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REALITY OF NORMS AND REALITY: A REPLY TO FRED GRÜNFELD

Michal Onderco*

Introduction

In a previous issue of this journal Fred Grünfeld argues¹ that while lawyers fail to take into account social reality once a legal norm has been determined, international relations scholars “skip the norm” and research social reality.² On the basis of the subsequent demonstrations, Grünfeld contended (quite rightly) that lawyers and social scientists are not familiar with each other’s work, while studying the same phenomena, although in “different phases”. He, however, argues that such division should be kept in place and lawyers and social scientists should remain working separately.

In this reply, I will address both the empirical elements of Grünfeld’s argument as well as his substantive argument of keeping the two disciplines separated. In the remainder of the article, I will engage Grünfeld’s demonstrations related to the research on norms in international relations (IR), methods of social science, and the cause and effect distinction in both. In particular, I will argue that not only can the work of lawyers and social scientists be mutually enriching, but also that new methods should be tried so that new findings can be reached.

I. Norms and Rules, Lawyers and IR Scholars

Grünfeld argues that it is inconceivable to lawyers that states endorse a norm,³ by accession to a treaty for example, and then violate it.⁴ This argument holds as long as we speak of practising lawyers. Practising lawyers would argue that not only are states bound by the Vienna Convention to enter into their international obligations in good faith, but as the International Court of Justice recently ruled “there is no reason to suppose that a State whose act or conduct

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¹ Based on F. Coomans, F. Grünfeld, and M. T. Kamminga (eds.), *Methods of Human Rights Research*, Antwerp & Portland: Intersentia 2009.

² F. Grünfeld, ‘International Law and International Relations: Norm and reality or Viceversa’, *Amsterdam Law Forum* 2011-3, pp. 3-14.

³ What Grünfeld understands as a “norm”, the social scientist would call a rule. A quick and dirty difference between rules and norms is that rules are written and codified (in a treaty or an agreement), whereas norms transcend rules because they have a social significance and thus provide boundaries which are flexible and open to interpretation.

⁴ Cf. J.D. Fearon, ‘Signaling Foreign Policy Interests’, *Journal of Conflict Resolution* 1997-1, pp. 68-90; C. Reus-Smit, ‘The Constitutional Structure of International Society and the Nature of Fundamental Institutions’, *International Organization*, 1997- 4, pp. 555-589.

has been declared wrongful by the Court will repeat that act or conduct in the future [...]”,⁵ extending the belief in the good faith. Grünfeld’s assertion is therefore understandable.

The example put forward, which the author argues to be an original thought, is however remarkably similar to research done by international relations scholars. Grünfeld could have also pointed to similar arguments made by Moravcsik (on the European Court of Human Rights) or Simmons and Danner (on the International Criminal Court).⁶ When Grünfeld argues that research on non-compliance with the convention against torture is a surprising research topic for lawyers, he ignores an important body of international legal scholarship that deals particularly with this compliance.⁷ Moreover, international relations scholars have explored compliance (and non-compliance) through arguments based on bargaining, regime and game theories.⁸

II. Till Method Us Do Part

Grünfeld’s argument on method is twofold. First, he engages what he calls “scientific distance”, arguing that international relations scholars⁹ as well as lawyers lack scientific distance, meaning the distance between researcher and his subject, when researching fields such as “foreign policy, human rights and issues relating to peace and security.”¹⁰ Second, he argues that the quantitative obsession of social scientists leads to distortion of facts because it attempts to quantify reality, thereby necessarily simplifying it.

If the “scientific distance” argument is valid, social science is in serious trouble. Grünfeld argues that human rights scholars tend to get too personally connected with their research subject, associating an advancement agenda with research. If that were true, the implications of such a lack of scientific distance would run counter to the recommendations for the conduct of research in the social sciences. Save for critical-theory and Marxist-inspired

⁵ 1969 Vienna Convention on the Law of the Treaties; *Navigational and Related Rights* (Costa Rica v. Nicaragua), ICJ 2009, para. 150.

⁶ A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 2000-2, pp. 217-252; B.A. Simmons and A. Danner, 'Credible Commitments and the International Criminal Court', *International Organization* 2010-2, pp. 225-256.

⁷ Such as H.H. Koh, 'Why Do Nations Obey International Law?', *The Yale Law Journal* 1997-8, pp. 2599-2659.

⁸ For a recent overview, cf. B. Simmons, 'Treaty Compliance and Violation', *Annual Review of Political Science* 2010-1, pp. 273-296.

⁹ Grünfeld uses the terms “social scientists” and “political scientists” interchangeably, although in his introductory paragraph he actually limits his case to the realist school of international relations. Unless explicitly stated, I will argue from the point of view of international relations, without any particular theoretical inclination.

¹⁰ F. Grünfeld, 'International Law and International Relations: Norm and reality or Vice versa', *Amsterdam Law Forum* 2011-3, p. 4.

researchers,¹¹ social scientists have been asked to keep as much distance as possible from the subject of their research.¹²

Nevertheless, the situation is not so dire. When it comes to political science the argument that scientists keep little scientific distance is ill-founded, because that is a contradiction in terms. If social scientists, as Grünfeld argues in his second methodological remark, really distinguish themselves by the use of quantitative methods¹³ (which the present author doubts heavily), then scientific distance is certainly not lacking. There is hardly a more impersonal way of engaging with the material than through a maze of numbers in matrices. When it comes to qualitative social science, researchers are not only encouraged to choose subjects they are not emotional about,¹⁴ but the existing qualitative research methods and policies of most professional journals inhibit such instances.

On the other hand, Grünfeld's argument bears relevance when it comes to research on international norms. Indeed the result of research there has been the highlighting of the advances in the human rights promotion. The existing constructivist research on international norms has focused too much on the successful examples of positive norms.¹⁵ However, even research on human rights, whether qualitative or quantitative, still does not qualify under the lack of scientific distance described by Grünfeld.¹⁶

¹¹ Guided by Marx's famous quote "Die Philosophen haben die Welt nur verschieden interpretiert; es kommt aber darauf an, sie zu verändern", in K. Marx, 'Thesen Über Feuerbach', at: <http://www.marxists.org/deutsch/archiv/marx-engels/1845/thesen/thesfeue.htm> (accessed on 15 December 2011).

¹² G.R.O. King and S. Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton: Princeton University Press 1994.

¹³ Which he equates with the social science methodology, ignoring important advances made in qualitative social science methods, cf. J. Gerring, *Case Study Research: Principles and Practices*, New York: Cambridge University Press 1997; A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences*, Cambridge, Mass.: MIT Press 2005.

¹⁴ W.L. Neuman, *Social Science Research Methods: Qualitative and Quantitative Approaches*, Boston, MA: Allyn & Bacon 2003.

¹⁵ J.T. Checkel, 'Review: The Constructivist Turn in International Relations Theory', *World Politics* 1998-2, pp. 324-348; P. Kowert and J. Legro, 'Norms, Identity, and Their Limits: A Theoretical Reprise', In: P.J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*, New York: Columbia University Press 1996, pp. 451-497.

¹⁶ Examples of qualitative research include (but are by far not limited to) M. Finnemore, *National Interests in International Society*, Ithaca, N.Y: Cornell University Press 1996; A. Klotz, *Norms in International Relation: The Struggle against Apartheid*, Ithaca: Cornell University Press 1995; T. Risse, S. C. Ropp, and K. Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press 1999. Quantitative research may be exemplified by R.C. Carpenter, 'Vetting the Advocacy Agenda: Network Centrality and the Paradox of Weapons Norms', *International Organization*, 2011-1, pp. 69-102.

The charge that social scientists oversimplify reality in their attempts of quantification is the most serious put forward by Grünfeld. He argues that international legal scholars and international relations scholars both use “highly different methods”,¹⁷ precluding their mutual cooperation. His argument is that while lawyers focus on “what ‘ought to be’”,¹⁸ social scientists are bound to observe social reality in ways that distort reality. Grünfeld takes particular issue with the operationalisation of phenomena for processing in a quantitative way, which he believes to distort reality.

The opinion that law studies what ‘ought to be’ is relevant only as long as we remain in the world of legal positivism¹⁹ and practice. Much of the research in international law has been about the social drivers and effects of legal practice. The law, as a social construct, exemplifies (and shapes) social reality in the community where it arises. As such, it serves as a useful lens to study the community. Through such a lens, legal scholarship has successfully studied phenomena related to real-world politics without losing its legal focus.²⁰ Even in positivist studies, the study of empirical phenomena such as existing case law or treaty interpretation has transcended the normative aspects and in fact focused on wider interpretation.

The operationalisation of phenomena for quantitative inquiry is just a different step in the traditional social science methodology. We can understand operationalisation, apart from dummy coding,²¹ as an exercise in dividing a line between two opposite *Gedankenbilder*.²² How does a country’s democracy score on a scale from -10 to 10²³? How corrupt is the country on a scale from 0 to 10²⁴? How developed is it, on a scale from 0 to 1²⁵? In each case, we know fairly precisely what we wish to study and how the results of a unit compare to other units. If the purpose of social science is to advance towards generalisable

¹⁷ F. Grünfeld, ‘International Law and International Relations: Norm and reality or Vice versa’, *Amsterdam Law Forum* 2011-3, p. 7.

¹⁸ *Ibid.*, p. 8. (Parenthesis in original).

¹⁹ While Grünfeld argues that he takes legal positivism as the representative of legal scholarship, such argument is hardly defensible (as legal positivism is only one of many schools in legal scholarship), once he starts making arguments about ‘legal scholarship’.

²⁰ For example, cf. T.M. Franck, *The Power of Legitimacy among Nations*, Oxford & New York: Oxford University Press 1990; R.H.M. Pierik and W. Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, Cambridge, New York: Cambridge University Press 2010.

²¹ Dummy coding is a way to code group membership or other social phenomena using only zeroes and ones (no or yes).

²² M. Weber, *The Methodology of the Social Sciences*, New York: Simon & Schuster 1949.

²³ M.G. Marshall, T.R. Gurr, and K. Jagers, *Polity IV Annual Time-Series 1800-2009*, at: <http://www.systemicpeace.org/polity/polity4.htm>

²⁴ Transparency International, *Corruption Perceptions Index 2011*, at: <http://cpi.transparency.org/cpi2011/>.

²⁵ UNDP, *Human Development Index 2011*, at: <http://hdr.undp.org/en/statistics/hdi/>.

conclusions, then we cannot do without comparisons. Social scientists thus do not distort reality but attempt to describe it in ways that are roughly comparable across time and space.

Grünfeld's criticism of the use of proxy measures by international relations scholars is related to this issue. He, however, does not recognise that proxies, if well constructed, are actually very helpful in studying empirical phenomena.²⁶ If human rights give individuals certain rights (right to health, right to education, etc.), the (mal)-performance of states in the sphere of human rights can be actually measured quite well.²⁷

III. Causes, Effects and Concerns

Grünfeld closes with the argument that while law is a cause-oriented field, political science is an effect-oriented one. He justifies this proposition by looking at sanctions research, arguing that “[l]awyers look back [...] to the point where the legal norm was violated and connect the legal consequence of the sanction to it”, whereas international relations scholars look at “the most effective way [...] to force the state to change its behaviour.”²⁸

Such an argument is misguided. What Grünfeld equates with causality, namely tracing the United Nations Security Council sanctions to norm violations, in reality is nothing but a mechanism. Mechanisms do not cause events to happen, but are only the link (trajectory) between the cause and the effect. If mechanism equated to cause (what Grünfeld implies), the UN Security Council would work like a stack of dominoes. If every time the dominoes fell (UN Security Council sanctions) would be caused by a push, namely a violation of a norm, then every push would also cause the fall of all dominoes. Every norm

²⁶ K.A. Clarke and D.M. Primo, *A model discipline: political science and the logic of representations*, Oxford; New York: Oxford University Press 2011.

²⁷ For a recent methodological discussion, cf. G. Goertz, 'Concepts, Theories, and Numbers: A Checklist for Constructing, Evaluating and Using Concepts or Quantitative Measures', In: J.M. Box-Steffensmeier, H. E. Brady and D. Collier (eds.), *The Oxford Handbook of Political Methodology*, Oxford, UK: Oxford University Press 2010, pp. 97-118. For an example, cf. N.A. Englehart, 'State Capacity, State Failure, and Human Rights', *Journal of Peace Research* 2009-2, pp. 163-180; E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' *Journal of Conflict Resolution* 2005-6, pp. 925-953.

²⁸ Grünfeld argues that political scientists do not look at sanctions as punishment but as a coercive measure. There is, however, a growing body of literature that suggests sanctions ought to be conceived not only as punishment but they serve more as a signaling device (of unacceptability of actions). Cf. G.J. Hufbauer, J. J. Schott, and K. A. Elliott, *Economic Sanctions Reconsidered* (3rd ed.), Washington, DC: Peterson Institute for International Economics 2007; D.J. Lektzian and C. M. Sprecher, 'Sanctions, Signals, and Militarized Conflict', *American Journal of Political Science* 2007-2, pp. 415-431; K.R. Nossal, 'International Sanctions as International Punishment', *International Organization* 1989-2, pp. 301-322.

violation would be met with action of the UN Security Council²⁹. But we know the UN Security Council does not work this way.

Neither international relations scholars nor legal scholars can establish causality by looking at violations of existing rules, or norms, in Grünfeld's language, alone. There is always an important social dimension which distinguishes some rule violations from others. If we were to establish causality by looking at rule violations, reverse tracing would not be possible – for not all rule violations, even of the same rule, lead to sanctions. There are many explanations for this, including power status, alliance patterns, and economic interdependence, but the key is to look at social reality. If there is any difference between positivist legal scholars and international relations scholars, then it is that the former focus on the rule violation itself, whereas the latter look at the complex reality.

IV. It Takes Two to Tango

In this final section, I want to take issue with Grünfeld's wider argument that lawyers and international relations scholars are better off in their separate disciplines and their separate methodologies. While Grünfeld concedes that the two fields should communicate more, he strongly argues against intermingling. Such argument is, however, short-sighted. Whenever we look at legal factors in international politics, we should take both law and politics into account. If we wish to study legal phenomena, we cannot be successful unless we integrate politics and law. The law is shaped by the social world and the shape of the law sheds light on the transformation of the social world. The interrelation is confounded by the fact that many concepts are dealt with by both lawyers and international relations scholars. A prime example is the notion of sovereignty, which forms both the core of the international legal order and is a key concept in international relations theory.³⁰ When joining the legal and IR positions, we gather useful insights into the transformation of the concept of sovereignty.³¹ The effect is not only one-way. International politics are heavily restrained by law and law shapes international politics. War, the main preoccupation of international relations scholars, is heavily legally constrained. Many political scientists study how the law constrains or co-shapes politics.³²

²⁹ Similar to the fact that every gentle push against the first domino leads to the fall of the last domino.

³⁰ H. Kelsen, 'Sovereignty and International Law', *The Georgetown Law Journal* 1960-4, pp. 627-640; S.D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton, NJ: Princeton University Press 1999.

³¹ T.E. Aalberts and W. Werner, 'Mobilising Uncertainty and the Making of Responsible Sovereigns', *Review of International Studies* 2011-5, pp. 2183-2200.

³² F. Kratochwil, 'Has The "Rule of Law" Become A "Rule of Lawyers"?', In: F. Kratochwil (ed.), *The Puzzles of Politics: Inquiries into the Genesis and Transformation of International Relations*, Abingdon: Routledge 2011, pp. 126-150. C. Reus-Smit, *The Politics of International Law*, Cambridge: Cambridge University Press 2004; A. Wendt,

The same applies to Grünfeld's methodological arguments. A method is just a lens; it does not belong exclusively to any of the disciplines. For example, successful quantitative legal studies have been done into sentencing practice³³ as well as qualitative studies into why states accept international tribunals.³⁴ The puzzle determines the method, not vice versa. Many important questions can be (and are) answered by legal scholars with the use of quantitative methods, especially when related to wider patterns or evaluation of existing practice. At the same time, qualitative social science methods can address some issues which can be hardly answered quantitatively. There is no impermeable methodological divide, just one that is given by preferences and puzzles.

Therefore, I respectfully disagree with Grünfeld's argument and problematic conclusion. Instead of continuation in separate disciplines, substantive and methodological interaction between lawyers and international relations scholars should be encouraged. Only then we can see the "mutual surprise and amazement" (p.14) envisaged by Grünfeld.

- The Amsterdam Law Forum is an initiative supported by the VU University Library -

Social Theory of International Politics. Cambridge; New York: Cambridge University Press 1999.

³³ B. Holá, A. Smeulers and C. Bijleveld, 'International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR', *Journal of International Criminal Justice* 2011-2, pp. 411-439.

³⁴ B.A. Simmons and A. Danner, 'Credible Commitments and the International Criminal Court', *International Organization* 2010-2, fn. 11.