
To Do Away with International Law? Some Limits to ‘The Limits of International Law’

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Goldsmith, Jack L. and Eric A. Posner. ***The Limits of International Law***. Oxford: Oxford University Press, 2005. Pp. 262. \$29.95.

Abstract

Different methodological approaches to international law abound. Recently the rationalist, game-theoretical approach in the law and economics tradition has gained much prominence, certainly so in the United States. Within this tradition the volume by Professors Goldsmith and Posner purports to set a milestone by providing a comprehensive explanatory theory of international law with normative lessons in order to put international law and its scholarship on a more solid foundation. In principle, the combination of careful doctrinal description and consequentialist social science theory is to be welcomed. The way in which the authors pursue that goal is, however, questionable. They sometimes show a biased understanding of rationality, use only basic game theory, and give ad hoc explanations and examples, failing to account for more recent developments in international law. Not pursuing international law and economics any further, however, would amount to throwing out the baby with the bathwater. Instead, more sophisticated, constructive and thoughtful rationalist approaches to international law ought to be further developed. Even though the Goldsmith-Posner critique of international law scholarship is an opportunity to critically reflect on some of international law’s institutional and conceptual limitations, ‘The Limits of International Law’ have not yet been reached.

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Jack Goldsmith and Eric Posner's recently published *The Limits of International Law* [hereinafter *Limits*] 'throws down a gauntlet' to international law scholarship, just as the title indeed promises. On the one hand, Goldsmith and Posner start out with the assumption that International Law (IL) is law, i.e. they evade the traditional legal question of validity, but blame international law scholarship for an improbable combination of idealism and doctrinalism. On the other hand, the authors claim to explain how IL works by integrating it with the realities of international politics, with the aim of generating a 'comprehensive theory of international law'; that is, a positive theory (in the social sciences sense) with normative lessons. The authors claim to better explain the functioning of IL in practice than traditional international law scholarship has done by employing a rational choice approach in the law and economics tradition.

Goldsmith and Posner's diagnosis that legal scholarship lacks a social science approach for an analysis of IL as *explanans* and *explanandum* is certainly by and large correct.¹ The combination of careful doctrinal description and consequentialist social science theory is therefore to be welcomed. The way in which Goldsmith and Posner pursue that goal is, however, questionable.

The book comprises four parts. The Introduction clarifies the authors' methodology. Part I deals with customary international law (CIL), Part II with treaties, focusing on human rights and international trade, and Part III takes up questions of rhetoric and morality in IL, thus challenging mainly liberal theories of International Relations. The first two parts stay within the positive framework proposed by the authors, while the third part takes up normative questions (although it is not always very forthcoming about doing so).

This review essay will examine each of the four parts of the book, with a focus on methodology. Section 1 analyses the assumptions put forward by Goldsmith and Posner, Section 2 discusses CIL, Section 3 examines treaties, Section 4 looks at challenges to other theories of IL and Section 5 concludes by reflecting on a more constructive rationalist approach to IL.

Although the book may be criticized from the perspective of other theories of IL and International Relations,² this essay will accept the main rationalist assumptions put

¹ A constructive early proposal on how to integrate a rationalist approach into international legal scholarship can be found in Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J Int'l L* (1989) 335 as well as in Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *Yale J Int'l L* (1999) 1.

² The debate on the rationalist approach to IL is an ongoing one which cannot be taken up here. For basic discussion, see Fearon and Wendt, 'Rationalism vs. Constructivism', in W. Carlsnaes, T. Risse, and B. Simmons (eds.), *Handbook of International Relations* (2002), at 52, and Keohane, 'Rational Choice Theory and International Law: Insights and Limitations', 31 *J Legal Stud* (2002) 307. Now, many International Relations scholars start from a rationalist assumption but do not exclude other explanatory factors used by other theories. For an exemplary work combining the different approaches in a methodologically sound way which could serve as a guideline for a more unified approach, see Yee, 'The Causal Effect of Ideas on Policies', 50 *Int'l Org* (1996) 66 and Abbott and Snidal, 'Values and Interests: International Legalization in the Fight against Corruption', 31 *J Legal Stud* (2002) 141, at 141 ff.: '[t]he disciplines of international law and international relations (IR) are split between two seemingly distinct and

forward by Goldsmith and Posner. In other words, the rationalist assumptions of their work will not as such be put into question. Rather, the essay highlights problems of the book within a rationalist framework. What will be attempted, therefore, is an 'internal' rather than an 'external' critique, criticizing not the choice of a rational choice methodology, but the specifics of its use in this context.

1

By relying on the rational choice approach, Goldsmith and Posner assume that IL emerges from states acting rationally to maximize their interests, given their perception of the interests of other states and the distribution of state power (at 3). A state's interests are determined by the preferences of its political leaders, who take into account the preferences of citizens and groups according to the particular national political regime under consideration. The authors define state interest as a state's preferences for outcomes (that is, expected utility), which allows them to consistently exclude one specific preference from a state's interest calculus: namely the preference for complying with IL (at 9). They argue that a successful theory of IL must show why states comply with IL rather than assume that they have a preference for doing so (at 10). On that assumption the authors exclude the possibility of transforming the interests of states through law. They also exclude various compliance theories, such as the regime theoretical managerial model of Chayes and Chayes,³ which holds that states are persuaded to comply by the dynamics created by the treaty regimes to which they belong, or Franck's procedural model,⁴ which holds that states are pulled toward compliance by considerations of legitimacy and distributive justice. Nevertheless, the authors avoid strong assumptions about the content of state interests and assume that they may vary according to context. This allows them to distance themselves from realists who assume that state interests are restricted to security or wealth (at 6). On the other hand, they nevertheless refer mainly to exactly those interests (e.g., at 9). Furthermore, while Goldsmith and Posner acknowledge that an assumption of changing state preferences is problematic (at 6), they end up doing just that throughout the book, which diminishes its explanatory power immensely.

incompatible accounts of law and legalization, each regarded as complete and foundational. Normative and constructivist scholars understand law primarily as an expressive and normative framework, created through the efforts of morally driven norm entrepreneurs and influencing behavior through internalization, "compliance pull", "transformation", "mobilization of shame", and other manifestations of a "logic of appropriateness". Rational choice scholars understand law as either epiphenomenal to interests or created through interest-based bargaining and as influencing behavior through sanctions and other incentives that draw on a "logic of consequences". This debate suppresses the central fact that law both reflects (and shapes) the values and serves (and shapes) the interests of those it governs. In this article, we argue that international law and legal institutions depend on the deeply intertwined interaction of "values" and "interests". Normative and rationalist accounts must therefore be joined to understand the creation and impact of legalized arrangements.'

³ A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

⁴ T. Franck, *Fairness in International Law and Institutions* (1995).

Methodologically, Goldsmith and Posner consider themselves close to institutional approaches of International Relations scholarship, but the book may be better classified as realist-coloured IL scholarship. Indeed, throughout most of the book the authors conclude that IL is mainly epiphenomenal and has no independent effect on state behaviour. IL is not a constraint on state interest, as the traditional view would have it, but is rather to be seen as a product of self-interest. In that sense, IL is endogenous to state interest and not an exogenous restriction (at 13). In rational choice analysis, the terms exogenous and endogenous are usually used to characterize variables as *explanans* or *explanandum*; that is, the former explains the (behavioural) consequences of law (law is then exogenous restriction⁵) and the latter explains how laws comes about (law is then endogenous). The authors' assumption of construing law as endogenous is conceptually problematic as IL is, depending on the research question, both – exogenous and endogenous: while it is endogenous to states as a group when IL is created or modified (either by custom or by treaty), it is in principle exogenous to the behaviour of a single state at any given moment.⁶ Thus, taking IL as an endogenous variable would be methodologically correct if Goldsmith and Posner's interest were only to explain how IL comes about. However, they equally want to explain how IL, once it exists, influences (or does not influence) state behaviour. In the latter case, law needs to be analysed as an *explanans*, i.e. as an exogenous restriction. In order to analyse the behavioural relevance of law, it needs to be taken as exogenous and not as endogenous, as the authors have done. In other words, the authors do not distinguish clearly enough at the methodological level between situations where states act as law-makers and where they act as law-takers.

If states do comply with IL, it does not necessarily mean that it will be effective, as effectiveness and compliance are two different notions.⁷ One could well be of the opinion that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time',⁸ and still find that IL is ineffective, in the sense that no behavioural causality between law and behaviour exists. But in order to find out if IL does have an independent behavioural force, one needs to make a conceptual distinction between motivation by self-interest and motivation by law (or social norms). Actual *behaviour* is a function of both – preferences and

⁵ The term 'restriction in rational choice terms' implies only that law circumscribes the possibilities of action; it may open or define possibilities as well as prohibit possibilities of action of states.

⁶ For a similar critique, see Norman and Trachtman, 'The Customary International Law Game', 99 *AJIL* (2005) 541, at 541f.

⁷ Effectiveness and compliance are different but related notions. Determining whether a state complies with a treaty requires comparing the relevant state activity with the treaty's requirements. Effectiveness is directly related to, but distinct from, compliance and regards causality. A state may comply with a treaty, that is, its actions comport with the requirements of the treaty, but the treaty may nonetheless be ineffective in changing that state's practices. For these notions see Guzman, 'A Compliance-Based Theory of International Law', 90 *California L Rev* (2002) 1823.

⁸ L. Henkin, *How Nations Behave* (2nd edn., 1979), at 47.

restrictions – in this case of law.⁹ If behaviour is a function of preferences and restrictions (law), then, on the basis of given preferences, a change in behaviour is attributed to a change in law. If the law changes, the expected utility of the behaviour will also change, at least if the law is effective. As Goldsmith and Posner argue that law does not independently influence state behaviour, they would have had to show that non-compliance with law does not influence the expected utility of the actor either because there are no direct sanctions or indirect sanctions such as reputational losses,¹⁰ for a breach of IL or, in the event that there are sanctions, they are never implemented. This methodological problem recurs throughout the book, leaving it open to contestation in large parts on that ground.

Goldsmith and Posner build their theory on an instrumentalist approach, thereby rejecting the view of many international lawyers who assume that states follow international law for non-instrumental reasons.¹¹ The authors use basic game-theoretical concepts¹² to explain international behavioural regularities as a function of national self-interest.¹³ They assume four empirically identifiable basic behavioural patterns to explain state behaviour which are referred to throughout the book (at 12). These are: (1) coincidence of interest: where behavioural regularities result from each state acting in self-interest without any regard to the action of the other state; (2) coordination: situations where states receive higher pay-offs if they engage in identical or symmetrical actions than if they do not coordinate; (3) cooperation: situations where two (or more) states refrain from activities that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits; (4) coercion: a powerful state forces or threatens to force other states to engage in acts that are contrary to their interests (absent the coercion). In this last situation, the authors assume that power may change the pay-offs of states, but law cannot. Whereas those situational descriptions are useful to understand the underlying problem structure of international relations without law, they do not capture the influence law may have on exactly those situations. Here, a further analysis would have been needed.

⁹ Norman and Trachtman, *supra* note 6, at 241 are therefore correct in accusing GP of a tautology arising from a false dichotomy. In a rational choice model, *behaviour* is assumed to be motivated by self-interest. If law is separated from self-interest concerning behaviour (not motivation), then of course it follows that law has no independent force on behaviour. Norman and Trachtman, like many others, show that CIL may alter pay-offs of states in a game-theoretical framework and therefore is an independent factor for behaviour.

¹⁰ For a thorough analysis of how reputational losses function as indirect sanctions in IL see Guzman, *supra* note 7.

¹¹ E.g. Franck, *supra* note 4 and Franck, *The Power of Legitimacy among Nations* (1990); Koh, 'Why do Nations Obey International Law', 106 *Yale LJ* (1997) 2599; Chayes and Handler Chayes, *supra* note 3.

¹² Game theory is a branch of applied mathematics, used in a variety of fields including economics, international relations, evolutionary biology, political science, and military strategy. It uses models to study interactions with formalized incentive structures ('games') and encompasses decisions that are made in an environment where various players interact strategically. For an introduction to game theory and an explanation of the many more games, see J.D. Morrow, *Game Theory for Political Scientists* (1994).

¹³ A more differentiated discussion of game-theoretical approaches e.g. to CIL with empirically testable hypotheses may be found in Norman and Trachtman, *supra* note 6.

2

The first part of the book deals with CIL by taking up articles published earlier by the authors.¹⁴ These articles had been widely criticized by other international lawyers, including those using a rational choice approach¹⁵ as well as by traditional IL scholars, for being essentially a theory *against* CIL.¹⁶

To the authors' merit, they were the first to explore a rationalist account of CIL. They claim to better understand the origin and evolution of CIL and to explain compliance with it than traditional legal scholarship has done (at 25). Conceptual and practical problems arising from the traditional definition of CIL, namely, the general and consistent practices conducted out of a sense of legal obligation (*opinio juris sive necessitatis*) are well known to IL scholars, for whom CIL has been a much debated topic.¹⁷ Goldsmith and Posner intend to challenge three purported assumptions in relation to the traditional view of CIL: (1) that CIL is unitary in the sense that all the 'behaviours it describes have an identical logical form'; (2) that it is universal 'in the sense that obligations bind all states' except persistent objectors; and (3) that CIL is 'exogenous in the sense that it represents an external force that influences state behaviour' (at 25). The second of these assumptions is not well founded in IL, as indeed regional custom is well accepted.¹⁸ The other objections will be discussed below.

In their description of the basic models, the authors take up the four aforementioned behavioural patterns explained in the Introduction and elaborate on them in the CIL context. In other words, the authors seek to model CIL as a behavioural regularity that emerges when states pursue their interests on the international plane (at 26). CIL may develop as a behavioural regularity either (1) if, by coincidence of interest,¹⁹ each state obtains a private advantage from a particular action (for instance, not destroying foreign fishing vessels because it is too costly for their navy); (2) if one

¹⁴ 'A Theory of Customary International Law', 66 *U Chicago L Rev* (1999) 1113; 'Understanding the Resemblance between Modern and Traditional Customary International Law', 40 *Virginia J Int'l L* (2000) 639.

¹⁵ Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner', 23 *Michigan J Int'l L* (2001) 143; Swaine, 'Rational Custom', 52 *Duke LJ* (2002) 559; Norman and Trachtman, *supra* note 6.

¹⁶ Vagts, 'International Relations Looks at Customary International Law: A Traditionalist's Defense', 15 *EJIL* (2004) 1031.

¹⁷ See, among many others, Jennings, 'What is International Law and How do We Tell It. When We See It?', 37 *Schweizerisches Jahrbuch für Internationales Recht* (1981) 59, at 65–71; A. D'Amato, *The Concept of Custom in International Law* (1971). He refers to the circularity of *opinio juris* as its 'fatal defect' (at 66): 'How can Custom create law if its psychological component requires action in conscious accordance with preexisting law?'; see also Hulsroj, 'Three Sources – No River', 54 *Zeitschrift für öffentliches Recht* (1999) 219, at 230: 'Opinio iuris is thus nothing but a requirement that states must have suffered from a legal misconception when following a practice'.

¹⁸ Bernhardt, 'Customary International Law', in Bernhardt (ed.), *EPIL* (1992), i, at 898, 902 ff. and Schindler, 'Regional International Law', in *ibid.*, (2000), iv, at 161, 163 ff.

¹⁹ Coincidence of interest denotes a symmetrical game, where each of the players has a dominant strategy and the resulting Nash-equilibrium is pareto-optimal.

or more states force other states to engage in actions that serve the interests of the other state (coercion); or (3) if the states' interests converge but each state's best move depends on the move of the other states, for instance, if state A chooses action Y, then state B will also choose action Y as this is in its best interest (coordination²⁰). In these situations of coincidence of interest, of coercion and of coordination, CIL is clearly viewed as being epiphenomenal.

In the case of cooperation, the authors rely on the prisoners' dilemma game as a part of non-cooperative game theory.²¹ In the non-iterated prisoners' dilemma game, non-cooperation is the only equilibrium, that is, it is a rational and dominant strategy for all players not to cooperate no matter how other states behave. Under certain conditions, however, cooperation is possible. First, the parties must know what counts as cooperation;²² second, states must have sufficiently low discount rates;²³ third, the game must continue indefinitely in the sense that states are uncertain about the conclusion; and fourth, the pay-offs from non-cooperation must not be too high relative to the pay-offs from cooperation (at 31 *et seq.*). Considering the probability of emergence of CIL in a multilateral rather than bilateral prisoners' dilemma situation, for instance, situations of global commons, Goldsmith and Posner are sceptical. Due to the lack of information and monitoring devices, genuine multi-state cooperation is unlikely to emerge. Therefore, universal CIL is unlikely to occur in multilateral prisoners' dilemma situations (at 35 *et seq.*), and we cannot expect CIL to solve global commons problems. Multi-state prisoners' dilemma games tend to be solved, if at all, by treaty or other international agreement, and not by decentralized evolution (i.e. the formation of CIL). In short, CIL can reflect genuine cooperation or coordination only between pairs of states or among a small group of states. In all other cases, CIL reflects self-interested behaviour either created by coercion or simply coincidence of interest. In order to show that CIL cannot evolve in a multi-state prisoners' dilemma

²⁰ In a coordination game there are multiple equilibria and the players are indifferent to which one is actually chosen. Once it is chosen due to the strategy of one player, the other players have no incentives to deviate from the equilibrium.

²¹ The prisoners' dilemma is a type of mixed-motive game. It is assumed that each individual player (prisoner) is trying to maximize his own advantage, without concern for the well-being of the other players. Each player rationally chooses to defect even though the joint pay-off would be higher if there was cooperation, that is defection is a dominant strategy. Unfortunately for the players, each has an individual incentive to cheat even after promising to cooperate. This is the heart of the dilemma.

²² It is correct that identifying cooperation can be difficult in IL, and in pure CIL situations (that is, no corresponding treaties or ILC drafts exist) that might be more difficult than in treaty situations (this problem was discussed early on by the International Law Commission: *Report of the International Law Commission on the Work of its First Session*, 12 April to 19 June 1949, ILC Report, A/925 (A/4/10), 1949: '[w]ays and means of making the evidence of customary international law more readily available'), but if the treaty solution was not chosen for whatever reason CIL provides a better focal point than no law. For a comprehensive account of why states would chose CIL or treaties, see Abbott *et al.*, 'The Concept of Legalization', 53 *Int'l Org* (2000) 401. For a political economy argument, see Setear, 'Treaties, Custom, Rational Choice and Public Choice', 94 *Am Soc Int'l L & Proc* (2000) 187.

²³ Discount rates are used in economics to conceptualize the relative value of the future in relation to the present. If a discount rate is low, that signifies that the future is important in relation to the present. If it is high, short-term gains become more important in relation to long-term gains.

setting, Goldsmith and Posner would have needed to draw on a multi-party model, if not a dynamic model in order to prove their theory.²⁴

The authors' analysis takes up the traditional game-theoretical account of a prisoners' dilemma game, which analyses situations *without* law influencing the pay-offs. That approach is correct for the question of how CIL may evolve under a prisoners' dilemma situation, i.e. CIL is viewed as *explanandum*. And here, indeed, traditional scholarship lacks sound hypotheses about how and why CIL may evolve, be stable or change over time. In order to answer these questions, Goldsmith and Posner rely on different explanations, depending on which of the four situations is relevant. In the case of coincidence of interest, a change in CIL reflects a change in interest (at 40). This assumption is methodologically unsound within a rational choice framework, which takes interests as given for methodological reasons and is thus empirically intractable.²⁵ In the case of coercion, a change in CIL reflects a change in power constellations (at 40). This latter explanation remains within a rationalist framework as power is a restriction in that sense. A change of CIL in coordination situations is attributed to results of trial and error (at 42). More difficult is the explanation in the case of a bilateral prisoners' dilemma game. Here, the authors explain the change of CIL with a change of focal points (at 41).²⁶ This explanation begs the question of how and why a focal point might change. There is no reference to *opinio juris* as possibly reflected in UN General Assembly resolutions, nor to a possible change of discourse induced by non-state actors.

The authors also conclude that states do not comply with CIL out of a sense of legal obligation, i.e. they use their theory to explain (non-)compliance with CIL (CIL as *explanans*). Here, a consideration of the well-discussed question of how CIL, once in place, may influence all those four conditions of cooperation in a prisoners' dilemma situation would have been desirable.²⁷ More importantly, however, is that CIL, like all other kinds of potentially sanctioned norms, is usually recognized as being able to change the pay-offs from the game,²⁸ be it for reputational reasons²⁹ or for expected direct sanctioning by other states. It is not necessary that the state itself considers a

²⁴ Norman and Trachtman, *supra* note 6, develop a multi-player prisoners' dilemma model of CIL and show that CIL might well be able to solve collective goals in a multi-party setting.

²⁵ This does not imply that states' preferences may not change in reality. But in rationalist methodology, one variable needs to be assumed as exogenous in order to be able to explain the change of behaviour. That is usually the preferences. Attributing a change in behaviour to a change in interests *and* a change in restriction makes a hypothesis empirically unfalsifiable: see Snidal, 'Rational-Choice and International Relations', in Carlsnaes, Risse, and Simmons (eds.), *supra* note 2, at 73; A. van Aaken, *Rational-Choice in der Rechtswissenschaft* (2003), at 46 ff.

²⁶ A focal point in game theory denominates an equilibrium point chosen by players out of a multitude of possible points due to its special characteristics. Players usually look for a focal point whereby coordination becomes possible.

²⁷ Norman and Trachtman, *supra* note 6, discuss exactly this in detail.

²⁸ See the literature concerning CIL in *supra* note 15. The majority of scholars using game theory in IL or International Relations view the function of IL as being the modification of pay-offs.

²⁹ Guzman, *supra* note 7, at 1874 ff.

norm to be CIL – it is sufficient that the state assumes that other states perceive the broken rule as CIL and react accordingly.

In the second chapter, Goldsmith and Posner rely heavily on traditional CIL examples. They discuss the ‘free ships, free goods’ rule of wartime maritime commerce; the breadth of the territorial sea; ambassadorial immunity; and the wartime exemption from prize for coastal fishing vessels. In resorting to these CIL examples, they also stress the importance of sometimes incoherent state practice for the formation of CIL. But by relying on state practice, the authors draw only on the interest of a state to follow the rules in question in a given moment, while leaving out completely the interest of a state in the validity of a rule, as expressed by *opinio juris*. A thief who breaks a rule against theft might still be interested in the validity of the rule against theft. Furthermore, the deviating behaviour of a state as such does not ‘destroy’ a rule of CIL. In the *Nicaragua* case, the International Court of Justice held that it is sufficient for the conduct of states to be generally consistent with statements of rules, provided that contrary state practice had generally been ‘treated as breaches of that rules, not as indications of the recognition of a new rule’.³⁰ Thus, CIL does not require that all states always adhere to CIL rules. Practice includes rule-following as well as rule-breaking as long as the rule-breaking is considered rule-breaking by other states and indeed by the violating state itself!

Nevertheless, the authors take up an issue which clearly demonstrates the problematic derivation of a normative ‘ought’ from factual practices. This is exactly the reason why some voices in IL scholarship rely more heavily on *opinio juris* as implicit consensus than on state practice.³¹ Whereas a reliance on state practice suggests an inductive approach, the emphasis on *opinio juris* builds on a deductive methodology. Goldsmith and Posner do not deal with the intricacies of this difference at all. Even though ‘modern’ CIL, as CIL powerfully influenced by *opinio juris*, has been heavily criticized on valid grounds,³² it might well be the case that modern CIL does rely more on the interest of states in the validity of a rule, thereby creating law with a potentially behavioural effect. If one follows the argument of basing the validity of CIL rather on *opinio juris* than on state practice, reputational effects as sanctioning devices may also become more important as deviating practices of one state in a given moment become less relevant for the judgment of other states. That might also alter the game of CIL even in multilateral settings as reputational effects may alter the game pay-off.

3

Only slightly less problematic is the authors’ account of treaties in Part 2. The theoretical aspects are outlined in Chapter 3, the theory is applied to human rights in

³⁰ *Nicaragua* [1986] ICJ Rep 14, at para. 186.

³¹ Usually this discussion is labelled traditional and modern CIL: see, among many others and with further references, Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *AJIL* (2001) 757. Whereas traditional CIL relies heavily on state practice, modern CIL relies more on *opinio iuris*.

³² See, e.g., Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) 413.

Chapter 4 and to international trade in Chapter 5. The selection of treaties recognized as integral treaties, i.e., treaties whose binding effect is collective (*erga omnes*) instead of bilateral, on the one hand and as reciprocal treaties on the other hand³³ reflects the types of treaties to be found in IL,³⁴ but it would have been desirable to have a discussion also on global commons problems in environmental treaties and their respective mechanisms of monitoring compliance and sanctioning as those, even if characterized as integral treaties, have different underlying problem structures to international human rights treaties.

The authors start by posing some questions about, for instance, why treaties exist, whether CIL might suffice, and what legalization adds to international agreements, i.e., why and under what circumstances do states prefer binding to non-legal agreements? Questions of compliance and the role of domestic bureaucracy are also discussed.

Goldsmith and Posner derive the basic logic of international agreements from the models of cooperation and coordination set out at the beginning of the book. In order to achieve joint gains, states must know what counts as cooperation. Treaties are much less ambiguous than CIL in that respect. Especially in multilateral settings where collective action problems are rife, players must be able to monitor and potentially sanction each other (at 86). While acknowledging the merits of the institutionalists' rationalist theory³⁵ (at 86) by accepting that multilateral organizations created by multilateral treaties may foster multilateral cooperation, the authors are nevertheless doubtful about the possibility of international organizations overcoming hurdles to multilateral cooperation in prisoners' dilemma situations, such as common fisheries, because of strong free-rider incentives for each state and due to a second-order prisoners' dilemma consisting in the sanctioning of a non-cooperative state (third-party enforcement).³⁶ Rather, they consider multilateral agreements concerning coordination games (such as transportation and communication problems) which only require common standards of states as potentially more successful than true collective action situations characterized by a prisoners' dilemma situation because in the former case there is no incentive to deviate from a common standard, once the standards is set. They hypothesize that institutionalized communication by states is a

³³ For an overview see Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law', 272 *Recueil des Cours/Académie de Droit International de La Haye* (1998) 9.

³⁴ See for that distinction, and the different legal consequences that follow from it, Pauwelyn, 'A Typology of Multilateral Treaty Obligations', 14 *EJIL* (2003) 907, at 933 especially for Human Rights Treaties. More generally for different types of treaties, see Gerald Fitzmaurice, 'Second Report on the Law of Treaties', UN doc. A/CN.4/107, *Yearbook of the International Law Commission*, Vol. II, 16-70 (1957), at 54 ff.

³⁵ Slaughter, 'International Law and International Relations: Millennial Lectures', 285 *Recueil des Cours/Hague Academy of International Law* (2001) 9, at 45 ff., characterizes institutionalist theory of International Relations as a paradigm which believes in the ability of international cooperation to achieve collective goals by international treaties and international organizations which diminish the possibility of cheating.

³⁶ So-called second-order prisoners' dilemma situations arise because of the sanctioning problem. The first-order problem may be solved if there are effective sanctioning devices in place, but here again the problem arises that every state would be better off if another state were to sanction the law-breaking state.

primary function of many treaties but they do not consider multilateral treaties and their corresponding organizations as genuine devices for sustaining cooperation. But even if the incentives for non-cooperation are indisputably existent, Goldsmith and Posner again fail to account for the difference between the interest in creating a multilateral treaty and the interest in following the treaty at a given moment. The proliferation of international treaties concerning global commons, such as multilateral environmental treaties, is well known. Seemingly, states do have an interest in signing and ratifying multilateral treaties even though it is time-consuming and costly. The interest in complying with a treaty then depends on the monitoring and sanctioning devices in place in the respective treaty regime.

Compliance and sanctioning is a different problem; namely the problem of analysing IL as *explanans*. A non-cooperative move can, depending on the treaty, be subject to different sanctioning mechanisms, some of them ineffective, some of them highly effective. Regimes with their own jurisdiction can be assumed to be most effective, for instance, the DSU of the WTO. It is wrong to label the WTO system, as Goldsmith and Posner do, as a bilateral repeated prisoners' dilemma (at 88). Not only does the WTO system have many multilateralization devices in substantive law,³⁷ but the DSU also allows non-legally affected parties to bring cases and therefore fosters a multilateral game.³⁸ Here, an in-depth inquiry into the DSU standing provisions as well as the sanctions system would have been helpful. Regarding the question of how IL may change incentives in a multilateral setting, it would also have been useful to look at different regimes with different monitoring and sanctioning devices in order to analyse if and under what circumstances legal institutions may make a difference. Surely, the effectiveness of IL depends on the underlying interaction structure as reflected in the various games, but it also depends on the institutional devices created to overcome those problems.

The authors claim to explain 'the logic of treaties without reference to notions of 'legality' or *pacta sunt servanda*' (at 90). According to the authors, 'states refrain from violating treaties (when they do) for the same basic reason they refrain from violating non-legal agreements: because they fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination' (at 90). This statement is a clear commitment to the epiphenomenality of IL. Furthermore, the authors

³⁷ The Most-Favoured Nation Clauses in Art. I GATT 1994 and Art. II GATS are just the most prominent example.

³⁸ In the Appellate Body Report on *EC – Bananas III*, adopted 25 Sept. 1997 [1997] II DSR 591, at para. 132 the AB stated: '[w]e agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel'. We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the WTO Agreement. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have "a substantial trade interest", and that under Article 10.2 of the DSU, a third party must have "a substantial interest" in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has "standing" to bring claims under the GATT 1994.'

do not explain how the international perception of a state that breaks IL might influence a state's reputation. Rather, they draw an analogy between international agreements and domestic non-binding letters of intent (at 90). They explain the choice of states between non-legal agreements on the one hand and treaties on the other hand by (1) the necessity of legislative participation for treaties in most cases, which might incline the executive of a state to choose the non-legal agreement in order to circumvent the legislative branch; (2) default rules in treaty regimes such as the applicability of the Vienna Convention on the Law of Treaties, which might be desirable; and (3) by the seriousness of a state's commitment, which might be shown by legislative participation.

Goldsmith and Posner rely on retaliation by other states as an incentive for compliance but are sceptical concerning the disciplinary effect of reputation, which they view correctly as an ultimately empirical question (at 101). They assert that reputation must be disaggregated in relation to the type of treaty (at 102 *et seq.*). This also means that it is more difficult to explain why some treaties generate more compliance than others. But here the authors could have drawn not only on their own game-theoretical framework but also on the specific monitoring and sanctioning devices incorporated in different treaties as well as different actors active in monitoring for an explanation, as all those factors influence retaliation and reputational effects. They fail to account for both the underlying incentives, e.g. reciprocal treaties or integral treaties, as well as the diversity of international treaty regimes in putting forward their explanation for the divergence in treaty compliance.

The authors consider international human rights regimes as an example in order to clarify their theory. They begin with a general account of state interests related to human rights: within the *national* realm, Goldsmith and Posner attribute respect for human rights to factors such as economic development, social, religious and political culture and the presence or absence of internal or external armed conflict. Furthermore, 'as a matter of fact, liberal democracies value liberties – either intrinsically or instrumentally, or both, more than authoritarian governments do' (at 109); that is, democracy serves also as an explanatory variable for states' human rights records.³⁹ The interest of one state in the human rights performance of *other states* is attributed to (1) a sympathy for coethnics and coreligionists; (2) a weak altruism provoked by atrocities; and (3) an instrumental interest in human rights based on the belief that human rights violations may destabilize another state in whose stability the state has an interest (at 109 *et seq.*). Turning to compliance issues, here again, the authors

³⁹ Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale LJ* (2002) 1935. See similarly Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', in S. Voigt, M. Albert, and D. Schmidtchen (eds.), *International Conflict Resolution* (2006), 69. His findings suggest that rarely does treaty ratification have unconditional effects on human rights. Instead, improvement in human rights is typically more likely the more democratic the country or the more international non-governmental organizations its citizens participate in. Conversely, in very autocratic regimes with weak civil society, ratification can be expected to have no effect and is sometimes even associated with more rights violation. He also summarizes the findings of less comprehensive empirical studies which all find more or less the same result.

apply their four basic behavioural regularity models but emphasize coincidence of interest and coercion. They plainly state that international human rights law is ineffective. If states comply with human rights norms, it is simply because it suits them more at a given moment (coincidence of interest). If states comply with human rights law against their interest, it is due to coercion by other states (at 115), including threats to reduce economic aid or to establish sanctions.⁴⁰

The authors argue that the existence of reservations and declarations to international human rights treaties has the effect of allowing liberal democracies to comply with a treaty without any change in behaviour, i.e., contradicting practice is rendered legal by reservations (at 111). This is certainly true of the US, which has quite a unique practice of appending considerable reservations to the few international human rights treaties it has ratified. The authors fail to explain, though, why states would have an interest in reservations if the treaties do not matter, as they purport a few pages later (at 120), when claiming that a state does not incur costs from violating a treaty. If non-compliance with those treaties would not impose costs on states, why would states bother to make reservations? Goldsmith and Posner flatly deny that international human rights law may play any role in the human rights performance of states.

The only counter-example of the behavioural relevance of human rights law is attributed to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Unfortunately the authors mistake the ECHR as the human rights regime of the EU rather than of the Council of Europe (at 126) and come to the conclusion that the human rights regime is backed up by the larger project of economic and political integration. By committing this error, they get around the puzzle of explaining the success of the European Court of Human Rights, which of course has jurisdiction for all the member states of the Council of Europe⁴¹ – that is, many countries which are not (and will most probably never be) Member States of the EU, such as Russia, Georgia, Azerbaijan or Armenia. The authors would be advised, in the event of a second edition, to correct this point and to provide an explanation for this puzzle, which does not fit into their theory.

Why do states ratify human rights treaties at all? Trivially, the answer is that states will ratify if the benefits outweigh the costs (at 127). A definition of costs and benefits is therefore crucial. Goldsmith and Posner believe that the costs involved in ratifying and being bound by international human rights treaties, such as the International Covenant on Civil and Political Rights, are close to zero (at 127), as states are monitored in any case through informal public scrutiny, regardless of whether they are a party or not. The point here is not to dispute the fact that enforcement mechanisms

⁴⁰ Empirically, it was indeed found that human rights treaties are to a large extent ineffective. But the empirical studies show different patterns, e.g. concerning the individual complaint mechanisms. See *supra* note 39.

⁴¹ Acceptance of the ECHR, as well as the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Council of Europe: Interim Resolution ResDH (2001) 80 adopted by the Committee of Ministers on 26 June 2001 at the 757th meeting of the Ministers' Deputies.

are weak.⁴² But the argumentation misses the margin at which even UN treaty-based bodies may make a difference by either clarifying focal points (the communication argument) through General Comments or by issuing views, even if they are non-binding.

The world trade system, usually considered rather successful, serves the authors as another example of the unlikelihood of successful multilateral cooperation. The authors first describe international trade in the 19th century in order to show how it worked well without a legalized international trade regime. In accordance with (economic) international trade theory, they identify two state interests of note: first, a state's economic welfare, which would always gain from a reduction of barriers to trade. If that were relevant, trade treaties would not be needed at all as states would reduce trade barriers by themselves. Second, they take up a political economy argument, noting that a state's trade interest will vary from product to product, depending on the relative political strength of exporters and importers. Here, mutual gains can be reaped by bilateral treaties solving bilateral prisoners' dilemma games. The Most Favoured Nation (MFN) clauses in 19th-century trade treaties are not viewed as a multilateralization device,⁴³ but rather as an enabling device for parties to protect their gains from subsequent trade treaties between one of the original parties and a third party. 'MFN terms served the interests of the state parties, and that is all' (at 142). Empirical evidence puts this argument into question. The closest resemblance to the old bilateral trade treaties we have today are Bilateral Investment Treaties (BITs), which usually also contain an MFN clause. The MFN clause is one of the most disputed and criticized clauses in BITs,⁴⁴ precisely because it does not necessarily serve the interests of *both* contracting states. Some newer BITs therefore do not contain an MFN clause.⁴⁵

Goldsmith and Posner then address the old GATT 1947 system, identifying some well-known problems like the undermining of the non-discrimination rule in Article I GATT as well as the multilateral punishment of rule-breakers. They claim that the old GATT supports their claim that IL can solve coordination problems and the bilateral prisoners' dilemma, but not collective action problems (at 157). The innovations under the WTO Agreement, especially the DSU are viewed equally sceptically. Here again, they do not attribute independent behavioural influence to IL or to decisions by international tribunals. 'If states follow the law just because it is the law, then the DSU would not be necessary. If they do not, then it is hard to see why the DSU would

⁴² For a proposal to strengthen the enforcement mechanisms through extended *ius standi*, see van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions', in Voigt, Albert, and Schmidchen (eds.), *supra* note 39, at 29.

⁴³ As conventional wisdom would hold: see e.g. the so-called Sutherland Report, *The Future of the WTO* (2004), available at: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf, at 19.

⁴⁴ See for a discussion of the case law concerning Most-Favoured Nation clause in bilateral investment treaties Kurtz, 'The MFN Standard and Foreign Investment—An Uneasy Fit?', 5 *J World Investment and Trade* (2004) 861.

⁴⁵ See now the BIT between India and Singapore, signed on 29 June 2005, available at: <http://app.fta.gov.sg/data//fta/file/India-Singapore%20Comprehensive%20Economic%20Cooperation%20Agreement.pdf>.

change their behaviour' (at 159). This comes close to saying that if law is followed out of sheer respect for its sanctity it is superfluous, and if it is not followed then there is not much point in trying to reinforce its implementation.⁴⁶ In no case can law influence behaviour. And 'if compliance with WTO decisions turns out to be greater than compliance with GATT decisions that could be due to the innovations in adjudicatory procedures, rather than the elimination of the veto' (at 160). These are ad hoc justifications which do not take account of the difference in sanctioning possibilities under the GATT and WTO. But rational choice theorists usually proceed by backward induction: they would assume that if the threat of being sanctioned (both formally and informally) after having broken a rule is credible, this would be taken into account when choosing one's behaviour. Thus, a more credible threat of formal sanctioning under the WTO system may lead to better compliance rates.

4

In the third part of *Limits*, which clearly has a more explicit normative drive, the authors address three potential challenges to their own critique from other theories of IL. They deal with (1) the challenge presented by those who argue that the rhetorical practices of states cannot be reconciled with an instrumental theory of IL; (2) traditionalists who claim that a positive theory of IL such as that which the authors seek to develop is no response to IL's normativity; and (3) with cosmopolitan theory.

Concerning legal rhetoric, i.e. legal or moral justifications used by states in order to hide their self-interested actions, Goldsmith and Posner make use of an earlier published working paper.⁴⁷ They consider the interesting question of why states engage in talk at all, responding to critics of realist and rational choice approaches to IL. These critics argue that if nations were motivated entirely by power or self-interest, their leaders would not make moral and legal arguments because no one would believe them. In order to answer this challenge, the authors rely on signalling theory.⁴⁸ For states acting aggressively, it is convenient to influence the perception of

⁴⁶ Empirically, that needs to be proven. The countermeasures allowed under Art. 3.7 DSU have many devices to induce compliance with WTO law. Prominent is *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Arbitration by the United States under Art. 22.6 of the DSU and Art. 4.11 of the SCM Agreement – Decision of the Arbitrators*, WTO/ARB 5 (30 Aug. 2002), WTO/DS108/ARB, where the arbitrator held that countermeasures may be such as to induce compliance, not only to counter the effects of the illegal subsidy. They also held that the obligation not to grant illegal subsidies is an obligation *erga omnes*.

⁴⁷ 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', University of Chicago, Olin Law & Economics Program, Working Paper No. 108 (Nov. 2000), available at: <http://ssrn.com/abstract=250042>.

⁴⁸ The signalling theory was first developed by Spence, 'Job Market Signalling', 87 *Quarterly J Econ* (1973) 355. The basic question is how honest communication can be ensured despite conflicting interests between a signaller and a signal receiver. In both biology and economics, a number of authors recognized that there may be a connection between the cost of signals and the reliability or honesty of signals. Spencer's model, applied to education, supposed that signals are costly and that, for one reason or

other states. Even if talk is ‘cheap talk’,⁴⁹ it can still serve to solve coordination problems by picking out one of many possible equilibria (at 175). Under certain conditions, cheap talk may also facilitate cooperation in prisoners’ dilemma games (at 176). The authors use signalling and cheap talk models to show that nations may engage in talk in order to (1) deflect suspicion from the fact that they have unstable political systems or adversarial interests; and (2) to coordinate through cheap talk by picking out one of the multiple equilibria when gains from coordination are available. Continuing with the more difficult question of the content of talk, i.e., moral and legal talk, they explain different contents with different audiences targeted with the intention of signalling cooperation. Depending on the group of states and the historical ‘in-group’ with whom they want to cooperate, states will make reference to certain values, for instance, Christian values, civilization or human rights (at 183). Even though moral or religious rhetoric will sometimes suffice, legal rhetoric, in the view of GP, being purely formal, is particularly convenient (at 184) in order to disguise the self-interest being pursued.

In the next chapter, the authors turn to the question of whether states ought to obey IL’s moral command, also taking up an earlier published article by Eric Posner.⁵⁰ By considering the question of whether individuals or states assume moral obligations, they find a dilemma concerning the persons bound. If the state is viewed as the primary obligation-bearing agent, then the obligation can have no direct moral force for the individuals or groups who control the state. If IL takes the individuals as obligation-bearers instead, then IL would become vulnerable to the birth and death of individuals, redefinition of groups and representativeness of political institutions (at 188 *et seq.*). The authors assume that IL binds states, not individuals, in concurrence with traditional IL scholarship. A moral obligation to obey IL due to the consent principle (or *pacta sunt servanda*) is denied: ‘Although states often do consent to a particular obligation, including a treaty, consent is neither a necessary nor a sufficient basis for creating an international legal obligation’ (at 189 *et seq.*). Moreover, they argue, most IL does not derive from consent. But if not consent, what is it that binds states?

As a further source of possible moral obligation, they consider the notion of the well-being of citizens being fostered by IL. In their view, however, IL does not foster the well-being of citizens as it reflects, in many cases, the interest of a number of states, especially the ‘powerful states rather than the interests of the world at large. The law reflects the interests of states, not of individuals’ (at 195) and therefore there is little reason to believe that the system as a whole is good or just (at 195 and 200). Therefore, each state ‘must make its own moral judgment (if it is inclined to be guided by morality) and comply with the treaty only if compliance is the right thing to do.

another, lies cost more than honest signals. If the extra cost of lying is sufficiently large, then it may never be worthwhile to lie. Assuming that there is something to be gained from sharing information, communication still takes place, and necessarily will be reliable despite the conflict of interest.

⁴⁹ Cheap talk is a notion from experimental game theory, describing costless and non-binding pre-play communication.

⁵⁰ Posner, ‘Do States have a Moral Obligation to Obey International Law?’, 55 *Stanford L Rev* (2003) 1901.

International law has no moral authority' (at 197). According to the authors, '[t]his should make clear that we cannot condemn a state merely for violating international law. The question is whether by violating international law a state is likely to change international law for the better from a moral perspective' (at 199). Whose moral perspective ought to be decisive under what circumstances is not discussed, even though this would seem particularly relevant. Furthermore, it is necessary to clarify whose interests are reflected at the time IL is created and whose interests are reflected in a later non-compliant behaviour of a state. Moreover, the assertion that IL reflects state interests, not individual interests, runs counter to the authors' assertion in the Introduction of the book that a state's interests may reflect citizens' preferences. It remains unclear, why the interests of powerful states as reflected in IL are mostly 'bad'. Goldsmith and Posner could have at least discussed the value of legal formalism independent of the content of IL.

The authors then turn briefly to questions of normativity and the validity of IL. In contrast to the introductory part of the book, where they accepted IL as law, they state now that IL is politics, a special kind of politics (at 202). Here, they flatly deny any source of validity of IL. The international lawyer's task, therefore, 'is like that of a lawyer called in to interpret a letter of intent or nonbinding employment manual ... to shed light on the meaning of the documents, but the documents themselves do not create legal obligations. ...' Indeed, the authors reinforce the realist thrust of their argument by the following suggestion: 'Efforts to improve international cooperation must bow to the logic of state self-interest and state power, and although good procedures and other sensible strategies might yield better outcomes, states cannot bootstrap cooperation by creating rules and calling them "law"' (at 203).

The last chapter of *Limits* is devoted to liberal democracy and cosmopolitan duty, and analyses a state's moral obligation to enter into treaties in the first place. Goldsmith and Posner turn against 'mainstream international law scholarship' (at 205), which contends that liberal democracies should be more other-regarding and give up more sovereignty to justice-promoting institutions like the International Criminal Court (ICC). They address a widely discussed problem: the frictions between national democracy and the ever more important legalization on the international plane with a democratic deficit on the same plane. The answer, according to them, is straightforward: the tension is to be resolved in favour of national democracy. A number of philosophical and anthropological arguments are made against the idea of an individual cosmopolitan duty. Following arguments of cosmopolitan theory, to shift the duty from individuals to states, the authors nevertheless pass on the burden further from states to NGOs by relying on normative individualism, arguing that the latter, for instance Oxfam, are voluntary corporations with explicit goals (at 211) and less heterogeneous preferences than states. Relying on an anthropological argument, they claim that solidarity and altruism depend to some degree on proximity. And to the extent that citizens have weak or non-existent cosmopolitan sentiments, political institutions in liberal democracies do indeed have a problem engaging in cosmopolitan action (at 212). But can a cosmopolitan duty shift to the state in the event that the citizens do have cosmopolitan sentiments (at 215)? In order to answer this

question, Goldsmith and Posner rely on US opinion polls on the ICC Statute and the Kyoto Accord, which find consistently that US citizens are in favour of signing the treaties (at 215). Here, they find ad hoc explanations of why the US should nevertheless not ratify the treaties: first, the surveys do not distinguish between international engagement and cosmopolitan duty. Second, ‘cosmopolitan sentiment for the ICC and Kyoto is probably not deep or intense’. Third, voters might be misinformed and worse informed than politicians about the treaties. Moreover, poll questions are not framed in a way that would include compliance costs (at 216 *et seq.*). Furthermore, they consider interest group politics, voter misinformation, and aggregation hurdles⁵¹ (at 217). This argument as such is perfectly acceptable, but not within an argument relying on the democratic principle. Not only does this argument for or against the ratification of international treaties rely upon ad hoc assumptions about the ‘real’ preferences of citizens, it also puts into question their whole argument about liberal democracy. If the democratic principle is a valid argument against binding international agreements (an argument which can be made), then citizens’ preferences need to be taken seriously, otherwise the argument fails.

5

Although Goldsmith and Posner claim to adopt a rationalist and consequentialist methodology, it can be argued that they occasionally fall short of it, and sometimes go beyond it. First, the authors’ narrow realist definition of state preferences (at 6), focusing as it does on what behavioural economists would deem short-term preferences, appears to be quite a biased understanding of rationality. Second, the rational choice approach allows for a breaking up of the black box ‘state’, a course followed by the authors only in order to give ad hoc explanations. Third, a rationalist methodology offers a testable social science approach for the hypotheses offered in the book, but we find no well-balanced empirical underpinnings of the hypotheses brought forward. Rather, they rely on a debatable selection of case studies and ad hoc explanations.

There are more sophisticated and thoughtful rationalist approaches to IL than the analysis presented in this book.⁵² It is perfectly possible to outline testable hypotheses not only concerning the effectiveness of treaties but also concerning the effectiveness of CIL.⁵³ If the explanatory power of a rationalist approach to IL is used

⁵¹ Aggregation difficulties arise if individual preferences are to be aggregated into a collective preference. Social Choice Theory deals with these problems.

⁵² See, e.g., Guzman, *supra* note 7; Norman and Trachtman, *supra* note 6; Dunhoff and Trachtman, *supra* note 1; Abbott *et al.*, *supra* note 22; Slaughter, *supra* note 35; for an overview, see Sykes, ‘The Economics of Public International Law’, University of Chicago, Olin Law & Economics Program, Working Paper No. 216 (2004), available at: http://papers.ssrn.com/paper.taf?abstract_id=564383.

⁵³ Norman and Trachtman, *supra* note 6, e.g. propose to test the possibility of CIL in multilateral settings: they develop a model of an n-player prisoner’s dilemma in the customary international law context that shows that it is plausible that states would comply with customary international law under certain circumstances. These circumstances relate to: (i) the relative value of cooperation versus defection, (ii) the

for institutional design on an international plane, an analysis well founded in IL doctrine together with a differentiated analysis of states' incentives to comply is necessary. Even though the four models used by Goldsmith and Posner might explain parts of state behaviour, the four models are too simplistic to reflect IL reality. Furthermore, one might question the application to moral issues of the rational choice approach as this stretches rational choice beyond its proper scope. Surely it is in the nature of moral obligations that they will more often than not run against states' self-interest.

Goldsmith and Posner end their book with the hope that it 'will help put international law and international law scholarship on a more solid foundation' (at 226). They raise and discuss many problems relevant to a decentralized legal system which are well known to international law scholars. It is laudable that they seek explanations for the shortcomings of IL. But they overshoot the mark, not only by applying rational choice theory inconsistently but also by relying on ad hoc explanations and examples to fit their theory. If putting IL on a more solid foundation was their aim, they could have asked the more interesting and challenging question of how to uncover the underlying problem structures of global issues (for instance, by using a more sophisticated game-theoretical framework) in order to rationally design IL in such a way as to solve pressing problems on the international plane and ensure compliance. Instead, the book seems entirely devoted to denying IL any normative force, without ever envisaging how it might acquire that force. There is no theoretical discussion of international organizations, the delegation of functions and power to them, or non-state actors and their influence on state behaviour. Also missing is the behavioural force of international administrative and judicial cooperation and networks: in other words, *Limits* is a book on the 'old world order',⁵⁴ dealing only with classical issues, structure and examples of IL, while neglecting other ever more important parts of the international legal order, as if states operated in a void of pure rational choice formation. Even if one takes the view that the proliferation of treaties and legalization has not changed the behaviour of states and that we therefore still live in the 'old world order', a debate on those issues and a reflection on the relevant literature would have been apposite. Putting the book in a broader perspective of legalization and its ordering force as well as of questions of sovereignty of nation states, one cannot but have the impression that Goldsmith

number of states effectively involved, (iii) the extent to which increasing the number of states involved increases the value of cooperation or the detriments of defection, including whether the particular issue has characteristics of a common problem, a public good, or a network, (iv) the information available to the states involved regarding compliance and defection, (v) the relative patience of states in valuing the benefits of long-term cooperation compared to short-term defection, (vi) the expected duration of interaction, (vii) the frequency of interaction, and (viii) whether there are also bilateral relationships or other multilateral relationships between the states involved.

⁵⁴ With reference to A.M. Slaughter, *A New World Order* (2004).

and Posner pursue a strongly normative goal, namely to unbind hegemonic states from their international duties.⁵⁵

In short, instead of deconstructing IL by questionable means and examples to reveal its purported *conceptual* limits, it would have been more constructive to deal with the current *institutional* limits of IL. For international lawyers, of course, this does not mean that the rationalist approach to IL ‘baby’ should be thrown out with the bathwater. The critique should be an opportunity to reflect critically on some of IL’s all too often minimized limitations.

⁵⁵ On the sovereignty discussion and the international order, see, among many others, Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’, 4 *EJIL* (1993) 447; Koskenniemi, ‘The Future of Statehood’, 32 *Harvard Int’l LJ* (1991) 397; Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’, 97 *AJIL* (2003) 782; Cohen, ‘Whose Sovereignty? Empire Versus International Law’, 18 *Ethics & Int’l Affairs* (2004) 1; Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’, 16 *EJIL* (2005) 131; Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *EJIL* (2005) 369, who draws on International Relations theory.