with these rules.[149] Richard Steinberg has empirically addressed this point in relation to trade and environment issues, showing how states exercising market power have advanced their positions in different forums.[150] Other scholars, in a parallel but different vein, contend that international trade law helps to lock in the advantages of transnational capital, as well as of powerful states, pointing to the Agreement on Trade-Related Aspects of Intellectual Property Rights as a prime example.[151] In other words, one can see a structural tilt in the ability of larger states and interests within them to shape and deploy WTO rules to advance their interests, directly and diffusely, through using material, ideological, and institutional resources.[152]

International trade law has been extensively studied empirically, which likely reflects the relative success of the WTO's dispute settlement system, the availability of high-quality data, and the long-running interest of economists in international trade matters.[153] Much of this empirical work is read and assessed within the trade policy community, thereby affecting litigation strategies and reform proposals. In this brief assessment, we first examine empirical work on the WTO, focusing on the use of the organization's dispute settlement system and on the judicial findings of the Appellate Body and panels.[154] We then examine the impact of these legal mechanisms.

How international trade law is produced. A sizable body of empirical work now exists on whether use of the WTO dispute settlement system reflects bias in favor of large, wealthy states. Three hypotheses have been formulated and empirically tested—namely, that the system is not biased since use simply reflects economic size, that market power favors use by large, wealthy states because of their ability to retaliate to enforce rulings, and that differences in legal capacity explain disparate use. These studies have normative and policy implications as regards both the fairness of the WTO dispute settlement system and strategies that states might develop to harness it more effectively.

Henrik Horn, Petros Mavroidis, and Häkan Nordstom spurred this field of analysis with their article "Is the Use of the WTO Dispute Settlement System Biased?"[155] They predict how many claims a member would bring based on its trading profile and then check this prediction

[149] Steinberg, *supra* note 9.

[150] *Id.*

[151] *Cf.* BRAITHWAITE & DRAHOS, *supra* note 147, at 79–80; B. S. Chimni, *The World Trade Organization, Democracy and Development: A View From the South*, 40 J. WORLD TRADE 5, 5 (2006) ("[T]he creation of WTO, its rules and organization, is the work of powerful social forces and states. It has emerged as a key institution to sustain the global capitalist order to the advantage of an emerging transnational capitalist class (TCC) whose interests are articulated by powerful states.").

[152] Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, *in* POWER IN GLOBAL GOVERNANCE 130 (Michael Barnett & Raymond Duvall eds., 2005).

[153] Henrik Horn and Petros Mavroidis provide an assessment of much of the quantitative work from law and economics to date. Henrik Horn & Petros Mavroidis, *A Survey of the Literature on the WTO Dispute Settlement System* (Centre for Economic Policy Research, Discussion Paper No. 6020, 2007).

[154] We address elsewhere studies on the negotiation of WTO rules. *See* Ginsburg & Shaffer, *supra* note 69.

[155] Henrik Horn, Petros Mavroidis & Häkan Nordstrom, *Is the Use of the WTO Dispute Settlement System Biased?* (Centre for Economic Policy Research, Economic Research and Analysis Division, Discussion Paper No. 2340, 1999).

against the actual number of claims brought. They find that states' initiation of WTO complaints roughly tracks their share of global trade, although they note some outliers—in particular, Japan. Almost ten years later, Joseph Francois, Horn, and Niklas Kaunitz likewise compare actual WTO complaints initiated by states against their model's predicted number of complaints, which is based on each member's size and industrial structure.[156] They use new statistical data of disputes from a World Bank database and incorporate an assessment of import-restricting measures at the industry level. They again find a strong positive correlation between the number of a member's complaints and the size of its trade and GDP, suggesting that use of the WTO legal system simply reflects trade patterns and is therefore not biased.

Chad Bown uses a different strategy to examine whether the system's operation exhibits bias because of power-oriented factors.[157] He looks at which states were the actual complainants and third parties in WTO disputes in relation to the affected exports, and finds that, controlling for other factors, a state is less likely to initiate claims when it lacks the capacity to retaliate against the respondent by withdrawing trade concessions, when it is poor or small, when it has a preferential trade agreement with the respondent, or when it is especially reliant on the respondent for bilateral assistance. Similarly, Bruce Blonigen and Bown find that differences in market power explain patterns of antidumping (AD) protection. They show that a state will less likely initiate an AD investigation against a state that is likely to initiate a retaliatory AD investigation, and also that a state is less likely to make a positive injury finding in a domestic AD case when the target is more likely to initiate a WTO complaint against it in any area of WTO law.[158]

Andrew Guzman and Beth Simmons examine the question of whether power or legal capacity matters more for legal claims through a research design focusing on the identity of the respondent targeted by a developing state complainant.[159] They hypothesize that if market power matters more, then developing states will tend to bring complaints against weaker opponents because of less "fear of retaliation" and that if legal capacity matters more, then developing states will use the scarce resources available to them to target those with larger markets in order to maximize the payoffs of bringing a claim. They find that each of their proxies for legal capacity but one (a general "bureaucratic quality" measure) yields a statistically significant negative coefficient as predicted by the legal capacity hypothesis. In contrast, they find no support for a market power explanation.

Marc Busch, Eric Reinhardt, and Shaffer examine the impact of legal capacity in international trade dispute settlement by using a new measure of legal capacity derived from their survey of WTO members.[160] They create a legal-capacity index based on states' responses to five

[156] Joseph Francois, Henrik Horn & Niklas Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System* (International Centre for Trade and Sustainable Development, Issue Paper No. 6, 2008).

[157] Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 WORLD BANK ECON. REV. 287 (2005).

[158] Bruce A. Blonigen & Chad P. Bown, *Antidumping and Retaliation Threats*, 60 J. INT'L ECON. 249 (2003).

[159] Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUDIES 205 (2002).

[160] Marc Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559 (2009); Marc Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO* (International Centre for Trade and Sustainable Development, Issue Paper No. 4, 2007).

questions regarding, respectively, their professional staffs, bureaucratic organizations at home, bureaucratic organizations in Geneva, experience handling general WTO matters, and involvement in WTO litigation. The researchers apply this index to assess the likelihood that a state will be named in a domestic AD petition and, if so, the likelihood that such state will challenge any resulting AD duties at the WTO. They find that states possessing greater legal capacity are both less likely to be targeted by AD duties and more likely to challenge such AD duties through the WTO. They find that legal capacity affects patterns of WTO dispute initiation and underlying AD protection among WTO members at least as much as market power, if not more.

Empirical studies have also employed qualitative methods to examine what lies behind the bringing of WTO complaints, such as the role of business and the lawyers that they hire. Shaffer has done extensive fieldwork and conducted over one hundred interviews at the WTO and in national capitals to uncover how public and private actors develop cases and use the law as leverage in bargaining.[161] He examines how the WTO legal system has unleashed new competition for trade law–related expertise, and traces the development of public-private networks of trade associations, law firms, and government officials in bringing cases and helping to shape WTO law over time. Joseph Conti has conducted important work in this vein, focusing on how "good cases" are constructed and the role of learning in WTO dispute settlement.[162] This work has formed the basis for discussions in Geneva and different regions to assess options for building legal capacity to facilitate access to the WTO legal system.

Overall, these studies of invoking the WTO dispute resolution system agree that states' use reflects their economic size. Large, wealthy states have developed greater legal capacity, providing them with advantages. Their large markets further provide them with leverage in the law's shadow through the greater risk that retaliation poses. Law, in other words, even while it may constrain the blunt exercise of material power, can also be viewed as an instrument whose use reflects a form of power. The use of WTO law is conditioned by economic size and the harnessing of legal capacity, including through the development of public-private partnerships.

Scholars have also empirically assessed whether WTO panels and the Appellate Body are independent actors in construing the meaning of international trade law. Some scholars contend that WTO judicial decision makers show a free-trade bias, which does not reflect state preferences. These studies focus on the winning record of complainants in WTO disputes—roughly a 90 percent success rate for panel and Appellate Body decisions combined. John and Caroline Maton use multivariate analysis to show that the complainant advantage in winning cases is not explained by such external factors as economic power, involvement of third parties, or status of the complainant as an experienced repeat player.[163] Juscelino Colares covers a broader set of cases; adds additional control variables, such as case type and subject matter,

[161] SHAFFER, *supra* note 86; Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177 (2006); Gregory Shaffer, Michelle Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008).

[162] JOSEPH CONTI, BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION (2011); Joseph Conti, *The Good Case: Decisions to Litigate at the World Trade Organization*, 42 LAW & SOC'Y REV. 145 (2008); Joseph Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 LAW & SOC. INQUIRY 625 (2010).

[163] John Maton & Carolyn Maton, *Independence Under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT'L ECON. L. 317 (2007).

party identity, and product type; but uses a bivariate approach.[164] He finds that selection effects, asymmetric incentives, and "playing for rules" cannot explain the finding that complainants win so often. Instead, he contends that interpretations of the WTO agreements have favored a free-trade normative vision, indicating biased rule development and providing evidence of judicial lawmaking.

Colares does not, however, examine the possible explanation that respondents are systematically contesting low-quality cases for domestic political reasons, even though they know they will lose. That is, respondents may be using WTO dispute settlement to provide political cover, attempting to show the affected domestic industry and its political supporters that the government is doing everything possible to uphold the trade-restrictive measure. The WTO's lack of retrospective remedies facilitates this political response because a member can effectively maintain an illegal trade measure for almost three years of litigation without being subject to any retrospective legal sanction. Complementary qualitative research would help to explain the quantitative data.

How and under what conditions WTO law matters. Two questions stand out regarding whether and, if so, how WTO law matters: does membership affect trade liberalization, and do states comply with dispute settlement findings affecting trade patterns? First, scholars have examined the impact of international trade institutions and institutional design on trade patterns and trade commitments. Andrew Rose's data controversially suggests that joining the GATT/WTO does not affect bilateral trade flows—a frontal challenge to neoliberal theory.[165] His conclusions have been challenged by Michael Tomz, Goldstein, and Douglas Rivers, who conclude that the GATT/WTO has a positive trade impact if one includes its effects on colonies, newly independent states, and provisional applicants as de facto members—which undercuts Rose's conclusions.[166] Arvind Subramanian and Shang-Jin Wei also find positive trade effects for industrialized members, although not for others, suggesting that the impact of trade law is contingent on a state's trade profile.[167]

Second, various studies assess the relative efficacy of the WTO/GATT dispute settlement system in inducing compliance, thereby facilitating trade flows. Robert Hudec's comprehensive analysis of GATT dispute resolution shows that the system successfully resolved some 90 percent of legally valid claims.[168] Busch and Reinhardt find similarly high success rates of resolving disputes under the more legalized WTO.[169] Importantly, the concessions made in the wake of WTO decisions appear to matter economically, as shown by Bown.[170] Three years after the

[164] Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383 (2009).

[165] Andrew K. Rose, *Do We Really Know That the WTO Increases Trade?*, 94 AM. ECON. REV. 98 (2004).

[166] Michael Tomz, Judith Goldstein & Douglas Rivers, Comment, *Do We Really Know That the WTO Increases Trade?*, 97 AM. ECON. REV. 2005 (2007).

[167] Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 J. INT'L ECON. 151 (2007). *Cf.* Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008) (finding that states able to take advantage of the WTO's flexibility provisions (namely, antidumping laws) tend to agree to more binding tariff commitments and to implement lower applied tariffs).

[168] ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993).

[169] Marc Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L. J. 158 (2000).

[170] Bown, *supra* note 16.

date of adoption of a WTO judicial decision in favor of the complainant, and controlling for other factors, imports of the complainant's affected goods had increased substantially into the respondent state. In other words, the party losing the case did not simply replace one form of protection with another; rather, the successful claim had tangible effects. In sum, WTO law and its judicialized system of enforcement provide effective leverage for states to reduce trade barriers and enhance trade flows. Their ability to do so, however, is conditioned on their economic size, trade profile, and legal capacity.

International Investment Law

The context of international investment law is both similar to and different from that of international trade law. They both involve the management of externalities from domestic regulations affecting foreign firms. However, the investment context, which typically involves wealthy, industrialized source states and developing host states, is much more asymmetrical and thus raises distinct distributional issues. This situation is somewhat changing, however, with the rise of newly industrialized states, potentially affecting the content and operation of investment law.[171]

The demand for international investment law is a response to a core feature of domestic institutional structure: the assumption that local courts will not effectively constrain government takings of investments owned by foreigners. Economists describe foreign investment as raising a *dynamic inconsistency problem*: the host state must make a credible commitment to the foreign investor that the host will not renege on the deal after the investment has been made. International dispute resolution helps resolve this problem. The key normative questions debated are whether international investment law is biased in its formation and application in favor of exporters of capital, and whether it indeed spurs increased investment that benefits host states.

How investment law is produced. While trade law has effectively been multilateralized, investment law remains subject to a complex array of bilateral investment treaties (BITs). Earlier generations of work described the evolution of the regime, but it was Andrew Guzman who launched a modern research program by asking *why* we observe a bilateral mode of agreement in this area of law.[172] Guzman explained that developing states are caught in something of a collective action problem. While they would collectively be better off if they could negotiate a multilateral treaty, each individual developing state has an incentive to defect from the collective group so as to capture a greater share of the overall pool of investment. This situation spurs, in effect, a race to liberalize foreign investment law. Economically poor states conclude bilateral agreements that reduce their options for regulating investment. These agreements differ from any agreements that would be negotiated multilaterally.

BITs concluded between rich and poor states grew dramatically in the 1990s. Zachary Elkins, Simmons, and Guzman examine the spread of BITs to test, and ultimately support, Guzman's hypothesis that developing states compete against each other to conclude BITs with

[171] *See, e.g.*, José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 237–38 (2011) (discussing changes in model BITs).

[172] Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

capital exporters.[173] They also find interesting evidence of diffusion-based explanations; for example, cultural similarity and security relationships explain which pairs of states are likely to conclude BITs. These arrangements thus represent a response to the different character of investment as opposed to trade, and illustrate some of the conditions under which multilateralism will lose out to bilateralism—which is important for conditional IL theory.

Similarly, scholars have debated whether the application of investment arbitration exhibits structural bias. Susan Franck is conducting an ongoing empirical study of the field using quantitative analysis.[174] While this area is still plagued by a small N and selection problems (since not all awards are published or reported), she finds that the nationality of the presiding arbitrator does not make a difference for outcomes, indicating an absence of bias against developing states.[175] One might question, however, whether the arbitrator's nationality is an appropriate proxy for bias in the investment law context since ideology and professional competition may affect the selection of the few developing state arbitrators in question.[176] Dezalay and Garth's extensive fieldwork and interviewing of arbitrators have shown the intense competition between potential sites of arbitration and between American and European arbitrators—both of which have helped to shape the development of arbitration law and to establish its legitimacy.[177] This legitimacy is increasingly disputed, however—for example, in relation to a series of challenges to arbitration awards against Argentina while it was mired in a financial crisis.[178] New studies need to assess how the system adapts to respond creatively to such situations.

How and under what conditions international investment law matters. The key normative question regarding the impact of BITs is whether they actually attract increased investment flows between the contracting states, and if so, with what impact. Empirical work is providing important new data for this analysis. Jason Yackee finds no positive relationship between the strength of investor protection in BITs and investment flows.[179] He gives a socio-legal explanation that investors often are ignorant of the law or that, because of reputation concerns, they use other, nonformal means to resolve disputes.[180]

[173] Zachary Elkins, Andrew Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006).

[174] Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009); Susan Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767 (2008); Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

[175] Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, *supra* note 174; *see also* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 47 (2010) (finding that repeat arbitrators "display no biases and no tendencies to 'split the difference' ").

[176] *See also* Gus Van Harten, *Reply*, 2010–2011 Y.B. INT'L INVESTMENT L & POL. (forthcoming) (replying to Susan Franck, Calvin Garbin & Jenna Perkins, *Response: Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law*, in same volume).

[177] DEZALAY & GARTH, *supra* note 71.

[178] William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 407 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010) (arguing that the recent decisions involving the U.S.-Argentine BIT threaten the legitimacy of the investor-state arbitration system); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 285 (2010) ("the perceived legitimacy of investor-state arbitration has come under threat in recent years in the eyes of some states" (footnote omitted)).

[179] Jason W. Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC. REV. 805 (2008).

[180] *Id.*

A competing theory is that BITs provide "credible commitments" when foreign investors have grounds to believe that a state's domestic legal system is inadequate and thus cannot be trusted to uphold a contractual bargain.[181] To test the hypothesis about credible commitments, a number of quantitative studies have assessed whether BITS and investment flows are related; the results are mixed.[182] Each of these studies uses different control variables, such as wealth, institutional quality, and concentration of natural resources, and the econometric specifications also vary. While competition in the academy often depends on scholars staking out and defending a position, it would be productive for the various scholars in the BIT debates to work together to sort out and reconcile their results.

Tim Büthe and Helen Milner take a unique tack in assessing the role of international law on investment flows. They apply credible commitments theory and find that membership in multilateral and preferential trade agreements results in increased investment into the state parties.[183] They contend that such membership provides information that helps to assure investors of domestic political stability. Applying a similar argument in a comprehensive survey of existing empirical work on BITs, these authors find that BITs help signal commitment to a whole range of liberal policies and thus improve all investment flows into the host states regardless of the source, and not simply the flows between the BIT parties.[184]

In sum, the BIT literature addresses the midlevel theoretical concept of credible commitments, and demonstrates the sensitivity of empirical work to different specifications. The discrepancies in existing studies may be explained by their use of different measures of investment flows, as well as different estimation techniques. Studies focusing on only bilateral investment flows between BIT parties find that BITs have little impact, whereas studies focusing on overall investment flows into BIT parties find that they have positive effects. The authors of the latter studies provide evidence that becoming a party to a BIT creates general signals for foreign investors regarding a state's commitments to investor protection. While the large-N evidence may be leading in the direction of consensus, the signaling story calls out for qualitative work on

[181] *Cf.* Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107 (2005) (finding little improvement in institutional quality after entering into a BIT, suggesting that international commitment devices can substitute for, rather than complement, domestic institutions); Jennifer Tobin & Susan Rose-Ackerman, *Do BITs Benefit Developing Countries?, in* THE FUTURE OF INVESTMENT ARBITRATION (Roger P. Alford & Catherine Rogers eds., 2009) (finding that BITs serve as complements).

[182] *E.g.*, Tobin & Rose-Ackerman, *supra* note 181; *cf.* Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows* (Indian Council for Research on International Economic, Working Paper No. 116, 2003) (positive effect); M. Busse, J. Koeniger & P. Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More Than a BIT?* (Kiel Institute for the World Economy, Working Paper No. 1403, 2008) (positive effect); Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI Through International Trade Agreements?*, 52 AM. J. POL. SCI. 741 (2008) (positive effect); K. P. Gallagher & M. B. I. Birch, *Do Investment Agreements Attract Investment? Evidence from Latin America*, 7 J. WORLD INV. & TRADE 961 (2006) (no increase in U.S. investment); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment?* (World Bank Policy Research, Working Paper No. 3121, 2003) (no effect); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005) (positive effect); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005) (positive effect); Tobin & Rose-Ackerman, *supra* note 181; Yackee, *supra* note 179 (no effect of strong BIT). Each of these studies uses a slightly different approach.

[183] Büthe & Milner, *supra* note 182.

[184] Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl Sauvant & Lisa Sachs eds., 2009).

foreign investment decisions to better understand the conditions under which decision makers respond to legal change.

International Environmental Law

International environmental law is a growing field of study that faces its own special challenges, especially in relation to transboundary environmental externalities and regulating the global commons. These challenges often involve considerable scientific and technical complexity regarding the diagnosis of a problem, its causes, and the implications of regulatory alternatives. International environmental law also has differential distributive implications for states and private stakeholders, rendering the politics of lawmaking especially salient. For example, while many states lose from climate change, others arguably win, and in any case the cost of mitigating climate change varies in light of national economies' relative dependence on fossil fuels. Starting with the *Trail Smelter* case,[185] which conceived of transboundary environmental pollution in a bilateral framework akin to domestic nuisance law, environmental concerns have entered many areas of international law, including trade law, the law of the sea, and even the law of war. The particular attributes of international environmental law call, once more, for greater attention to contextual, midrange theorizing. Among the most interesting issues for empirical study is the role of nonstate actors and of soft law in the production of international environmental law and in its impact.

How international environmental law is produced. Work that treats environmental law as a distinct field has expanded significantly in the last two decades. Scholars have compiled and compared numerous qualitative case studies by using the method of process tracing to determine how international environmental law is created in particular areas.[186] Collectively, these studies show that environmental regimes frequently start as disappointments but that they can create, in John Braithwaite and Peter Drahos's words, a "contractual environment" into which mass concern can be channeled later, as in the wake of a major news event.[187] Through these regimes, soft and hard law are often developed in stages, with national capacity built to address the particular environmental concerns at stake at any particular point.

Nongovernmental actors frequently play major roles in the politics of international environmental lawmaking, including by heightening global concern about the environment and

[185] Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941). For an excellent overview of international environmental law, see BODANSKY, *supra* note 38.

[186] *See, e.g.*, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Robert Keohane, Peter Haas & Marc Levy eds., 1993) (case studies of seven international environmental problems); POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES (Oran Young & Gail Osherenko eds., 1993) (building from five case studies on the formation of environmental regimes for the Arctic to test hypotheses regarding regime formation); THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS (David Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998) (fourteen case studies covering eight areas); EDWARD MILES, ARILD UNDERDAL, STEINAR ANDRESEN, JORGEN WETTESTAD, JON BIRGER SKJAERSETH & ELAINE M. CARLIN, ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE (2002) (reviewing the effectiveness of fourteen regimes as a function of the character of the problem and the problem-solving capacity to address it; combining qualitative and quantitative analysis; and tracing the incremental stages of the regimes' formation, implementation, and impact); RONALD B. MITCHELL, INTENTIONAL OIL POLLUTION AT SEA (1994); R. MICHAEL M'GONIGLE & MARK W. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA (1979).

[187] BRAITHWAITE & DRAHOS, *supra* note 147, at 618–20; *see also* Ronald B. Mitchell, *International Environmental Agreements: A Survey of Their Features, Formation, and Effects,* 28 ANN. REV. ENV'T & RES. 429 (2003).

by framing the issues to be addressed.[188] Private actors, whether they are NGO activists, businesses, or knowledge-based epistemic communities such as scientists and members of particular professions, work both with states and independently of them to shape perceptions of international environmental problems and solutions. Socio-legal scholars Penelope Canaan and Nancy Reichman, for example, use extensive participant-observation and interviews to assess the role of epistemic communities, such as scientists, in the development and implementation of the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer.[189] This work has laid some basis for studying the crucial case of climate change, a paradigmatic global problem for which the problems of regime formation are especially acute. As is well known, however, there have been sustained attempts to delegitimize scientists since they are potentially capable of wielding such significant influence.

NGOs have also been central in creating private and hybrid consumer-oriented regimes to overcome the limitations of state-built alternatives—spurring new research on how these regimes were constructed.[190] Ben Cashore and Errol Meidinger, for example, show how transnational civil society networks have created new transnational forest-stewardship norms and institutions to enforce them.[191] They assess the role of these networks in defining and implementing soft law standards, including through labeling regimes that convey whether lumber has been harvested in an environmentally sustainable manner. These civil society programs frequently stimulate competition by business-based programs, generating, in turn, dynamic processes of competitive standard setting.[192]

There is some movement toward building databases for more quantitative analysis in this area, as evidenced by the creation of the International Regimes Database, which facilitates the comparison of specific aspects of international environmental regimes.[193] For example, Denise Degarmo has tested a series of variables to predict the probability that a state will become party to a multilateral environmental agreement; she finds that more open, free governments are more likely to become parties,[194] which resonates with the work we cited earlier in other domains, highlighting the potential broader implications of context-specific studies.

[188] *See, e.g.*, PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS (1996); KECK & SIKKINK, *supra* note 104.

[189] Sept. 16, 1987, S. Treaty Doc. No. 100-10 (1987), 1522 UNTS 3; *see* PENELOPE CANAN & NANCY REICHMAN, OZONE CONNECTIONS: EXPERT NETWORKS IN GLOBAL ENVIRONMENTAL GOVERNANCE (2001); *see also* GLOBAL ENVIRONMENTAL ASSESSMENTS: INFORMATION AND INFLUENCE (Ronald B. Mitchell, William C. Clark, David W. Cash & Nancy M. Dickson eds., 2006); Peter Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992).

[190] *See, e.g.*, WAPNER, *supra* note 188.

[191] *See, e.g.*, Abbott & Snidal, *supra* note 59; Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47(2006); Cashore et al., *supra* note 59.

[192] Civil society groups, moreover, also divide on environmental issues, as North- and South-based NGOs often disagree on the appropriate approaches for addressing environmental problems at the international level, particularly regarding the legitimacy of unilateral trade measures imposed by large states—a point that is often elided by normatively oriented legal scholars. *See* Judith Mayer, *Environmental Organizing in Indonesia: The Search for a Newer Order*, *in* RONALD LIPSHUTZ & JUDITH MAYER, GLOBAL CIVIL SOCIETY AND GLOBAL ENVIRONMENTAL GOVERNANCE 169 (1996); Gregory Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 68–74 (2001) (building from interviews and systematic review of minutes of WTO committee meetings).

[193] HELMUT BREITMEIER, ORAN YOUNG & MICHAEL ZURN, ANALYZING INTERNATIONAL ENVIRONMENTAL REGIMES: FROM CASE STUDY TO DATABASE (2006); *see also* INTERNATIONAL ENVIRONMENTAL AGREEMENTS DATABASE, http://iea.uoregon.edu.

[194] DEGARMO, *supra* note 56.

How and under what conditions international environmental law matters. The work on the impact of international environmental law faces the challenges raised by Downs and colleagues regarding international law generally—that is, whether international law requires states to do more than they already plan. The impact of international environmental law can be assessed in terms of formal changes in national law, changes in actors' behavior, and changes in environmental quality.[195] Environmental advocates are clearly most concerned about the ultimate impact of international environmental law and about mechanisms that can be adapted to enhance that impact. Empirical studies have addressed both compliance with, and the effectiveness of, international environmental agreements.[196]

The impact of international environmental law is typically context specific. What needs to be taken into account are the characteristics of the activity, the characteristics of the accord, the international environment, and domestic factors, as shown by Edith Brown Weiss and Harold Jacobson in their study regarding the compliance of eight states and the European Union with five international environmental agreements.[197] A key issue is how to enhance the impact of international law over time. Following Chayes and Chayes's work,[198] many environmental law scholars have advocated a "managerial approach" in which agreements maximize inclusiveness but minimize initial commitments and deemphasize enforcement; the rationale is that through ongoing state interaction, states' positions will gradually transform, leading to deeper cooperation. Soft law mechanisms are often advocated in such circumstances. From a series of fourteen case studies involving eight issue areas, David Victor, Kal Raustiala, and Eugene Skolnikoff conclude that, although compliance with legally binding agreements is high, states often agree only to modest commitments, with which they can easily comply. In contrast, the researchers find that nonbinding agreements can be more ambitious in the change envisaged and can have a greater influence on changing state behavior.[199] This latter conclusion has been supported by some scholars, who have combined qualitative and quantitative methods to document how a number of effective regimes have followed incremental, stage-based pathways to greater cooperation.[200] But that conclusion has also been disputed—for example, by Downs, Kyle Danish, and Barsoom, based on their review of state responses to agreements fitting the "transformational model" relative to others.[201] Further empirical work is needed that assesses the conditions under which an incremental, transformative approach is more likely to be effective.

[195] RONALD MITCHELL, INTERNATIONAL POLITICS AND THE ENVIRONMENT 148 (2009); MILES ET AL., *supra* note 186, at 5–7.

[196] ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); MILES ET AL., *supra* note 186; ORAN YOUNG, COMPLIANCE AND PUBLIC AUTHORITY (1979); ORAN YOUNG, THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS (1999); Thomas Bernauer, *The Effect of International Environmental Institutions: How We Might Learn More*, 49 INT'L ORG. 351 (1995).

[197] ENGAGING COUNTRIES, *supra* note 196.

[198] CHAYES & CHAYES, *supra* note 7.

[199] THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 186.

[200] See, in particular, MILES ET AL., *supra* note 186.

[201] George W. Downs, Kyle W. Danish & Peter N. Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465 (2000).

Finally, environmental law scholars have attended to mechanisms that harness the incentives of the private sector and lead to environmental improvements. Ronald Mitchell's leading study of oil pollution at sea stands out in this respect.[202] He finds that obligations placed on states to prosecute violators were relatively unsuccessful in stemming oil discharges but that a particular provision regarding the installation of specified equipment on oil tankers had the greatest impact. It did so because it expanded the target for enforcement to include not just states, but also insurance-classification societies and shipbuilders. Insurers insure only ships that are classified as satisfying certain standards, such as the segregation of ballast tanks, which is critical for reducing oil pollution at sea.[203] The use of a broad-based compliance system, moreover, increased transparency and reduced implementation costs, deterring violations. Similarly, Aseem Prakash and Mathew Potoski show the importance of harnessing the private sector in their study of the relation between trade and a voluntary international business standard regarding environmental management systems (ISO 14001).[204] They find that trade linkages encourage businesses's adoption of the standard within a state if the standard is adopted in the state's major export markets. In short, empirical studies in international environmental law stress the importance of disaggregating the state in analyzing how international law becomes effective—in this case through harnessing the private sector.

IV. BUILDING CONDITIONAL IL THEORY

Empirical work is not atheoretical. Rather, in line with the emergent analytics we have stressed, empirical work is central to building what we have termed *conditional IL theory*—that is, midlevel theory that is sensitive to the varying contexts in which international law operates and that addresses the conditions under which international law is produced and has effects.

From the perspective of conditional IL theory, we have stressed the different types of situations that international law involves, such as collective action problems, externalities, cooperation and coordination challenges with distributive implications, and expressive norms regarding right conduct within a broader community (see Table 1). What has been called the fragmentation of international law reflects these different challenges and the political and social contexts in which states and nonstate actors operate. As a result of these diverse factors, some areas of international law are characterized by a web of bilateral treaties (as in investment and tax law), and others characterized by a multilateral approach or a mix of multilateral and bilateral approaches (as in human rights and international trade law). In some areas soft law is seen as desirable and effective in facilitating patterns of cooperation (as in environmental law); in others, hard law and third-party dispute settlement are seen as central for inducing compliance (as in trade law). Similarly, international law's impact varies in light of the different underlying conditions and institutions characterizing these different subject areas; for example, compare the high politics of humanitarian law, which can involve state survival and elite power struggles,

[202] Ronald Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425 (1994).

[203] See discussion in BRAITHWAITE & DRAHOS, *supra* note 147, at 618.

[204] Aseem Prakash & Matthew Potoski, *Racing to the Bottom? Trade, Environmental Governance, and ISO 14001*, 50 AM. J. POL. SCI. 350 (2006) (drawing on a panel study of 108 states over seven years). For interesting empirical work on industry self-regulation, see Michael Lenox, *The Prospects for Industry Self-Regulation of Environmental Externalities*, *in* MAKING GLOBAL REGULATION EFFECTIVE: WHAT ROLE FOR SELF-REGULATION? (N. Woods ed., 2008).

TABLE 1.
SUMMARY OF PROBLEM TYPES, EMPIRICAL QUESTIONS, AND FINDINGS

	Human rights	International criminal and humanitarian law	Trade	Investment	Environment
Core problem types	Expressive of norms	High politics Expressive Reciprocity Collective action (prisoner's dilemma)	Reciprocity Collective action (prisoner's dilemma and battle of the sexes)	Asymmetric power structure Dynamic inconsistency	Externalities Collective action (global commons) Distributional conflict
Major topics of research on how IL is produced	Reasons for treaty ratification	Construction and operation of tribunals Presence of bias	Role of power Propensity of states to dispute Presence of bias in dispute resolution	Reasons for bilateral vs. multilateral approach Presence of bias	Reasons for treaty ratification Iterative processes of lawmaking Soft vs. hard law Role of nonstate actors
Major topics of research on how IL matters	Impact of treaty ratification on domestic practice	Effects on deterrence and on postconflict integration	Compliance Effect of law on trade flows	Effect on investment flows	Compliance Impact of treaty ratification on domestic practice
Conditional IL findings	Domestic politics variables matter for understanding ratification and impact Civil society is key shaper, conveyor, and translator of norms	Conflict nature, regime type, timing, and tribunal design all affect outcomes Time horizon for evaluation matters for assessing impact of trials and amnesties, alone and in combination	Legal capacity is important for exercising leverage in disputes Market power is important in shaping rules and combating protection	Asymmetry leads to bilateralism Mixed evidence on direct effects, but BITs and FTAs work as signals to investors	Epistemic communities and NGOs matter in framing Private sector matters in implementation Soft law matters on own and as part of incremental process

BIT = bilateral investment treaty; FTA = free trade agreement; IL = international law; NGO = nongovernmental organization.

with trade law, which does not). In light of this diversity, grand theory is not helpful. Without attention to context, theorizing will be of little pragmatic use.

We have reviewed the major empirical findings in the recent literature across five important areas of international law. These areas, of course, are hardly exhaustive, but they do represent a range of important problems where international law has developed and can be useful. Table 1 summarizes our review of each of the five areas covered in Part III. We identify the area's core problem structure, note the chief questions that have motivated empirical study to date, and list some conditional findings regarding the parameters that determine whether international law is produced and whether it is effective.

Conditional IL theory focuses on the different *mechanisms* through which international law is produced and has its effects in different domains. As we have noted, the mechanism of reciprocity is central to international trade law, but not to human rights law, in which expressive and norm-conveying mechanisms play a primary role. In contrast, the mechanism of competition is central to the development of international investment law. For environmental standard setting, the mechanism of modeling often plays a more significant role.[205] This point regarding the study of mechanisms has great practical value since the tools to make international law effective often will be specific to particular domains and contexts, whether involving international human rights or trade or environmental law, or different states in different areas of the world.

Notwithstanding the importance of problem type in determining what mechanisms might be effective, future empirical work may find it valuable to *borrow* research questions and approaches from areas of law with different problem types. Table 1 highlights the predominant questions pursued in different issue areas to date. For example, as we have noted, extensive ethnographic work has been conducted concerning international criminal tribunals, but not WTO panels. By contrast, the WTO literature, though not the investment literature, has thoroughly analyzed the conditional decision by a state to bring claims. Writing on investment law has focused, instead, on the macro question of whether BITS increase investment flows—even though decisions to initiate investment arbitrations also raise interesting questions. Our suggestion is that understanding the conditions under which international law is produced and is effective in one area can generate research questions about other areas, helping, in turn, to identify the factors that generate similar or different outcomes.

Another strategy for conditional IL theory is to *disaggregate groups of states* in order to focus on the characteristics of, and factors within, states that help to explain the influence of international law—as reflected in the work of Beth Simmons, Oona Hathaway, Kathryn Sikkink, and others.[206] International law does not matter for all states all the time, but that does not mean that it does not matter. The burgeoning empirical literature that we have discussed helps to explain how the effectiveness of international law is linked to the characteristics of states and their institutions and social contexts. It would be especially useful to see more work along these lines in international trade, investment, and environmental law. Case studies of marginal states in which compliance with, or use of, international law is not overdetermined could potentially help to tease out possible causal relationships.

[205] We also address the use of mechanisms in Ginsburg & Shaffer, *supra* note 69. In addition, we cover regulatory standard setting, where the mechanism of modeling is again important. *See also* BRAITHWAITE & DRAHOS, *supra* note 147, at 532–49; Halliday & Osinsky, *supra* note 23.

[206] *See, e.g.*, SIMMONS, *supra* note 1, pt. III.A, III.B; Hathaway, *supra* note 95; Kim & Sikkink, *supra* note 141.

Conditional IL theorists sometimes focus on states, but even when they do, they also tend *to disaggregate the state and study the role of networks, firms, and civil society as actors* that affect state compliance. Many empirical studies—in all of the areas we analyze—show that nonstate actors and subdivisions within the state play key roles, both in producing international legal norms and in communicating and implementing them within states, including by reframing them in light of local social contexts. Theories of international law that are purely state-centric may be parsimonious, but this empirical work highlights their limits, especially where legal norms are appropriated and hybridized by local actors for their own local ends.[207] This work also points to the importance of studying the production of soft law and how such lawmaking interacts with more conventional forms of international lawmaking.

V. CONCLUSION

The production and impact of international law, to borrow from the social theorist Robert Merton, "cannot be usefully posited in advance of observation. It is a question of fact, and not a matter of opinion."[208] This point is of great pragmatic and normative importance. From the perspective of conditional IL theorists building from empirical work, international lawyers should avoid prescriptions that are based solely on theoretical positions and that are not also grounded in empirical investigations.

As recently as two decades ago, empirical work on international law was rare. Scholarly discourse tended to be segmented, with proponents of international law conducting internal debates about law and legal cases, and IR scholars paying little attention to law, focusing instead on the operation of international organizations in relation to state interests. Systematic analysis of data played a secondary role at best. The end of the Cold War, coupled with economic globalization, initiated a new round of institutionalization and lawmaking on the international plane. The increasing intensity of international interaction, the growing number of international organizations and tribunals, and developments in the social sciences and legal scholarship spurred an increase in empirical scholarship on international law. This growing body of work has made important contributions, with the promise of more to come.

Much of the empirical work on international law is focused on specific issue areas, providing rich materials on which to build conditional theory—that is, theory regarding the *mechanisms* and *conditions* through and under which international law works. We act in situation-specific contexts. We thus need to focus attention on the processes, mechanisms, and conditions for the production, conveyance, and implementation of international law within such contexts. The focus on empirical study, we contend, thus gives rise to midlevel theory that helps us to assess the conditions under which international law works, rather than to grander theoretical claims about *whether* it works. By separating our assessment of empirical scholarship into core questions applied to five different substantive areas, we have highlighted and attempted to explain variation across and within those areas of international law.

This new orientation in scholarship narrows the gap between abstract theory, doctrinal analysis, and empirical assessment of practice. The gap between theory and practice is narrowed

[207] *See, e.g.*, MERRY, *supra* note 28; Shaffer, *supra* note 59.

[208] MERTON, *supra* note 3, at 84.

through the development of emergent analytics—that is, work that oscillates between empirical findings, abstract theorizing, and back again. As the institutional economist Avner Greif writes, with "interactive, theoretically informed, context-specific analysis," one obtains "constant feedback from evidence to theory and from theory to evidence."[209]

The world is constantly changing, creating new contexts, posing new challenges. As Douglass North notes, we live in a "non-ergodic" world, one in which probabilities of recurrence of particular patterns of events are uncertain because humans' efforts to reduce uncertainty and "to render their environment intelligible result in continual alterations in that environment and therefore new challenges to understanding that environment."[210] As he continues, "The changes in the environment that we make today create a new and in many cases novel environment tomorrow."[211] Theoretical and empirical study of international law thus must be a continuous, ongoing, embedded process, as analysis gives rise to intervention, which gives rise to new contexts. Theorizing and empirical work should consequently be viewed as part of a never ending process of human engagement with our environment, the world in which we live and make decisions. To paraphrase North, the change we create in the human environment today creates the novel environment that we must analyze and act in tomorrow.

We have noted how the question of international law's efficacy is plagued by problems of the counterfactual—namely, that we do not know how a world without international law would look. The challenge posed by realists such as Goldsmith and Posner is to explain how international law induces states to behave differently than they otherwise would.[212] The weight of studies reviewed here—including in areas such as human rights law, where the realist claims would seem to be especially salient—shows that international law *can* be effective under certain conditions, typically involving the mobilization of domestic interests. This finding invites further theorizing at the less abstract level of midrange work that emphasizes concept formation and testable hypotheses.

Our focus in this article has not been normative. Nevertheless, the empirical trend in international legal scholarship has great potential to inform normative work on questions of institutional design and practice. Normative international law work has often proceeded on the basis of behavioral and institutional propositions that are simply assumed to be true. Subjecting these assumptions to rigorous empirical assessment would not only expose the limits of international law, but its possibilities as well. A key step, we stress, is to understand the conditions under which international law works. Under conditional IL theory, although one needs to start with higher-level principles and values regarding what one wishes to accomplish, one also needs to think more concretely—closer to the ground and based on experience—about implementation and about what mechanisms and tools are likely to work best in any particular context. To be effective, one needs to use tools that are suitable for that context, whether involving an environmental, human rights, trade, or other regulatory issue.

We recognize that our emphasis on variation and midlevel theory over all-encompassing, grand claims poses challenges to scholars and international lawyers. The world is a complex place, and unifying theories have great attraction in making sense of it. But we also believe that

[209] GREIF, *supra* note 3, at 308, 451.

[210] DOUGLASS NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 5 (2005).

[211] *Id.* at 20.

[212] GOLDSMITH & POSNER, *supra* note 20.

theories must be evaluated not only by their parsimony, but by how much of the world they explain.[213] The new empirical work on international law has shown that the predictions of grand theories are only borne out conditionally. The best response, from the perspective of conditional IL theory, is to move our theorizing down a level of abstraction and to emphasize the iterative relationship between empirical work and theoretical development. The new wave of empirical scholarship should lead the way to a better understanding of how, and the conditions under which, international law works, ultimately informing normative projects.

[213] One of the first to observe this point was John Stuart Mill. *See* JOHN STUART MILL, A SYSTEM OF LOGIC, bk. III, ch. 4 (1843).