

*The Limits of International Law*. By Jack L. Goldsmith and Eric A. Posner. Oxford, New York: Oxford University Press, 2005. Pp. 304. \$29.95.

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International crises in recent years, including the reactions of the United States and the world community to September 11<sup>th</sup>, and the war against Iraq, have only furthered the perennial debates on the nature and role of international law. They have deepened the debates on whether, in its management of crises and, more generally, in the socialization of the international realm, international law is an instrument of peace, security, and justice, or simply a set of rules and norms to be called upon or ignored when it is convenient to do so. It is in this context that the value of Jack L. Goldsmith and Eric A. Posner's book on *The Limits of International Law* lies.

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The book sets out the task of outlining a theory of international law and provide a framework for explaining international legal regimes, applying what is a somewhat controversial tool in this regard, namely that of rational-choice theory. The book is divided into three parts, combining theory with case studies, each part illustrating as well as testing Goldsmith and Posner's main hypotheses. The first part focuses on customary international law, the second on treaties, and the third on rhetoric, morality, and international law.

Throughout the book, Goldsmith and Posner's objective is to show that states' behaviour associated with international law can be explained by the combination of four behavioural models namely: coincidence of interests, coordination, cooperation, and coercion. As such, the authors argue that their approach differs from traditional international law scholarship, and the view that international law serves as a check on state-interest. Their position is that international law emerges from states' pursuit of self-interested policies on the international stage.

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The ideas advanced by the authors follow in the footsteps of the earlier international institutionalists, who since the 1980's, have sought to further the understanding of the international regime through rational choice theory.<sup>1</sup>

Goldsmith and Posner argue to deny international law an independent value. Unwilling to recognize that there even exists such a thing as customary international law outside coincidences of states' interests, they explain how the only value of international law lies in the way in which treaties can serve as mechanisms, as a forum for power negotiations, for states when they so choose.

All other interpretations, especially 'cosmopolitan theory', are dismissed for serving no other end, than that of idealism applied to state behaviour. Normative forces are denied all together in this overly positivist strive for rationality that relies on simplified assumptions about the units of analysis as well as the overarching analytical and theoretical framework.

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<sup>1</sup> For more on the evolution of an institutionalist account of international law see for example, Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers", *Yale Journal of International Law*, 14 (335): 1989 or, Ann-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda", *American Journal of International Law*, 87 (205), 1993.

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On the whole, three ideas in particular are destined to puzzle the reader. The first one, which is central to *The Limits of International Law*, is the exclusive dichotomy that the authors establish between, on the one hand, international law as a check on states' self interest and, on the other, international law as a product or instrument of states' self-interest. The second, is related to the realist premises on which the conclusions are made, and the perception of the state as by and large the sole vehicle and beneficiary of international law. Third and finally, the way in which Goldsmith and Posner claim to include normative issues in their account of international law raises some concern.

The way in which Goldsmith and Posner interpret international law as either an instrument in the control of states, or an instrument for the controlling of states, is to a large extent their message. The dichotomy serves to prove the theory of the book in the sense that by not being able to control states in the pursuit of their interest, international law is limited to being an instrument applied only when it advances or coincides with state-interest. Two underlying assumptions stand out as particularly problematic; one regarding the function of law, the other regarding state-interest.

To begin with, Goldsmith and Posner make the claim that international law does not perform that check on state-interest which it is intended to, by pointing to how international law lacks that coercive force which can make states act contrary to their pronounced will or intention. As such, they are limiting the notion of law to an over-positive view in which, law only exists in the moment when it is directly and coercively enforced. Is not the very purpose of law to shape behaviour and socialize interaction without actually directly enforcing the law? But is it not the case that contrary to Goldsmith and Posner's suggestion, the use of coercive force indicates that the law has been broken and therefore, is more a proof of default, than of successful law? This in turn suggests that to understand the functioning and impact of international law, one cannot focus exclusively on its direct enforcement, but look closer at how the subjects' behaviour conforms with what that law prescribes at all times.

In addition, to argue that international law is only influential when it makes states act against their self-interest, assumes that international law is by definition predominantly contrary to states-interest. It excludes the possibility of state-interest actually coinciding with that of international law, or evolving together, and influencing each other. It is doubtful how such a conclusion can be reached considering that it suggests that state-interest and international law can be clearly analyzed as two phenomena separate from each other, not to mention the national from the international realm. The way in which Goldsmith and Posner apply rational choice theory to show that state-interest precedes the international, is far from convincing. After all, state borders are very rarely (if ever) capable of isolating one state from all external interactions and influence, and it is therefore hard to see how it can be argued that state-interest is formed first in isolation, then introduced to the international realm. And if the choices of state-interest are made in isolation, how can they be informed sufficiently for the fulfilment of the criteria of being the result of rational choice?

Rather than being an either/or proposition, international law can only be considered as a combination of the two, as both an instrument or product of state-interest, and a means of upholding a certain conduct of state behaviour. This is exactly why it presents us with such a complex phenomenon to study, let alone to draw accurate conclusions about. However, this is no

reason for simplified behavioural models that overlook its function and influence. Furthermore, a check on state self-interest is a requirement for any legitimacy claim of international law. Because to achieve a sense of legitimacy, international law has to contribute to the socialization of state self-interests in a way that rights and duties evolve in a reciprocal, and therefore mutually reinforcing, relationship.

The second problematic element is Goldsmith and Posner's perception of the state as by and large the sole vehicle and beneficiary of international law. This poses two general problems, again related to the underlying assumptions according to which this statement is made. The first is related to the understanding of the state and national interest, and the second, to perceiving states as the only actors of international law.

The first point is related to how Goldsmith and Posner seem to suggest that states act according to their self-interest defined as not only pre-existing to the international context, but also as unitary.<sup>2</sup> According to Goldsmith and Posner, state-interest is formed in a vacuum of each particular state, clear and consistent without internal divisions of neither party politics, nor among the citizens more generally. The same unitary agreement applies to the method or strategy with which these interests are played out, to the policy choices. This is a serious simplification of the problem of identifying a unified interest of man, with which rational choice theory has struggled since Hobbes.<sup>3</sup> How can Goldsmith and Posner simply assume a level of unitary state-interest without closer considerations?

Second, Goldsmith and Posner confine international law to states and as such, they exclude all other possible actors from international organisations, to regional, to non-governmental actors, and even the individual. Beginning with international organisations, and the exclusion of multilateral actors, this is of course explained by the way in which Goldsmith and Posner interpret the international system through the rigid framework of the traditional realists. Doing so in the context of international law is for various reasons neither representative of its scope, nor is it appropriate since international law, in its very purpose, is set up to hold states accountable for their actions, independent of towards whom offence has been committed. Disregarding all non-state actors, and the individual in particular, as right claimers and holders, is to disregard the whole purpose of international law, not to mention its legitimacy.

Finally, the way in which Goldsmith and Posner try to integrate the normative into their behavioural models, arguing that it can also provide answers to this end, raises some concern. They present a rather limited perspective of what it is that the normative implies, and how it relates to state-interest. Afterwards, they fail to recognize the normative implications of their own statements, concerning states and their behaviour.

Goldsmith and Posner avoid the discussion of what it is that norms imply in the context of international law. Rather, they speak of moral obligations as subject to states' definition and re-definition according to their interest. As such, where international norms and moral obligations come from is left open to be understood as if they would not exist without states. Needless to say, this is explained by their realist perspective, which prevents them from recognizing the existence of an international realm independent of states. Once again, a rather

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<sup>2</sup> For a more detailed discussion of this problem and others of Goldsmith and Posner's book, see Paul Schiff Berman, "Seeing Beyond the Limits of International Law: Book Review of Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*", *University of Connecticut School of Law Working Paper Series*, University of Connecticut, Paper 39, 2005.

<sup>3</sup> Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge, UK: Cambridge University Press, 1996).

static picture is painted which fails to recognize the importance of process and of continuous interaction to the understanding of not only international law, but also of inter-state relationships, whether bi-or multi-lateral. The claim that states only follow moral obligations when it is in their state-interest remains incomplete, because the investigation does not expand to include the other side of the coin, meaning, to what extent norms and moral obligation form state-interest in the first place. Indeed, it is in this relationship between the actual forming of state-interest, and the evolution of international law as an interactive and mutually reinforcing process, that the heart to understanding international law lies.

Linked to the way of looking upon the relationship between norms and state-interest in only one direction of interaction, is the failure to recognize the normative claim that Goldsmith and Posner themselves make on behalf of international law. By stating that states only follow moral obligation when it is in their interest, points to the fact that states do attach some importance to normative considerations, although it might be limited. The way in which it is argued that states try to express their compliance with international law before they choose to pursue non-compliance, indicates that there is an interest in trying to comply. This in turn suggest that there is an interest in considering whether it is possible to draw certain conclusion as to when breaking international law is more costly than complying. Yet the book refrains from making such considerations beyond saying that it is subject to a specific time and place. This is a discussion that would be particularly interesting in the context of humanitarian intervention. Although Goldsmith and Posner do bring out such incidences in their case-studies, they only do so to argue that states intervened only because of their state-interest as defined within traditional realist terms.

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The concerns with Goldsmith and Posner's book that have been raised here are connected to the traditional realist framework of thought on the one hand, and to the method of rational choice theory on the other. Limiting their study to a realist framework, while trying to include an approach of the early institutionalists that allows them to apply rational choice in the context of international law, causes some problems of incoherence for the authors.

Goldsmith and Posner, already in their introduction make it clear that what they are referring to is a conservative conception of international law that refutes a non-instrumental account of international law as a distinct institution. Then they move on to discuss international law as a phenomenon that, although dependent on state self-interest, is not intrinsic to state-interest. The notion of international law is referred to in a somewhat incoherent manner where discussions of 'what it is not', leave out 'what it is'. As such, their conclusions about international law leave the reader with few conclusions in terms of substance, and well-defined questions with which to pursue the problems presented. Indeed, the price that they seem to be forced to pay for the sake of making a 'solid' argument is well demonstrated in the note on which they end the book. They state that to understand international law and its context fully, one has to go beyond the realist approach and focus on factors other than concerns of security and wealth. Unfortunately, what framework it is that they are referring to, or where one could start looking for such a framework, is never identified, let alone investigated.

In addition to the limitations of the realist perspective, the choice of Goldsmith and Posner to return to the work of early institutionalists leads them to make some limiting sacrifices in favour of a pragmatic methodology. The weaknesses of the method applied, and of trying to interpret international relations exclusively as a result of rational choices made by rational actors

lead the authors to flawed conclusions. It is perhaps not so much a problem with the method of rational choice theory, as it is with the way in which it has been applied. It would seem that what Robert Keohane warns against in the application of rational choice theory to the understanding of international law, might be worthwhile for Goldsmith and Posner to consider more closely. Although Keohane recognizes the value of rational choice theory in this context, he also notes that it is important not to overestimate the capabilities of the theory to generate actual answers, but to leave it to do what it is that it does best, namely generate puzzles, to ask questions.<sup>4</sup> However, the way in which Goldsmith and Posner conclude their book shows little indication of doing just that: “some global problems may simply be unsolvable. This is a depressing conclusion, but it is consistent with all we know of human history.”<sup>5</sup>

The way in which Goldsmith and Posner make sacrifices for an as clear and ‘rational’ foundation for the scholarship of international law as possible is rather unfortunate considering the value which their approach could have, were it slightly more open to alternative understandings. An investigation of what rational choice signifies in international relations beyond the traditional realist framework may very well present interesting findings in regards to the definition of interest and interests. Moreover, it might be useful to consider international law from an institutionalist perspective, however again, without limiting its framework to that of states. As for the study of any international phenomenon, an understanding of international law necessarily has to be based on an encompassing picture representative of its full size, its process beyond the direct enforcement of law, and opened to actors other than states, and to acts other than military coercive ones. It is about behaviour and about processes which interestingly enough is what rational choice theory has increasingly turned its attention to, since Locke’s revisiting of Hobbes contract theory,<sup>6</sup> neither of which Goldsmith and Posner reference in their work.

To conclude, Goldsmith and Posner’s book has analytical qualities, which will be of value to students of international law. But the overall message that it delivers is not convincing as it uses a narrow understanding of traditional scholarship to make the case of what is, after all, a conservative conception of international law. Among the more valuable insights of the book is perhaps one related to the logic of rational choice theory, namely to look beyond that which seems to be the empirical. Meaning, just because states claim to intervene for humanitarian reasons in compliance with moral obligations of international law, their true motivation might be of a different nature. However, one could also wonder to what extent the alternative motive is more important to identify, than to consider how to strengthen that framework which makes states act for humanitarian reasons whatever their reasons. After all, short of engaging further in the discussion of not only what state-interest implies, but also how it is formed and its interaction with international law, leaves the book with little insights to that problem which it sets out to answer; “how international law works”.<sup>7</sup>

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<sup>4</sup> Robert O. Keohane, “Rational Choice Theory and International Law: Insights and Limitations”, *Journal of Legal Studies*, Vol. XXXI(1), Pt 2, January 2002, s307-319.

<sup>5</sup> Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, New York: Oxford University Press, 2005), p. 227

<sup>6</sup> John Locke, *Second Treaties of Government*, edited by C. B. Macpherson (Indianapolis: Hackett Publishing Company Inc., 1980), originally published in 1690.

<sup>7</sup> Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, New York: Oxford University Press, 2005), p. 3.