

TOWARDS BEHAVIORAL INTERNATIONAL LAW AND ECONOMICS

A COMMENT ON *ENRICHING RATIONAL CHOICE INSTITUTIONALISM FOR THE STUDY OF INTERNATIONAL LAW*

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I. INTRODUCTION

In his contribution to this issue, Kenneth Abbott discusses the question of which social science paradigm should be used to analyze international law (IL) and proposes to enrich rational choice institutionalism with elements of constructivism.¹ This presupposes the usefulness of social science for the doctrinal work of lawyers; something well accepted in the United States, but still debated in Europe. This comment starts one step ahead and asks if and where social science may enter legal scholarship in order to clarify and offer a framework for discussion. It then proceeds to the question of enriching rational choice approaches to international law.

The Law and Economics movement has not been as well received and influential in European legal scholarship as in the United States.² On the contrary, many European scholars explicitly eschew that approach or declare it incompatible with a Kantian based approach to law, stressing a nonconsequentialist, deontological approach, fearing for the neglect of “justice,” and stressing doctrinal work as the foremost task of a lawyer. The reception of economic analysis of law including its development as Behavioral Law and Economics has thus been rather cautious

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1. Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5.

2. For an explanation, as well as an empirical examination on the relevance of Law and Economics at European Law Schools, see Oren Gazal-Ayal, *Economic Analysis of Law and Economics*, 35 CAP. U. L. REV. (forthcoming 2007) (manuscript available at <http://ssrn.com/abstract=901164>).

and slow. Whereas in areas such as economic analysis of competition or private law areas such as contract law, Law and Economics has been more successful in Europe, public law such as constitutional or public international law has been almost entirely neglected.³ The above-mentioned reservations seem to apply more forcefully here than in private law areas. Two main characteristics of Law and Economics draw objections from European scholars and prevent a more successful reception of Law and Economics in Europe: one is the normative relevance of the efficiency criterion, the other is the positive rational choice approach. Where the former is seldom used in International Law and Economics, the latter has been “softened” through the developments in behavioral economics at least in national Law and Economics. Its relevance for International Law and Economics has yet to be discovered and faces special difficulties, but may be suggested as a way of narrowing down the gap between European, more constructivist approaches to International Relations (IR) and rational choice approaches to IR. To quote Andrew Moravcsik: “Theory synthesis is not only possible and desirable but is constitutive of any coherent understanding of international relations as a progressive and empirical social science . . . theories ought to be treated as instruments to be subjected to empirical testing and theory synthesis”⁴

The discussion about the merits of International Law and Economics in Europe is twofold, which may be difficult to understand for differently trained and cultivated U.S. legal scholars. The first discussion is concerned with the relationship of social science and the law generally: *if and where* social science approaches may be relevant to legal analysis. The second discussion is concerned with the question of *which* social science paradigm is best suited to answer questions related to law. Although the first discussion is mirrored in most European comments in this symposium issue, the second is the focus of Kenneth Abbott’s paper.

This short comment on Abbott’s article seeks to clarify some methodological misunderstandings on what Public International Law and Economics can do, and how it fits methodologically in the more legal positivist thinking of European International Law scholarship. Part II will make use of an old classification of epistemic approaches to law in an attempt to clarify methodologically where social science, and more precisely rational choice analysis, has its place in the realm of international legal scholarship. This should help to mitigate some still prevailing misunderstandings and confusions in the European discussion on International Law and Economics. Part III follows the suggestions of Kenneth

3. This was one reason the symposium organizers held the discussion on International Law and Economics in Europe: in order to mitigate misunderstandings and discuss the potential for, as well as the potential limits of, economic analysis in the area of public international law.

4. Andrew Moravcsik, *Theory Synthesis in International Relations: Real Not Metaphysical*, 5 INT’L STUD. REV. 131, 131 (2003).

Abbott to enrich institutionalism. Whereas most European international law scholars agree that there is a place for social science somewhere in law,⁵ they tend to be skeptical of individualistic rational choice approaches and prefer constructivist approaches to law, as well as system theory;⁶ the latter not being testable empirically.⁷ Following Abbott's suggestion to enrich rational choice institutionalism, I would cautiously like to suggest a look at behavioral economics where appropriate. Part III briefly discusses the problem of which specific characteristic of the rational choice theory may be used—and when. Part IV advocates for cautious application of Abbott's approach.

II. METHODOLOGICAL CLARIFICATIONS

Traditionally, three categorical statements are possible in law, meaning that lawyers may take three different perspectives or roles.⁸ Hermann Kantorowicz introduced that type of distinction first,⁹ followed by Max Weber¹⁰ and Hans Albert,¹¹ as well as some of the legal sociologists in the German speaking countries.¹² Of course, classifications are never right or wrong but only more or less useful. Kantorowicz composes an epistemological trilogy¹³ consisting of the normative perspective (Wertwissenschaft)¹⁴ (in the social science sense), the sociological perspective (Realwissenschaft), and the dogmatic perspective (Normwissenschaft). He also distinguished between the general level of knowledge and the specific level of knowledge within those three columns.¹⁵

5. Banning social science as irrelevant for the study of law—law application as well as legal policy—would not even be faithful to the father of legal positivism, Hans Kelsen. There is consensus that social reality is relevant to the understanding of the law. Once that is accepted though, it seems difficult to defend individual lawyer's intuition as the social science "theory" to be admissible, either in court or in parliament (no matter how correct their intuitions may or may not be).

6. See NEUE THEORIEN DES RECHTS (Sonja Buckel et al. eds., 2006).

7. NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 34–41(1998) (stating that system theory does not even intend to empirically validate its descriptions). For social scientists, such as economists, trained in the tradition of critical rationalism of a Popperian kind, that is difficult to accept as a scientific approach.

8. For extensive discussion, see ANNE VAN AAKEN, RATIONAL CHOICE IN DER RECHTSWISSENSCHAFT (2003).

9. HERMANN KANTOROWICZ, RECHTSWISSENSCHAFT UND SOZIOLOGIE (1911).

10. Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 285 (2006) (attributing this classification to Max Weber). Weber neither used this categorization in *Sociology of Law* (1921) nor in *Objectivity in Social Science and Policy* (1904), though he of course always made a sharp distinction (as Kantorowicz did) between normative and empirical knowledge. Weber also knew Kantorowicz's work as he commented on the book RECHTSWISSENSCHAFT UND SOZIOLOGIE in 1911. See BIBLIOGRAPHIE ZUR MAX WEBER-GESAMTAUSGABE 13 (2002), available at <http://www.mohr.de/mw/pdf/MWG-Bibliographie2002.pdf>.

11. Hans Albert, *Erkenntnis und Recht. Die Jurisprudenz im Lichte des Kritizismus*, in RECHTSPHILOSOPHIE ODER RECHTSTHEORIE? 289 (Gerd Roellecke ed., 1988).

12. See, e.g., MANFRED REHBINDER, RECHTSZOLOGIE (2000); HUBERT ROTTLEUTHNER, RECHTSTHEORIE UND RECHTSZOLOGIE 13 (1981).

13. KANTOROWICZ, *supra* note 9, at 69 ("erkenntnistheoretischer Trialismus").

14. Bodansky, *supra* note 10, at 286 (calling this the "ethical perspective").

15. KANTOROWICZ, *supra* note 9, at 92 (generalisierende und individualisierende Erkenntnis).

The normative perspective includes questions of how IL ought to be. On a general knowledge level this is meant to be legal philosophy: what kind of goals IL should pursue. The specific level includes legal policy questions, such as how to design international institutions (*de lege ferenda*) with a view on achieving the stated goals, including the effectiveness of the law. The discussion on which goals are to be pursued and how they are to be justified (e.g., efficiency, peace, certain human rights, preservation of global public goods) thus belong to the normative perspective. The question of how best to pursue them, though, necessarily includes social science knowledge; norm idealism without a reality check is at best naïve, at worst untruthful. Although the normative criterion of efficiency was especially criticized in Europe, as well as in the United States,¹⁶ it is not of the same importance and rarely used in International Law and Economics. This allows me to confine the discussion to the debate on the sociological column.

The second column entails the sociological perspective or positive explanation in the social science sense. Here, descriptive, explanatory and prognostic questions can be asked. Usually one proceeds by developing a hypothesis which should be empirically tested. Here, the causes and effects of IL come to the fore, depending on whether IL is used as *explanans* (independent variable) or *explanandum* (dependent variable). Only that kind of knowledge enables IL scholars to look at the problem structure underlying IL, and explain or prescribe law-making procedures or monitoring mechanisms for certain issue areas of IL. Furthermore, explaining the effectiveness of international human rights treaties or international trade treaties, for example, needs a view on the underlying problem structure (mostly modeled in game theoretic terms) in order to know why some monitoring mechanism works in one issue area but not in the other.¹⁷ Here again, one may distinguish the general from the specific level. Whereas on the general level discussions on the merits of different social science theories and their respective hypotheses take place (e.g., rationalist vs. constructivist views on how IL functions), on the specific level, a scholar may work empirically on a specific issue and try to validate a hypothesis. I agree with Abbott on this part: rational choice analysis should be taken as a basis and a starting point, but needs to be enriched. That question will be further discussed in the next Part.

Last, but not least, there is the third column which is the genuine domain of international lawyers, namely the doctrinal perspective, which Kantorowicz called “Normwissenschaft,” or in legal theory would be

16. See Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

17. This is nothing other than the argument Andreas Zimmermann makes with respect to the question of why there was never a state complaint under Article 41 of the International Covenant on Civil & Political Rights (and only very few under Article 24 European Convention on Human Rights). See Andreas Zimmermann, *Is It Really All About Commitment and Diffusion?*, 2008 U. ILL. L. REV. 253. The relevant question is what kind of incentives are set by *erga omnes* obligations: do they carry their weak enforcement within themselves due to the incentive structure?

called “Rechtsanwendungswissenschaft” (science of law application). European international lawyers tend to concentrate on that column. Here again, two levels may be distinguished: methods of interpretation on the general level and doctrinal analysis on the specific level. An example for the first would be the discussion whether a legal comparative or a consequentialist argument (Folgenargument) is permissible as an interpretative method. Examples for questions on the second level are whether the invasion of Iraq violated the UN charter,¹⁸ how to understand the potential victim requirement under the standing norms of regional human rights treaties or whether a country in severe economic crisis could justify its necessity measures under Article 25 of the International Law Commission Draft on State Responsibility or respective essential security escape clauses in Bilateral Investment Treaties. Here, an IL scholar takes the perspective of a judge, a legal advisor to government or a lawyer for her client and asks first of all what the law is. No matter what kind of norms (soft or hard) are relevant for changing states’ behavior, only the sources of IL as stated in Article 38(1) of the International Court of Justice Statute are relevant for this task.¹⁹ On questions of legal validity, legal positivism is still the way to go.²⁰ However, it is more silent on the second step: the question of permissible interpretative methods.

Those columns or perspectives do not stand unconnected to each other. Positive explanation can be used to derive normative critique; positive explanation is indispensable for the pursuit of certain goals.²¹ This shows again how closely interconnected the three columns are. On questions of legal policy and institutional design, there is broad consensus that social science should be taken into account. The differences in view arise more forcefully on the question of law application; that is the

18. This example is taken from Bodansky, *supra* note 10, at 285.

19. The debate on the importance of soft law is exploding. Nevertheless, even if one assumes the importance of soft law for changing states’ behavior, e.g., Eibe Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 EUR. J. INT’L L. (No. 2) 58, 58–60 (1991), there seems to be a wide consensus that the sources of international law should not be extended (though of course there is a wide discussion on the importance of soft law as a means of interpretation of hard law or its role in forming customary international law). See Daniel Thürer, *Soft Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 452 (Rudolf Bernhardt ed., 2000). For a different view including soft law as a source of law, see Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823, 1878–83 (2002).

20. This is a small problem for treaties: they are valid through consent even if not effective. Consent would also still be needed on a “constitutional level,” even if there is a delegation of lawmaking to International Organizations. For a game theoretical analysis of the trend of eroding the traditional consent model in IL, see Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71. The problem is greater with Customary International Law, where sociological factors might be necessary in order to determine its validity and a confusion of doctrinal and sociological perspectives might result. Nevertheless, this requirement also leads to misunderstandings on the validity of Customary International Law. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23–43 (2005); Anne van Aaken, *To Do Away with International Law? Some Limits to ‘The Limits of International Law.’* 17 EUR. J. INT’L L. 289, 297 (2006) (book review essay).

21. See generally Daniel A. Farber, *Positive Theory as a Normative Critique*, 68 S. CAL. L. REV. 1565 (1995).

extent and the way by which the normative and the sociological perspective may enter the doctrinal perspective.²² Here, the difference between European and American IL scholars may be the largest; the latter being generally more open to the normative as well as the sociological than the former, although the wording of the text²³ is well accepted as a limit (with all its own known problems). There is more room for the integration of social science insights with regard to institutional design than with regard to law application. The difference of reception of social science insights between lawmaking and law application is a matter of degree, not principle. Having said that, legal science as practiced in Europe and Germany lacks social science competence; the doctrinal perspective is strong as a hermeneutical science only. Once it is accepted that reality enters legal application, lawyers are forced to look at their neighboring disciplines. All this sounds terribly familiar to U.S. scholars, but is still debated within German and European scholarship.

Some interpretative methods not only leave open a window for social science knowledge, but even demand it, for example in teleological interpretation,²⁴ in comparative interpretation, in openly consequentialist argumentation or within the principle of proportionality (e.g. necessity under Article XX(b) of the GATT or Article 1 of Protocol No. 1 to the ECHR). Thus, rational choice, if accepted as a social science paradigm, may enter the interpretation of IL through various interpretative methods—and already does so. The famous statement by Anne-Marie Slaughter that international relations as a social science approach can make international lawyers better *lawyers*,²⁵ reflects this understanding. Oftentimes in Europe, however, elements of social science enter the interpretation by everyday intuition of the respective law applier,²⁶ who

22. See the old-new theoretical reflections on what constitutes “legal science” in Germany, in *DAS PROPRIUM DES RECHTS* (Christoph Engel & Wolfgang Schön eds., 2007), as well as *WAS IST UND WOZU EINE RECHTSWISSENSCHAFTSTHEORIE?* (Matthias Jestaedt & Oliver Lepsius eds., forthcoming 2007).

23. Vienna Convention on the Law of Treaties art. 31(1), May 22, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (directing “ordinary meaning to be given to the terms of the treaty”).

24. Object and purpose as mentioned in *id.* art. 31(1).

25. Anne-Marie Slaughter, *International Law and International Relations*, 285 *REC. DES COURS* 12, 26 (2002); see also Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT’L L.* 367 (1998). For an early argument, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335 (1989).

26. Robert D. Cooter, *The Minimax Constitution as Democracy*, 12 *INT’L REV. L. & ECON.* 292, 292 (1992) (“For two millennia lawyers and legal theorists in the West used the same reasoning as the man in the street to predict how people will respond to laws. Legal scholarship knew no behavioral theory beyond common sense.”). The same criticism can be found in Europe. See, e.g., Peter Noll, *GESETZGEBUNGSLEHRE* 27 (1973) (“Wo empirische Überlegungen bei gesetzgeberischen und richterlichen Entscheidungen selbst beim Rückzug auf normenidealistische Positionen unvermeidlich sind, werden selten mehr als *vulgärsoziologische oder vulgärpsychologische* Erkenntnisse bemüht.”). Though this still holds largely true, the German Constitutional Court recently reasoned openly with a law and economic approach for the first time. See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Dec. 12, 2006, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2576/04 (¶ 67) (F.R.G.).

sometimes smuggles in either her own social science intuition (sociological perspective) or hidden value judgements (thus a category from the normative/ethical perspective) without making the epistemological status of the argument clear and without thus enabling open critique and discussion.²⁷ Furthermore, in the United States, sometimes normative statements are hidden under the cover of positive science in economic analysis of law—not contributing to the acceptance of Law and Economics in Europe. Epistemological obscurities thus contribute to misunderstandings, especially concerning the application of Law and Economics; an epistemologically clear discussion could mitigate those misunderstandings.

III. WHICH RATIONAL CHOICE THEORY?

Which social science paradigm should be used for legal analysis? Abbott suggests in his article to enrich Institutionalism by other approaches of international relations scholarship. He distinguishes basically rationalist (liberalism, institutionalism, realism) from constructivist approaches describing the main schools of thought in IR theory; something not to be repeated here. The rational choice approach and the constructivist approach are seen as complementary, not contradictory.²⁸ I am very sympathetic to that approach and would like to suggest two bridges of complementation. One is the deliberative bridge based on procedural rationality, the other the behavioral economics bridge of cognitive and motivational “biases.” Both are not necessarily contradictory to a classical rational choice approach to law but refine or complement it. Due to space restrictions, little more can be done than to highlight those bridges already under construction and to ask some further questions, highlighting problems and suggesting further research.

Let me begin with a preliminary remark: explanatory parsimony is one of the foremost and indispensable requirements of good science. This is sometimes misunderstood by lawyers when they complain about undercomplexity of modeling. Without abstraction there is, however, no academic knowledge. If for the purposes of a research question, the model (not necessarily rational choice in the form of game theory) is sufficient to answer the question, it is incompatible with parsimony to add on complexity through more variables. This holds even if more complicated models of rationality/bounded rationality are applied; they should be used only if necessary for the explanation. For example, Lawrence Helfer can answer his research question on the eroding principle of consent in IL by using classical rational choice game theoretical tools for a

27. The latter was one of Hans Kelsen's main critiques of his colleagues. See Hans Kelsen, *REINE RECHTSLEHRE*, in *Foreword*, *PURE THEORY OF LAW* (1st ed. 1934).

28. See James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in *HANDBOOK ON INTERNATIONAL RELATIONS* (Walter Carlsnaes et al. eds., 2002).

range of treaty constellations.²⁹ Maybe some areas, such as human rights or environment, need “enrichment” in order to explain a phenomenon, such as that of compliance, but the first try would always be a game theoretical model based on rational choice.³⁰

Whether the state is taken as a black box, whether it is broken up and analyzed as a two-level game (from bottom up or vice versa, i.e. the influence of IL on the national level), or whether nonstate actors are taken into account, again depends on the appropriateness of the research design regarding the research question. If the state is taken as a black box, that may be done as a shorthand aggregation of individual actions, but the choice of the researcher may be debated for its appropriateness. The question of aggregating individual choices to a coherent “preference function” is loaded with difficulties which cannot be discussed any further here.³¹ Also, is it permissible to attribute certain rational choices to collective actors, i.e. state or nonstate collective actors? It may pose a problem in the moment that one deals with limits of rationality, emotions and, preference changes. Though all these problems have been discussed already on the level of individual decision making, they might be more complex for collective actors. But difficulty in obtaining knowledge should not prohibit the attempt. And it is preferable to have imperfect, reversible knowledge over having none.

Having said that, let me nevertheless follow Abbott in enriching the rational choice paradigm when and where appropriate, keeping in mind his question, “To what extent can rationalist institutionalism be enriched without destroying it?,” as well as his cautionary note, “[T]he precise answer is impossible as the relevant research remains at an early stage.”³²

The classical rational choice approach looks at the outcome utility of decisions (“logic of consequences”) and—in spite of many variants of thin and thick notions of rationality—is defined by two central assump-

29. See Helfer, *supra* note 20.

30. See, e.g., Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155.

31. For a more extensive discussion see VAN AAKEN, *supra* note 8, with further references.

32. Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, J. INT'L L. & INT'L REL. 9, 18, 28 (2005). For further discussion, see also Kenneth Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141, S141–42 (2002), stating that

[t]he disciplines of international law and international relations (IR) are split between two seemingly distinct and 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.

tions: methodological individualism and purposeful action. The first assumes that social outcomes are the result of individual interaction,³³ whereas the second assumes that actors (individuals, but for simplicity also organizations or states) are able to maximize a complete and transitive preference ordering over outcomes. Action is the result of (in the short run stable) preferences and restrictions. Though generally certain preferences are assumed, such as profit for firms or power for states, the theory is in principle agnostic over what affects preferences.

One bridge-building suggestion would be to take into account procedural rationality which leads to questions of effectiveness of law through legitimacy (in a positive social science sense).³⁴ This bridge deals mainly with motivational reasons for action. Some approaches distinguish outcome from procedural utility and try to measure the latter.³⁵ Although outcome still matters, it might be complemented by research focusing on procedures. The core of the question is (1) whether the procedure, the conditions under which a decision is taken, matters for the acceptance of a decision or norm as legitimate, and (2) whether legitimacy leads to rule following. Two background theories are possible here: the more normative one is discourse theory based on communicative and procedural rationality,³⁶ and the more positive one is of a psychological background.³⁷ Both are, or can be, formulated in hypotheses and can be or have been tested empirically. A particularly important factor in the effectiveness of institutions is the promotion not only of extrinsic, but also of intrinsic, motives for an individual's compliance with rules, as this fosters compliance and diminishes surveillance costs. The participants of the discourse will regard the fact that the discourse conditions are adhered to as a sufficient condition for compliance with a rule.³⁸ The thinking behind Discourse Theory has been supported by experiments which study the motives for complying with rules and established a link with legitimacy.³⁹ For rule following and the acceptance of authoritative decisions both, a normative and an instrumental perspective of

33. JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 5 (1990).

34. For a more extensive elaboration, see Anne van Aaken, *Deliberative Institutional Economics, or Does Homo Oeconomicus Argue?*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* (Anne van Aaken et al. eds., 2004).

35. See Bruno S. Frey & Alois Stutzer, *Beyond Outcomes: Measuring Procedural Utility*, 57 *OXFORD ECON. PAPERS* 90, 90 (2005); Bruno S. Frey et al., *Introducing Procedural Utility: Not Only What, but Also How Matters*, 160 *J. INSTITUTIONAL & THEORETICAL ECON.* 377, 377 (2004).

36. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 222–25 (William Rehg trans., 1998); JÜRGEN HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS* (1988).

37. Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in *THE PSYCHOLOGY OF LEGITIMACY* 416, 416 (John T. Jost & Brenda Major eds., 2001).

38. See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 22 (Alan Hamlin & Phillip Petit eds., 1991) (“[T]he participants suppose that they can act from the results, taking the fact that a certain decision is arrived at through their deliberation as a sufficient reason for complying with it.”).

39. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–7 (1990); Tyler, *supra* note 37, at 432–33.

rule following is found. The latter, instrumental perspective, is based on the rational choice model and assumes that people comply with rules because of external incentives. It is supposed that the results of legal proceedings, for example, are accepted only if they are thought to be beneficial in result. Intrinsic motives are found if procedures are regarded as fair, meaning that a person may not only expect a fair result but foremost a fair procedure, e.g., that she can express opinions and is given good and impartial reasons for a decision. In short, “not experiencing fair procedures undermines legitimacy”⁴⁰ and lack of legitimacy undermines compliance.

The most prominent theory of legitimacy in international law holds that states are pulled toward compliance by considerations of legitimacy and distributive justice.⁴¹ The fundamental idea underlying this theory is that states obey rules perceived to have “come into being in accordance with the right process.”⁴² This theory has not been empirically tested as such (just as discourse theory is not empirically tested as such) but can be validated through psychological testing at the individual level. A transposition onto the international sphere is problematic, but could be a project for further research. Do participatory and “fair” procedures of norm generation and law application lead to more legitimacy on the international plane? That question may be tested not only in *amicus curiae* participation before the WTO Appellate Body or under Article 37(2) of the new rules of procedure of the ICSID-Convention in international investment disputes, but also through (soft) law making of conventions (e.g., participation of NGOs as in the UN Convention against Corruption) within standard setting bodies such as the Codex Alimentarius Commission or the Basel Committee of Banking Supervision, or through requests for the participation of local population in the construction of World Bank financed infrastructure projects. Last but not least, there is an issue concerning the “ownership” of developing countries for programs implemented by the World Bank. However, a difficulty remains concerning the relevant actors to be tested for their perception of legitimacy.

Although legitimacy may be a very relevant factor for compliance, other scholars focus on the “discipline of shame,” using a psychological game theoretic model to test compliance with international environmental agreements⁴³ and relying on the manifold enrichments of rational

40. TYLER, *supra* note 39, at 172.

41. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7–9 (1995); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 18–26 (1990); OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 111, 135–36 (2005); Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2641–45 (1997).

42. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 706 (1988).

43. Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. S237 (2002).

choice theory with emotions.⁴⁴ Drawing on the insights of cognitive psychology on two mental decision modes⁴⁵—one quick, intuitive, and emotional; the other deliberative, calculating, and slow—others apply emotional and deliberative control to issues such as terrorism.⁴⁶ Still other approaches use an expressive theory of international law,⁴⁷ again following insights which were first developed in national Law and Economics.⁴⁸ Here, the problem of testing comes to the fore as this theory is interested in norm internationalization and thus preference change.⁴⁹ Expressive law means that a social norm is internalized as a moral commitment that attaches a psychological penalty to a forbidden act. In the international realm, expressive law theory examines the potential of IL for changing the social meaning of a particular behavior by altering the social cost of undertaking that behavior.⁵⁰ Whereas reputational mechanisms may function as external incentives to comply,⁵¹ expressive law theory considers the nexus between law and social meaning. Law may cause individuals (or states) to alter behavior not only due to fear of sanctions but also due to a change in preferences.

The second bridge under construction takes into account the insights of behavioral economics for international law. Classical rational choice works with expected utility functions in individual choice behavior. In national Law and Economics, a concept of bounded rationality is ever more widely used. This line of research finds its most elaborate studies undertaken in a field known as experimental or behavioral economics⁵² (mainly based on cognitive psychology but also testing theories of fairness and motivational factors), which deals with the specific conditions (especially cognitive ones) in which individual decisions are made. Those approaches are increasingly applied to law.⁵³

44. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 67–70 (1988). For the international sphere, see Jonathan Mercer, *Rationality and Psychology in International Politics*, 59 INT'L ORG. 77, 92–99 (2005).

45. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697 (2003).

46. Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1067–73 (2005).

47. Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007).

48. See generally Robert D. Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

49. It is useful to keep in mind that there is a methodological reason for keeping one variable, namely preferences, stable in principle. If preferences and restrictions are changeable simultaneously, a change of behavior is not attributable to either.

50. That does plainly contradict the approach of GOLDSMITH & POSNER, *supra* note 20, at 9, who consistently exclude one specific preference from a state's interest calculus: namely the preference for complying with IL. 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.

51. See Guzman, *supra* note 19, at 1861–65.

52. For a survey of findings, see Daniel Kahneman, *New Challenges to the Rationality Assumption*, 3 LEGAL THEORY 105 (1997).

53. See BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000); RECHT UND VERHALTEN: BEITRÄGE ZU BEHAVIORAL LAW AND ECONOMICS (Christoph Engel et al. eds., 2007).

Does it make sense to transpose this approach to the international sphere? In my view, yes, if the research questions allow for it. Here again, caution is appropriate regarding the level of analysis. How easily can we transpose insights from individual cognitive biases to collective actors such as a state or an NGO? Or just assume a unitary actor is also subject to those biases? Here, it depends on the “biases” as well as on the research question.⁵⁴ It is impossible here to trace the vivid research in behavioral economics, but an example may suffice. Based on prospect theory,⁵⁵ there is plenty of evidence that individuals are more sensitive to changes in assets (of whatever those are constituted) than to net asset levels, and that they judge gains and losses from a reference point. This reference dependence might also be relevant for international law, perhaps with a view on border or trade disputes, but also relating to human rights. Framing the way a decision situation is drawn may even lead to preference reversals. That may again be relevant for the international sphere, e.g., in treaty negotiations, before international courts and tribunals, and in international conflict resolution generally. It may also give hints of how treaty texts are drafted: negatively, not taking from global commons, or positively, contributing to a public good.⁵⁶

IV. CONCLUSION

Law is the most formidable means of ordering societies and is becoming an ever more important means of ordering the international community, by influencing national lawmaking and adjudication. Once this proposition is accepted, consequentialist reasoning has to be accepted (though it does not need to exclude deontological reasoning). It follows that the question of what kind of consequences result from IL is a central question lawyers should ask in their daily work of doctrinal analysis. Second, lawyers may question which kind of social science paradigm is most appropriate. Few international lawyers would deny that states (as “imagined communities”⁵⁷), act in predominantly rational ways. Even in doctrinal work, this tacit assumption prevails. It is time to discuss underlying assumptions and replace everyday intuition on conse-

54. For a two-level game theoretic analysis including uncertainty of actors (though not necessarily biases), see GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* (1995).

55. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 *ECONOMETRICA* 263 (1979).

56. For elaborations with examples, see Jack S. Levy, *Prospect Theory, Rational Choice, and International Relations*, 41 *INT'L STUD. Q.* 87 (1997); Jack S. Levy, *Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict*, 17 *INT'L POL. SCI. REV.* 179 (1996).

57. Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *MOD. L. REV.* 1, 1 (2007). Here, economists would agree with constructivists: states are no more than imagined entities. Only individuals can act. Nevertheless, the reasoning behind the critical view on holistic thought differs.

quences in legal reasoning with explicit social science paradigms that can be empirically tested.

It seems appropriate to reproduce insights of national-level theories of law on the international level with the mentioned caveats. Therefore, it makes sense to apply, where appropriate, Behavioral Law and Economics or deliberative theories of legitimacy to the international realm. As argued above, this needs to be done cautiously as the aggregation problem in collective actors is prominent and not to be underestimated. It is nevertheless worth a try, and Kenneth Abbott's article is one step toward reconciling different theories in the interest of knowledge in international law and international relations; a prospect too promising to avoid pursuing further.

