

# Introductory Report of the Interest Group of the European Society of International Law on Social Sciences & International Law

## 1. Purpose and justification

### 1. Objectives

International legal scholarship often focuses on careful doctrinal description of what the law is. However, international lawyers have long recognised that concepts, methodologies, and experimental evidence from the social sciences may shed substantial light on inquiries such as treaty design, interpretation, effectiveness, custom, soft law, international institutions, substantive norms, and international legal theory.

Recent developments in international legal scholarship indicate an increased interest in social sciences, such as (behavioural) economics, international political theory, and sociology, into the analysis of international law. These insights are used to analyse topics from a broad range of sub-fields, such as human rights, the law of the sea, investment law, the laws of war, environmental law, trade law, the role of adjudication, and the role of international organizations.

The creation of an interest group (IG) on social sciences & international law establishes a forum in which members that draw methodologies, concepts, theories, or experimental evidence from the social sciences can present their research, gain feedback from like-minded scholars, and broaden their knowledge of neighbouring disciplines. The IG has two objectives: (1) to further our understanding of how, when, and whether to integrate insights from social sciences in the analysis of international law, and; (2) to stimulate debate regarding the benefits and limitations – from both a positive and normative perspective – to social sciences approaches to international law.

### 2. Themes and foci

The scope of the IG is intentionally broad, in order to allow both for a plurality of different scholarly perspectives as well as to ensure the continuity of the group after the expiry of the mandates of the initial coordinating committee. However, in order to structure our work over the first two-year period, we have identified three themes that we would like to pursue within the framework of the IG.

#### *i. (Behavioural) economic analysis of law*

The economic analysis of international law assumes that states are rational, self-interested agents that use international law to address international externalities and obtain benefits of international cooperation. This rational choice approach emphasizes that due to the absence of a central enforcement system, international law must be self-enforcing. In other words, states must believe that if they violate international law, other states will respond negatively through retaliation or other means. Through the economic analysis of

international law, answers could be found to inquiries of what the law should be to achieve a certain objective (e.g. environmental protection, compliance, human rights protection).

While the economic analysis of international law is already a quite recent development, more recently academics have started to challenge the rational choice paradigm that underpins much of international legal scholarship, and the economic analysis of international law in particular. Behavioural insights are applied to explore how systematic deviations from rationality affect the operation of international law, and how these insights could inform international legal scholarship. Through behavioural economic analysis of law, answers could be found to inquiries of what the law should be to achieve a certain objective when the actors involved are expected to deviate significantly from the rational choice approach.

Due to the relatively recent nature of the (behavioural) economic analysis of international law, reflections are needed on how (behavioural) economics could inform international legal scholarship. As such, this IG provides a platform for discussion on various topics related to the (behavioural) economic analysis of international law, including, but not limited to:

- 1) utility of incorporating (behavioural) economic insights into analyses of international law;
- 2) methodological limitations to the (behavioural) economic analysis of international law (e.g. aggregation and external validity);
- 3) normative limitations to the (behavioural) economic analysis of international law (e.g. the use of nudges).

## *ii. Sociology & International Law*

Sociologists of law have long emphasized that law is deeply embedded in communities, and that norms are expressive of those communities. In this context, international rules too reflect and affect its different communities and the societal factors and processes that shape them. In recent years, scholars have for example used sociological analysis of international law to explain what motivates international actors to behave as they do and to show how states' interests are formed and how they change. Studies have examined different international communities (most prominently courts and tribunals, to the study of judges, arbitrators and counsel, and other 'experts') to reveal how international norms are shaped by elite groups who hold greater power or position in decision-making. In this context, researchers have identified processes through which these norms are internalised and outsiders are socialised and assimilated, but they have also questioned how international norms enable the existing structures of power to maintain and reinforce the dynamics of inequality and history.

In order to understand the 'living international law' and how structures of power are shaped and maintained, the sociology of international law makes use of non-traditional and unofficial sources of international law, expanding the research methods used by traditional international law to include surveys, examination of public and archival records, interviews, content analysis and recently social network analysis. These approaches seek to identify and understand the networks and communities international lawyers form between each other (so called 'ingroups') and the relationships they maintain with those outside

(‘outgroups’). The insights generated through this type of analysis can reveal information about the evolution of international law and the behaviour of international actors but also more broad understanding of the structures of powers within these communities.

The IG will provide a platform for scholars that engage with all kinds of sociological scholarship. Such discussions could include, for example:

- 1) What dynamics drive the complicated processes through which international law is formed, interpreted, and implemented? Who are the primary international actors in this context and what motivates them?
- 2) How does international law contribute to the formation of ‘culture’ and ‘identity’ in the international legal sphere? How does international law operate in (and between) social groups? How does it reflect and affect certain groups and what consequences arise for international law due to the formation of this ingroup/outgroup behaviour (such as fragmentation of international law, limited diffusion of norms, strained relationships between different communities)?
- 3) To what extent are the existing structures of power and the distributional disparities in the international community a function of international law? In what ways are international norms helping to reflect and serve the interests of the powerful and perpetuate the existing inequalities?

### *iii. International Relations & International Law*

Studies at the intersection of international relations (IR) and international law have traditionally been linked to North American interdisciplinary approaches to international law. Over the second half of the twentieth century, international lawyers drew with increasing frequency on realist, institutionalist, and constructivist theories that were developed in international relations scholarship in order to theorise how and why states act the way they do. Perspectives that build on international relations theory have played an outsize role in certain parts of international legal theory, such as compliance theory, where the vast majority of the literature rests on theoretical foundations drawn from IR.

Contemporary work in international relations, however, has started to move away from the ‘sterile’ debate between the paradigms of realism, constructivism, and institutionalism. Instead, a new generation of international relations scholars focus on exploring the pivotal role that individuals play in determining state behaviour. They aim to study why similar-situated elites nevertheless make different decisions, drawing on large-*n* quantitative studies, laboratory experiments, and archival work to support their arguments. Whilst international lawyers have yet to engage fully with this new strand of international relations scholarship, it promises to be a fruitful avenue for interdisciplinary research.

The IG will provide a platform for scholars that engage with all kinds of international relations scholarship. Such discussions could include, for example:

- 1) What are the theoretical or epistemological differences between the two disciplines? Do the prescriptive goals of international lawyers limit the applicability of concepts/theories/methodologies drawn from IR?
- 2) How can/should international lawyers engage with the new generation of IR scholarship? What are the potential insights/limitations of this literature in the context of international law?
- 3) How can international lawyers move beyond theories of compliance that are based on outmoded IR theories, such as realism? Is it necessary for international lawyers to do so?

## 2. Activities

A number of activities that fall within the scope of the IG have already been organised by members of the co-ordinating committee. Information regarding these activities will be communicated to members via email in the coming weeks and will also be posted on the website of the IG. Such events will be supplemented by additional events should those be proposed by IG members.

## 3. Initial Co-ordinating Committee

1. Dr. Veronika Fikfak, Associate Professor, iCourts, University of Copenhagen
2. Dr. Daniel Peat, Assistant Professor, Grotius Centre for International Legal Studies, Leiden University
3. Dr. Eva van der Zee, Assistant Professor, Institute of Law and Economics, University of Hamburg