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Herding Schrödinger's Cats: The Limits of the Social Science Approach to International Law

Simon Chesterman

chesterman@nus.edu.sg

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Simon Chesterman*

Abstract

The struggle to assert the legitimacy and relevance of international law is integral to its story. Among academics, that tale has seen other lawyers question whether it is “really” law, while scholars of international relations have dismissed it in a bemused footnote. Among politicians, the narrative has been one of efforts to establish international law as more than simply one foreign policy justification among others. The turn to social science offers a double remedy: a rigorous method that will earn the respect of the academy while also demonstrating the discipline’s “real world” impact. This is an elegant answer—to the wrong question. For the problems of international law cannot be solved by adopting an “external” and therefore objective or privileged position. International law’s structure and history make academics necessarily participants as well as observers. An uncritical embrace of social science methods risks losing much of what draws people to international law and what has, over the centuries, given it value. As a work in progress in which academics have a special role to play, a commitment merely to take international law “as it is” is not neutral; it is a value statement in itself.

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* Dean and Provost’s Chair Professor, National University of Singapore Faculty of Law. This article was presented at the Chicago Journal of International Law’s symposium on “The Transformation of International Law Scholarship”, held at the University of Chicago and online on Feb. 26, 2021. Many thanks to Tom Ginsburg, Katherine Luo, Ana Carolina Luquerna, and Jared I. Mayer for their comments and improvements to the draft. Errors and omissions remain the author’s alone.

I. INTRODUCTION

The subject of international law has always struggled to be taken seriously. Much of that struggle has been over its status as “law,” with H.L.A. Hart among others expressing serious reservations about such a claim.¹ More recently, Anthea Roberts has questioned the extent to which it can be said to be “international,” given divergences in the way it is taught and understood around the world.² Now Adam Chilton, Tom Ginsburg, and Daniel Abebe are raising an eyebrow as to whether it even deserves to be considered a “subject” in the academic sense—proposing that this would be bolstered through recognizing and expanding the social science methods described in their article. Such an approach will, they argue, produce research that is more “normatively restrained, empirically informed, and more skeptical”³—by which they mean “better.”

This essay will push back against these explicit and implicit claims in two ways.

First, analytically, their article and its plan of action misdiagnose the nature of international law scholarship, or a substantial part of it, by embracing the idea of an “external” and therefore objective or privileged position. Without subscribing to the maximalist claim that objectivity itself is impossible, I will argue that international law’s structure and history make academics necessarily participants as well as observers. Second, politically, a wholesale embrace of social science methods would lose much of what draws people to international law and what has, over the centuries, given it value. As a work in progress in which academics have a special role to play, a commitment merely to take international law “as it is” is not neutral; it is a value statement in itself. I will conclude by explaining the somewhat labored metaphor in my title.

II. THE PROJECT OF INTERNATIONAL LAW

Chilton, Ginsburg, and Abebe’s argument is, at its core, about method. “For over a hundred years,” they observe, “scholars have argued that international law should be studied using a ‘scientific’ approach.”⁴ And yet they also observe that

¹ H.L.A. HART, *THE CONCEPT OF LAW* 213–37 (3d ed. 2012) (concluding that international law constitutes a set of rules but not a system of law, as it lacks a basic norm providing general criteria of validity for other norms within that system).

² ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017). A distinct critique is the extent to which non-Western states participated in the development of international law and institutions. See Simon Chesterman, *Asia’s Ambivalence About International Law & Institutions: Past, Present, and Futures*, 27 *EUR. J. INT’L L.* 945 (2016).

³ Adam Chilton, Tom Ginsburg, & Daniel Abebe, *The Social Science Approach to International Law*, 22 *CHI. J. INT’L L.* __ (2021).

⁴ *Id.*

the methods that those scholars have used have been, to put it politely, lacking in scientific rigor. International lawyers invented their own approaches on the fly—not so much methods as sets of “assumptions and theoretical claims.”⁵ No wonder, one might draw the conclusion, that two international lawyers routinely find three different answers to a given question. The solution proffered to solve this problem is the tried and tested methods of social science. The authors are modest in their argument but cannot hide their apparent mystification as to why this was not evident to serious researchers up to now.⁶

By social science methods, they mean the formulation of questions, development of hypotheses that can be tested with qualitative or quantitative data, and offering of conclusions while acknowledging underlying assumptions and uncertainty.⁷ An important part of their critique is that this should be done in an “external” manner: “that is, an approach that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world.”⁸

This is an elegant answer—to the wrong question.

Because international law is *not* like other subjects of social scientific research, for one-and-a-half reasons. The half reason, which is not a compelling one, is that international law—its study and its practice—has always had an undercurrent of idealism. I do not mean idealism in the international relations sense,⁹ though the two are connected in that idealism in the theoretical sense underpins a strong vein of international law scholarship. Rather I mean a more general sense of having an unrealistic belief in, or the pursuit of, perfection. International law and international lawyers have always conflated the “is” and the “ought.”¹⁰ Anyone who has taught international law knows the experience of having to explain to students that “real world” suffering may not be addressed by international law remedies. The maxim “no wrong without a remedy” may be true in the courts of equity, but it holds no water in the International Court of Justice.¹¹

⁵ *Id.* at __ n.12.

⁶ See also Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 3 (2012).

⁷ Chilton, Ginsburg, & Abebe, *supra* note 3, at __n.13.

⁸ *Id.*

⁹ See generally MARTIN GRIFFITHS, REALISM, IDEALISM AND INTERNATIONAL POLITICS: A REINTERPRETATION (1992).

¹⁰ See, e.g., Andreas Th. Müller, *The Effectiveness-Legitimacy Conundrum in the International Law of State Formation*, in THE NORMATIVE FORCE OF THE FACTUAL: LEGAL PHILOSOPHY BETWEEN IS AND OUGHT 79 (Nicoletta Bersier Ladavac, Christoph Bezemek, and Frederick Schauer eds., 2019).

¹¹ In the domestic context, see, e.g., *Leo Feist v. Young*, 138 F.2d 972, 974 (7th Cir. 1943) (citing it as “an elementary maxim of equity jurisprudence”). In international law, by contrast, remedies were long neglected in the literature and the Statute of the International Court of Justice provides little

As I noted, this is not a good reason, and we academics ourselves are not immune to the desire to make international law better. Indeed, it has often encouraged overstretch. To be fair, this has typically been on the progressive side—one need only think of the efforts in the early 1990s that led to the new interventionism that sought to promote human rights through righteous violence.¹² Two problems resulted. First, the deaths of U.S. Rangers in Somalia in 1993 showed the limits of political commitment to such projects—particularly in Africa.¹³ Secondly, international lawyers tied themselves in knots to justify the 1999 Kosovo intervention when there *was* political commitment but the authorization that would have added legality was not forthcoming.¹⁴ Chilton, Ginsburg, and Abebe quote the infelicitous phrase “illegal but legitimate” to describe this phenomenon, a circumlocutory approach that sought to have its cake and bomb it too.¹⁵

Another example of idealism is the efforts through that same decade to hold businesses accountable for human rights violations. Coincidentally, my only other article in the *Chicago Journal of International Law* was on this topic, discussing among other things the manner in which activists and scholars sought to take human rights norms applicable to states and extend them to corporations also—essentially through sheer force of will.¹⁶ When John Ruggie criticized the “doctrinal excesses” and “exaggerated claims” of such writers,¹⁷ he was accused of attempting to “derail the standard-setting process and bow to the corporate refusal to accept any standards except voluntary codes.”¹⁸

This may sound like special pleading for international law and, to some extent, it is. But the better reason for distinguishing international law from other

guidance on their application. Ian Brownlie, *Remedies in the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 557–58 (Vaughan Lowe and Malgosia Fitzmaurice eds., 1996).

¹² See generally THE NEW INTERVENTIONISM 1991-1994: UNITED NATIONS EXPERIENCE IN CAMBODIA, FORMER YUGOSLAVIA AND SOMALIA (James Mayall ed., 1996).

¹³ See, e.g., Thomas G. Weiss, *Overcoming the Somalia Syndrome—“Operation Rekindle Hope?”*, 1 GLOBAL GOVERNANCE 171 (1995).

¹⁴ See SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 211–18 (2001) and sourced there cited.

¹⁵ Independent International Commission on Kosovo, *The Kosovo Report*, at 4 (2000), <https://perma.cc/35FG-5XG4>.

¹⁶ Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT’L L. 321, 327 (2011).

¹⁷ John Gerard Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006), ¶ 59.

¹⁸ David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Business*, 26 BERKELEY J. INT’L L. 373, 390 (2008).

subjects of social scientific research is that academics have always been participants rather than mere observers in our field. This is partly because our subject matter is incomplete; there are lacunae.¹⁹ Indeed, it is sometimes said that the relationship between international law and law is similar to that between Swiss cheese and regular cheese—similar in substance, but a lot more holes.

More seriously, international law is very unlike domestic law in two ways. Structurally, domestic law can be thought of as having a vertical relationship between sovereign and subject; international law operates—at least theoretically—in a realm where states exist in a horizontal plane of sovereign equality.²⁰ As a result, a great many substantive international legal questions are left without conclusive answers. Is humanitarian intervention permissible? What is the legal status of Taiwan, of Kosovo, of Palestine? The International Court of Justice, tasked with giving answers, often dodges them. When asked for an advisory opinion on the secession of Kosovo from Serbia, for example, it neatly answered a different and far less controversial question.²¹ Even when the ICJ does give answers, they may be contradictory. Within the space of three years, for example, it concluded for the purposes of jurisdiction that Serbia both was²² and was not²³ the successor state to the Socialist Federal Republic of Yugoslavia for the purposes of ICJ Jurisdiction.

Nature and the academy abhor a vacuum, so academics fill this uncertainty. There is, as we know, a normative basis for this. The ICJ Statute itself lists as a subsidiary source of law the “writings of the most highly qualified publicists of the various nations.”²⁴ From Grotius’s battle of the books to modern lawfare,²⁵

¹⁹ See, e.g., Prosper Weil, “*The Court Cannot Conclude Definitively...*” *Non Liquet Revisited*, 36 COLUM. J. TRANSNAT’L L. 109 (1997).

²⁰ See generally Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331 (2008).

²¹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22). Instead of addressing the matter of Kosovo’s asserted independence, the Court chose to focus on the legal significance of its *declaration* of independence, concluding that international law has no prohibitions on such declarations—and leaving unanswered the question of whether the declaration had any legal effect.

²² Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

²³ Legality of the Use of Force (Serbia and Montenegro v. United Kingdom), Judgment, 2004 I.C.J. Rep. 1307 (Dec. 15).

²⁴ Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933 at art. 38(1)(d). And much as 90 percent of faculty members generally regard themselves as “above average” teachers, few international law professors would put themselves outside the group of “most highly qualified publicists”. See K. Patricia Cross, *Not Can, But Will College Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUCATION 1 (1977).

²⁵ ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* (2016).

international law has always provided scope for academics to be advocates as well as analysts.

The position articulated here is an unashamedly *internal* view of the discipline. Chilton, Ginsburg, and Abebe allow for this, noting that internal scholarship has played a “particularly prominent”—*surprisingly* prominent, they seem to mean—role.²⁶ But their call to abandon labels, to avoid “committing oneself to any assumptions, theories, or philosophies beyond those required of any other social science researcher”²⁷ presumes the ability to be a truly *external* observer. Some postmodernists and poststructuralists have made the strong claim that this is impossible in any circumstance. Here I will confine myself to the more modest claim that, in the context of international law, the role that academics have played and continue to play in constructing the discourse makes that dispassionate and disinterested claim dubious.

Chilton, Ginsburg, and Abebe are, of course, aware of all this. Indeed, one of the two key influences on international law scholarship that they highlight is the impact of “real-world problems” on the work done by academics. What I think they underestimate is the converse: the impact of academia itself on the real world of international law.

This is not to say that the influence of academics has been uniformly positive. It is sometimes naïve, often misguided, and too often patronizing or colonial in its approach to helping “the other.”²⁸ Sometimes, like the ICJ,²⁹ the contradictions are laid bare: those who supported unilateral humanitarian intervention in Kosovo in 1999, for example, struggled to oppose intervention in Iraq a few years later—and bristled when Russia invoked the same arguments more recently in Crimea.³⁰ (Perhaps that is why humanitarian intervention has always been more popular among academics than states.³¹)

Yet it is hard to deny that academics in international law have had and continue to have an impact on their subject that is qualitatively different from other fields of social science. Human rights, international humanitarian law, the

²⁶ Chilton, Ginsburg, and Abebe, *supra* note 3, at __n.65.

²⁷ *Id.* at __n.14.

²⁸ See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005).

²⁹ See *supra* notes 22-23.

³⁰ JUAN FRANCISCO ESCUDERO ESPINOSA, *SELF-DETERMINATION AND HUMANITARIAN SECESSION IN INTERNATIONAL LAW OF A GLOBALIZED WORLD: KOSOVO V. CRIMEA 1* (2017).

³¹ See Simon Chesterman, “Leading from Behind”: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya*, 25 *ETHICS & INT’L AFF.* 279–85 (2011).

very word “genocide”,³² the one true faith of global administrative law³³—all are examples of the observer turning participant. All are attributable to the work of academics not just documenting but creating the path of international law.

III. THE VIEW FROM BELOW

A second reason to push back against this social science manifesto is that, in addition to being analytically questionable, it is normatively undesirable. Politically, the project of international law remains unfinished.

If Oppenheim had been successful in his call for international lawyers to embrace a scientific method a century ago, few of the advances mentioned in the previous section would have happened. Oppenheim acknowledged, of course, that international law was a work in progress, that it was necessary for writers, “and in especial the authors of treatises, . . . to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like.”³⁴ But there were limits: “the international jurist must not walk in the clouds; he [*sic*] must remain on the ground of what is realizable and tangible. It is better for international law to remain stationary than to fall in the hands of the impetuous and hot-headed reformer.”³⁵

Once more, Chilton, Ginsburg, and Abebe are aware of this also: they devote a whole paragraph to each of feminism and TWAIL.³⁶ They might respond that these are simply different projects: I am writing from an unashamedly “internal” angle; their approach is “external.” But the permeability of these borders is important.

The social scientist, Chilton, Ginsburg, and Abebe argue, is “engaged in a positivist enterprise of trying to describe the world as it is, rather than how it should be.”³⁷ Taking international law “as it is” *is* a normative position, however—and in a way different from the maximalist claim that that is true of everything in the world. Because the international law academic—more, I would argue, than perhaps any other discipline—has the potential to affect the subject matter of the study. We are not scientists merely observing the phenomena around us. When U.S. Chief Justice John Roberts claimed in his confirmation hearings that his job

³² WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 25 (2000).

³³ Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

³⁴ L. Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT'L L. 313, 315 (1908).

³⁵ *Id.* at 318.

³⁶ Chilton, Ginsburg, and Abebe, *supra* note 3, at __nn.47-52.

³⁷ *Id.* at __n.70.

was merely “to call balls and strikes,”³⁸ knowing pundits rolled their eyes. No ICJ judge would be foolish enough to make such a sporting analogy. Or if they did, they would at least concede that their role might well be to call balls and strikes—after they have negotiated where the strike zone was going to be on that particular day.

Assuming or stipulating a measure of objectivity does not dispense with partiality and partisanship; it merely masks it. That does not mean that the impact of the academic—or the judge—need be nefarious. It does not even mean that they will have an impact at all. But they can, and sometimes they will. Being open about that impact and responsibility does not guarantee that the project of international law will be a liberating one. Hopefully, however, it reduces the likelihood that international law will be frozen in time, limiting thereby the voices that can be heard and the emancipatory projects that remain unfinished.

IV. ABOUT THOSE CATS

Which brings me, finally, to the labored double-metaphor of my title.

“Herding cats” is, of course, the adage that points to the difficulty—some would say the futility—of controlling or organizing entities that are inherently uncontrollable.³⁹ States are, manifestly, not cats. But, like cats, their respect for authority is episodic at best; when they do not get their way, they may hiss, spit, or draw their claws. Various international relations theorists have drawn on this analogy to describe what Hedley Bull termed the “anarchical society.”⁴⁰

Schrödinger, in turn, is a reference to the famous thought experiment in which a cat—somehow having been herded into a box—can be both alive *and* dead, due to its fate being tied to a random subatomic event. Only when the box is opened will the cat’s fate be revealed or resolved.⁴¹ It should be stressed that Erwin Schrödinger intended this as a joke to demonstrate the absurdity of quantum dynamics in the 1930s. Nonetheless, it has come to be taken more seriously as illustrating that some phenomena only exist in any meaningful sense when they are observed.

In the same way, the status of many international legal questions—more so, I would argue, than most phenomena, including human phenomena—remain ambiguous until they are studied. Indeed, some would argue that they can remain

³⁸ “I Come Before the Committee With No Agenda. I Have No Platform”, N.Y. TIMES (Sep. 13, 2005).

³⁹ Cf. HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester A. Crocker, Fen Osler Hampson, and Pamela R. Aall eds., 1999).

⁴⁰ HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977).

⁴¹ John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper*, 124 PROC. AM. PHIL. SOC'Y 323 (1980).

ambiguous. The late, great Tom Franck, writing on the question of humanitarian intervention, once observed that sometimes such conduct is lawful, sometimes, it isn't, "and sometimes it both is and isn't."⁴² I happen to disagree with Tom about that one,⁴³ but his point about legal indeterminacy—the lacunae of which I spoke earlier⁴⁴—runs through much of modern international law.

This, then, is the more serious criticism of the turn to empiricism in international legal scholarship, exemplified by this symposium: that it risks reducing some of the most interesting questions to yes and no answers, or to problems of coding. The lead article essentially concedes this, with the example of ongoing debates over the effectiveness of international human rights agreements.⁴⁵ Despite using "similar data," different conclusions are reached—though there is said to be agreement that "social science should be the way that debate is resolved."⁴⁶ As those methods become more sophisticated and opaque—as we move from regression analyses to machine learning and artificial intelligence—we are beginning to see the limits of such approaches, at least in relation to inherently contested areas of life like law in general and international law in particular.⁴⁷ Such approaches are useful and effective when "facts [can be] ascertained"⁴⁸ and when it is possible to maintain an "aversion to normative commitments."⁴⁹ But if one concedes that, for most of the most interesting questions in international law, facts are contested and determining norms is half the game—if one concedes that the cat could be either alive *or* dead *or* somewhere in-between—then social science methods alone may not be the answer.

To their credit, Chilton, Ginsburg, and Abebe do not claim theirs is the best or the only valid approach to researching international law. Their aim is to "build bridges" between the practice of international law, legal academy, and social science departments. Without wanting to wholly align myself with the "critical" school as discussed in their article, an *uncritical* acceptance of these methods risks building a bridge to nowhere.

⁴² Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 204, 204 (J.L. Holzgrefe and Robert O. Keohane eds., 2003).

⁴³ SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001).

⁴⁴ See Weil, *supra* note 19.

⁴⁵ See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

⁴⁶ Chilton, Ginsburg, & Abebe, *supra* note 3, at __nn.76-78.

⁴⁷ See SIMON CHESTERMAN, WE, THE ROBOTS? REGULATING ARTIFICIAL INTELLIGENCE AND THE LIMITS OF THE LAW (forthcoming 2022).

⁴⁸ Chilton, Ginsburg, & Abebe, *supra* note 3, at __n.75.

⁴⁹ *Id.* at __n.73.

To end where I began, the subject of international law itself has always been ambivalent about its own status. I struggle to think of a discipline that has spent so much time and ink agonizing over the very words that should define it. The debate we are having is therefore as familiar as it is healthy. Moving forward, I fully expect to see more work taking up Chilton, Ginsburg, and Abebe's invitation to bring a social science approach to the study of international law.

And I, for one, look forward to fighting against it.