International Law's Empire

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The Continent of International Law. By Barbara Koremenos. New York: Cambridge University Press, 2016.

How to Do Things with International Law. By Ian Hurd. Princeton, NJ: Princeton University Press, 2017.

Is International Law International? By Anthea Roberts. New York: Oxford University Press, 2017.

We live in and by the law. It makes us what we are. . . . We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.
—Dworkin (1986, vii)

q1 Scarcely a day passes without demonstration of the scope, power, and contentiousness of international law. In recent months, countries worldwide have retaliated against the United States for new aluminum and steel tariffs, which they believe violate international trade law. The United States and its allies have launched missile strikes against the Assad regime in Syria for violating international laws that prohibit the use of chemical weapons. And massive flows of migrants into Europe and the United States have prompted debates about the international legal obligations that rich and stable countries have toward individuals who flee poverty and violence in their homelands. These are just a few of the many contemporary examples of international law's empire.

Three new books offer diverse perspectives on the design, use, and development of international law. These books adopt diverse perspectives—rationalist, constructivist, and sociological—to examine the relationship between international law and politics. When viewed collectively, they demonstrate that political scientists have underappreciated the vast expanse of international law's empire, and they suggest a path forward. First, we must examine the diverse forms of international law. Second, we must analyze the uses of international law in influencing politics. Finally, we must consider how political-economic power affects the development of international law.

FORMS OF INTERNATIONAL LAW

In her new book, *The Continent of International Law*, Barbara Koremenos constructs a theoretical and empirical account of how states design international treaties to promote joint cooperation. She builds on the legalization and rational design schools of international cooperation, which includes a growing body of theoretical scholarship (Abbott et al. 2000; Johns 2014, 2015; Koremenos, Lipson, and Snidal 2001). Additionally, numerous scholars have examined empirical variation in the design of bilateral investment treaties (Allee and Peinhardt 2010, 2014) and preferential trade agreements (Baccini, Dür, and Elsig 2015; Johns and Peritz 2015; Kucik 2012). Koremenos bridges these issue areas and others, presenting a grand theory of the design of international treaties.

Koremenos begins with the assumption that states are rational actors, meaning that they have well-identified preferences over political outcomes and seek to achieve their preferred outcomes, given their beliefs about how other states will behave. She argues that the underlying nature of the strategic environment will shape the design of treaties. For example, Koremenos argues that when states are more concerned about the enforcement of an international agreement—because they have greater incentive to unilaterally defect from cooperation—they "are more likely to include punishment provisions" in their treaties (232). Similarly, she argues that when states are more uncertain about one another's behavior, they "are more likely to include monitoring provisions" (270). The ambition of the project is large, with the theory containing 12 explanatory variables and 10 dependent variables. Her hypotheses are tested using statistical analysis of a random sample of 234 treaties that address economics, the environment, human rights, and security.

Overall, Koremenos presents compelling evidence that strategic concerns shape the design of international agreements.

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However, the broader implications of her project are limited in two ways by the project's exclusive focus on the initial design of international treaties. First, treaties are only one of the many possible forms (or "sources") of international law. As discussed below, international law's empire is much more expansive than the "continent" presented by Koremenos. Second, Koremenos ignores the relevance, survival, and use of treaties. She does not ask: do treaties actually ameliorate the problems that they were designed to solve? Koremenos assumes that states, as rational actors, would not waste their time designing treaties that are ineffective.[1] This conflation of the existence and effectiveness of treaties is inherently problematic. For example, Koremenos implicitly claims that the design of the Antarctic Treaty has prevented war in Antarctica when she writes that "the long-lasting peace in Antarctica . . . can be a model for peace treaties more generally" (334). Setting aside the issue of whether war in Antarctica has ever been a tempting prospect, the mere existence of institutions does not necessarily imply that they are effective in solving real problems (Alter 2014; Gray 2018).

USES OF INTERNATIONAL LAW

In contrast, Ian Hurd uses a constructivist approach in *How to Do Things with International Law* to examine how states use the discourse of international law to achieve their objectives. Like Koremenos, Hurd believes that international law changes the way that states behave. He writes that "states feel pressure to frame their actions as rule abiding and consistent with their legal obligations" (8). However, while Koremenos focuses primarily on treaties as credible constraints, Hurd argues convincingly that international law can also enable states to take actions that would not otherwise be possible.

Hurd's conception of international law as a tool for power politics is grounded in his belief in the importance of discourse in international relations (Hurd 2014). As Dworkin noted, "Legal practice, unlike many other social phenomena, is *argumentative*" (1986, 13). That is, international law affects the way in which states publicly justify their actions, both to other states and to domestic audiences. Consider a state's decision to go to war. Numerous scholars have argued that seeking UN Security Council approval for the use of force can serve as a costly signal that a leader has good intentions or a well-chosen policy (Thompson 2006; Voeten 2005). However, Hurd argues that the process of seeking approval for the use of force is more than just a costly signal; it is a legal act that changes the way that states evaluate policy decisions. He writes that "the morality and strategic wisdom of a given policy become secondary to questions of law and legality, the answers to which depend on how states interpret their obligations" (51). By invoking international law, a state can transform the way in which political actions are assessed.

Hurd illustrates his argument using the United States, a country that notoriously questions the value of international law and can act unilaterally. He focuses on three issue areas: the use of force, humanitarian law, and torture. His analysis is most interesting when its deals with contemporary questions like the military use of armed drones. Since no international law explicitly addresses the use of drones, policy makers are faced with a legal vacuum. Hurd documents the way in which "governments invoke legal understandings for even novel policy problems and so legal gaps are filled as quickly as they are discovered" (83). Legal historian Martti Koskenniemi and others have highlighted the way in which "analogy is the lawyer's means of supplementing fragmentary or contradictory materials so as to ensure law's systemic unity" (Koskenniemi 2001, 364). Yet Hurd's broader and novel point is that such legal analogies come with inherently political consequences and can thus be used as a tool for power politics.

One major contribution of Hurd is that he challenges the contractualist approach of Koremenos and other contemporary scholars who seek to understand law purely by examining the written terms of treaties. He argues: "The tendency for international law to change its meaning under the influence of strong states means that it is unlikely that the international rule of law can rest on the degree to which the law *as it is written* binds the international community or some 'leading' states" (38, emphasis added). As scholars, we must be attentive to not only how law is written but also how law is used.

DEVELOPMENT OF INTERNATIONAL LAW

Finally, in her new book, Anthea Roberts asks: Is international law international? A growing body of legal scholarship has highlighted the colonial origins of international law (Anghie 2007; Koskennieni 2001). Historically, European states viewed non-Europeans as fundamentally uncivilized and outside of the international community. This exclusion meant that non-European states had little influence over early international law. Roberts's new book suggests that these power dynamics are not a historical anomaly: powerful and rich states, particularly the United Kingdom and United States, continue to drive the development of international law.

Roberts's primary aim is sociological: to understand the way in which "different national communities of international lawyers construct their understanding of international law" (1). To that end, she collects and explores extensive data on legal education and academic publishing in China, France, Russia, the United Kingdom, and the United States. Roberts

1. Namely, she argues that "the variation we see is a sign that states care, which is why they take the time and effort to negotiate specific treaty provisions that fit the demands of the situation" (Koremenos, 4).

argues that legal education and academic publishing matter because they affect the development of international law: today's law students are tomorrow's international lawyers and judges. Roberts finds that France has a disproportionate influence in shaping legal scholarship and training in Francophone countries. But for the rest of the world, the United Kingdom and United States play the dominant role in educating international lawyers.

For a political science audience, Roberts provides two major insights into how power shapes global governance. First, she convincingly challenges international law's claims to universalism, showing that international law is instead a pluralist enterprise. The contentiousness of international law lies not in simple distinctions between compliance and noncompliance but rather in contested interpretations of what is required by law. Roberts documents numerous ways that countries differ in how they interpret international law and balance competing legal values. In particular, she discusses the use of legal rhetoric in Russia's territorial dispute with Ukraine and in China's numerous disputes with its neighbors over the South China Sea.

Second, Roberts suggests that contemporary legal education undermines this pluralism by relying on textbooks that disproportionately emphasize local practice. Textbooks used in US law schools, for example, provide extensive coverage of US approaches to international law but usually neglect to present competing perspectives. She argues that this bias leads to "an inaccurate understanding of state practice and a false sense of universality" (177). While Roberts does not systematically trace the influence of the legal education onto legal outcomes, recent historical work convincingly demonstrates that individuals play a key role in the development of international law (Hathaway and Shapiro 2017).

UNDERSTANDING INTERNATIONAL LAW'S EMPIRE

These recent books collectively suggest that, as political scientists, we must broaden our narrow conceptions of international law's empire through more expansive inquiries about the form, use, and development of international law. First, most political scientists focus exclusively on international treaties, like Koremenos. Yet other valid forms of international law include customary international law—which is created by state practice and a belief that a particular behavior is legally binding—and general principles of law. Additionally, judicial decisions (at both the domestic and international levels), scholarly writings, unilateral acts of states, and the decisions of international organizations all play an important role in shaping international law (Thirlway 2014). The heavy emphasis of political science on statistical analysis has led us to focus on those questions that can be analyzed using treaties, which can be relatively easily collected and coded. Yet actual legal practice often hinges on forms of law that are less easily quantified. International law's empire is far vaster in its forms than our current scholarship acknowledges.

Second, to fully understand international law's empire, we must look beyond the mere creation of law to examine how states and individuals actually use law. Hurd suggests one profitable path forward: analysis of legal discourse as a form of politics. An alternative path forward is to examine disputes over the interpretation and application of law. One growing area of research is the use of international legal bodies to resolve disputes over foreign investment, human rights, and trade (e.g., Helfer and Voeten 2014; Johns and Pelc 2014, 2016, 2018; Wellhausen 2015). One less explored area is the role of domestic courts in upholding international law. Domestic courts are routinely called upon to adjudicate international disputes over contracts, expropriation, human rights, and even terrorism (Johns 2018). Additionally, numerous domestic courts have invoked the concept of universal jurisdiction to criminally prosecute political and military leaders for human rights violations and war crimes that lie outside of their traditional bases of domestic jurisdiction (Langer 2011; Langer and Eason 2017). By ignoring the influence of international law on domestic courts, we have unduly limited our understanding of the uses of international law.

Finally, both Hurd and Roberts bolster the importance of understanding the role of power in the development of international law. For example, in the *Jurisdictional Immunities* case of 2009–12, the International Court of Justice (ICJ) was asked to rule on whether Italy had violated international law by allowing individuals to use its domestic courts to sue Germany for war crimes committed during World War II.[2] The case hinged on the legal question of sovereign immunity: was Germany, a sovereign state, immune from adjudication in domestic Italian courts? The ICJ has to make its ruling based on customary law, which is created by the combination of state practice and the belief that a legal rule exists. As Roberts notes, the ICJ gave tremendous deference to UK and US state practice, suggesting that the immunity rules of these states reflected a nearly universal consensus. Yet recent analysis by Verdier and Voeten (2015) shows that the ICJ's deference was highly biased: a substantial portion of countries in the world disagree with the UK and US approach. International conceptions of sovereign immunity are far less universal than the ICJ's ruling suggests. International law will remain an empire—by which Western states project their influence abroad—until we dispel the myth of universalism to fully reveal the diverse competing views about the meaning of law.

2. See ICJ, *Jurisdictional Immunities of the State*, Judgment of February 3, 2012.

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