Trachtman / Drezner Final Exam, IL/IR Seminar, P207 -- Student No. 6

1) **One world, two optics: what can IL and IR scholarship offer each other?**

After establishing the historical backdrop in which international law (IL) and international relations (IR) operate with and against each other, I examine the two aspects of your question in turn. First I look at how IL scholarship can inform IR, focusing on procedural, legally technical, and theoretical frameworks. I then look to how IR can strengthen IL, focusing on empirical fact corroboration, the breadth and scope of IR relative to IL, and the occasional necessity for IR pragmatism to rein in IL idealism.

However, since IR/IL have become more conversant with each other over the last few decades, and since norms and interests exist side by side, it is sometimes difficult to see where IL ends and IR begins. I therefore choose to follow constructed norms (insofar as a body of law is, at its root, a set of agreed-upon norms) and rational interests as representative of IL and IR. Such a divide is useful because "constructivism is ideographic, whereas rationalism is nomothetic";[1] my basic argument in reduced form, then, is that IL can present general theoretical frameworks which IR can, if the situation is ripe, attempt to test empirically.

The Historical Context

The historical relationship between IL and IR parallels the useful—if somewhat facile—spectrum that runs from "interest-based theories" to "norms-based theories",[2] or from what Keohane terms an "instrumentalist optic" to a "normative optic". (Keohane, 1997) If this spectrum were merely the positioning of IL at the norms-based end and IR at the interest-based end, this question would be much easier to answer. Instead, we see the above spectrum recreated *within* IR and *within* IL. Nonetheless, mainstream IR can be said to gravitate towards interest-based theories and mainstream IL can be said to gravitate towards norms-based theories.

To properly address the question of what IR can contribute to IL, and vice versa, it is necessary to understand where each discipline stands *vis-à-vis* the other. By looking

[1] Peter J. Katzenstein, Robert O Keohane, and Stephen D. Krasner, "*International Organization* and The Study of World Politics," from *Foundations of International Law and International Politics*, p. 11.
[2] Oona A. Hathaway and Harold Hongju Koh, "International Law and International Relations: An Introduction", *Foundations of International Law and International Politics*, p. 2.

at a century of the *American Journal of International Law*, Steinberg and Zasloff (2006) trace the development from classical legal thought[3] to legal realism to structural realism to rationalist institutionalism to liberalism to constructivism. Not surprisingly, the interests/norms pendulum, which swung violently from norms to interests with realism's attack on classical legal thought, has since settled—at least in the realm of theory—into the more 'centrist' rational institutionalism, with tugs coming from both constructivism on the norms side and various forms of realism on the interests side. While this argument creates a pleasing mental image of balance, it too is rather facile.

The realist attack on classical legal thought was a *normative* attack that saw the Kellogg-Briand Pact, "peace in our time", and the Maginot Line as utopian[4] acts that destroyed the very norms to which they were trying to adhere. Nonetheless, Waltz's structural realism represents the IR-skewed pendular limit of instrumentality and interests in self-defined opposition to IL's pendular limit of norms and normativity. Subsequent theory, whether IR or IL, is almost[5] never so polarized in this respect as were Elihu Root and Kenneth Waltz, Charles Evan Hughes and Hans Morgenthau.

On the IL side, McDougal and Lasswell's New Haven School began the steady shift back towards normativity by influencing socially positive effects through a power-based network of laws and enforcement mechanisms. On the IR side, buttressed by the work of the New Haven School and the international legal process scholars, Keohane and others' rationalist institutionalism brought rules—and, through them, norms—back into the fold. As with Waltz's attack on classical legal thought, however, a problem remained: some schools of rational institutionalism view institutions merely as a means to create Pareto-improving scenarios by overcoming collective action problems that otherwise impede cooperation and collaboration; in other words, this view of rational institutionalism can be purely interest-based.

To wrap up the historical overview, constructivism swings the pendulum back towards norms, at least in terms of the theoretical policy palette. Just as Morgenthau

[3] "Classicists generally believed that power and coercion could become far less prominent in world affairs through the development of international law." (Steinberg and Zasloff, 2006)
[4] "Utopian" in both senses of the world. In the original Greek, utopia means both "good place" (u-topos) and "no place" (ou-topos).
[5] Some still hold something resembling the banner of structural realism: see, for example, John Mearsheimer's attack on the utility of international institutions. (1994/1995)

looked to the behavioral revolution to attack classical legal thought, Wendt and other constructivists draw the Nietzschean lesson of self-creation and the secular humanist lesson of socially created 'post-postmodern' normativity. In this framework, interests cannot exist without a set of constructed norms dictating their flow and ebb.

What can IL do for IR, and norms for interests?

IR is already a profligate borrower, so borrowing some more from IL should be reasonably straightforward. IR borrows the prisoner's dilemma, the stag hunt, and various other models from game theory. It borrows cost benefit analyses from economics. It borrows from history, from political science, from classical literature, and so on. As a discipline, IL seems less inclined to borrow than does IR or its domestic legal counterpart (see, for example, the critical legal studies and law and economics schools of thought).

And yet, in some respects, international law can be viewed as a subset of international relations. Viewing the quad from our second day of class—international law, international institutions, international organization, international regime—as a series of concentric circles rather than as a continuum allows us to better understand what effects one circle has on another. And if IL is truly a subset of IR, which in principle comprises all four circles, why aren't IL's findings being transferred to IR in the first place? Most of the 'blame' can be attributed to legacy of IR's wholesale rejection of IL with structural realism.

What, then, does IL have to offer IR that IR is not noticing, not accepting, or slow to pick up? Principally, IL can offer the insight of Beth Simmons' work on the six principal international human rights treaties: that norms codified in international treaties can actually change the structure of domestic policy incentives, and that the supposedly monolithic interests of the unitary state are no longer sufficient to explain the observable changes taking place in global civil society. (Some IR theorists may respond to this: what changes? This is a debate for another paper.)

Parts of this insight can also be answered by rationalist institutionalism, which I have somewhat factitiously placed on the IR side. Koremenos, Lipson, and Snidal (2001) and Norman and Trachtman (2005), among others, would possibly argue that the

structure[6] of the organization can lead to the most efficient and Pareto-improving (e.g., non zero-sum) games among the various players.

This is not the same as Simmons' main insight: in my reading, Simmons is not merely stating that the organizational and—in the case of a regime complex for international human rights treaties *a la* Raustiala and Victor[7]—"thick" background affects the relative success of a project. Rather, the regime actually *changes* the incentives[8] in a way they would otherwise not have changed (barring exogenous factors). Some rationalists might again state that this is merely a reallocation of preference maximization, but the key constructivist insights are that interests are thoroughly mutable and that norms can actually change interests.

Of the range of insights that IL can offer IR beyond the norm/interest divide, two stand out: 1) IL can guard against IR's tendency to use words sloppily, and 2) IL can enrich IR with the procedural knowledge gleaned from a thorough understanding of legal process.

On the first point: in part because IR scholars vary so widely in background and in policy domain, they have a tendency to use words in very different ways in very similar contexts. This creates neither clarity nor precision, and should be avoided. IL scholars in a WTO context, for example, look exclusively[9] to the Shorter OED in Panel and Appellate Body proceedings. Such precision is obviously only available in clearly organized cases, and it is understandable that the same word can and should be used differently in different contexts, but the point remains.

On the second point: IL theorists can use their expertise in the understanding of procedural and legal structural issues to built "norm blueprints" which the IR scholar can then superimpose over the empirical data set and real world scenarios, both to see if the

[6] Koremenos *et al* refer to the five dimensions of membership, scope, centralization, control, and flexibility.
[7] In their words: "In a regime complex rules evolve against a thick backdrop of existing rules: there is no clean institutional slate on which actors pursue interests or wield power. This backdrop defines the regime complex but also generates its distinctive dynamics. In an international system characterized by increasing legalization, the lack of legal consistency that flows from differing and overlapping rules pushes states to seek resolutions and to negotiate broad rules." (Raustiala and Victor, 306)
[8] In short, "treaties influence the national policy agenda, they influence legal decisions, and they influence the propensity of groups to mobilize." (Simmons, ch. 4, 2) Or: "I argue that moral/legal talk cannot be assumed to be costless, for it risks changing the values, identities, and interests of potential beneficiaries." (Simmons, ch. 4, 34)
[9] And to the relevant provisions of the VCLT, the context, and the other languages in which the treaty was written.

norm blueprint fits the model and to see if the existing model can be adapted to the norm blueprint.

What can IR do for IL, and interests for norms?

At the basic level, IR can serve as a reality check to IL. Drezner's work on institutional proliferation (2008) provides such a check to the IL cheerleaders who categorically see more law as a positive development. Downs, Rocke, and Barsoom's (1996) work demonstrates a more general function of academic scholarship generally (to check for selection bias, strawmanning, and so on), but it also serves as a check on extending Chayes and Chayes' optimism regarding compliance to a broader optimism about cooperation. Just as constructivist IL scholarship can point out that narrowly-defined interest-driven theories can combine with expansive views of the self and unrealistic goals for absolute security to create what Neta Crawford terms "spirals of anticipation", interest-based scholarship can provide a contrasting but equally important anchor on norms-based IL scholarship.

IR can also provide IL with some much needed disciplinary breadth, even if much of what IR has to offer was itself lifted from game theory, economics, and sociology. Norman and Trachtman's *The Customary International Law Game* demonstrates such a borrowing of game theoretical and rationalist frameworks in a usually norms-driven field to develop a "repeated multilateral prisoner's dilemma model of CIL". (Norman and Trachtman, 542, footnotes omitted) Building heavily on the "social norm" literature as defined by Ellickson's *Order without Law*, Norman and Trachtman's piece demonstrates that norms-based IL frameworks don't have to be sacrificed to IR in order to accept what IR has to offer.

Finally, IR scholarship can capitalize on its self-claimed role as a social science in a way that "pure" IL scholarship cannot. Although Quine's logical positivism has been replaced by Kuhnian and Lacatosian frameworks, the 'science' of social science has historically sought to gain credibility by empirically testing the validity of hypothesis and attempting Popperian falsification to subject existing hypotheses to critical scrutiny. In this vein, IR can test IL's theories in a way that IL historically has less disciplinary acumen to test. (For a relevant example of such empirical scrutiny of IL, we could look to

Busch's upcoming work on BITs and PTAs.) Such a division of labor is also the most efficient use of a scarce resource (the scholars' time and resources), apportioning to each discipline the task it is relatively most efficient at completing.[10]

[10] Some IR scholars may get annoyed by this 'dumping' on them of the empirical drudgery. I am not saying that IR scholars should not write framework papers. Rather, IL scholars are less disciplinarily suited to address empirical validation than their IR partners who so strongly profess their social *scientific* credentials.

2) The causal nexus of compliance: reputation as one variable among many

> States are concerned about their international reputation. If they violate interstate agreements or fail to comply with international law, other actors will see them as [un][11]reliable partners. Most states comply with international law most of the time because of concerns about reputation.

If I were forced to simply choose 'agree' or 'disagree' with this statement, I would disagree. In reality, I partially agree. The statement contains many constituent parts. I agree that the large majority of "states are concerned about their international reputation" (part A). I agree that "if they violate interstate agreements or fail to comply with" *relevant* "international law, other actors will" tend to "see them as [un]reliable partners" (part B). And I agree that "most states comply with international law most of the time because of concerns about reputation" (part C) *and* from factors as diverse as "routine, to persuasion, socialization…acculturation", (Brewster, 4, footnote omitted) and even moral obligation.

I thus agree with the three parts of this passage with decreasing orders of certitude: part A is largely true, with a few potential outliers; part B is sometimes true as stated but is more often true with the caveats that issue domain reputations can be unconnected when mechanisms for issue linkage and cross-retaliation are lacking; and part C does point to a single causal factor explaining this paraphrase of Schacter's famous quote, but it does not sufficiency address the multivariable nature of assessing the causes of international legal compliance. I will address each part in turn.

Before I do so, it is important to point out one of the reasons why it is difficult to entirely reject a statement like this. In general parlance, a reputation can be defined as the extent to which one's past actions influence—via the perceptions of others and their resultant stances *vis-à-vis* the actor in question—one's range of potential future actions.

[11] This paragraph as written simply doesn't follow logically, let alone make sense. I must presume that you either meant to say "will not see them as reliable partners", "will see them as less reliable partners", or "will see them as unreliable partners". If the paragraph as written is correct, then I strongly disagree with it on the grounds that parts A ("States are concerned") and C ("Most states comply") of the excerpt simply don't line up with part B ("If they violate), rendering the whole self-contradictory.

As Rachel Brewster notes, however, "reputation has become the god in the machine that drives compliance with international law". (Brewster, 2) In other words, a over-broad interpretation of what "reputation" constitutes waters the phrase down to the point where it lacks much predictive power.[12] The more important question, as Brewster points out, is that "the central unanswered questions are *when* and *how* [reputation] matter[s]." (Brewster, 3)

To begin the analysis: **Part A** is generally true, and merits little attention other than to provide an overview of why states engage in 'costly signaling'. Only certain 'rogue states', like North Korea, run by a single powerful figure with relatively little interaction with the outside world and a short enough time horizon that the shadow of the future does not sufficiently impinge on the present to change policy course. Barring such examples, states clearly do attempt to foster, variously, a reputation[13] for legality, for tolerance, for the rule of law, for strong IP protection, for weak IP protection, and so on.

With the exception of such isolated authoritarian states, most states existing in the anarchical international system have incentives to engage in costly signaling in order to change the incentive structure of what would otherwise be a prisoner's dilemma into a cooperation game. Such signals come in a variety of forms—and can sometimes constitute mere 'cheap talk', in which case they're not really costly at all—and Simmons points to an important division in the treaty signing domain[14]: between ex ante costs and ex post costs, which can "screen" and "constrain", respectively. (Simmons, ch. 4., 8)

In her chapter on theories of commitment, Simmons divides states into three groups according to signal and policy reality: sincere ratifiers, false positives, and false negatives (or strategic ratifiers). (Simmons, ch. 3, 2) (I would also add a potential fourth group: sincere nonratifiers. The US position on capital punishment is a relevant case in

[12] A similar argument can be made for over-broad visions of what "rationality" constitutes, with the result that any behavior can be justified as rational (which then robs the theory of its ability to parse behaviors).
[13] An interesting example of how reputations matter comes from Scott Barrett's lecture on the difficulty-fraught Polio campaign when he was referring to the 'last man' to have Smallpox (from Nigeria? Sierra Leone?), and how he was almost not found because of the state's interest in not being known as the last state to harbor smallpox.
[14] I found it interesting that professor Chayes referred in class to reputation as "a cluster of treaty behavior." While treaty behavior definitely constitutes a large part of how a nation signals its 'type', there are other mechanisms as well, from public proclamations and summit meetings to the various aspects of government policy more generally (presuming interstate policy transparency…a big presumption, especially for those states where things like human rights treaties matter the most).

point, especially in light of last week's supreme court ruling) States' treaty behavior, supplemented by the facts available on the ground,[15] helps other states to see whether or not their signals are genuine or strategic.

Along with the view that sincere ratifiers are hampered by the actions of false positives, the potential variety of available reputations hits on the central weakness of **part B**: that states have different reputations in different domains, and, barring official linkage mechanisms (for example, the TRIPs Agreement's granting cross-retaliation rights), only the most severe breaches of trust in one policy region, or the presence of what Brewster regards as a state's "structural reputation",[16] will, more often than not, have effects beyond the domain of the issue in question.

Helfer's work on the Andean Tribunal of Justice's (ATJ) effect on IP protections in the otherwise law-weak Andean Community provides a case in point, if in a rather different context. Whereas the ATJ formed an IP "rule of law island" in intellectual property—and a resultant Andean reputation for resisting US-based big pharma interests in certain forms of 'TRIPs-plus' IP protection—neither the IP island nor the reputation for a strong regional rule of law has carried over into other policy domains. Granted, part B is talking specifically about "violat[ion of] interstate agreements or fail[ure] to comply with international law", but the broader point about the compartmentalization[17] of reputational domains holds. As Brewster mentioned in class, then, for reputation to support compliance, it is good to bleed across issue areas.

Building on Drezner's work about the dangers of regime proliferation and on the ILC's "Conclusions of the work of the Study Group on the Fragmentation of

[15] And, if the facts are not available, a total lack of transparency is often interpreted as a signal that the 'opaque' government has something to hide, which itself can have negative reputational consequences. Then again, one need only look to the US's history of trading with repressive gulf state regimes—or of providing more development aid to its strategic partners than to others—to question the effect of reputation on state behavior barring a significant popular outcry a lack of other strong incentives (such as petrodollars).

[16] Using the US as an example, Brewster asserts that 'structural reputations' would not enter into politician's policy calculus, insofar as an Obama administration has little incentive or ability to change a perception of "the US" as against a perception of "the Bush administration". I'm not entirely sure that I buy this argument. An individual's incentive to change a situation would correspond to the strength of her or his preferences and their relative realizability. If one's preferences are strong, and the structural reputation has severe adverse consequences, an actor definitely has incentives to at least work towards a change that future presidents and policymakers can continue to improve.

[17] According to Downs and Jones, (and as was stated in class,) "cabining" one's issue areas like this can lead to less compliance generally, which itself would provide a further incentive to promote linkage (if compliance is what we're seeking!).

International Law", it is also important to note that countries violating one international legal obligation may be doing so to adhere to another international legal obligation, such that the "other actors [that] will see them as [un]reliable partners" would be balanced by another set of actors with a different preference allocation who see them as increasingly reliable actors for having adhered to the latter law rather than the former. Thus could the US point to the Inter-American Convention for the Protection of Sea Turtles (and to CITES, for that matter) to justify their violation of GATT Article XI in the *US-Shrimp* case.

Similarly, if "failure to comply with international law" includes the act of not signing international law in the first place—which, in reputational terms, it clearly does (although Brewster points to the conflict of reputations inherent in Bush's unsigning of the ICC Statute)—Simmons points out that different states have very different incentive structures regarding the potential effects of international law on domestic law according to whether the state is legally monist or dualist, common or civil law, and federal or central. Whereas other states won't necessarily have sufficient information—or, more likely, interest—to realize why one state does or does not sign treaty X or treaty Y, such factors present additional reputational variables beyond compliance and violation.

This brings me to **part C**, which claims that "most states comply with international law most of the time because of concerns about reputation." Returning to my opening remarks about the scope of the word 'reputation', this sentence would be true if the word is allowed as broad a scope as is potentially conceivable. All other rationales could then be packed into the prismatic box "reputation", with the effect that the word reputation would lose most of its meaning. The fact that Helfer and Swain can take diametrically opposed positions on the effects of reservations (and "RUDs" more generally) on reputation says a good deal about the ambiguity of what a reputation is in the first place.[18]

Reputations clearly matter, and it would be foolish to dismiss them entirely. It is largely because of reputation—more specifically, an interest in signaling one's type—that Guisinger and Singer's forthcoming work on government proclamations in exchange rate

[18] As prof. Brewster pointed out in class, a popular reputation among various country's citizens is something very different from a legal reputation for compliance or non-compliance.

policy posits that governments that supplement their de facto fixed exchange rate with official declarations to that effect will experience lower rates of inflation.

If we limit the definition of reputation to within reasonable parameters, however, and if we acknowledge that reputations can have dispositive effects on policy decisions, we are back to asking one of Brewster's original questions: when does reputation matter, and how much? A robust causal explanation of why "most states comply with international law most of the time" requires a far more robust answer than "because of concerns about reputation". When is reputation the same as a desire to avoid sanctions? When is it different? When does a country comply merely out of habit, courtesy, or, in legal parlance, comity?

Different 'types' of states will have very different reasons for complying with international law. It may appear that the sincere ratifier is ratifying and complying for reputational reasons, especially if few other rational policy incentives (narrowly defined) present themselves. But they might simply be ratifying because of the "sincere" part of sincere ratifiers! Many IR scholars, and many rationalist-inclined IL scholars, may dismiss this distinction as a mere conflation of preference allocations, but the norm in question is something closer to duty than reputation.

In sum, although I partially agree with the statement in question, its failure to clarify a range of key issues focusing on the compartmentalization of reputations and the fragmentation of international law that leads to conflicts of law forces me to the conclusion that the statement is fundamentally lacking, especially in the empirically difficult domain of causation. Ironically, it may be precisely because causation and reputation are both so hard to properly order—one to attribute, the other to define—that the two are rather sloppily lumped together in part C.