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The Limits of International Law Fifteen Years Later

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The Limits of International Law Fifteen Years Later

Jack Goldsmith* & Eric A. Posner†

Abstract

The Limits of International Law received a great deal of criticism when it was published in 2005, but it has aged well. The skeptical, social-scientific methodology that it recommended has become a normal mode of international law scholarship. And the dominant idealistic view of international law that the book criticized is today in shambles, unable to explain the turmoil in international politics. This Essay reflects on the book's reception and corrects common misperceptions of its arguments.

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I. INTRODUCTION

Our book, *The Limits of International Law*¹ (*Limits*), was published fifteen years ago. A lot has happened since then, both in international law scholarship, and in the world. Here we take a brief retrospective look at *Limits*, its critics, and the arc of international law scholarship and international law since its publication.

II. ORIGINS

The collaboration that resulted in *Limits* began many years before publication, in 1998. That year we wrote *A Theory of Customary International Law*,² which we published in 1999, and (after revision) incorporated into chapter 1 of *Limits*. The late 1990s was the high-water mark of American exceptionalism and optimism about prospects for a benign international liberal order. This optimism had seeped into mainstream public international law scholarship, and especially American international law scholarship.

As *Limits* noted, that scholarship was an improbable combination of idealism and doctrinalism.³ The idealism was reflected in the conviction that international law was powerful, expanding, and liberal in orientation. The doctrinalism was manifest in the traditional lawyerly practice of parsing legal “texts”—treaties, judicial decisions, government declarations, and so on—to discern legal obligations. The improbability of this combination arose from the tension between those texts, associated state practice, and the idealism. The texts tended to display either exceedingly narrow compromises hammered out by states that jealously guarded their interests, or florid rhetoric that expressed aspirations for a better future that most states plainly did not take seriously as binding commitments in the here-and-now. Meanwhile, numerous violations of international law at the time—and, more frequently, circumventions that revealed the narrowness of the actual commitments—were downplayed, explained away, or bemoaned. These were the currents of thought that we reacted to, first in the 1999 article,⁴ then in two other journal articles,⁵ and then in the book.⁶

Mainstream public international law scholarship of the time had not yet caught up with developments in scholarship in American law schools. In the

¹ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

² Eric A. Posner & Jack L. Goldsmith, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

³ GOLDSMITH & POSNER, *supra* note 1, at 3.

⁴ Posner & Goldsmith, *supra* note 2.

⁵ Eric A. Posner & Jack L. Goldsmith, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEG. STUD. S115 (2002).

⁶ GOLDSMITH & POSNER, *supra* note 1.

1970s, legal scholarship welcomed influences from other disciplines—including economics, history, philosophy, sociology, and psychology. By the 1990s, legal scholarship had been transformed. Most influential scholarship became firmly grounded in the methodology of the social sciences. While economics was the dominant social scientific discipline in and out of law, the transformation was broader than that. Legal scholars took from the social sciences a commitment to theory and empiricism even while they maintained their traditional normative policy orientation, which the social sciences, for the most part, had shunned.

“Theory” meant that legal scholarship connected its normative claims to a recognizable, in-principle-testable theory about how people behave. In law and economics, the theory was that people act in an instrumentally rational way, based on stable preferences and subject to a budget constraint. “Empiricism” meant that legal scholars would look beyond the law as it appears in statutes and judicial opinions and evaluate how it influences behavior. In large part, law and economics drew on the empirical results in economics. But it also claimed that its normative proposals for legal reform would have certain predicted outcomes that could be empirically validated. And “normative” meant that legal scholarship made proposals for reform or defended existing arrangements. There was a huge amount of debate about the appropriate normative criteria.⁷ While there was not as much convergence as one might have hoped, legal scholars did make progress by being clearer about their normative assumptions and standards.

III. LIMITS

Limits was a broadside against these prevailing attitudes in international law scholarship. In place of the idealism of international law scholarship, we sought to approach the topic with the more skeptical style of thinking about institutions that we associated with the social science tradition.

We were not writing on a clean slate. In the field of international trade law, law and economics ideas had already made an impact.⁸ In political science, scholars who called themselves “rational institutionalists” (and similar things) had begun to apply economic theory to international institutions and law, albeit with a focus and approach that were somewhat foreign to the style of legal scholarship.⁹

⁷ Law and economics mostly used efficiency as its chief normative criterion. In recent years, scholars have become more interested in distributional equity as well. In other areas of law, various other normative criteria drawn from political and moral philosophy were common. See Zachary Liscow, *Redistribution for Realists* (Yale L. Sch., Working Paper, Feb. 24, 2021), <https://perma.cc/FU4Z-KDDC>.

⁸ See, e.g., Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999).

⁹ See, e.g., Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, (1985); Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L. ORG. 385 (2000).

Other methodologies in international relations theory were also beginning to influence international law scholarship.¹⁰ And some international law professors had begun to think about ways that law and economics could be imported into international law.¹¹ Little of this work focused on big-picture theoretical questions about how public international law operated. And little of it focused on the incentive-compatibility issue—the issue of how states’ incentives might affect their compliance with international law, and hence their design of international law. Much of the brouhaha about *Limits* resulted from our placement of this question—which recalled the tradition of realism in international relations—at the center of the study of public international law.

For theory, *Limits* drew on economics and game theory. While there was nothing particularly sophisticated about our approach, we could not simply draw on standard law and economics, which was mostly applied to domestic law, because of a distinctive feature of international law—namely, decentralized enforcement. Because one cannot assume a relatively neutral and reliable central enforcer of international law, as one can for domestic law, the incentives of enforcers (states) to comply with, as well as make, international law must be accounted for. That is why we used the theory of repeated games. The requirement that international law be “incentive-compatible”—that is, consistent with the interests of states—puts a significant limit on what international law could accomplish, compared to domestic law, where centuries of institutional development made possible laws and regulations that could advance broader conceptions of the public good.¹²

The central claim in *Limits* was that international law—treaties and customs—emerges from and is sustained by states acting rationally to maximize their interests given their perception of the interests of other states and the distribution of state power. This was a self-consciously reductive claim based on reductive assumptions. The goal was to see how much of macro behavior related to international law could be explained not on the basis of the field’s standard assumptions about a tendency toward law compliance, but rather on the basis of simple assumptions about state interests and rudimentary tools of game theory.

In the introduction to *Limits* we discussed some of our simplifying assumptions. While acknowledging that a rational choice theory of international law could, in theory, be built based on assessments of the interests of citizens or

¹⁰ See, e.g., Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367 (1998).

¹¹ See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1 (1999); Alan O. Sykes, *The Economics of Public International Law*, (John M. Olin Program in L. and Econ., Working Paper No. 216, 2004).

¹² See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

domestic institutions, we chose the state as the unit of analysis primarily because that is the unit upon which most of international law operates. In doing so, we followed mainstream practice in economics and political science, which treated states—as well as other collective entities, like corporations, households, political parties, and government agencies—as individual agents for purposes of analysis. We also acknowledged that a state’s interest—in this context, its preferences over international outcomes—was often difficult to discern or contested. Our theory assumed that a state’s interest was reflected in the preferences of its leaders. This assumption “is a simplification and is far from perfect,” we noted, but we embraced it nonetheless “because a state’s political leadership, influenced by numerous inputs, determines state actions related to international law.”¹³

Limits was agnostic about the content of a state’s interest with one important exception: we formally excluded a preference for complying with international law. We did not claim that leaders and their citizens lack a preference for complying with international law. We noted that this was “an empirical question that we do not purport to resolve in this book.”¹⁴ We excluded this preference primarily for methodological reasons. One was that we were exploring how robust a theory of international law one could develop without relying on this prevailing dogma. Second, as we noted, it “[i]s unenlightening to explain international law compliance in terms of a preference for complying with international law,” which tells one “nothing interesting about when and why states act consistently with international law and provides no basis for understanding variation in, and violation of, international law.”¹⁵

On these assumptions, we crafted a theory that sought to explain the behaviors associated with international law. Here is the theory in a nutshell:

International law refers to equilibrium outcomes in games of cooperation and coordination among rational, self-interested states. In some cases, these outcomes emerge in a decentralized way as states act in reciprocal fashion in order to obtain mutual gains. “Customary international law” is the term used to refer to the resulting rules of behavior. Because decentralized norms are often ambiguous, states also either codify customary international law in treaties or draft treaties to address novel problems that customary international law does not address. International law can be, and often is, effective and stable because once cooperation begins, it is in the rational self-interest of states to maintain it. But international law can be, and often is, violated, as the relative power of states changes, the preferences of states change, and new problems arise. Often violations are avoided as states anticipate them and renegotiate their obligations; at other times, they occur, sometimes on massive scale. International law may be normatively desirable for the simple reason that it facilitates mutual gains across states. But it need

¹³ GOLDSMITH & POSNER, *supra* note 1, at 6.

¹⁴ *Id.* at 10.

¹⁵ *Id.*

not be: states frequently act in predatory fashion, and can use international law to entrench normatively undesirable outcomes.¹⁶

Parts I and II of *Limits* applied this framework to various rules of customary international law and various treaty and related regimes. We made several general claims, including: bilateral cooperation was more robust than multilateral cooperation; seeming multilateral cooperation in multilateral treaty organizations was best understood as a combination of coordination and pairwise cooperation; customary international law is more fragile than treaties; and ratification procedures can facilitate cooperation. We did our best to use qualitative empirical evidence to support our theoretical claims, or to show how they could be supported.

With respect to normative issues, we imported the efficiency criterion of law and economics while expressing skepticism toward the traditional normative commitments of mainstream international law scholarship. We took seriously the diversity of populations (and thus interests) across states rather than assume that deep down, everyone is an American liberal or a European social democrat. We also made two normative claims extraneous to law and economics: first, that states have no moral obligation to comply with international law contrary to their interests; and second, that the cosmopolitan claim that states have a duty to craft international law on the basis of global rather than state welfare was incompatible with cosmopolitans' commitment to liberal democracy, which is designed to serve the interests of its citizens and almost always produces a self-interested (that is, nationalist) foreign policy.¹⁷

IV. CRITICISMS AND SUBSEQUENT DEVELOPMENTS IN INTERNATIONAL LAW SCHOLARSHIP

In the fifteen years since its publication, *Limits* has been widely discussed and loudly criticized. During the same period, international law scholarship changed quite a lot—in the direction of the commitments made in *Limits*. Here we focus on three major criticisms of *Limits* that relate to the changes in scholarship during the period.

A. Challenges to Theory

We noted at the outset of *Limits* that “[o]ur approach falls closer to the political science international relations tradition, and in particular to [rational choice] institutionalism, than to the mainstream international law scholarship tradition.”¹⁸ Indeed, political scientists and economists were unperturbed by the

¹⁶ See *id.* at 4.

¹⁷ See *id.* at 185–224.

¹⁸ GOLDSMITH & POSNER, *supra* note 1, at 16.

claims in the book. Lacking any interest in controversies among international lawyers, they saw little that was bothersome.¹⁹

But most legal scholars viewed the book with hostility as a radical and unhelpful departure from prior scholarship, and as flawed on many grounds.²⁰ Some of our critics didn't like the rational choice framework of *Limits* and dismissed it out of hand.²¹ Others accepted the framework, at least for purposes of argument, but criticized our application of it. Some claimed that the state was the wrong or incomplete unit of analysis.²² Others stated that more complicated models would produce different and better explanations.²³ Yet others said that that our concept of state interest was too narrow, or too reductive, or too flexible.²⁴ Some argued that we used an impoverished notion of reputation in our models.²⁵ Many did not like our argument that states lacked a moral obligation to comply with international law or to take cosmopolitan action.²⁶

¹⁹ See, e.g., Stacie Goddard, Book Review, 120 POL. SCI. Q. 710, 711 (2005) (“[A]lthough political scientists may be sympathetic to the study, most will find the argument of limited added utility.”); cf. G. John Ikenberry, Book Review, 84 FOREIGN AFF. 150 (2005) (“This elegantly argued book . . . has the virtues and liabilities of all simple rationalist theories.”); Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155, 156 (2008) (“extend[ing] and modify[ing]” the “interesting and useful approach” to international law in *Limits*).

²⁰ There were exceptions. See, e.g., Kenneth Anderson, *Remarks by an Idealist on the Realism of the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006); David Gray, *Rule-Skepticism, “Strategy,” and the Limits of International Law*, 46 VA. J. INT'L L. 563 (2006).

²¹ See, e.g., MARY ELLEN O'CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY & PRACTICE OF ENFORCEMENT* (2008).

²² See, e.g., Balakrishnan Rajagopal, Book Review, 19 ETHICS & INT'L AFF. 106 (2005); David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159, 207 (2006); Kal Raustiala, *Refining The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 430–34 (2006); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 454 (2006).

²³ See, e.g., ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* 274–75 (2017); Andreas L. Paulus, *Potential and Limits of the Economic Analysis of International Law: A View from Public International Law*, 165 J. INST. & THEORETICAL ECON. 170, 176 (2009); Anne van Aaken, *To Do Away with International Law? Some Limits to ‘The Limits of International Law,’* 17 EUR. J. INT'L L. 289, 291 (2006).

²⁴ See, e.g., Paulus, *supra* note 23, at 172; David Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 339 (2006); Sloss, *supra* note 22; Edward T. Swaine, *Restoring (And Risking) Interest in International Law*, 100 AM. J. INT'L L. 259 (2006); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1406 (2006); Paul Berman, *Review Essay: Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006).

²⁵ See, e.g., Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006).

²⁶ See, e.g., Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305, 309 (2006).

We anticipated these criticisms in the book,²⁷ and addressed them further in a subsequent essay.²⁸ Many of the criticisms were reasonable; others were misplaced. A lot of criticisms were generic attacks on the methodology of social science. We won't reiterate these points here, except to make two general comments.

First, our models were self-consciously reductive and simplifying about the influences on state behavior related to international law. The aim was to try to understand how much of international law can be explained in a rigorous way based on the centuries-old view that states act on the international stage on the basis of what the state or its leaders see as what is best for the state. Any theory must trade off the accuracy of its assumptions in order to achieve possible explanation. This is standard social science. Many social science-influenced theories since *Limits* have made these tradeoffs in different ways. None, we think, offer as powerful an account of how international law works with such simple premises. But it is hard to compare different theoretical frameworks with different theoretical and empirical focuses.

Second, international law has now definitively taken the social science turn. As we noted in 2006, *Limits* was at the broadest level different from the vast majority of international law theory that preceded it along six dimensions: (1) it made its assumptions explicit; (2) it addressed the limitations and criticisms of its assumptions; (3) it separated out positive from normative analysis; (4) it framed its claims as testable hypotheses; (5) it addressed alternate hypotheses and made an effort to weigh the evidence; and (6) it chose its case studies and other evidence carefully.²⁹ We “welcomed” the criticisms of *Limits* from within the social science paradigm because we believed they portended improved “standards of analysis” in international law scholarship. “If international law scholarship generally . . . comes to embrace the standards of methodological and empirical care that the critics demand of *Limits*,” we wrote, “the discipline would be significantly improved.”³⁰ This, in a nutshell, is what happened in the field in the intervening fifteen years.

²⁷ GOLDSMITH & POSNER, *supra* note 1, at 23–44.

²⁸ Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463 (2006).

²⁹ *Id.* at 466.

³⁰ *Id.*

B. The Reality of International Law

A major criticism of *Limits* was its supposed claim (or implication) that international law didn't matter, was irrelevant, or didn't exist.³¹ Many people argued that the theory in *Limits* was incompatible with the existence of so much international law, and with the state's use of international law in international relations.³²

It is true that the book has a self-consciously skeptical tone about international law (more about which below), and this is likely what misled or angered some readers. But the book is not skeptical about international law in the sense of arguing that it is a fiction or unimportant, as some realists in the political science tradition claim,³³ or that international law is not "law," as some philosophers have argued.³⁴ We were (and are) not realists as that term is commonly understood by political scientists in international relations theory, who believe that international law has no or little importance—though some influential realists, like Hans Morgenthau, did take international law seriously—largely because their focus has been on broad questions of international structure and stability rather than how states cooperate over trade, migration, and related matters. The book's second sentence described the claim that international law is not "really" law as "misleading."³⁵ *Limits* is skeptical about the claims made by international law scholars about international law, not about international law itself. Above all, as noted, the book is skeptical about the methodological value of an assumption that states experience "compliance pull."³⁶

Yet *Limits* asserted a robust role for international law, and for international law negotiations, in fostering international coordination and cooperation (and in avoiding losses from a lack of available coordination or cooperation).³⁷ The terms of a treaty, or of a rule of customary international law, matter quite a lot to whether and how coordination and cooperation are achieved. The book sought to show through theoretical argument and case studies how the behaviors associated with

³¹ See, e.g., JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 117 (2008); JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 3 (2010); Berman, *supra* note 24.

³² See, e.g., Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 287 (2006); Raustiala, *supra* note 22, at 429; Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

³³ See generally John J. Mearsheimer, *The False Promise of International Institution*, 19 INT'L SEC. 5 (1995).

³⁴ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 260 (1832).

³⁵ GOLDSMITH & POSNER, *supra* note 1, at 3.

³⁶ *Id.* at 13.

³⁷ We emphasized that it did not follow that "international law is irrelevant or unimportant or in some sense unreal," and indeed that international law "can play an important role in helping states achieve mutually beneficial outcomes." *Id.*

international law (including state behaviors consistent with international law) could be explained based on simple premises that did not require reliance on non-instrumental factors. And while we did take an instrumental approach to the question of compliance, and thus accounted for when international law violations took place, especially with respect to ambitious multilateral treaties, these arguments would be meaningless if our thesis had been that international law is a fiction.

We were not surprised by the sharp reaction to our rational choice approach because it flew so sharply in the face of the standard orientation of the field at the time. But we were surprised that some of the early critics questioned whether the non-instrumental accounts of international law that we targeted even warranted a response, and that none of them—or later critics—gave these non-instrumental accounts a robust defense.³⁸ We speculated at the time that “a major generational change is underway” in which younger scholars (then) of international law had witnessed the power of political science and economics to bring “fruitful insights to international relations,” and had begun to pay “greater attention to the social science virtues: methodological self-consciousness, empiricism, and theoretical rigor.”³⁹

And this is what has happened since. A trend that was picking up steam before *Limits* was conceived, and that we drew on in part, is now the dominant approach in international law scholarship. There has been a huge outpouring of international law scholarship grounded in economics and game theory,⁴⁰ and in other disciplines as well, including sociology and psychology.⁴¹ But the most remarkable transformation has come in the application of serious empirical analysis of international law.

C. Empirical Work

Limits was mainly a theoretical and methodological book, but it backed its claims with some case studies as well as some quantitative work in economics and political science relating to trade and human rights. The case studies on customary

³⁸ See Goldsmith & Posner, *supra* note 28, at 464.

³⁹ *Id.*

⁴⁰ See, e.g., ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2007); EUGENE KONTOROVICH & FRANCESCO PARISI, *ECONOMIC ANALYSIS OF INTERNATIONAL LAW* (2016); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* (2013).

⁴¹ See, e.g., Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015); Ryan Goodman & Derek Jink, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

international law attracted criticism,⁴² and the published studies that we drew on were vulnerable to various methodological challenges.

Since we wrote our book, there has been an explosion of quantitative empirical work on international law. In part this has resulted from the accumulation of publicly available data sets made possible by the internet and other technological developments and by the development of software and other tools that have made it easier to analyze this data. Relatedly, PhDs in the social sciences have increasingly moved toward empirical methods because the intellectual payoffs seem high. These developments have had a large impact on social science scholarship, and that impact has spilled over into international law scholarship.

In 2017, Gregory Shaffer and Tom Ginsburg wrote a 47-page paper describing those developments.⁴³ One can now find empirical work on compliance and related aspects of international law in a variety of subfields, including human rights, international trade, bilateral investment treaties, migration, use of force, customary international law, international courts, and international non-judicial organizations.⁴⁴ This work has benefited from collaborations between political scientists like Beth Simmons and Erik Voeten and law professors.⁴⁵ In recent years, law professors with empirical training have made contributions on their own. Thanks to this empirical work, the role of international law in international relations is clearer than it used to be. The work has gone beyond the earlier issue of compliance and shed light on how international institutions work, how states design treaties, and much else.⁴⁶

This empirical work has focused on discrete treaties or international law regimes and has not tested general theories of international law—a difficult task,

⁴² See, e.g., Golove, *supra* note 24.

⁴³ Shaffer & Ginsburg, *supra* note 32, at 1.

⁴⁴ See, e.g., Vera Shikhelman, *Geography, Politics and Culture in the United Nations Human Rights Committee*, 28 EUR. J. INT'L L. 845 (2017); Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration* (George Mason L. and Econ. Research Paper No. 21-01, 2020); Cree Jones, *Do Legal Remedies Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network* (Univ. of Chicago PhD Dissertation 2017); Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. INT'L L.J. 357 (2020); Adam S. Chilton & Eric A. Posner, *Why Countries Sign Bilateral Labor Agreements*, 47 J. LEGAL STUD. 545 (2018); Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731 (2019); Adam Chilton & Katerina Linos, *Preferences and Compliance with International Law*, THEORETICAL INQUIRIES L. (forthcoming); Adam S. Chilton & Mila Versteeg, *International Law, Constitutional Law, and Public Support for Torture*, 3 RSCH. & POL. 1 (2016).

⁴⁵ See Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014); Cosette D. Creamer & Beth A. Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1 (2020).

⁴⁶ See generally Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1 (2021).

to be sure. And in general, theorizing about international law has waned in the last decade or so. This decline in theory followed and reflected trends elsewhere in law and economics, and economics proper, as the incremental intellectual gains from further refining existing theories diminished and empirical questions became more interesting and pressing.

V. SKEPTICISM AND RECENT HISTORY

We think that sharp reaction to *Limits* mainly resulted from its commitment to understanding international law as a function of national interest and the distribution of power. While the critics who claimed that we argued that international law does not exist were wrong, they no doubt picked up on a strong skeptical subtext about international law and international law scholarship. That subtext includes skepticism about:

1. The extent to which the norms of international law persist when nations' interests or relative power changes;
2. The strength of international law, or the capacity of decentralized enforcement to constrain states, especially powerful states;
3. The robustness of multilateral cooperation via international law, as opposed to bilateral treaty-making, and relatedly, the capacity of international law to resolve major collective action problems as opposed to bilateral disputes like border disagreements;
4. The neutrality and effectiveness of international organizations;
5. The reality of sovereign equality;
6. The normative importance of international law in the abstract, as opposed to specific international legal regimes which, we argued, must be evaluated on a case-by-case basis;
7. The Whig-style progressive histories of international law, and especially human rights law, which assumed that international law inevitably expands and improves;
8. The claim that international law is necessary for international cooperation; and
9. The claim (more common among American academics than foreign academics) that the U.S. plays an essential role in advancing international law.

This skepticism contrasted sharply with the dominant view of international law at the time, which, as we noted earlier, saw international law as approximating or approaching a domestic legal system in advanced countries.⁴⁷ That view saw

⁴⁷ There were some skeptics even then. See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* (2001). But this vein of

international law as increasingly universal (rather than bilateral), robust (rather than fragile), taken for granted (rather than open to question), constitutionally grounded (rather than subject to renegotiation), and teleological (rather than a reflection of temporary political arrangements in the international plane). The fifteen years since *Limits* was published have borne out our skepticism.

In fact, international law moves in cycles, with periods of enthusiasm and advance followed by periods of decay and retrenchment. A gradual but real development in international law and institutions in the second half of the nineteenth century, and the early twentieth century, collapsed with World War I. The League of Nations was followed by fascism and World War II. Another burst of international law-making saw the creation of the United Nations, the seeds of the human rights treaty regime, and the development of security, economic, and financial institutions mainly in the West, but gave way to the Cold War. The post-Cold War enthusiasm for international law has now collapsed as well. This collapse can be traced through a series of crises that began twenty years ago and that are now wearisomely familiar: the 9/11 terrorist attacks, which flowered into an ongoing conflict between the West and Al Qaeda and other violent Islamic organizations, and a war in Afghanistan that has not yet ended; the Iraq War that began in 2003, that has also not really ended, but rather has extended in various ways to Syria and Iran; the financial crises that began in 2008; the ensuing global recession; the European debt crisis that reached its peak in 2010 and 2011; the Arab Spring and its collapse from 2010 to 2012; a refugee crisis in Europe that began around 2015; the Brexit referendum, which threw the European Union into turmoil in 2016; and the global pandemic and recession of 2020. These crises accompanied and contributed to deepening popular unhappiness with globalization and international governance, which in turn generated domestic political upheavals as nationalist, nativist, and populist movements made inroads on popular opinion. These movements took place both in entrenched liberal democracies like the U.S., the U.K., France, Germany, the Netherlands, and Italy, as well as in developing countries, like China, India, Brazil, and the Philippines, where the commitment to liberal democracy is shakier or non-existent.

Meanwhile, the American-led international order has faced challenges from a rising China and a newly aggressive Russia. Under the leadership of Xi Jinping, China has suppressed democracy in Hong Kong, ratcheted up pressure on Taiwan and in the South China Sea, increased domestic repression, committed horrific abuses—against more than one million Uighurs in particular—and used its economic might to expand its influence in East and Central Asia, Europe, and Africa through the Belt and Road infrastructure initiative. Russia under Vladimir

literature was less skeptical about the efficacy of international law than the possibility that it has unintended negative consequences, or that it reflects the interests and obsessions of elites, a theme subsequently taken up by SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

Putin has also increased domestic repression and put pressure on its neighboring countries by going to war in Georgia and Ukraine and using covert operations to interfere with elections and government operations in the U.S. and other countries.

These upheavals have had an impact on international law. The U.S. under Trump upended the World Trade Organization (WTO) by gutting the appellate body and sparking a global trade war.⁴⁸ It remains unclear which of these moves violate the WTO and which simply exploit its loopholes, but either way, the weakness of the regime has been revealed. Also revealed is the extent to which powerful nations will retreat from global trade rules that no longer serve their interests. It is noteworthy in this regard that the Biden administration has accepted the Trump administration's basic critique of global trade rules and has announced that it will take a "different" approach to "free trade agreements" that will focus sharply on the interests of "American job[s]" and the "interests of all American workers."⁴⁹

Whether conceived in terms of violations of international human rights treaties or the ostensible customary international law of human rights, the last fifteen years have witnessed a similarly broad retreat in respect for human rights. The supposedly developing international law right to democracy that was touted in the 1990s and early 2000s has been replaced since 2006 with fifteen straight years of decline in democratic freedoms.⁵⁰ According to Freedom House, countries experiencing deterioration in democracy in 2020 "outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006." Freedom House concludes that "the long democratic recession is deepening."⁵¹

The U.N. Charter's injunction to states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" has also taken a beating.⁵² To take only the most obvious examples: Russia invaded Georgia, annexed Crimea, and committed a number of assassinations in the West. China ceaselessly threatens Taiwan and asserts its territorial will in the South China Sea (in part through ignoring a ruling

⁴⁸ Keith Johnson, *How Trump May Finally Kill the WTO*, FOREIGN POL'Y (Dec. 9, 2019).

⁴⁹ Antony J. Blinken, Secretary of State, U.S. Dep't of State, A Foreign Policy for the American People (Mar. 3, 2021), <https://perma.cc/DLH3-C4WH>; *see also* Jake Sullivan (@jakejsullivan), TWITTER (Dec. 30, 2020, 1:40 PM), <https://twitter.com/jakejsullivan/status/1344352624385126400?s=20>.

⁵⁰ *See* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE (2021).

⁵¹ *Id.*

⁵² U.N. Charter art. 2, ¶ 4.

by a tribunal constituted under the Law of the Sea treaty).⁵³ The territorial integrity and political independence of many Middle Eastern nations—most notably Yemen and Syria—are regularly violated. Other examples include the great power fight for control of the U.N.-sanctioned destruction of Libya, the war between Ethiopia and the Tigray Region, and clashes between Armenia and Azerbaijan over the disputed region of Nagorno-Karabakh. There have been many other cross-border conflicts in the last fifteen years. And perhaps most significantly, the U.S. has so broadly expanded the “self-defense” exception to the prohibition on the use of force in the last fifteen years that it now swallows the “rule.”⁵⁴

Limits did not predict these developments. But it did provide tools for understanding them. The book warned that international law that depended on the collective action of numerous states was fragile and devoted two chapters to explaining that the international trade and human rights systems were vulnerable for this reason. It also argued that when particular rules of international law stop reflecting the interests of powerful states—either as a result of shifts in power across states, or changing perceptions of national interest—violations will occur, and the law itself will change. That seems to be happening as China and Russia reassert their security interests, China gains power through economic growth, opponents of international economic cooperation obtain influence in various states, and governments rethink the value and limitations of human rights and free trade commitments in response to internal religious, security, and economic pressures.

Mainstream public international law scholarship from the 1990s, which was oriented toward explaining the growth and spread of international law, is not in a strong position to explain its contraction. Many international law scholars have blamed the backlash against international law on populism. There is certainly evidence for this view—and for the view that the neo-liberal elements of international law contributed to this backlash. In many notable cases, a state’s refusal to comply with a legal norm can be traced to the demands of a domestic populist movement.⁵⁵ But the question is what to make of this evidence. For traditional public international law scholars, the temptation is to see the backlash as the result of a temporary eruption of irrationality. Populism is not just normal politics but collective self-delusion that has no lasting effect. Or, at best, as political tactics—mere rhetoric—that will have no effect over the long term.⁵⁶ On

⁵³ Tom Phillips, *Beijing Rejects Tribunal’s Ruling in South China Sea Case*, THE GUARDIAN (July 12, 2016), <https://perma.cc/GR7F-BQZ9>.

⁵⁴ See Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7 (2016).

⁵⁵ See Eric Voeten, *Populism and Backlashes Against International Courts*, 18 PERSP. POL. 407 (2020).

⁵⁶ See generally Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT’L L. 971 (2019).

this view, the solution is to preserve valuable international institutions while riding out the wave of populism until it crests.⁵⁷

By contrast, the view of *Limits* was that we should expect international law to change and even regress as power relations and the interests of states change. States' interests, of course, must be determined through domestic political institutions, and populism characteristically arises when a substantial group of people believe that those institutions disregard their values and interests. That is what has happened as people in many western countries have lost confidence in their governments as a result of economic stagnation and other perceived political failures—including failures associated with international institutions like the WTO. Their distrust of their own governments and elites carries over to international institutions and elites as well. On this view, the backlash against international law is rational even if unfortunate.⁵⁸

We do not mean to suggest, and do not believe, that all of international law is in decline. A huge amount of (mostly unstudied, mostly bilateral) international law continues to foster cooperation and coordination in normal ways. Our point is that one cannot understand the massive changes in and non-compliance with major international law instruments alongside this persistent lower-level cooperation through the lens of traditional public international law scholarship.

Another trend in the last fifteen years that *Limits* provides the tools to understand is the notable decline in the use of binding international instruments and a rise in the use of “non-binding” political commitments to foster international cooperation. This is true for large-scale, ambitious international efforts, such as the Iran deal and components of the Paris Agreements, and for less ambitious forms of regulatory cooperation. Political commitments are a puzzle for traditional international law scholarship because they lack the fairy dust of “legal obligation” that supposedly induces compliance. But they are not a puzzle for *Limits*. Indeed, the book began its explanation of binding international agreements with an explanation of why states used non-binding political commitments so often and how they succeed.⁵⁹

The basic answer is that non-legal agreements can set the terms for (and thus help achieve) self-enforcing coordination of cooperation among nations without ratification and legal obligation. For us, the puzzle was not how are political commitments possible, but rather: “If states can cooperate using nonlegal instruments, why do they ever enter into treaties governed by international law?”⁶⁰

⁵⁷ See, e.g., Anne Orford, *International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment*, 35 AM. U. INT'L L. REV. 427 (2020).

⁵⁸ See generally HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018).

⁵⁹ GOLDSMITH & POSNER, *supra* note 1, at 90–91.

⁶⁰ *Id.* at 82.

We outlined three possibilities: (1) domestic ratification processes that attend binding agreements convey important information about state preferences for the agreement; (2) binding agreements implicate certain interpretive default rules; and (3) binding agreements by convention signal a more serious commitment than nonlegal agreements. We doubt that these three explanations are exhaustive. The point is that any theory of international law must explain how cooperation via non-binding instruments works and must have an account of what, if anything, legalization adds.

VI. CONCLUSION

International law scholarship, even more than international law, seems to be at a turning point. The field appears to be bifurcating. One branch has fallen back on traditional doctrinal scholarship, still cosmopolitan and liberal/progressive, but with a chastened tone. The other branch is devoted to quantitative empiricism and is beginning to inform questions of treaty design. Old habits die hard, but we put our money on the second branch producing more wisdom than the first.