

## INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: NORM AND REALITY OR VICE VERSA

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### Introduction

The fields of Public International Law (PIL) and International Relations (IR) share the same research area: international politics. Political scientists, more generally social scientists, study the Theory of International Relations (TIR) while lawyers, especially experts on the law of nations, study Public International Law.

There are several schools of thought within TIR, some of which (like the liberal/pluralist, constructivist and the English School) attach more importance to norms and laws than others.<sup>1</sup> With respect to laws, it is not just a question of whether they are being complied with or not; the various schools within IR also ascribe a wide range of different meanings to them. The narrow vision is that laws can only impose limitations to the actions of states, while these limitations can still be ignored in the state's interest. In that case international law serves as a mitigating factor. The extremes within TIR are discussed by Lyons and Mastanduno, with the one extreme being pure realism with *might makes right*, and the other being pure globalism with *global governing authority*.<sup>2</sup> Some lawyers in Public International Law work on the basis of legalistic, positivist beliefs, while others take a broader perspective and involve social reality. The bold statement I am pioneering with this article is born from the more extreme views of the two fields: the 'realists' among the IR experts and the 'positivists' among the lawyers. My proposition is that lawyers stop once the norm has been determined, and fail to look into social reality. Political scientists, on the other hand, do not occupy themselves with norms and research social reality directly: their interpretation fails because they skip the norm.

In my opinion, the methodological differences between the two fields are major and important. This in particular sets the two fields even further apart than would be initially resumed in view of the different attitudes among

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<sup>1</sup> For schools in IR, please refer to (among others): J. Baylis & S. Smith (2005), *The Globalization of World Politics*: Oxford: Oxford University Press; Dunne, T., M. Kurki & S. Smith (eds.) (2007), *International Relations Theories: Discipline and Diversity*, Oxford: Oxford University Press; Smith, S., A. Hadfield & T. Dunne (eds.) (2008), *Foreign Policy: Theories, Actors, Cases*, Oxford: Oxford University Press.

<sup>2</sup> Lyons, G.M. & M. Mastanduno (1993), International intervention, state sovereignty and the future of international society, *International Social Science Journal*, 45, 4, pp. 517-532, p. 528.

researchers and the wide range of approaches within each research area. This article focuses on the differences between social scientists (especially political scientists studying International Relations) and legal researchers (specifically in the fields of Public International Law and human rights) in terms of research methods.<sup>3</sup> I will use a number of examples to discuss the different presumptions, questions, data collection methods and the nature of the conclusions. The focus on methodology will highlight the difference between the researchers of Public International Law on the one hand, and International Relations on the other. Finally, I will list a number of recommendations, preferring that each discipline continues using its own instruments while making its conclusions accessible to other researchers, so that lawyers get more of an eye for empirical reality, while social scientists get more of an eye for norms and conceptualisation.

The legal limitations to a state's freedom to act can apply to both domestic and international policy. As early as thirty years ago, Voorhoeve concluded that European Law imposed greater limitations on domestic policy than did Public International Law.<sup>4</sup>

### 1. Norm and Reality

The subjects of the research area of international politics include politicians, statesmen, lawyers, judges, diplomats, high-ranking civil servants, military personnel, activists, journalists, etc. Researchers study what these people do. There are many schools and orientations in the two academic disciplines of International Relations and Public International Law, and it is possible to distinguish the more theoretically inclined researchers from the more practice-oriented ones.

The more practice-oriented researchers closely follow the subject area and make the activities of the actors their central focus. To lawyers, the source of inspiration and sometimes of admiration tends to be case law, especially case law from higher legal institutions like the *Hoge Raad* (Dutch Supreme Court), the Court of Justice of the European Union, the European Court of Human Rights, or the International Court of Justice. Political scientists, too, closely follow the subject area, at times strongly identifying with either the diplomats or the activists. This attitude of practice-oriented researchers can detract from critical analysis when they believe that such an analysis does not serve the higher cause of their ideals. Especially in fields such as foreign policy, human rights and issues relating to peace and security, lawyers and political scientists frequently employ this orientation with a limited 'scientific distance'. This often

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<sup>3</sup> Substance and research methods are closely related: *method is the substance*. See: Landman, Todd (2009), Social science methods and human rights, pp. 19-44, in: Fons Coomans, Fred Grünfeld and Menno Kamminga (eds.), *Methods of Human Rights Research*, Antwerp - Oxford-Portland: Intersentia, 2009, to be cited as *Methods of Human Rights Research, 2009*.

<sup>4</sup> Voorhoeve, J.J.C. (1978), *Internationale macht en interne autonomie: verkenning van de Nederlandse situatie*, Wetenschappelijke Raad voor het Regeringsbeleid, The Hague.

goes hand in hand with a normative interpretation of the professional field, based on predetermined principles, such as the ideal of promoting human rights. Eva Brems concluded that most human rights researchers are of the opinion that their research should not just aim to promote human rights, but that it should also contribute to promoting and improving the protection of human rights.<sup>5</sup> It may be laudable to take the promotion of human rights or of peace as one's basic principle, but it starts to get worrisome when the research results are not published, or are kept outside of the research plan when they may hint at different trends. Andreas Follesdal points out the risk that the research agenda will become purely solution-oriented, with a bias against studies that do not result in the desired solution.<sup>6</sup> My position in this is that basic principles and norms are very important, but can only make a real contribution when tested against social reality. Vice versa, the social reality of international politics is meaningless until connected to norms and basic principles.

Previously, I posited that some researchers have a certain desirable result in mind for their research, and consciously or subconsciously take their research in that direction through their choice of methodology. The implicit presupposition, the question and the selection of data and other source material frequently betray the desired outcome. Sometimes, this is mentioned explicitly. For instance, Maria Stuttaford states that her research aims to bring about a change of power by listing wrongs and solutions for improvement.<sup>7</sup> The method she uses in her research at the local level in South Africa also aims to strengthen local groups (*empowerment*). Should that fail, she would change her research method in order to achieve the desired result after all. The normative attitude, working purposely towards a desired outcome, is stated openly and explicitly. Her working method of participant observation is in line with this. Unfortunately, others are more prone to concealing it when they employ this strategy. We allude to situations where a client 'hires' a researcher to arrive at a desired result. This enables the client to exert force to try and steer the outcome of the study to a direction that is more desirable for the client, while still presenting the results to the outside world as independent scientific research. This scenario is more likely when the research assesses policy or is applied to policy than when it is more fundamental research. Fundamental research at universities does not tend to be privately funded and is conducted increasingly less frequently due to governmental budget cuts in the Netherlands at the Ministry of Education, Culture and Science and the Netherlands Organisation for Scientific Research (NWO).

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<sup>5</sup> Brems, Eva (2009), *Methods in legal human rights research*, pp. 77-90, in: *Methods of Human Rights Research, 2009*.

<sup>6</sup> Follesdal, A. (2009), *Methods of philosophical research on human rights*, in: *Methods of Human Rights Research, 2009*.

<sup>7</sup> Stuttaford, M. (2009), *Methods in health and human rights research: Towards a spiral of co-learning*, in: *Methods of Human Rights Research, 2009*.

## 2. Torture

The norm takes such precedence in the minds of lawyers that they can barely imagine that a state that explicitly endorses a specific norm – for instance, by acceding to the Convention against Torture – will then still and increasingly commit torture, even when circumstances have not changed. A legal researcher (!) studied this counterintuitive outcome and concluded that some states accede to the Convention against Torture merely to acquire more funding. Once the accession had been finalised, and the additional development aid that came with it had been received, there was no longer any motive to restrain torture. Oona Hathaway studied the behaviour of 160 states over a period of forty years and concluded that:<sup>8</sup>

- (1) states that are party to the Convention against Torture of 1984 do not demonstrate better practices than states that are not;
- (2) democratic states are quicker to assume the obligation to refrain from torture than non-democratic states;
- (3) democratic states that torture more, do not accede to the Convention as quickly;
- (4) non-democratic states that torture more, accede to the Convention sooner than those that torture less;
- (5) accession often has the opposite effect: states do not torture any less after they accede to the Convention;
- (6) states that have ratified regional anti-torture treaties demonstrate an even poorer performance in practice than states that have not ratified such treaties;
- (7) states that accept articles 21 and 22, relating to the right of complaint of states and of individuals, respectively, do tend to do better (*better torture ratings*, i.e. less or no torture).

Conclusions (4) and (5) are remarkable. How can it be explained that non-democratic states where torture is more widely used are more likely to accede to the Convention, and that those states that ratify the Convention torture more than those that do not? Hathaway points at the indirect effect of the role of reputation. Signing the Convention adds to a country's positive reputation, which improves its chances to attract foreign investment and aid. States that already do well in terms of human rights have less to gain by signing the Convention, as they already have a good reputation. Countries with bad practices thus improve their reputation by signing the Convention, without running too many risks. In this way, Hathaway explains findings (4) and (5) by referring to the role of reputation, which also makes it clear that the incentive for improving torture practices after accession is gone. This is so contrary to expectations that many – and this is probably more true for lawyers than for political scientists – would not have thought to start such an investigative empirical study. As stated, this research was conducted by a lawyer, so we should be careful about contrasting the two disciplines. The results are contrary

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<sup>8</sup> Hathaway, O.A. (2004), The promise and limits of the international law of torture, in: S. Levinson (ed.), *Torture: A Collection*, Oxford: Oxford University Press, pp. 199-212.

to expectations based on the norm. Yet the behaviour of the states in question can be rationally explained from a different principle – accession to the Convention against Torture as a means to acquire development aid – especially when compliance with international treaties is not a state’s primary concern. Improved, possibly obligatory monitoring of compliance with Convention commitments may have the desired effect of forcing the states in question to change their behaviour. The research proved that states that accepted monitoring – see (7) above – in fact demonstrated reduced torturing practices; moreover, this effect was not just temporary. This means the social relevance of this study is enormous; larger, in fact, than that of research that merely confirms the norm. This latter type of research occurs when it is decided beforehand – such as set down in the basic principles of the Netherlands School of Human Rights Research – that the objective is to implement and strengthen international, regional and national systems for the protection of human rights.<sup>9</sup> From this angle, it seems tribunals will be judged positively.

It is difficult to place contrasting expectations in the research programme in advance. This makes it hard to explain contrary effects, so they will at most result in the expected effects being discarded. Positive and negative side effects will have to be identified in advance – i.e. based on expectations; after all, they can be imagined – which enables them to be tested separately. The traditional peacekeeping forces of the first generation were meant to serve as temporary troops to reduce the interval between cease-fire and signing a peace agreement. In fact, peacekeeping forces tend to have the opposite effect, because they help settle down problems in the area, the need to close a peace agreement is no longer as pressing and the agreement is postponed sooner. A well-known example is UNFICYP in Cyprus.<sup>10</sup> Turkish and Greek Cypriots have lived separately since the 1960s. However, this calm has turned out to be a mere pretence; whenever one of the parties means to change the status quo, the peacekeeping forces are effortlessly knocked aside, like they were during the Turkish invasion of Cyprus in 1974 and the Israeli bombing of Lebanon in 1981 and invasion in 1982. A peace treaty would have been a better guarantee for peace and quiet in the area; compare the above to the situation along the Israeli borders since the Egypt-Israel peace treaty of 1979 or the Israel-Jordan peace treaty of 1994. The arrival of peacekeeping forces did nothing to expedite such a peace agreement between, for instance, Israel and Lebanon, or Greece and Turkey with respect to Cyprus.

### 3. Research Method

Lawyers and political scientists employ highly different research methods. It is often not sufficiently appreciated beforehand that the selected research method will be a deciding factor in the results. As Todd Landman put it: *method*

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<sup>9</sup> School of Human Rights Research (2007), *Annual Report 2006*, Utrecht, p. 1 ([www.law.uu.nl/orm](http://www.law.uu.nl/orm)).

<sup>10</sup> Greig, J.M. & P.F. Diehl (2005), The peacekeeping–peacemaking dilemma, *International Studies Quarterly*, 49, 4, pp. 621-646.

*is the substance*. In other words: it is not only true that the content determines the method, and the method determines the content: the method *is* the content.<sup>11</sup> This is much further-reaching than the more common belief that the one precedes the other and that the method partly determines the results. Without methodology – specification of the question, determining discernible theoretical implications, meticulous compilation and presentation of evidence, logical conclusions – research remains limited to speculations and conjecture. No substance without method.

Opinions of one's own discipline can determine the method. Jan Smits, for instance, states that when a lawyer takes the norm as his main focus, he will ask normative questions about what 'ought to be'.<sup>12</sup> Lawyers then weigh the arguments. Weighing arguments from case law – on an internationally comparative basis wherever possible – is more important to him than weighing the interests involved, such as those of the mother and child in cases of wrongful birth. This makes the contrast between the legal and the social sciences particularly sharp and ties in with the opinion of an NWO director that Law is not an empirical science and should therefore be grouped with religious studies or philosophy with respect to research assessment rather than with social sciences.

The research question and the method are inextricably bound in many ways. Method serves the research question and the conclusions to be drawn from the results, as well as their meaning. The generalisation of research of local communities is naturally more limited than that of comparative national research or research at an international level. Evidently, one does need to have reliable, comparative data for research at the international level. When there are no reliable data, as Hans-Otto Sano and Hatla Thelle found out in the course of their China studies, quantitative research becomes impossible; for that reason they conducted qualitative research, supplemented with interviews among the elite.<sup>13</sup> Much of the political quantitative research in the United States into human rights violations is based on a tremendous love of large databases, which are supposed to enable researchers to deduce 'hard', statistically significant connections. I would like to make two comments on this. Firstly, Landman acutely points out that all quantitative research – or more precisely: the quantifying process – is preceded by qualitative distinctions.<sup>14</sup> My second comment is that such research assumes that violations of norms can be measured using the available data, while such a measurement threatens to pass over the actual content of the norm. I will explain this with reference to the socioeconomic human rights.

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<sup>11</sup> Landman (2009).

<sup>12</sup> Smits, J. (2009), *Redefining normative legal science: Towards an argumentative discipline*, in: *Methods of Human Rights Research*, 2009.

<sup>13</sup> Sano, H.-O. & H. Thelle (2009), *The need of evidence based human rights research*, in: *Methods of Human Rights Research*, 2009.

<sup>14</sup> Follesdal (2009).

#### 4. Violations of the Socioeconomic Human Rights

The question of when exactly a socioeconomic human right is being violated has not received the same attention either in practice or in research that violations of civil and political human rights have. This definition is harder, partly because there is much less case law available in this field, which is caused by the different nature of these rights. Violations are, after all, more difficult to identify when ‘promoting the substance of the right’ is a more prominent concern than protecting said right. Although this reasoning is not exactly hard and fast – for instance, discrimination is a clear violation of both types of human rights – what interests us at this point is that when legal practice and legal researchers have not provided further details, the empirical scientists will find it hard to do any sort of meaningful research.

For example, one political researcher asked the question of whether arms procurement by developing countries constituted violations of socioeconomic rights. This was investigated by looking into child mortality rates and life expectancy.<sup>15</sup> Statistical data are considered a measure for checking whether human rights violations can be attributed to a state. Violations of these ‘subsistence rights’, as the American political scientists call them, are measured merely through statistical basic data like literacy rates, life expectancy and child mortality,<sup>16</sup> while the actual scope of, for instance, the right to education and the right to health are much wider in scope and encompass (among other things) access to the right in question.

Lawyers tend to handle such matters with more accuracy and divide the obligations of states into protecting, respecting and implementing the specific right. It is also examined whether the state has increasingly implemented the right without setting an absolute benchmark and keeping in mind socioeconomic development. This may make violations of such a right by the state a little more difficult to prove, but it does not exclude the possibility. Deliberately withholding a right from certain groups – i.e. discrimination – is such a violation. Withholding certain commodities from the entire population while they are in fact available is also a violation. For instance, the Chinese population was not provided with food during the Cultural Revolution while the granaries were overflowing for export purposes. A group of lawyers have drawn up guidelines<sup>17</sup> that enable the identification of socioeconomic human rights violations. The American political research referred to earlier, does not pay enough attention to these nuances, with the researchers using large quantities of available socioeconomic data for a large number of states to try and draw

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<sup>15</sup> Miller, D. (2004), Security at what cost? Arms transfer to the developing world and human rights, in: S.C. Carey & S.C. Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies*, Aldershot: Ashgate, pp. 63-81.

<sup>16</sup> Callaway, R.L. & J. Harrelson-Stephens (2004), The paths from trade to human rights: The democracy and development detour, in: S.C. Carey & S.C. Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies*, Aldershot: Ashgate, pp. 87-105.

<sup>17</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, January 1997, at: [www.rechten.unimaas/humanrights](http://www.rechten.unimaas/humanrights).

conclusions about the violations. At this high (international) level of analysis, far-reaching generalisations can be made. Examples include the studies by Poe and Carey that compare states with respect to human rights violations.<sup>18</sup> These are global, inductive studies of a quantitative nature, thus making the scope universal, as well. And yet the more extensive studies have often been hugely wide of the mark, so that their pretention of universal validity cannot be taken at face value. Significant connections found by the one do not, at times, resurface with the other. As an example, Richards concluded, based on research into civil and political rights in 158 states in nine regions over the period 1981-1999, that the only places where economic improvements did not benefit human rights were Muslim countries. None of the three types of human rights included in the study demonstrated a positive connection to economic growth.<sup>19</sup> Poe's research, on the other hand, which was based on civil and political rights in six regions in the course of the period 1977-1996, concluded that the 'Islam' factor had no influence whatsoever on human rights violations, but that the explanation lay in the 'Middle East region' factor. More democracy did not improve the human rights situation in the Middle East, while it did in other regions.<sup>20</sup> The limitations of major quantitative empirical research at the international level mainly come to light when one tries to explain the differences. That applies even more significantly to the socioeconomic human rights than to the civil and political ones.

The data may determine the outcome, but it is not an outcome that in any way answers the original question relating to socioeconomic human rights violations. Other studies of human rights violations at the global level use the shortage of available data as an argument to explain the lack of studies regarding violations of these socioeconomic human rights. The research agenda is thus narrowed down to violations of civil and political human rights.<sup>21</sup>

One study into the access to healthcare (as a study of violations of socioeconomic human rights) in a number of different states, based on large data collections at the international level, had unexpected results. The expected connection to socioeconomic development in the analysis at the international level did not manifest completely: some poor countries, like Moldova and Vietnam, have very low child mortality rates, while a rich country like the United States had a much higher child mortality rate than, for instance,

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<sup>18</sup> Carey, S.C. & S.C. Poe (eds.) (2004), *Understanding Human Rights Violations: New Systematic Studies*, Aldershot: Ashgate.

<sup>19</sup> Richards, D.L. (2003), The civilizational geography of government respect for human rights, 1981-99, in: F.P. Forsythe & P.C. McMahon (eds.), *Human Rights and Diversity: Area Studies Revisited*, Lincoln/London: University of Nebraska Press, pp. 25-28. Richards distinguishes the following within civil and political rights: 'Physical integrity rights', 'Empowerment rights', 'Women's rights'.

<sup>20</sup> Poe, S.C. (2003), Does region matter in provision of the human right to physical integrity? An empirical examination, in: D.P. Forsythe & P.C. McMahon (eds.), *Human Rights and Diversity: Area Studies Revisited*, Lincoln/London: University of Nebraska Press, pp. 59-78.

<sup>21</sup> Forsythe, D.P. & P.C. McMahon (2003), Conclusion: Rights, practices and 'area studies', in: D.P. Forsythe & P.C. McMahon (eds.), *Human Rights and Diversity: Area Studies Revisited*, Lincoln/London: University of Nebraska Press, pp. 297-316.

the Netherlands and the United Kingdom. The low child mortality rates in Moldova and Vietnam are interesting ‘outliers’, as are the higher American mortality rates in comparison to the Netherlands and the UK. For this study of child mortality, Dabney Evans used mortality figures for children under the age of one from 181 states. She sought her explanation not at the international, but at the sub-national level.<sup>22</sup> This lower level of analysis enabled a distinction between different groups in particular societies. In the United States there turns out to be a major difference between African Americans (child mortality of 13.8), Non-Hispanic White Americans (5.7) and Asian Americans (3.6). These results may indicate unequal access to healthcare, which means a violation of the right to healthcare due to discrimination.

It remains imperative that researchers observe due care with regard to the results of major quantitative empirical research over long periods of time. Statistical data cannot be used directly as a measure for violations or as a useful human rights indicator. Maria Green described a human rights indicator as “a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation”.<sup>23</sup> It is in this respect, in particular, that empirical scientists will first have to touch base with the lawyers to get a feel for the meaning of the term, and only then should they go looking for suitable data and instruments. The way in which the norm is interpreted is important for every study. Here I have used the example of violations of socioeconomic human rights, which are not so easy to identify. The problem lies in the operationalisation. Primarily, proper indicators should be found, and then used in the best possible manner. Quantifiable indicators can also be made for such things as access to education without using merely the increase or decrease of illiteracy in a given state; after all, by itself that is no valid indicator.

## 5. The Question of Effectiveness

Social scientists at times have the tendency to judge the work of lawyers, with their strong focus on norms and procedures, with something of disdain – and lawyers feel the same in reverse. David Forsythe, for instance, states that human rights are a means to achieving the goal of protecting human dignity. Focusing exclusively on the means (for instance, the prohibition on child labour without providing economic compensation) could have the opposite effect of what was intended, while in other cases using illegal means (such as the violation of the prohibition on force with the military air raids in Kosovo) could actually have the desired result. In short, he dismisses the focus on legal means. He then aims his discontent at the procedures and refers to research on the condemnations of the UN Human Rights Committee between 1977 and 2001.<sup>24</sup> The many and continuous condemnations of Israel by this Geneva-based

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<sup>22</sup> Evans, D.P. & M.E. Price (2009), Measure for measure: Utilizing legal norms and health data in measuring the right to health, in: *Methods of Human Rights Research*, 2009.

<sup>23</sup> Green, M. (2001), What we talk about when we talk about indicators: current approaches to human rights measurement, *Human Rights Quarterly*, 23, pp. 1062-1097, p. 1065

<sup>24</sup> Lebovic, J.H. & E. Voeten (2006), The politics of shame: The condemnation of country human rights practices in the UNHCR, *International Studies Quarterly*, 50, pp. 861-888.

Committee have had no results whatsoever: the situation in the occupied territories on the West Bank of the River Jordan has only deteriorated. Forsythe's criticism of procedures induces him to ask what difference it makes to the victims. He feels that the '*so what*' question should always be asked. In doing so, researchers should not shy away from conclusions that are contrary to expectations and that may well be unpleasant.<sup>25</sup> In addition to the '*so what*' question regarding the effect, the question of '*why*' with respect to the cause is also an important one. Both questions require an interdisciplinary approach to the research.

The matter of effectiveness has always been more important to political scientists than to lawyers. I would like to clarify this by means of the example of binding economic sanctions. Binding economic sanctions can only be imposed by the Security Council of the United Nations when the fifteen members of the Security Council have decided, with a three-fifth majority and without a dissenting vote from one of the five permanent members, to qualify a given situation that has arisen as a threat to the peace, a breach of the peace or an act of aggression in accordance with Art. 39 of the UN Charter. Only then will it be allowed to act according to Chapter VII of the Charter and impose binding economic sanctions pursuant to Art. 42. To a lawyer, this makes sanctions a type of punishment imposed on a state for having acted unlawfully. Lawyers look back, as it were, to the point where the legal norm was violated and connect the legal consequence of the sanction to it: they think in terms of causality. The political scientist will disregard the legal line of thinking and ask not how best to punish a state, but what the most effective way would be to force the state to change its behaviour. The state has to be brought back in line and the entire collective security doctrine of the United Nations, including the method of imposing sanctions, is based on that premise. The lawyer and the political scientist have the same goal: to restore the *ex ante* situation. The lawyer looks back in time, while the political scientist tries to look ahead to find the most effective sanctions: causality versus effect-oriented thinking. The latter approach is the only way to get an eye for the negative effects of sanctions, where the suffering of the population may in fact strengthen the oppressive regime. The blame for the poor socioeconomic situation can then be shifted abroad, pushing feelings of nationalism to the forefront. This insight has resulted in more refined and tailored sanctions, aiming to affect the dominant political elite and to spare the population wherever possible. Freezing funds and imposing travel restrictions are some examples of so-called smart sanctions that replace the comprehensive economic ones.<sup>26</sup> After this, the ball is in the court of the lawyers once again, to study the individual legal protection that these individual sanctions endanger.<sup>27</sup>

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<sup>25</sup> Forsythe, D. (2009), Human rights studies: on the danger of legalistic assumptions, in: *Methods of Human Rights Research*, 2009.

<sup>26</sup> See also Genugten, W. van, F. Grünfeld & D. Leurdijk (2007), Internationale rechtshandhaving, in: N. Horbach, R. Lefeber & O. Ribbink (red.), *Handboek Internationaal Recht*, The Hague: T.M.C. Asser Press, pp. 385-436.

<sup>27</sup> See: Wessel, R.A. (2008), Rechtsbescherming voor terroristen, *Vrede en Veiligheid*, 37, 1, pp. 5-9.

## 6. Legal Breakthrough on Third-party Interference in Genocide

I want to use the example of the judgment of the International Court of Justice (ICJ) of February 2007 to illustrate that the legal world has given a very precise and close definition to the concept of *Responsibility to protect* and the issue of third-party responsibility in cases of genocide. With it, the Court demonstrates a very different view on the intervention issue than the social scientists. Resolution 260 of the General Assembly of the United Nations on 9 December 1948 accepted the *Convention on the Prevention and Punishment of the Crime of Genocide*, which sets down that genocide is a crime in international law that should be prevented and its perpetrators punished. This Genocide Convention defines genocide (Art. 2) as well as the punishable actions (Art. 3). The state is responsible for prevention and punishment within the state. Not even the Genocide Convention tampers with the prohibition on interfering in national autonomy. No matter how grave a matter genocide might be ('the crime of crimes'), no legal obligation to interfere in order to prevent genocide in other nations can be deduced from the Convention, at most only a moral duty. This possible moral obligation resulted in the fact that the term 'genocide' was avoided for a long time for Rwanda (1994), was disputed for Srebrenica (1995) and led to heated debates – involving a commission of inquiry and diverging use of the term – with regard to Darfur (since 2003). The United States, for instance, calls this 'genocide', while the United Nations sticks to 'crimes against humanity'. The debate increasingly focused on the extent to which third parties were allowed, able or obliged to act, with on the one side the prohibition on the use of force and the prohibition on interfering in internal matters, and on the other side the moral obligation to prevent a large-scale bloodbath. Terms like 'humanitarian intervention' (military intervention without the authorization of the Security Council for humanitarian purposes) and *Responsibility to Protect* (collective action by the Security Council when peaceful methods do not suffice and national governments manifestly fail at protecting their own population) did not help much, as no obligation could be derived from them. The International Court of Justice did make a breakthrough, in my opinion, with its genocide judgment on Srebrenica.<sup>28</sup> This verdict condemned the state of Serbia and Montenegro, not for having participated in genocide or ordering it (par. 413), or for being complicit in genocide by, for instance, supplying Bosnian Serbs with weapons for that specific purpose (par. 422), but for not attempting to prevent the genocide. The obligation to prevent genocide relates to conduct and not to result. The obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible (par. 430) once the state became aware, or could have been aware, of the risk of genocide being committed (par. 431). In this way, the Court concluded that Serbia and Montenegro could be condemned, as this state knew of the imminent risk of genocide, and then omitted to act in order to prevent the massacres at Srebrenica (par. 438). The counterargument that Serbia and

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<sup>28</sup> Decision of the International Court of Justice in the case of Bosnia and Herzegovina against Serbia and Montenegro regarding the application of the Genocide Convention to Srebrenica, 26 February 2007.

Montenegro was powerless is not a valid one, according to the International Court of Justice, as the state did not employ a single initiative for prevention.

### **Conclusions and Recommendations**

Every research report should include an explicit methodology. Lawyers employ different research methods than social scientists, especially with regard to the interpretation of the norm on human rights violations by lawyers and the testing at a different level of analysis by social scientists.

(1) Lawyers and other social scientists study different phases of the same phenomenon, as I have demonstrated with their respective approach to sanctions.

(2) Lawyers and social scientists are not very familiar with each other's work and do not tend to make it very accessible to one another. The former is frightened away by the first sight of a table of correlations and connections and loses interest when it comes to Chi-squared; the latter cannot pin the meaning of the many considerations and archaic-sounding legal formulas, and throws these aside in turn. That is a pity.

(3) Lawyers and social scientists should continue to work in their own academic fields and use their own research methods.

(4) Lawyers and social scientists should use the relevant research results of the other discipline much more than they have. Incorporating the legal developments will take the discussion about military intervention among social scientists to a higher level, as I have demonstrated with the International Court of Justice's judgment on Srebrenica. Social scientists could find a new challenge in a wide-ranging research area based on material from different international tribunals – Sierra Leone, Cambodia, East Timor, Rwanda, former Yugoslavia, Criminal Court, etc. Checking the importance of such things as human rights as compared to economic interests and research of violations at the international level could not, then, overlook the lawyer's interpretation of socioeconomic human rights violations.

(5) It is up to the social scientists to find suitable data and instruments and then to conduct the empirical research. These results may be entirely in contrast with the expectations of the more normative lawyers. I foresee mutual surprise and amazement.