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The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power

Gerry Simpson*

Abstract

The rejuvenation of international law in the last decade has its source in two developments. On the one hand, 'critical legal scholarship' has infiltrated the discipline and provided it with a new sensibility and self-consciousness. On the other hand, liberal international lawyers have reached out to International Relations scholarship to recast the ways in which rules and power are approached. Meanwhile, the traditional debates about the source and power of norms have been invigorated by these projects. This review article considers these developments in the light of a recent contribution to international legal theory, Michael Byers' Custom, Power and the Power of Rules. The article begins by entering a number of reservations to Byers' imaginative strategy for reworking customary law and his distinctive approach to the enigma of opinio juris. The discussion then broadens by placing Byers' book in the expanding dialogue between International Relations and International Law. Here, the article locates the mutual antipathy of the two disciplines in two moments of intellectual hubris: Wilson's liberal certainty in 1919 and realism's triumphalism in the immediate post-World War II era. The article then goes on to suggest that, despite a valiant effort, Byers cannot effect a reconciliation between the two disciplines and, in particular, the power of rules and the three theoretical programmes against which he argues: realism, institutionalism and constructivism. Finally, Byers' book is characterized as a series of skirmishes on the legal theory front; a foray into an increasingly rich, adversarial and robust dialogue about the way to approach the study of international law and the goals one might support within the

* Law Department, London School of Economics. The title is derived from an essay by the Russian legal theorist, Evgeny Pashukanis. This article was written while the author was a Visiting Researcher at Harvard Law School (1999). The section entitled 'International Law and International Relations' is drawn from a larger forthcoming work, *Hierarchy and Equality in the International Legal Order*. Thanks to Fleur Johns, Anne-Marie Slaughter, Catriona Drew and Deborah Cass for extensive comments and Rebecca Jenkin for research assistance. The term 'international relations', as used in this article, refers to the academic discipline rather than the political environment of interstate affairs.

discipline. Here, the article dwells on Byers' doubts about critical legal scholarship and argues that Byers has misunderstood the nature of power and drawn an unsustainable distinction between arguments about rules and rules themselves.

1 Introduction

On 23 July 1914, following the murder of Archduke Ferdinand, the Austro-Hungarian Empire issued an ultimatum to Serbia. The terms and conditions of the ultimatum were such as to make a Serbian capitulation highly improbable. The world thus began its drift to war. All this is familiar enough. What is less well known is that Serbia responded to the Austro-Hungarian communication with a suggestion that the differences between the two countries be resolved by the Permanent Court of Arbitration in The Hague.¹ In retrospect, this seems like a romantic gesture to a hopeless formalism. Instead of the Great War, we could have had a lengthy PCA judgment.²

For many years international relations scholars regarded international law with the same disdain that the Hapsburgs, no doubt, viewed the Serbian proposal. International law was thought to have little cachet or purchase in the world of power politics. There was power and there were rules and when the two clashed there was the rule of power. In their professional endeavours, international lawyers have struggled repeatedly with this realist conviction.

Michael Byers is the latest to cross the Great Divide by adopting an interdisciplinary approach to international order.³ In this ambitious but readable account of the customary process, he seeks to '... explain the most foundational aspect of international law in international relations terms.'⁴ Byers has two primary aims. The first is to establish how customary rules are changed or maintained through the customary process and the role power might play in this process. For example, do

¹ See R. Albrecht-Carrié, *The Concert of Europe* (1968) at 360.

² I wrote this introduction on 28 April 1999, two days before the initiation of a series of cases by the Serbian government against NATO members at the International Court of Justice claiming that the air attack against Serbia was illegal at international law. See *New York Times*, 30 April 1999, A1; 'Yugoslavia seeks a Legal Order to Halt NATO Bombing', *New York Times*, 12 May 1999, A14. The latter report suggested that NATO had 'mocked' Yugoslavia's claim. The Federal Republic of Yugoslavia brought ten separate actions against NATO member countries. The cases against the United States and Spain have been dismissed for lack of jurisdiction (see e.g. *Legality of the Use of Force (Yugoslavia v. United States)* <<http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm>>. In the other cases, the Court has rejected the Yugoslav application for provisional measures but has decided that it remains seized of the substantive matters (e.g. *Legality of the Use of Force (Yugoslavia v. United Kingdom)* <<http://www.icj-cij.org/icjwww/idocket/iyuk/iyukframe.htm>>). For a detailed analysis of the international law implications of the initial threat to use force, see Simma, 10 *EJIL* (1999) 1. I will use the Kosovo crisis as a way to frame some of the more theoretical discussions in this review.

³ These interdisciplinary perspectives are not new though they have tended to wax and wane. The debates about the relative merits of international relation's scientific approach and international law's juridical approach to international affairs dates back to the late nineteenth century, at least. See e.g. J. Stephen, *International Law and International Relations* (1884) at 3 (arguing that of the two sciences, the legal and the political, the latter is to be preferred).

⁴ See M. Byers, *Custom, Power and the Power of Rules* (1999), back cover.

large states exert a greater influence on the development and transformation of customary rules? The second is to assess the influence of a raft of customary processes and principles on the exercise of power by states. For example do higher order international legal processes constrain the projection of power in the international order?⁵ In particular, Byers takes four international legal structures (jurisdiction, personality, reciprocity and legitimate expectation) and demonstrates how each of them operates to limit the way states and, in particular, powerful states exert power.

In all this the relationship of international law to international relations is central. This 'dual agenda'⁶ is neatly captured in both the title of the book and on a cover adorned with two photographs, each heavy with symbolism. One is of a US Navy carrier bristling with war planes; the other features Kofi Annan and Saddam Hussein shaking hands on a deal allowing UNSCOM to return to Iraq. These images appear to represent power and rules respectively. The Annan-brokered agreement has long since unravelled, leaving 'rules' looking rather sad and ineffectual. Aircraft carriers, on the other hand, look like the sort of machines that could achieve results more rapidly than the Secretary-General does. The shift from rules to power, though, has hardly yielded better results. The United States is engaged in a quiet war with Iraq that is having no discernible impact on Iraqi policy. Indeed the dominant theme of recent geo-political crises has been the failure of both rules and power. The sort of raw power projected by US Navy carriers has proved as ineffectual as some of international law's less well-regarded rules. In Kosovo, too, law, diplomacy and power have each taken a battering.⁷

These world order crises are a warning against adopting facile conclusions about the efficacy of any one particular instrument of control. Fortunately, Byers is not guilty of this. His is a judicious assessment of the limits and possibilities inherent in both rules and power. In assessing power and rules, this book engages in a difficult but worthwhile translation project. The esoterica of international legality are translated into the language of power and politics, while the conceptual scaffolding of the international relations discipline is made meaningful to international lawyers.

In thinking about this project, I want to begin, in Section 2, by assessing the book's contribution to a classic international law problem — the source and meaning of customary international law. In this section, I describe Byers' imaginative strategy for reworking customary law and in particular the enigma of *opinio juris* while at the same time suggesting a number of reservations.

In Section 3, I broaden the discussion by placing Byers' book in the expanding dialogue between international relations and international law.⁸ Here, I suggest that despite a valiant effort, Byers cannot effect a reconciliation between the power of rules

⁵ Though the author emphasizes the former over the latter in the Preface at xi–xiii.

⁶ The term is Anne-Marie Slaughter's. See 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205–239.

⁷ It remains the case, even in the light of the Serbian withdrawal, that some international legal norms were paid scant regard by NATO.

⁸ This is something Byers himself does. I simply want to adopt a different perspective from which to approach the interdisciplinary relationship. See Byers at 21–34.

and the three theoretical structures against which he argues (and on which he draws): realism, institutionalism and constructivism.⁹ Nor is he likely to persuade realists, institutionalists and constructivists of his central claims. Nevertheless, the way in which Byers integrated some important international relations insights into a work principally about international law makes for provocative reading.¹⁰

In Section 4, I characterize the book as a series of skirmishes on the legal theory front; a foray into an increasingly rich, adversarial and robust dialogue about the way to approach the study of international law and the sort of goals one might support within the discipline. I dwell mainly on Byers' conversation with critical legal scholars and I imagine a possible answer to Byers' criticisms of critical legal scholarship.

The comments below are mainly critical. Before beginning, however, I should enter a qualifier to these criticisms. The job of critical engagement is never more difficult than when the reviewer is confronted with arguments that are either modest to the point of triteness or hedged with so many conditions and pre-emptive defences as to render review superfluous. Michael Byers' book is neither of these things. His is an open and frank engagement on the legal theory front.

2 Customary International Law

A *Opinio Juris*

Had this text simply been a description of the relationship of international law and international relations or a contribution to the intellectual debates within international legal theory it would have remained interesting but perhaps a little abstract. However, there is more to *The Power of Rules* than this. Byers takes customary international law seriously.

The concept of custom is notoriously abstruse. Students often find it bewildering and teachers of international law tend to approach it gingerly. By the time the Jessup Moot comes around some bright student is invariably given the job of explaining custom to both her team-mates and the judges. According to the preface, this thankless task fell to Michael Byers in 1989 when he was a member of the McGill Jessup Moot team. Unlike most Jessup Mooters, Byers continued to find custom fascinating after completing his tour of duty. In particular, he began to

identify the distinction between 'opinio juris' and 'state practice' with the distinction between international law and international politics, between what states might legally be obligated to do, and what they actually did as the result of a far wider range of pressures and opportunities.¹¹ (at xi)

⁹ In fact Byers claims to draw on realism, institutionalism and the English School in his approach. However, consideration of Bull *et al.* seems to drop from the picture as the book progresses. Instead, the pre-eminence of 'ideas' becomes a key theme.

¹⁰ See, however, David Kennedy's recent criticisms of the IR/IL project, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9.

¹¹ This is an unusual perspective for an international lawyer. International law is dedicated to a fusion rather than a separation of the two elements.

This book grew out of these ruminations and Byers continues to identify *opinio juris* as the central problem of customary international law. Without it, law is apology.¹² But what is this feeling of legal obligation? How can it be identified? Is it a material fact (and therefore easily collapsed into practice) or is it a psychological quality (and therefore readily dismissed as ‘unscientific’ subjective belief)? This is the conundrum that Martii Koskenniemi identified some time ago.¹³ Does Byers solve the problem? Is it soluble?

Byers’ approach to *opinio juris* is idiosyncratic. He rejects the view that *opinio juris* is a state of mind accompanying a specific state act which gives that act its legal significance. This is the traditional view. Instead, *opinio juris* is a ‘diffuse consensus, a set of shared understandings among States as to the legal relevance of different kinds of behaviour . . .’ (at 19). So, *opinio juris* is converted from an individual attitude (what a state believes about its own behaviour) to a collective phenomenon (what states in general believe about a particular action or more importantly about the process of consent). This idea of collective belief is partly drawn from the international relations literature on regimes and on constructivism (what Byers calls, ‘sociological institutionalism’) and partly from legal positivists like H.L.A. Hart who distinguish primary and secondary rules.¹⁴

It is undoubtedly Byers’ mining of this literature that gives his take on custom its distinctive voice.¹⁵ His definition is certainly novel. Byers seems to be saying that the quality of obligation or legality is created by a consensus that acts are ‘legally relevant’ (at 148). However, I wonder how far this gets us in assessing the content of legality itself or explaining from where states receive their ideas about legal relevance? This is especially so when considered in the light of Byers’ explanation that diffuse consensus is, ‘based on general acceptance by states of the customary process’ (at 19). The very motor of the customary process (diffuse consensus) appears to be based on and signalled by acceptance of that self-same customary process. Even if one were to put aside this apparent circularity and accept that there is ‘system consent’ (at 204) instead of individual *opinio juris* in the case of relevant state practice, it is difficult to see how this higher order consent could resolve disputes such as the one that arose in, say, the *Nicaragua* case.

¹² M. Koskenniemi, *From Apology to Utopia* (1989).

¹³ Koskenniemi, ‘The Normative Force of Habit: International Custom and Social Theory’, 1 *Finnish Yearbook of International Law* (1990) at 77–89.

¹⁴ Indeed these shared understandings about legal relevance strongly resemble a sort of rule of recognition for the international order.

¹⁵ The key articles and books here are: in regime theory, Krasner (ed.) *International Regimes* (1983) and the work of Robert Keohane e.g. *International Institutions and State Power* (1989); in constructivist thought, F. Kratochwil, *Rules, Norms, and Decisions: On the Condition of Practical Reasoning in International Relations and Domestic Affairs* (1989). Alexander Wendt is probably now the leading exponent of this brand of international relations. His article, ‘Anarchy is What States Make of It: The Social Construction of Power Politics’, 46 *International Organizations* (1992) 391–425, is much-cited. A full-length study, *A Social Theory of International Politics* (1999) has just been published. An accessible and detailed account of the workings of constructivism is found in an essay co-authored by Wendt and Friedheim, ‘Hierarchy under Anarchy: Informal Empire and the East German State’, in T. Biersteker and C. Weber (eds), *State Sovereignty as Social Construct* (1996).

This boot-strapping problem becomes more acute when Byers, in the following paragraph, argues that ‘the customary process measures the legally relevant State behaviour which has occurred . . . in order to determine whether a particular interest is widely shared’ (at 19). How does this square with the notion that only ‘legally relevant behaviour is . . . capable of contributing to the process of customary international law’? (at 19). Is it that the ‘legally relevant behaviour’ both constitutes the process and is measured by it? Equally, if the legal relevance of practice depends on shared understandings among states (at 19) how can it be that this legally relevant behaviour requires to be measured (again?) for conformity to shared interests?

B Power and Obligation

The relationship between customary international law and power is a key theme in the book. Customary international law is both a source of power and an effect of power. Byers distinguishes between two categories of power in thinking about this issue. Non-legal power (influential in the creation of custom) includes raw military power, moral power and economic power while the power that ‘resides in rules’ (at 5) (legal power or the effect of custom) encompasses the ‘legitimising and constraining effects of the international legal system’ (at 6). This is the sort of distinction Myres McDougal was keen to make, in his response to Hans Morgenthau, when he called for a ‘. . . workable distinction . . . between that power which is based upon effective control or force only, and that which is based upon expectations of community authority’.¹⁶

However, Byers then discusses the application of raw power in the international system. This behaviour, he claims, ‘tends to promote instability and escalation’ (at 6). But one would have to be cautious about making grand claims about the effect of legal authorization. Did the Gulf War or the intervention in Somalia (both UN-authorized) produce less instability than the ongoing intervention in Kosovo or the Vietnamese invasion of Cambodia (both probably illegal except under some expanded and contested doctrine of humanitarian intervention)? These empirical claims have yet to be tested.

Moreover, I wonder if there are not three categories of power under discussion here rather than simply two. There is ‘raw, unsystemized power’ (at 6) — an exercise of power I take to be illegal (though Byers is not explicit about this). Then, there is the power of rules themselves — their constraining, persuasive, legal power. Third, there is the use of power within the customary process i.e. the attempts by states to manipulate or effect or avoid change in the development of customary law through the exercise of ‘power within the framework of an institution or legal system’ (at 6).¹⁷

Some examples might better explain how I see these categories. In the first category, ‘raw power’, one might place the Bay of Pigs or the invasion of Hungary. In neither case was the superpower involved concerned with the legal consequences or effects on the customary process of its action. These issues were simply sidelined. The second

¹⁶ M. McDougal, ‘The Realist Theory in Pyrrhic Victory’, editorial comment, 49 *AJIL* (1955) 376 at 377.

¹⁷ Byers alludes to this distinction (at 9) in his discussion of Hohfeld but this idea is not developed.

category includes any effects legal rules have on the behaviour of states e.g. the effect of Article 2(4) on the propensity of states to engage in interventionist behaviour. This is 'rule power'. In the third category I would place diplomatic activity, state practice and political or economic pressure used by states to influence the development of international law.

Byers' focus appears to be on the second category and a variant of the third category, though there is a tendency to move across the categories. The questions he (appropriately) returns to are: how does power distribution within the international system affect the development of customary international law? How do background, foundational customary principles such as reciprocity, jurisdiction, personality and legitimate expectation constrain and influence the way states use power to change or create other customary rules? It is this decision to narrow the field of inquiry that provides the book with its analytic clout (at 10). Byers is of the view that power does play a significant role in the development of customary law. Powerful states are better able to enforce claims and use extra-legal techniques to acquire support for their position on legal developments (at 205) and they possess a more responsive diplomatic corps. But power is not decisive. Byers' realism does not take him this far.

The realist in him is concerned with power, the lawyer with rule power and obligation. It is, perhaps, this idea of 'obligation' that is a distinguishing mark of the international lawyer's world-view. In international relations literature this is a word that appears less regularly than other analogues such as expectation and norm.

When Byers does turn to obligation and rights, some complications arise. His description of the interaction of obligation and power is elegant. The customary process converts expressions of power (or instances of state practice) into obligations. These obligations, expressed in customary legal rules, then act to qualify the use of power in the international system.

These obligations are designed to constrain, but they also generate rights to apply power. Here, we enter Hohfeldian territory and indeed, the great man makes an appearance in the discussion. However, Byers' example of an obligation generating 'a correlative right to apply power' (at 7) is not convincing. Yes, there is an obligation not to use force in international law against other states (Article 2(4)) but does this duty really give rise to a correlative right *on the part of the same state* to employ force against domestic insurgents, as Byers claims? (at 7). The correlative 'right' is surely the right to territorial integrity (or immunity from interference) enjoyed by other states. It does not make sense to suggest that a legal person can possess a correlative right to act in one field *because* they have a duty to act in another.¹⁸

¹⁸ W. Hohfeld, 'Some Fundamental Legal Conception as Applied in Legal Reasoning', 23 *Yale Law Journal* (1914–1915) 16. To use an analogy from domestic legal systems, it is the case that in all legal orders there is a *prima facie* duty not to commit acts of violence against other persons. There may also be a right (or in strictly Hohfeldian terms, a privilege) to commit acts of violence against one's own person (as part of a larger right to autonomy or moral independence or liberty). The fact that these rights/privileges and duties coexist and appear to occupy similar moral terrain does not mean that they correlate in any way. Whether a right to territorial integrity gives rise to a power to use force against one's own citizens is debatable.

The discussion of obligations seems occasionally unfocused. Where does obligation come from? Weber, Hohfeld and Franck are all invoked though ultimately Byers accepts the New Stream insight that the source of obligation must lie outside the law; that law itself cannot be a self-generating source of legitimacy. However, to suggest that international relations might have the answers is asking a lot. It would have been interesting to discover which ‘non-legal factors’ do provide the basis for this obligation.¹⁹ Byers decides to inquire no further, asserting that ‘... this book assumes that States are only bound by those rules to which they have consented’ (at 7). So consent is the source of obligation but from where does consent receive its legitimacy as a secondary rule of recognition? The questions are familiarly recessive and circular and, perhaps, it is prudent of Byers not to go too deep. Still, the to-ing and fro-ing between sociological knowingness and straight-faced positivism made this reader a little dizzy.

C The Power of Doctrine

The most powerful part of the book is the doctrinal analysis at Chapters 5–9. Here, Byers presents the most original elements of his thesis. The idea is to show how some of the foundational principles of international law condition states in their attempts to change, modify and maintain customary international legal rules. In other words the focus is not on individual rules as such but on fundamental doctrinal matrices. The four to which Byers turns his attention are jurisdiction, personality, reciprocity and legitimate expectation. I will simply describe what Byers does in one of these cases, that of jurisdiction, and then make some brief remarks about the others.

The discussion of jurisdiction is enlivened by a novel approach to the different bases or types of jurisdiction. Instead of the usual trawl through the various territorial grounds (objective and subjective), the nationality grounds (passive and active) and the idea of universal jurisdiction, Byers carves rules into three types ‘on the basis of the relationship between the areas or activities governed by those rules and the jurisdiction of those States which are interested in supporting or opposing them’ (at 55). These rules are described as internal rules, boundary rules and external rules. Unsurprisingly, territory plays a large part in determining whether a state will be capable of influencing the development of these rules. This is an important insight because it means that power is not some all-determining factor in deciding disputes over the territorial sea and/or the reach of anti-trust provisions. So, in an example of the latter, Byers discusses US attempts to extend its jurisdiction into other states through the use of extra-territorial anti-trust legislation. Eventual US compromise occurs, according to Byers, because of the qualifying effects of the principle of jurisdiction. The United States simply lacks significant territorial nexus with the relevant behaviour.

But how would, say, a realist respond? Perhaps by making the obvious claim that the reason for US diffidence is not the qualifying effects of an international legal

¹⁹ It seems that obligation, like authority, is always ‘elsewhere’. See D. Kennedy, *International Legal Structures* (1986) at 511.

principle but simply the limits on American capacity to project its power (jurisdiction abroad) and the potentially damaging effects of such projection on its important friendships. So, this example could be explained in terms of national interest. I think it would be less easy to explain the development of limits in the territorial sea on such grounds. Here, I think Byers has a stronger case since these limits often favour weaker nations.

The principle of legal personality, too, qualifies the application of power in a number of different ways; the most obvious being that it determines the number and nature of the entities who are able to participate in the system. This has a couple of interesting effects. First, when a large number of weaker states are admitted to the international system they can then pool their resources and exert a disproportionately large influence on the development of norms and practices. This appears to have occurred in the case of self-determination where the interests of powerful colonial states gave way in the face of legal developments inspired by a confident Afro-Asian majority (at 76).²⁰ A second important effect involves the way the doctrine of personality operates to exclude very powerful non-state entities (e.g. corporations) from direct participation in law-making activities. This would seem to be a qualifying effect on power, too, though some might argue that corporations influence states through informal and economic channels which render the effect of personality nugatory in some cases.²¹

The principle of reciprocity ensures the operation of the Golden Rule in international legal relations. The activities and claims of powerful states are tempered by the knowledge that other states may engage in the same activities and make the same claims on a reciprocal basis. This discourages rogue behaviour on the international plane (at 88–105) but at the same time can convert unilateral claims into customary international rules (see discussion of *The Truman Proclamation* at 91–92). This discussion contrasts (favourably) with some international relations views deprecating the effects of reciprocity in international relations.²²

One of the more impressive aspects of this argument lies in Byers' ability to rethink and relabel familiar concepts. This occurs to good effect in his discussion of legitimate expectations (a principle more familiar from an administrative law perspective) (at 106–126). In Byers' view, the idea of legitimate expectation encompasses treaty *grundnorms* such as *pacta sunt servanda* as well as more specific principles such as

²⁰ There are other interpretations possible here. One is that in fact the two most powerful states in the system were hostile to colonialism (the US and USSR) so that the rise of the self-determination norm can be explained in terms of power. Another is that most of the colonial states had come to realize the economic folly of continued possession of overseas territories.

²¹ Of course, realists would have no quarrel with this idea since for them states are the relevant players in the system. Citizenship in the community of nations has no effect on already existing states. However, this raises an interesting question about the realist project — its focus on power but its lack of interest in some very powerful institutional players.

²² See Vasquez, *The Power of Power Politics: From Classical Realism to Neo-Traditionalism* (1999) 161 (discussing studies showing that '... the foreign policy actions of states do not correlate as strongly with the actions others take towards them (reciprocity) as they do with their own previous actions'). But see Keohane, 'Reciprocity in International Relations', 40 *International Organisation* 1–27.

estoppel and unilateral declaration. The point appears to be that legitimate expectations build into the system a certain stability both in the operation of rules and the structure of institutions which makes these rules less susceptible to short-term change based on calculations of self-interest. Indeed, this is the case even when the legitimate expectation is purely subjective i.e. is not attached to any already existing rule of international law. So, mistaken legitimate expectation can generate resistance to change. According to Byers, this was initially the case when English courts began developing the new doctrine of restrictive state immunity.

To conclude this section, then, Byers adopts a cautious though innovative approach to customary international law and power. There is a constraining circle operating on powerful states in the system. It is true that the power of power is not to be underestimated in the creation of legal norms but once these norms are created, and given the shared understandings about the customary process, international law comes to play a sometimes decisive part in state behaviour or at least that behaviour which is deemed to be legally relevant.

3 International Relations and International Law

A *A Twentieth-century Affair*

In all of the above, the intersection of power and law is central. In turn, an understanding of the relationship between the two frequently estranged disciplines of international law and international relations provides at least one possible key to conceptualizing the power/law nexus. In the next section, I want to explore this linkage more fully and, in particular, reconfigure its historical roots. I then intend to locate Byers' work in this exploration.

The relationship between the two sibling disciplines of international law and international relations has been one of the twentieth century's most torrid. It is a relationship forged and then remade in the aftermath of two world wars. Yet, the causes and consequences of these two wars and the effects they had on the self-image of each discipline present a curious paradox. On one hand, international law, in its modern phase, embraced institutionalization and bureaucratization as a response to the horrors of World War I. The idealist, liberal-international moment in international law is derived from Wilson's rejection of the pre-Great War, realist balance of power.

On the other hand, two decades later international relations, as a self-styled, realist, political *science* of interstate affairs, became fully entrenched only after World War II and as a consequence of a comprehensive rejection of inter-war idealism. In this section, I want to describe these two processes in some detail before tracing the development of the international law/international relations relationship after World War II. This, in turn, will lead into a discussion of Byers' examination of the two disciplines.

First, from the international relations side we have one account in which international relations establishes itself as a distinct discipline by detaching itself from

both political theory and, more pointedly, international law. It does this under the conditions of disillusionment existing in the 1930s and arises directly from them. According to this account (preferred by many international relations scholars), international relations is born out of a contempt for, and disappointment with, inter-war idealism. This idealism had produced the League of Nations and the Kellogg–Briand Pact but it also was held responsible for the failure to prevent a host of interventions in the 1930s before eventually being implicated in the rise of Hitler and World War II. Idealism's failure became realism's ascendance. The intellectual triumph of realism created the conditions for a new discipline of international relations.²³

This is critically important to the international law/international relations story because international law and idealism were fused in the minds of many realists.²⁴ Idealism's failure was also international law's.²⁵ International lawyers had created institutions, developed laws and established regimes to abolish war. All this work had simply led to another war by erecting an edifice of illusion around the hard realities of international life. By abolishing war on paper, international lawyers had provided a stimulus to world statesmen to disregard its dangers, its causes and its continuing prevalence in an anarchic world. Hence, appeasement and war.

So, realist international relations in the 1940s and 1950s was an assertion of antipathy towards the idealist international law of the inter-war period. Indeed, Hans Morgenthau, the leading American realist of the post-war era, was a reformed international lawyer. His apostasy is symptomatic of that of a whole generation of thinkers and decision-makers. The classic texts of the realist era were each

²³ There are other interpretations. First, it has been argued that international relations arose in the early 1900s (as an idealist attempt to apply science to the reform of the international order e.g. The Hague Peace Conferences) or 1919 (as an idealist response to World War I). Second, there are those who do not view this period as idealist at all (e.g. a pluralist reading of the inter-war period can be found in Little, 'The Growing Relevance of Pluralism', in Smith, Booth, and Zalewski (eds), *International Theory: Positivism and Beyond* (1996) 66 at 70–71). See also B. Schmidt, *The Political Discourse of Anarchy* (1997) for a series of more complex images. The account given in the text contains the most common of these images and tells the story from a realist perspective. A typical statement along these lines is that of Jack Donnelly who argues that, 'Realism initially arose in the inter-war period in response to extreme versions of legalist liberal internationalism'. See Donnelly, 'Twentieth Century Realism', in T. Nardin and D. Mapel (eds), *Traditions of International Ethics* (1992) at 107. Ole Waever, meanwhile, argues that the post-war realists wished to 'develop a specific discipline, International Relations'. See Waever, 'The Rise and Fall of the Inter-Paradigm Debate', in Smith, Booth, and Zalewski, *supra*, at 155. See also, another associated perspective suggesting that even if the discipline existed in the inter-war years it was first given a proper scientific basis by the post-war realists (Olsen, 'The Growth of a Discipline', in B. Porter (ed.) *The Aberystwyth Papers: International Politics 1919–1969* (1972) 22 describing the move 'from idealist advocacy to realist analysis'). These various views share the understanding that realists forged the discipline but disagree on precisely when. Of course, we are speaking here of realism/international relations as academic projects not as ideas. Realism can be traced back to a variety of great thinkers from Thucydides to Rousseau.

²⁴ For example, according to Vasquez (in *The Power of Power Politics*) idealism is 'embodied in the LON, PCIJ, and in the emphasis on international law', at 33.

²⁵ See Slaughter, *supra* note 6, at 207–208.

indictments of the starry-eyed legalism of the inter-war period.²⁶ This legalism was naïve, dangerous and morally dubious. It resulted in the application of principles that threatened the very existence of those states relying on such principles (Morgenthau).²⁷ It encouraged total war by applying standards of guilt, justice and culpability to the conduct of war (Kennan).²⁸ It was a vain attempt to extend the ‘social sympathies of individuals’ from the national to the international level (Niebuhr).²⁹ For George Kennan even the buildings of the era were implicated. The Department of State was described as ‘a quaint old place, with its law-office atmosphere’.³⁰ By the end of the Second World War international relations scholars and many foreign policy analysts were convinced that the post-war order was to be engineered using the tools of realism.³¹

There is surely, then, irony in the fact that international law, in an earlier period, was modernized and institutionalized in a similar, parallel manner. However, this time it was the failure of the ‘realist’ balance of power in the Great War that provided the catalyst for institutional revision. The great institutional projects of the post-Versailles order were provoked by a sense that the old politics of secret diplomacy, deterrence, self-help and legitimate warfare were bankrupt; responsible for the war which had destroyed most of Europe and condemned millions of young European men and women to unnecessary deaths. So, international law entered the post-WWI era with comparable vigour and purpose to that of international relations in the post-WWII era.

In other words, each discipline locates its modern roots in a moment of profound disillusionment with wars said to be ‘caused’ by the adoption of a set of ideas drawn from the other. This may at least account for the mutual indifference with which each has confronted the other since.

The story continued, at the conclusion of World War II, when realists vowed to lead the international relations field (Morgenthau) and US Foreign Policy (Kennan) in the direction of prudence, containment, suspicion and alertness. In this they were more or less successful.³² But the Wilsonian idealism against which they reacted all but

²⁶ In a forthcoming work, I argue that in the inter-war period most international lawyers were not driven by this form of ‘extreme legalism’ but were in fact rather cautious and modest in their claims for law. International lawyers, to an extent, embraced some of the realist convictions. See *supra*, my citation. I thank Fleur Johns for this insight.

²⁷ See Hans Morgenthau’s claim that the legalistic solutions favoured in the dispute over Finland in 1939 might have led to a general war between a Franco-British alliance and a Soviet-German coalition in H. Morgenthau, *Politics Among Nations*, 5th ed. (1978) at 12–13.

²⁸ G. Kennan, *American Diplomacy 1900–1950* (1951) at 101.

²⁹ R. Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (1936) at 92.

³⁰ Kennan, *supra* note 28, at 92.

³¹ In fact, although post-war US foreign policy was made in the image of the realists, the international order created at San Francisco was an amalgam of legalism and realism. See Slaughter, ‘The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations’, 4 *Transnational Law and Contemporary Problems* (1994) 377–396.

³² Though there are those who argue that American foreign policy was imbued with a revolutionist fervour in the post-war era. For this view that it was in fact a form of roll-back liberalism that dominated post-war US Foreign Policy, see Buzan, ‘The Timeless Wisdom of Realism’, in Smith, Booth and Zolewski, *supra* note 23, 47–66 at 48.

disappeared from the international law agenda. In its stead came a mixture of 'conceptual pragmatism' (international lawyers simply built new institutions which sought to accommodate the world (the UN) rather than transform it (the LON))³³ and/or legal positivism. The UN Charter then became all things to all people or alternatively satisfied no one.³⁴ International legal theory attempted to meet the realist challenge in other ways but these are not the subject of this essay and the story of these efforts is recited in several key articles written by contemporary international lawyers.³⁵

I do want to discuss, though, the relationship between legal positivism and political realism because it is an interesting and misunderstood one and because it is a relationship that informs parts of Byers' book. In one sense they can be regarded as the classical paradigms of the two disciplines. Each enjoyed long periods of theoretical dominance in the last century and the two disciplines of international relations and international law have occasionally been associated exclusively with the dominant school in each. International lawyers have tended to see international relations as a subject entirely in thrall to power politics while even sympathetic international relations scholars describe what they think international lawyers do in mostly positivistic terms. Robert Jackson, in his study of Third World states and negative sovereignty, describes international lawyers in the following way:

Lawyers, as I understand them, seek knowledge of the rules that constitute particular legal orders and their validity . . . The main point is to establish with as much certainty as possible what the law is in particular domains in order to give instruction to the legal student or practitioner . . . Political scientists are interested in rules not to determine their current legal status but to ascertain the extent to which they shape political life.³⁶

The picture is confused by the use of the term legalism to describe both classical international legal positivism and Wilsonian idealism. International relations work amalgamated these two distinct projects and labelled them 'international law' or 'legalistic-moralism'. Yet, the inter-war idealism of Wilson's legalism is far removed

³³ Purvis, 'Critical Legal Studies in International Law', 32 *Harvard International Law Journal* (1991) 81 at 83–85.

³⁴ See Slaughter, *supra* note 31. International lawyers could congratulate themselves in having preserved so much of the LON system. This is the surprise. Realists could point to the Security Council with satisfaction. Here, real power lay. Some, Morgenthau for example, did not see it this way, lumping the Covenant together with the Charter as an example of legalist idealism. See Slaughter, *supra* note 6, at 207, n. 6 (quoting Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (4th ed., 1967) at 4–5, 25–26).

³⁵ See Slaughter, *supra* note 6; Purvis, *supra* note 33; Boyle, 'The Irrelevance of International Law: The Schism between International Law and International Politics', 10 *California Western International Law Journal* (1980) 193 at 206–213. This is nothing like the whole story, of course. One would have to recognize the contributions of the New Haven School (for whom law becomes a form of policy thus undercutting the realist critique), the rule sceptics, the legal process school and the burgeoning human rights movement (attesting to the continuing presence of natural law ideas in the international environment). The triumph of arid positivism was probably quite brief. See, for a counter-example, immersed in politics, the later post-war work of Julius Stone e.g. *Aggression and World Order* (1958).

³⁶ R. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1990) at 3.

from the dour positivism that supplants it in the post-Charter era. To invert Marx, Wilson sought to change the world; the idea for legal positivists was to describe it. In many ways, then, legal positivism was quite compatible with realism. Each was state-fixated, each found temporary solace in the facts of international life such as state practice or national interest (in more innocent times these seemed to be tangible data)³⁷ and each took a conservative approach to change.³⁸ It is no coincidence that James Watson, in several highly readable and splenetic distillations of legal positivism, called it a ‘realistic jurisprudence’.³⁹

Positivism and realism continue to exert massive influence on the two disciplines and each of these ‘master-isms’ has been favoured with a meticulous defence in recent times (e.g. Prosper Weil in international law, Buzan, Jones and Little in international relations).⁴⁰ Even the international lawyers and international relations scholars who lack sympathy for the two paradigms feel obliged to explain why.⁴¹ However, it is also clear that in these fields, realism and positivism no longer enjoy the dominance in scholarly work that they once did (and perhaps continue to enjoy in foreign policy and legal practice). Realism has come under attack from liberal internationalists, institutionalists, various neo-Marxists, constructivists and critical theorists. Positivism is a favourite target of feminists, critical legal scholars and some human rights lawyers. Meanwhile, post-structuralists in both camps declare from the sidelines that these ‘inter-paradigm’ debates themselves are passé.⁴² These are exciting times.

Coinciding with all this is the arrival of an era of mutual curiosity and polite interaction between the two disciplines sparked by a loosening of intellectual muscles and post-cold war openness. Books and articles on the relationship have become exceedingly vogueish considering the chilly atmosphere existing just 20 or so years

³⁷ In this sense realists were positivists, too.

³⁸ This hardly does justice to the sheer complexities of positivism. For a sweeping and detailed account of the meanings of positivism in social science and international relations, see Smith, ‘Positivism and Beyond’, in Smith, Booth, and Zalewski, *supra* note 23 at 11–46.

³⁹ See e.g. Watson, ‘A Realistic Jurisprudence of International Law’, 30 *Yearbook of World Affairs* (1980) at 265.

⁴⁰ Weil, ‘Towards Relative Normativity in International Law’, 77 *AJIL* (1983) 413; B. Buzan, C. Jones and R. Little, *The Logic of Anarchy* (1993). The latter is more radical reformulation than defence.

⁴¹ See e.g. J. Rosenberg, *The Empire of Civil Society* (1994); A. Linklater, *The Transformation of Political Community* (1998).

⁴² See e.g. Waever, *supra* note 23.

ago.⁴³ In the world of Morgenthau and Sohn such studies would not have flourished.⁴⁴ Indeed, the work done by international lawyers and relations scholars in some areas is almost identical in direction and tone, for example, Thomas Franck's legal realism finds its echo in the work of regime theorists and international society scholars.⁴⁵ In other respects, only the language separates certain projects within the two disciplines. International relations scholars refer to 'patterns of activities',⁴⁶ 'informal norms',⁴⁷ 'decentralized norms',⁴⁸ 'norms of behaviour that structure repeated human interaction'⁴⁹ or, most famously, 'a persistent and connected set of rules that prescribe behavioural roles, constrain activity, and shape expectation'⁵⁰ while international lawyers speak of 'customary law' or 'soft law' or 'normative expectations'.⁵¹ Similarly, while Stephen Krasner characterizes rules as 'specific prescriptions or proscriptions for action',⁵² international lawyers can use the shorthand, 'law'.

This is all by way of a lengthy introduction to the interdisciplinary concerns of Michael Byers. His book advertises itself as international law for international relations types or international relations made accessible to international lawyers.

⁴³ A representative sample might include the following. From the international relations side: Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard International Law Journal* 487 (1997); J.C. Hsiung, *Anarchy and Order: The Interplay of Politics and Law in International Relations* (1996); R. Beck, A. Clark Arend and R. Vander Lugt, *International Rules: Approaches From International Law and International Relations* (1996); Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale Journal of International Law* (1989) 335–411. From the international law side: Slaughter, *supra* note 6; Boyle, 'Schism', *supra* note 35. For a recent bibliography see Slaughter, Tulumello and Wood, 'International Law and International Relations: A New Generation of Interdisciplinary Scholarship', 92 *AJIL* (1998) 367 at 393–397. However one would not want to overstate this interest. It occurs largely at the prompting of an enthusiastic group of scholars in each discipline. At the level of pedagogy or textbook, the interlinking is less conspicuous. Very few international law courses feature readings drawn from international relations. Meanwhile, some international relations texts either ignore law or lump it together with moral issues (see e.g. M. Nicholson, *International Relations: A Concise Introduction* (1998)). Even a volume as diverse as the recent *International Theory: Positivism and Beyond* (1996) (S. Smith, K. Booth and M. Zalewski, eds) *supra* note 23 contains no reference to international law in a thorough index that includes 'itinerate condottiere', 'immutability thesis' and 'intelsat'.

⁴⁴ A number of important thinkers represent exceptions to this general rule. See e.g. elements of Hedley Bull's work, Louis Henkin's *How Nations Behave* (1979) and Morton Kaplan's *The Political Foundations of International Law* (1961).

⁴⁵ Not everyone is enthusiastic, of course. Little critical work has thought it worthwhile engaging with international relations and others are more openly hostile. See e.g. Allott, 'Kant or Won't: Theory and Moral Responsibility', 23 *Review of International Law Studies* 339 (1997).

⁴⁶ H. Starr, *Anarchy, Order and Integration* (1997) at 94.

⁴⁷ *Ibid.*

⁴⁸ Diehl and Goertz, 'Towards a Theory of International Norms', 36 *Journal of Conflict Resolution* (1992) 634–664.

⁴⁹ North, 'Institutions and Economic Growth: An Historical Introduction', paper prepared for the Conference on Knowledge and Institutional Change sponsored by the University of Minnesota, Minneapolis, November, at 6, quoted in Keohane, 'International Institutions: Two Approaches', 34 *International Studies Quarterly* (1988) at 379–396.

⁵⁰ Keohane, *ibid.*

⁵¹ See e.g. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) at 46.

⁵² Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in Krasner (ed.) *International Regimes* (1983) at 2, quoted in Beck *et al.*, *International Rules*, *supra* note 43, at i.

Either way, Byers is anxious to insert his work into the ongoing interdisciplinary dialogues. In particular, he seems keen to repudiate two international relations accounts of the role of international law. The first is an unsympathetic neo-realist position that declares the irrelevance of international law. Though the hostility of realist and neo-realist scholarship towards international law is often overstated, there is little doubt that law has a marginal place in this universe.⁵³ A second international relations school, variously described as institutionalism or regime theory, takes law seriously but only as part of a network of norms, institutions, expectations and the like. Law is rather unceremoniously integrated with all the phenomena that might influence state behaviour but is not seen as having exceptional significance in this regard.⁵⁴ In response to both schools, Byers is concerned to demonstrate the special power of international law within an anarchic international order.

In one sense, while Byers has caught the interdisciplinary wave he is not riding it in the same direction as most of his colleagues. After all, this is a book about state behaviour.⁵⁵ As Robert Beck remarks, ‘... both international relations and international law began as largely state-centred disciplines, but ... each has come increasingly to appreciate the significance of non-state actors and phenomena’.⁵⁶ In the face of this, Byers adopts a series of positivist, realist and statist assumptions in driving his thesis forward.⁵⁷ In an age of transgovernmentalism, new medievalism and a general denigration of the state, this is refreshingly nonconformist.

B Against Realism

Byers’ realist inclinations are honest and unfashionable. International lawyers have tended to perceive in realism a sort of ready-to-order nemesis or bogeyman. The temptation to collapse realism and international relations is irresistible. Realist

⁵³ There is a large difference between the classical realists (Carr, Morgenthau, Bull) and the neo-realists (Waltz). The classical scholars tend to see the importance of law in regulating that body of interstate behaviour which has no effect on vital national interests e.g. the Universal Postal Union or various civil aviation conventions. The neo-realists simply disregarded law altogether.

⁵⁴ See Slaughter *et al.*, ‘A New Generation’, *supra* note 43 at 379. Byers sparring with John Setear is situated within this debate. See Setear, ‘An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and Law’, 37 *Harvard International Law Journal* 139 (1996); Michael Byers, ‘Taking the Law Out of International Law: A Critique of the Iterative Perspective’, 38 *Harvard International Law Journal* 201 (1997).

⁵⁵ ‘... this book considers power to involve the ability, either directly or indirectly, to control or significantly influence how actors — *in this case States* — behave’, Byers, at 5 (my emphasis).

⁵⁶ Beck, ‘International Law and International Relations: The Prospects for Interdisciplinary Collaboration’, in Beck *et al.*, *supra* note 43, at 6.

⁵⁷ Having said this, Byers modifies his positivism, realism and statism to a certain degree at various stages throughout the book. His positivism is modified by his continual neo-naturalist reference to ‘shared understandings’ (e.g. at 205). Thus, he is at one point found ‘breaking out of the positivist mould’ (at 206). He certainly does not fit the positivist image of international lawyers suggested by Jackson (see *supra* note 36). On realism, he assumes states pursue their ‘self-interest’ through the use of ‘power’. However, later, Byers distinguishes his project from that of the neo-realists by emphasizing the diverse forms power takes and the way that power is constrained by more than the balance of power or the imperatives of anarchy. The statist orientation of the book is qualified in the final few paragraphs by his recognition that other actors are coming to play an increasingly important role in the system.

international relations scholars have provided international lawyers with an (additional) reason for their existence; a vaguely demonic counterpoint to international law's relentless cheeriness about international order. The encounter is of mutual benefit to each discipline's self-image.

Of course, realism is one of the principal enemies of international lawyering because it seems to court power politics, eschew moral reasoning and deny any role to normativity in the international order. These are heavy-duty crimes in the eyes of international lawyers. Because of all this, it is sometimes too easy to dismiss the very important insights realism brings to our understandings of international order. Realism is a highly plausible and, paradoxically, somewhat moral approach to international order and foreign policy. The avoidance of total war, the urgings of prudence and the requirement that states act in the best interests of their own citizenry are compelling principles.

So, Byers can be excused for beginning with a series of realist assumptions. However, despite these realist sympathies, he has a bone to pick with international relations scholarship in the realist mould. This is not uncommon for international lawyers who, after all, are likely to take umbrage at a school of thought that regards law as peripheral. For, as Byers notes, post-war classical realists such as Morgenthau and Schwarzenberger did not let a legal training come between them and a frank dismissal of law.⁵⁸ The neo-realist revival in the 1970s brought even worse news for international lawyers. These structural realists ignored law altogether. For figures such as Kenneth Waltz, the relevant structures conditioning state behaviour and the exercise of power were anarchy (at a permanent, abstract level) and, at the time of his writings, the superpower balance (at the concrete level). Law was not part of this structure.⁵⁹

Inevitably, Byers refuses to embrace the whole realist agenda. According to him, the realists are only half right. States do pursue their self-interest but always within a

⁵⁸ Byers at 22–23.

⁵⁹ However, it is not quite correct to say that realists explain interstate relations solely on the basis of 'short term calculations of self-interest' (as Byers implies at 25). There is no logical reason for supposing that realists cannot explain interstate relations on the basis of a mix of short and long-term calculations of self-interest. Indeed, foreign policy realists like Henry Kissinger would argue that this is precisely how the realist model is meant to operate (whether he satisfied these injunctions in his own foreign policy is another matter). George Kennan, too, was withering in his attacks on an American foreign policy that 'can hardly be said to be distinguished by such things as privacy, deliberateness, or the long-term approach', *supra* note 28, at 94. Fernando Téson, meanwhile, distinguishes between utilitarian and communitarian realisms. The former operating according to the demands of self-interest (long and short-term), the latter responsive to the long-term *values* of the state implementing the particular policy. In the case of the communitarians, the self-interest involved may not be immediately transparent. See Téson, 'Realism and Kantianism in International Law', 86 *American Society of International Law Proceedings* (1992) 113 at 115–118. The implications of this for international law are significant. Communitarian realists could well pursue community (the community of the state not the universal community) values using international law even if the pursuit of these values has counterproductive effects in the short-term. It is at this point that realism and, for example, democratic liberalism begin to overlap. In Kosovo, one might say that the Clinton Administration is pursuing both a democratic liberal and a communitarian realist agenda. The promotion of American values abroad in this way would be viewed as entirely wrong-headed by classical realists such as Kennan.

normative structure in which legal obligation plays a key constraining, defining and facilitating role. The customary process operates as a fetter on the pursuit of national self-interest and the projection of power. This is the classic defence of international law, albeit a particularly thoughtful and intricately argued version.

So, who is right? One way to think about the way international lawyers (such as Byers) and realists might confront each other is to ask how their approaches to various questions differ. Byers has given us one definition of the customary process.⁶⁰ One possible realist response might suggest that the customary process simply reflects collective interests and that, therefore, it has no independent constraining effects on these interests. Realists might argue that there is no clash between interests and law — either because law is the embodiment of these interests or even when there is the appearance of a clash with law, a greater interest in preserving the legal order prevails. In cases where there is a serious conflict (the *Nicaragua* case, the Panama Intervention), states will simply defect from the customary process. In this way, expanded and sophisticated notions of utility, rationality and interest will tend to absorb legal effects into a realist explanatory framework. When vital national interest is at stake (the environment or security), the law falls away. This was the argument made, famously, by Dean Acheson when he decried the arrogance of international lawyers in assuming that law had anything to say in crises involving the very survival of the state.⁶¹

The lawyer's response to these arguments is to say that law (while initially reflecting collective interests) develops a logic of its own which acts to impose some autonomous normativity on the international legal order. This is, in essence, Byers' position but he also suggests that realism can be rehabilitated or made more realistic by incorporating law as part of the conditioning structure of international relations.⁶² International Law has always been reconciled to anarchy. The suggestion here is that anarchy (i.e. the structure in 'structural realism') incorporates law. This is a commendable enough project but there comes a point in the career of an idea or system of thought when modification becomes transmutation. One might even say that law reconciled with realism is institutionalism and that structural realism would cease to have a core meaning if it was shaped to satisfy the professional needs of international lawyers.

Ultimately, it might be more useful to accept realism's antipathy to international law and to see them as two distinct approaches to the problem of international order.⁶³ If Byers is to convince realists, he will have to inspire them into becoming something other than realist. I will restrict myself to one comment on this effort. If Byers was

⁶⁰ See *supra* Section 2.

⁶¹ See Acheson, 'The Arrogance of International Lawyers', 2 *International Law* (1968) 591 at 591–599 quoted in B. Weston, R. Falk and A. D'Amato (eds), *International Law and World Order* (1980) at 362–367.

⁶² Barry Buzan is undertaking a similar project in international relations theory. See *supra* note 40.

⁶³ I do not mean to suggest by this that international law exists in idealist opposition to realism. International law must resist the extremities of both if it is to survive. For a now familiar argument along these lines see Martti Koskenniemi, *supra* note 12.

intent on persuading recalcitrant realists, then might it not have been better to choose a customary process or principle through which matters involving core security were implicated? Realists are not likely to be unsettled by evidence that states conform to rules regulating diplomatic immunity or by the revelation that these rules have power. Realists have always had a response to this. Law is useful in regulating what is marginal or apolitical.⁶⁴ In more central areas such as the use of force, self-defence and collective security, it has no independent, causal role.⁶⁵ I would have like to have seen Byers' ideas applied to the doctrines that seek to limit force and modify conceptions of security. Indeed, this may be the most fruitful area of exploration for future research.

C *Distinguishing Institutionalism*

More successful, I think, is the attempt to identify what separates two approaches that may, at first blush, seem almost indistinguishable (emphasis and language apart). Institutionalists (latter-day regime theorists) and classical international lawyers share a great deal. It is no surprise that the leading institutionalist, Robert Keohane, is perhaps the most quoted international relations scholar in international law writing.⁶⁶ Institutionalists modified some of the realist insights and developed a set of concepts to explain how international regimes or institutions operate to constrain and mediate interstate behaviour. These legal, diplomatic and bureaucratic processes were thus assigned an important position in international relations theory.⁶⁷ States continued to pursue their, sometimes collective, interests (independently posited and assumed — to this extent, institutionalists remained realist) but through participation in these regimes or institutions. These regimes were analysed and explained using ideas such as reciprocity, efficiency, defection and exchange. The economics argot used by the institutionalists is readily translated into the language of law. And yet, as Byers points out, there is one critical difference. Institutionalists, like Keohane, believed that the form, direction or shape of an international regime (and its attendant legal norms) is continually susceptible to shifts in power differentials between states and defections by powerful states. The same is not true in reverse. According to some

⁶⁴ Morgenthau, in developing a theory of international politics, is very keen to distinguish the non-political activities of states from those involving the application of power. He says: "Two conclusions follow from this concept of politics. First, not every action that a nation performs with respect to another nation is of a political nature. Many such activities are normally undertaken without any consideration of power . . . Many *legal*, economic, humanitarian and cultural activities are of this kind' (my italics). See Morgenthau, *Politics Among Nations* (1960) at 27–28, quoted in Vasquez, *supra* note 22 at 49. This is helpful in assessing why classical realists approach law in the way that they do but does not really clarify the areas in which power is dominant. Would, for example, self-determination be an area in which states take political action?

⁶⁵ The blithe disregard for the Security Council in the case of the Kosovo intervention would be taken as evidence of this by realists.

⁶⁶ Keohane takes international law seriously, too. He has written several articles with an international law focus and seems genuinely interested in the discipline. See *supra* note 44.

⁶⁷ But see the work of the English School e.g. Bull, *The Anarchical Society: a Study of Order in World Politics* (1977).

institutionalists, vital national interests were unlikely to be modified or relegated in the face of institutional imperatives. This was a one-way street.⁶⁸

Byers, along with most international lawyers, cannot help believing that law has some autonomous, constraining effect on state behaviour, that regimes will modify calculations, expressions and, perhaps even definitions of state interest. So, the Byers project is about putting the law back into institutions. This is I think an important contribution of the book but I have some reservations.

A crucial insight is tucked away in an early footnote where he remarks that the . . . distinction between the non-legal power wielded by States and the obligation that resides in rules [that] enables this book to avoid a risk that may be inherent in any general definition of a potential causal factor in international relations, i.e., of losing sight of the causal factor amongst its potential results.⁶⁹

This is directed at the institutionalist tendency to lump law together with a host of other compliance factors. However, the important distinction is surely that between rule-power and non-rule institutional or regime power rather than that between rule-power and state-power. It is one thing to distinguish the non-legal power wielded by states and legal power (this is the realist-legalist debate) but quite another to distinguish regime power and rule power (the institutionalist-legalist debate). This latter project is crucial to Byers' project but, I believe, he rather misconstrues it here. The section on institutionalism is really an attempt (somewhat successful) to distil one causal factor (the power of the customary process) from other analogous causal factors (e.g. expectations, informal norms).

Byers argues that institutionalists have refused to 'take the additional necessary step of recognizing that the obligatory character of rules of international law render these rules less vulnerable to short-term political change than the other, non-legal factors they study' (at 9). One possible institutionalist response might suggest that it is indeed plausible to argue that some non-legal regimes (e.g. US-UK amity or the tacit non-interference agreements reached at Yalta or the diplomatic practice of not issuing parking tickets to diplomats⁷⁰) are less vulnerable to short-term political change than some legal rules (e.g. Article 2(4)).

Byers concludes his initial reflections on international relations by quoting (approvingly) Kratchowil's constructivist reading of structure and agency (at 34). Later he takes this constructivist insight a little further in his discussion of the

⁶⁸ Robert Keohane asks 'how institutions affect incentives facing states' in *International Institutions and State Power: Essays in International Relations Theory* (1989) at 11. I take this to mean that the decision of a state to pursue its self-interest will depend, in some cases, on the costs imposed by international regimes (legal and non-legal). It is fair to say that some regime theorists have taken law seriously, notably Andrew Hurrell. See e.g. 'International Society and the Study of Regimes: A Reflective Approach' in Volker Rittberger (ed.) *Regime Theory and International Relations* (1993). Indeed, Hurrell's analysis of international legal processes bears some similarity to Byers' work.

⁶⁹ Byers at 9.

⁷⁰ See *Parking Privileges for Diplomats Case*, ILR 70 at 396 (Fed. Admin. Ct. FRG). This final example is drawn from Brownlie, *Principles of Public International Law* (1990) at 5. See also Levy, Young and Zorn, 'The Study of International Regimes', 1 *EJIR* (1995) 267–330 at 272.

influence of ideas on the workings of the international legal process.⁷¹ It is a little curious, then, that at the end of the section on 'law and international relations' he concludes that the book will draw on regime theorists, institutionalists and the English School. A more full-blooded attempt to come to terms with the constructivist agenda would have strengthened the argument. After all, Byers is concerned with the effect of customary law on state behaviour. The constructivist theoretical programme is the latest to study the effects of norms and ideas on the way states conceive of their own self-interest, the way state identity is imagined or formed and the way anarchy itself is constructed.⁷²

However, this is cavilling when one considers Byers' erudition in a field that is not his own. Byers has added a significant chapter to the ongoing interdisciplinary dialogue. He has edged that dialogue on from the narrative and technical to the conceptual. As a consequence of reading Byers' thinking on the power of custom international relations and international law scholars should find themselves looking at each other in a different light.⁷³

4 International Legal Theory at the Front

In this final section, I relate Byers' book to the current international legal theory debates as a way of thinking about his work in relation to other theoretical orientations with a concern for 'power'.

There is a danger in making a field seem more dialectical than it actually is. Nonetheless, there seems to be a struggle in train for the soul of international law. The discipline is more permeable and fluid than it has been for some time. There is less consensus about how it should proceed, the range of self-definitions seems broader than ever and the responsibility of international lawyers is more contested than for some time.

For example, the 1999 American Society of International Law Annual Meeting had a distinctly different feel to it from that of previous years. There was less fustiness and a more self-conscious flexing of interdisciplinary muscles. Military personnel mixed with literary theorists (at least on the programme), globalitarians and cosmopolites abounded. The guard seemed to be changing. But if we really are saying *au revoir* to a classical liberal consensus of some sort, and there was much talk of this, then who is taking over?

In the United States, the international law academy is fracturing along familiar philosophical and temperamental lines. Everyone is agitated about globalization. There are those who view it as the basis for a new liberal-cosmopolitan project; an

⁷¹ See Byers at 148, 215, 219.

⁷² It may be that Byers, in keeping with his positivist orientation, did not wish to go beyond more conventionally understood agent-structure relationships.

⁷³ It should be noted that while Byers is an advocate of the interdisciplinary approach to international law he acknowledges that the IR/IL relationship is only one possibility. Byers calls for integration with sociology, economics and history for instance (at 215).

opportunity to realize the Kantian dream.⁷⁴ These scholars are enthusiastic about democracy, transgovernmentalism, compliance, liberal values and the like. Another group of scholars seeks to undercut these claims by demonstrating the endlessly nuanced and contradictory trends underlying the shift to the global.⁷⁵ Meanwhile, a pragmatic mainstream sits uneasily between these two positions.

It is tempting to divide these groups according to temperament into optimists and pessimists.⁷⁶ According to one view, for example, liberal cosmopolitans may be more inclined to see unambiguous merits in the international legal process while critical legal scholars see forms of subordination, culture, ideology and rhetorical ‘moves’. I think another, more productive way to see this opposition is to reverse the usual assumptions.⁷⁷ To be sure, there is a surface optimism about some of the democratic liberal work. At the same time, though, some of it reads like a loss of faith (in redistribution, in the rehabilitation of disfavoured zones, in strong forms of social democracy). On the other hand, critical scholarship in international law (crudely derided as cynical or Marxist) is infused with a sort of yearning (for better worlds, for new words to describe these worlds). The clichés about critique seem all wrong.⁷⁸

However one conceptualizes this division, there are traces of Herbert Hart and the dream, the nightmare and the good night’s sleep (‘English’ agnosticism, American pragmatism) in all this.⁷⁹ Michael Byers, whose recent training has been in England, has elected for a good night’s sleep (he wants to make the present system work a little bit better) but one punctuated by the odd fantasy and the occasional demon. The liberal cosmopolitan fantasies (though they are not unreasonably fantastic) include a prediction that, ‘the international system will become more and more like a federal State’ (220–221) (this idea is not central to the thesis). The demons (apart from ‘realism unmodified’) are everyone’s favourite demons, ‘critical legal studies scholars’. What Byers has to say in response to Koskenniemi *et al.* provides an interesting glimpse into the thrust of his project.⁸⁰

⁷⁴ See e.g. Tésou, ‘The Kantian Theory of International Law’, 92 *Columbia Law Review* (1992) at 53 (though Tésou is scathing about the operation of the present order).

⁷⁵ See e.g. Kennedy, ‘New World Orders: Yesterday, Today and Tomorrow’, 4 *Transnational Law and Contemporary Problems* (1994) at 329–374.

⁷⁶ See Sir Herbert Butterfield, *The Whig Interpretation of History* (1950).

⁷⁷ Deborah Cass has pointed out that some New Stream scholarship is infused with a tragic idealism. Cass, ‘Navigating the New Stream’, 65 *Nordic Journal of International Law* (1996) 341–383 at 366.

⁷⁸ This is mostly an American experience. Indeed, perhaps there is something American about the whole idea of theoretical schools in this discipline. The British, for example, seem less inclined to align themselves with any particular project.

⁷⁹ Not everyone (perhaps no one) fits into these categories. Tony Carty and Philip Allott may represent major exceptions to this. Carty’s ‘critical’ scholarship seems one step removed from that of the American New Stream while Philip Allott completely rejects the good night’s sleep of contemporary classical scholarship but fits very uncomfortably into either of the other categories. His work lacks the complacency of the liberal cosmopolitans and is too bluntly normative and aspirational for New Stream tastes.

⁸⁰ Byers also discusses the New Haven School but with a brevity that does not conduce to genuine engagement (at 207–210).

Byers makes three charges here.⁸¹ The first is that the critical scholars (including feminists, 'Third World' scholars and the New Stream), '... have yet to explain how power operates within the international legal system to affect the creation of law' (at 46). Second, that Koskenniemi and others fail to distinguish process (controversial and indeterminate) from the rules generated by this process (real and tangible). Third, that the dichotomies critical scholars identify in the international legal process, instead of being arbitrary or political, are in fact a product of law's diversity and richness and should be celebrated as such. This third claim is supplemented by the proposal that the endless tension between apology and utopia can be escaped through reference to shared understandings at the deepest conceptual levels.

The first point does not ring true. To take feminism as an example, surely the initial stages of this project were about the very specific ways in which power 'affected the creation of law' (at 46). 'Feminist Approaches to International Law', for example, is an essay *about* the way power (different forms of male power) limits, taints, constrains and influences the creation of legal rules. It is about the under-representation of women in and on law-creating institutions and the structuring of those institutions and the norms they reproduce around ideas of exclusion.⁸² Equally, Antony Anghie's recent work has focused on the power of empire and the way that power, and the various systems of thought generated by it, were important elements within the creation of modern international law.⁸³

The second point is an interesting one. Byers accuses Koskenniemi of failing to distinguish process from outcome. However, it seems more likely that Byers has drawn an artificial and unsustainable line between argument about rules and rules themselves. Thus, he states at one point, 'their [rules] normative value is not diminished by the possible indeterminacy of the arguments that may be used to establish their existence and content' (at 211). Rules, according to Byers, are 'tangible', 'real' and capable of being 'applied' and 'determined' (at 211). The assumption here is that while the process by which a rule comes into effect might be messy and political, and the arguments about the meaning of the rule arbitrary and indeterminate, underneath all this discourse lies a self-authenticating, self-applying rule. The problem with this position is that rules *are* arguments, they are constituted

⁸¹ Before discussing this encounter, it should be acknowledged that any sort of engagement is to be welcomed. As I have noted elsewhere, conversations between the new and main streams are thin on the ground. Customary international law would seem to be the perfect terrain for such an encounter. See Simpson, 'Is International Law Fair?' 17 *Michigan Journal of International Law* (1996) at 615–642.

⁸² See Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) at 613–645.

⁸³ Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1–80. The suggestion that the New Stream has not been concerned with the operation of power in the creation of law is too blunt and question-begging. It is accurate to say that critical scholars have devoted relatively little attention to the way state power (in the realist sense) engages the customary process. However, in other respects critical international law has been all about power. This power is simply more diffuse than the sort of power Byers is concerned to analyse.

by arguments about meaning. There can be no radical separation of the argument (the interpretation of the rule) and the rule itself (some pre-interpretative, tangible reality). As Byers himself puts it, adopting a more post-positivist line: ‘. . . the process of customary international law is nothing but a set of ideas . . .’ (at 151).

Of course, rules can be determined and applied. Judges do this. But Koskenniemi and others can continue to maintain in the face of this that these same rules could just as easily have been determined or applied in another direction, that the rule itself mandated no particular outcome. To maintain that a rule has a tangible result does not put to rest hermeneutics even if it resolves a particular dispute. Determination does not end indeterminacy. The *Anglo-Norwegian Fisheries* case resulted in a finding in favour of the Norwegian method of delimitation as an exception to a general rule. This is a ‘result’ but the deeper issue is surely whether this result was required by the legal materials or whether (a) either the British or Norwegian positions were equally plausible interpretations of the rules or (b) some external or extra-legal factor entered the reasoning and determined the outcome (e.g. the interests of Norwegian coastal fishermen).⁸⁴

Duncan Kennedy, in his recent book *A Critique of Adjudication*, explains what is going on in this debate about indeterminacy and application:

In both unselfconscious rule application and constraint by the text, it makes sense to say that law determined the outcome [this is Byers], if we mean that from the point of view of the actor there was no insertion of his or her own desires. But we can’t say that whenever a judge describes what happened this way the question of law had a determinate answer. The reason is that it was just an experience and might have been modified by more work done differently.⁸⁵

Byers’ third criticism of Koskenniemi resembles that made by others. Here the argument revolves around the key idea that the oscillations between apology and utopia are inevitable and not particularly damaging to a legal system. These simply reflect ‘the conspicuous or non-conspicuous character of states interests in a particular rule’ (at 211). Anyway, the point is to identify common interests (capable of resolving the apology/utopia problem) and the fact that a number of different methods are employed to do this is a response to complexity and not a lapse into political reasoning (at 211).

All this may work to achieve consensus on potentially difficult issues, although I am not certain how this method can be used in cases of serious dispute over a certain rule. Surely, it is in the very nature of such disputes that reference to common interests has failed or that there is methodological conflict about where to locate these common interests. To take Kosovo as an example, a common interest can be identified (say, the protection of ethnic groups trapped within hostile states). A method could be employed to support a doctrine of humanitarian intervention in support of that ethnic group (perhaps involving a reference of pre-1945 customary practice or a purposive reading of the Charter). Or the opposite approach could be taken, this time disclosing a

⁸⁴ Byers at 128.

⁸⁵ D. Kennedy, *A Critique of Adjudication* (1997) at 169. For a fuller account see 169–171.

different common interest (e.g. state sovereignty). A legal method could then be used to buttress or support this interest (say, a textual reading of the Charter or a reference to post-1945 state practice). One response to the 'social complexity' of this dispute would be a decision in support of humanitarian intervention. Another might insist on the sanctity of state borders. These are legitimate responses but how should we decide which is to be preferred? What higher level interests could possibly prove decisive?

A further problem with this reliance on shared interests, mutual interests and a 'universalizing public interest phenomenon' is that it assumes that the international system operates to smooth out the occasional trouble between states by appeal to higher order agreement. But does the customary process 'protect and promote with rules, the common interest of most and sometimes all States'? (at 154). Another way to view the customary process sees it as supporting economically discriminatory customary rules (dependency theorists) or maintaining political and cultural hierarchies (post-colonial critique). Yet another, as I have already noted, views shared interests as too thin a basis on which to resolve real disputes. Another range of problems is raised when one thinks of the international system in cosmopolitan or critical terms. Here, the customary process seems to operate to retard progress on realizing the public interest on environment, poverty and neo-colonialism. The search for common ground can only take us so far.

A range of epistemological and methodological contentions is implicated in deciding how to frame this whole issue. Rationalists (like Byers) say that law can be used to find the best possible reading of the materials.⁸⁶ This may be difficult but can be achieved by ascending to common interests, picking the superior methodology and bringing these to bear on the particular problem. Post-rationalists (such as Koskenniemi) deny the existence of a normative universe that would allow us to decide which were the relevant common interests and which was the superior methodology. Hence our imprisonment in the apology/utopia trap.

I suspect one's perspective on these conflicts between the new and main streams will depend partly on temperament, partly on one's stake in the system and partly on philosophical predilections and prior epistemological commitments. In other words, I doubt whether there can be a 'rational' process by which such deep disagreements can be resolved. It really becomes a matter of faith after a certain point. And, though international law is a 'broad church',⁸⁷ it does not seem likely that one will improve positivism by inserting a dash of critique or finally realize the success of the critical

⁸⁶ At one point Byers says of humanitarian intervention that it may 'benefit from interdisciplinary study . . . a truly integrated analysis of how relevant political, moral *and* legal factors interact in a particular situation . . .' (at 215). This could not possibly tell us whether a particular instance of humanitarian intervention was legitimate even if such a Herculean analytical task could be carried out. What constitutes a relevant moral factor? The whole of moral philosophy is implicated here. In any case, I am not certain that many of the studies Byers refers to do not already *attempt* just such an analysis. It is rare to find a lawyer writing on humanitarian intervention who does not refer to a host of political variables (likely success of intervention, duration) and legal criteria (motive, bad faith).

⁸⁷ The phrase is used by James Crawford in his Foreword to T. McCormack and G. Simpson, *The Law of War Crimes* (1997) at xiii.

project by adding blunt aspiration. An amalgam of Catholic belief and Presbyterian faith will probably result in an inferior religion and fewer worshippers.⁸⁸

So, the theory wars will continue and these conflicts will drive the discipline forward. I have located three images of international law as a discipline: the liberal cosmopolitans, the critical scholars and the pragmatic mainstream. Michael Byers is sceptical of the explanatory power of the first two, newer streams. Instead, his is a robust and forthright defence of a modified pragmatism. This is slightly unfashionable and occasionally unsuccessful but, much of the time, illuminating.

5 Conclusion

Byers' thesis may be designed to appeal to both lawyers and political scientists and I believe it will accomplish that end. However, there will be those in each camp who view Byers as too ecumenical. Legal positivists will find his reliance on high level shared understandings too imprecise. Critical legal scholars either will see these shared understandings as a product of a skewed political process (feminists, neo-Marxists) or regard the understandings as themselves contested or incoherent (CLS). Liberal cosmopolitans will find less to quarrel with on the descriptive level but may regard Byers' programme as too modest and procedural. On the international relations side, realists will remain unpersuaded until Byers demonstrates how the customary process might work in relation to self-defence or the use of force. Institutionalists will probably find common ground but wonder whether Byers' shared understandings are distinguishable from the expectations and behavioural roles found in institutionalist literature. Constructivists will wonder why their work was not more fully applied and may find Byers' assumptions about identity too elementary.

Still, satisfying all the people all the time would represent the end of argument not to mention the end of history. One of the chief virtues of this book is that Byers makes a genuine effort to connect his project with that of a range of theoretical schools. It is his own engagement with these various texts that informs an intellectual journey that begins with the baggage of positivism and ends by gesturing towards the cosmopolitan idealism of a figure like Philip Allott.⁸⁹

This is interesting work. Michael Byers engages international relations with great enthusiasm. Even better, is the vitality demonstrated in his engagement with his own discipline. The combination of Byers' sustained attention to legal detail and his interdisciplinary bearing makes for a controversial but significant contribution to our thinking about international law and politics.

⁸⁸ Or as Richard Little has it: 'The danger with these attempts at reconciliation is that they gloss over fundamental differences between the competing perspectives. They underestimate the extent to which these perspectives offer interpretations which necessarily rest on judgments derived from deep-seated and ultimately untestable beliefs about reality', in Little, 'The Growing Relevance of Pluralism', *supra* note 23 at 83–84.

⁸⁹ However, it seems to me that at some fundamental level Byers' project is incompatible with Allott's.