R Mushkat
Professor of International Law, Hopkins-Nanjing Centre, Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University, and Honorary Professor, Faculty of Law, University of Hong Kong. I wish to thank Miron Mushkat for helping me navigate through Social Science territory, but the author is solely responsible for the views expressed herein.

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The case for the case study method in international legal research

Abstract

The exploration of international law has gradually, but perceptibly evolved into an increasingly multifaceted enterprise. A notable development, albeit not yet on a large scale, has been the adoption of empirical approaches relied upon in the Social Sciences for purposes of description, explanation and evaluation. A genuinely rich body of theoretical insights has consequently taken shape, providing a more robust foundation than previously available for pursuing knowledge and engaging in policy action. Much of the information generated has been obtained via the examination, often elaborate in nature, of specific cases. However, the technical underpinnings of this scientific endeavour leave something to be desired, as illustrated by a juxtaposition of methodological requirements with prevailing practices and offering concrete examples of greater technical rigour observed in neighbouring disciplines.

1. Introduction

Legal scholarship has long followed diverse paths and has grown progressively more heterogeneous in recent years.[1] Nevertheless, it has traditionally displayed a strong predilection towards the doctrinal investigative mode.[2] This pattern remains largely intact, albeit to a diminishing extent.[3] The essence of the 'black-letter-law' approach, a term employed interchangeably with doctrinal research, has also retained its key characteristics, emanating from painstaking endeavours to construct legal arguments with reference to statute law and court judgements.[4]

In the course of such pursuits, the 'black-letter' method has consistently purported to systematise, reform and elucidate the law on any particular subject by applying a distinct type of analysis to authoritative texts encompassing primary and secondary sources.[5] One of the pivotal assumptions underlying this form of disciplined inquiry has been that the nature of "legal scholarship is derived from the law itself".[6] The majority of academically and practically

1 McConville & Chui 2007:3-7.
2 McConville & Chui 2007:3-7.
3 McConville & Chui 2007:3-7.
4 McConville & Chui 2007:3-4.
5 McConville & Chui 2007:4.
6 Rubin 1997:525.

inspired legal investigations reflect this fundamental proposition and are conceptually and organisationally structured accordingly.[7]

The second route followed in dissecting the law, although on a more modest scale, has been marked by an empirical orientation commonly equated with sociolegal studies.[8] It has been partly driven by its own impetus, but it has, to a considerable degree, been propelled by a sense of dissatisfaction with doctrinal analysis stemming from the growing belief that, if narrowly construed and exclusively relied upon, it constitutes an "intellectually rigid, inflexible and inward-looking"[9] way of exploring the law and the functioning of the institutional machinery underpinning it. The empirical/sociolegal paradigm seeks to place the entire legal system in a broad economic, political and social context and examine it within a multidisciplinary, and even interdisciplinary, conceptual and methodological framework.[10]

The third perspective embraced by scholars researching the law cannot be said to exhibit unambiguously distinct features when addressing specific legal issues.[11] Rather, it draws heavily on the other two modes of inquiry in most of the key respects, except for level of analysis and geographic focus.[12] The aspect that differentiates it from doctrinal investigation and empirical/sociolegal studies is the emphasis on international, supranational and cross/multi-jurisdictional matters, and this accounts for its status as a clearly demarcated component of the knowledge-generation toolkit in the field of law.[13]

International and comparative legal scholarship clearly reflects the essence of the phenomena and problems being scrutinised. This is true of other subdisciplines within the law. To some extent, the nature of the material, or the subject, inevitably dictates the choice of the method, which cannot mechanically be imposed on what is being observed and assessed. The scope, diversity and macro-like quality of the issues and challenges confronting researchers engaged in international and comparative legal studies militate against the adoption of certain instruments for systematically extracting information from data and judiciously evaluating it.

Doctrinal analysis remains the principal tool consistently and widely employed. This may be noted in the chapters on international law[14] and comparative law[15] in the most broad-based and technically oriented introductory-level collection of essays on methods available to international

7 McConville &Chui 2007:4.
8 McConville & Chui 2007:4-6.
9 Vick 2004:164.
10 McConville & Chui 2007:5.
11 McConville & Chui 2007:6-7.
12 McConville & Chui 2007:6-7.
13 McConville & Chui 2007:6-7.
14 See, in general, Hall 2007:181-206.
15 See, in general, Wilson 2007:87-103.

legal scholars and their comparative law counterparts.[16] The doctrinal element is amply highlighted in both instances, although they should not be lumped closely together, because comparativists may have ventured further afield in seeking to build a conceptually underpinned empirical foundation than their international law colleagues.[17]

In the chapter on the international legal dimension, which is of primary interest in this context, the emphasis is thus exclusively on sources such as treaties, custom and general principles, judicial decisions, acts of international organisations, and soft law.[18] While not fully comprehensive, due to space constraints and the targeted audience, it is a reasonably detailed and structured account of how to pursue traditional-style international legal scholarship.[19] However, the empirical ingredient is far more narrowly delineated than elsewhere in the volume – indeed, it is not explicitly pinpointed and perhaps, strictly speaking, it is debatable whether it legitimately and unequivocally qualifies as such.

Other contributors to the book outline an array of qualitative and quantitative research instruments broadly applicable across the entire space encompassed by the intellectual and practical exploration of the law.[20] Related questions such as integrating theory and method,[21] development of empirical techniques and theory,[22] and even non-empirical discovery in legal scholarship,[23] which lies at the intersection between doctrinal and more scientifically geared types of inquiry, are also systematically addressed. However, these themes are conspicuous by their absence in the chapter specifically devoted to international law,[24] attesting to the lack of strong empirical awareness (as distinct from action, which manifests itself in multiple informal guises) in that particular domain.

Perhaps the most notable gap in this solid examination of time-honoured means for disentangling international legal patterns and charting corresponding paths towards authoritative, acceptable and sound problem management is the paucity of references to the case-study method. Knowledge generation in international law is a process that features widespread recourse to this specific empirical tool. No other investigative vehicle is resorted to so often and on such a large scale for that purpose. It is virtually impossible to undertake any meaningful research project in this complex realm without incorporating the case-study technique in one shape or another into the overall design and implementation plan.

16 See, in general, McConville & Chui (eds.).
17 See, in general, Mushkat 2014a:229-287.
18 See, in general, Hall 2007:181-206.
19 See, in general, Hall 2007:181-206.
20 See, in general, McConville & Chui (eds.).
21 See, in general, Findlay & Henham 2007:104-132.
22 See, general, McConville 2007:207-226.
23 See, in general, Pendleton 2007:159-180.
24 See, in general, Hall 2007:181-206.

Indeed, from a purely terminological perspective, this practice is firmly established and richly documented. Cases are liberally alluded to, and invoked in support of normative and theoretical propositions. However, that does not necessarily equate to explicitly and transparently using the case-study method as a rule-based instrument with clearly identified goals, constraints and procedures.[25] Adherence or, alternatively, non-adherence to the routes that emanate therefrom may have significant implications for the reliability and validity of scholarly and policy-inspired output.

Given this state of affairs, it is desirable to delineate the boundaries and mechanics of the case-study technique in a potentially fruitful manner from an international legal viewpoint. That is the aim of the present article. A mapping out exercise, whereby the basic characteristics of this empirical tool are sketched, is conducted first. Its relevance as a means to enhance the scientific quality and reduce the opacity of factually grounded scholarly endeavours in international law is subsequently illustrated by revisiting some previously produced empirical work with a salient case-study component.

2. Analytical foundation

The origin of the concept of case study is related to that of case history.[26] The latter is commonly relied upon in clinical disciplines such as medicine and psychology.[27] Sociolegal and other macro-type case studies, or their equivalent monographic surveys, have shared the defining features of this professional vehicle by assuming the form of in-depth explorations of particular cases.[28] The specific subject or cluster of subjects selected is comprehensively, intensively and often repeatedly examined "by giving special attention to totalising in the observation, reconstruction and analysis of the cases under study".[29]

While this is not a necessary condition, case studies are typically marked by a high degree of complexity and elaborate contextual linkages.[30] The rich internal and external tapestry manifests itself most conspicuously when the focus is on a single case, before aggregation or comparison across a more substantial sample, if desired or required, is undertaken.[31] The prevailing view is that, like a detailed and nuanced case history, a "case

25 See, in general, Feagin *et al.* 1991; Hamel *et al.* 1993; Stake 1995; Gomm *et al.* 2000; de Vaus 2001:219-266; Scholz & Tietje 2002; Yin (ed.) 2004; Plant 2004:110-118; Hancock *et al.* 2006; Gerring 2007; Tul & Hak 2008; Byrne & Ragin (eds.) 2009; Gagnon 2010; Woodside 2010; May 2011:219-242; Yin 2012; Yin 2013.
26 Hamel *et al.* 1993:1.
27 Hamel *et al.* 1993:1.
28 Hamel *et al.* 1993:1.
29 Zonabend 1992:52.
30 Stake 1995:XI.
31 Stake 1995:XI.

study is expected to catch the complexity of a single case".[32] However, again in a manner parallel to a case history, the account produced needs to extend beyond the narrow confines of the specific case, because it is the outcome of "a study of the particularity and complexity of a single case, coming to understand its activity within important circumstance".[33]

There is some disagreement as to whether this mode of inquiry constitutes a method in the strict sense of the term.[34] Researchers who express scepticism in this regard emphasise the fact that the dissection of cases entails recourse to a broad array of data collection and processing techniques and thus extends over a highly heterogeneous territory with permeable boundaries.[35] For this reason, French social scientists prefer the term 'monographic approach'.[36] That said, the differences highlighted are predominantly semantic in nature, and jettisoning method in favour of approach has arguably the disadvantage of obscuring the distinct characteristics of what qualifies in key respects as a unique process of scientific discovery.[37]

Indeed, the all-encompassing attribute of the case technique, or its elasticity, may be considered a factor differentiating it from other empirical instruments, which typically are one-dimensional in terms of their epistemological orientation, information sources, and data-generation procedures.[38] Clearly, this is not the sole feature that sets it apart as an investigative tool and accounts for its status as a method, albeit one of the synthesising or triangulating variety.[39] As indicated earlier, the case technique singularly involves an in-depth scrutiny of complex phenomena within a real-world context, especially in circumstances where the boundaries between the phenomenon and context are blurred. It is noteworthy that, in such situations, there are often many more variables than data points.[40]

Methodological breadth, flexibility, intensity and versatility inevitably lead to a certain lack of uniformity or considerable variation within this space. Both single- and multiple-case studies are thus included, although some scholars find it convenient to distinguish between the two formats by referring to the latter as the comparative case technique.[41] By the same token, the evidence relied upon may be qualitative or quantitative, or a mixture of the two.[42] Contrary to the prevailing perceptions, it need not

32 Stake 1995:XI.
33 Stake 1995:XI.
34 Hamel *et al.* 1993:1.
35 Hamel *et al.* 1993:1.
36 Hamel *et al* 1993:1.
37 Hamel *et al* 1993:1-2.
38 Yin 2013:16-17.
39 Yin 2013:17.
40 Yin 2013:17.
41 Yin 2013:18.
42 Yin 2013:18.

exclusively fall into the first category.[43] On balance, qualitative observations dominate, but not to the exclusion of quantitative inputs.[44] Even when the latter are omitted, the case-study method does not amount to simply another type of qualitative research and does not necessarily always entail "thick description" or elaborate portrayal of intricate realities.[45]

Allusions to description, in general, and the thick variant, in particular, abound, because it is commonly assumed that this is the primary purpose of the majority of, perhaps even all, case studies.[46] This is an oversimplification, because the objectives are more wide-ranging in nature.[47] Broadly speaking, in addition to description, they encompass exploration, explanation, and evaluation.[48] The last three activities, particularly exploration and explanation, may have theoretical underpinnings, and description is seldom undertaken in a theoretical vacuum.[49] Needless to say, given the symbiotic relationship between theory and practice, this is also true of evaluation.[50]

Case studies may serve the purpose of both theory-building and theory-testing.[51] The former pursuit – typically, but not exclusively, witnessed when an exploratory project is embarked upon – involves a bottom-up/inductive process whereby a tentative question, at times coupled with a conjectural proposition, prompts a detailed examination of empirical material, culminating in the formation of a clearer and firmer theoretical framework.[52] By contrast, a theory-testing exercise, the more prevalent of the two patterns, begins with a coherent and tightly articulated theoretical structure – or a set of competing ones – regarding a particular phenomenon and proceeds in a top-down/deductive fashion to endeavour to validate it, or any of the rival alternatives in a specific set, through the dissection of relevant raw data.[53]

The relatively flexible contours observed in case-study territory should not be construed as implying that this is an open-ended domain from a procedural perspective. The rules governing research design, in general, also apply in this instance.[54] The guiding questions and, if appropriate, derived propositions must be stated in advance.[55] By the same token, the unit(s) of analysis should be identified with a degree of precision.[56]

43 Yin 2013:19.
44 Yin 2013:19.
45 Yin 2013:19.
46 Yin 2013:19.
47 Yin 2013:215-217.
48 Yin 2013:215-217.
49 Yin 2013:215-217.
50 Yin 2013:217.
51 de Vaus 2001:221-223.
52 de Vaus 2001:223.
53 de Vaus 2001:221-223.
54 de Vaus 2001:29-37.
55 de Vaus 2001:29-30.
56 de Vaus 2001:31-34.

In addition, the logic linking the data to the questions and propositions (again, if any) and the criteria for interpreting findings need to be satisfactorily pinpointed.[57] These measures ought to be explicitly and systematically implemented.[58]

Specifying the unit(s), or the 'case' often entails bounding the space targeted, or determining its boundaries.[59] In practical terms, this means deciding what to consider and what to disregard – or, to express it differently, include and exclude – in focusing on a case or a cluster of cases.[60] Spatial and temporal parameters are typically resorted to for this purpose, but not to the exclusion of other concrete yardsticks.[61] The emphasis is on palpable real-life patterns rather than mere abstractions.[62] Ideally, in order to facilitate the accumulation of knowledge and comparative inquiry, the choice of cases and units of analysis ought to reflect trends in the academic and professional literature, rather than be the product of idiosyncratic influences.[63]

Theory plays a crucial role in shaping the guiding questions and derived propositions, as well as identifying the unit(s) of analysis and elaborating the logic underlying the data-centred linkages, and even selecting the criteria for the interpretation of findings.[64] This is particularly true with respect to top-down (testing, deductive) case studies, but it also applies to the bottom-up (building, inductive) category, albeit less strictly and more selectively so.[65] Theoretical elements also loom large when the vital stage of generalising from a case study or a set of case studies is assumed to have properly been reached.[66]

At this advanced stage, the distinction between analytical and statistical generalisation comes to the fore, because it is the former that drives the inferential process, whereas the latter, which features prominently in other modes of research, recedes into the background.[67] In statistical generalisation, inferences are drawn about a population, or universe, on the basis of empirical information obtained from a sample of that population.[68] This is not considered to be an appropriate way of generalising from a case study, or a cluster of case studies, since the case or cases are not "sampling units" and are normally too small in number to serve as an adequately sized sample to represent any larger population.[69]

57 de Vaus 2001:35-37.
58 de Vaus 2001:29-37.
59 de Vaus 2001:33-34.
60 de Vaus 2001:33-34.
61 de Vaus 2001:34.
62 de Vaus 2001:34.
63 de Vaus 2001:34.
64 de Vaus 2001:37-40.
65 de Vaus 2001:37-40.
66 de Vaus 2001:40-44.
67 de Vaus 2001:40-44.
68 de Vaus 2001:40.
69 de Vaus 2001:40.

Rather than regarding a case or cases as a sample, it or they need to be viewed as an opportunity to empirically illuminate some theoretical constructs or principles, in a manner analogous to the quest for broader insights in laboratory experiments.[70] In both settings, the objectives extend beyond the confines of the specific case(s) and experiment(s) in that the scholars engaged in the project aim at producing generalizable findings or identifying lessons to be learned – analytical generalisations, in the scientific vernacular – that stretch further than the particular case study/studies or experiment(s) conducted.[71] For instance, the process may culminate in the articulation of a working hypothesis, either to be applied in reinterpreting the results of previous explorations of other concrete situations (*i.e.*, other cases or experiments) or in paving the path for new research on yet unexamined concrete situations (*i.e.*, new cases or experiments).[72]

The theoretical propositions underlying the initial design, empirically reinforced by the subsequent findings, lay the groundwork for analytical generalisation.[73] Alternatively, a new generalisation may evolve without any preconceptions on the basis of the case study's/studies' findings alone.[74] The corollary is that analytical generalisation may be founded on either: (a) corroboration, modification, rejection or otherwise advancing of theoretical constructs or principles referenced in designing case studies or (b) new theoretical perspectives that emerge upon the completion of such investigations.[75] Whichever of the two routes is followed, the essence of analytical generalisation means that it should be undertaken at a conceptual level higher than that of the specific case study/studies (or experiment(s)).[76]

The essential irrelevance of statistical generalisation does not imply that case selection is an entirely rule-free affair, at best loosely guided by a body of seemingly pertinent theories. In a wide-ranging survey of sampling methods employed in qualitative research, including case studies, as many as 27 moderately structured and reasonably systematic (albeit partly overlapping) techniques relied upon to this end are outlined.[77] They include open sampling, relational and variation sampling, discriminate sampling, extreme or deviant case sampling, intensity sampling, maximum variation sampling, homogeneous samples, typical case sampling, stratified purposeful sampling, critical case sampling, snowball or chain sampling, criterion sampling, theory-based or operational construct sampling, confirming or disconfirming cases, opportunistic sampling, purposeful random sampling, sampling politically important cases, convenience

70 de Vaus 2001:40.
71 de Vaus 2001:40.
72 de Vaus 2001:40-41.
73 de Vaus 2001:40.
74 de Vaus 2001:40.
75 de Vaus 2001:40.
76 de Vaus 2001:40.
77 Coyne 1997:623-630; Gerring 2008:645-684; Seawright 2008:294-308.

sampling, purposeful sample, nominated sample, volunteer sample, total population sample, selective sampling, theoretical sampling, phenomenal variation sampling, and theoretical variation sampling.[78] These are not necessarily statistically robust approaches, but they possess distinct logical attributes that are transparently conveyed.[79]

It is commonly assumed that single cases dominate the case-study landscape. This may fundamentally be true of disciplines such as Law, but it is not a universal pattern.[80] Indeed, a single case research design is inherently less sturdy than a multiple case one.[81] Invoking the logic of replication, it may be argued that the former represents only one replication and thus does not provide a sufficiently stringent test of a theory.[82] The latter, on the other hand, fulfils this goal more satisfactorily and, in addition, plays a crucial role when case studies are dissected for comparative purposes.[83] Practical constraints in the shape of limited access or paucity of resources may, of course, preclude the option of embracing the otherwise preferable multiple case research design.[84] Moreover, there are circumstances (for example, a single critical case) where this format is simply not suitable.[85]

The multiple case research design may be implemented in a number ways. A key difference often highlighted is between the parallel and sequential modes.[86] The former entails the simultaneous exploration of a set of cases, with recourse to comparative inquiry following completion of the exercise.[87] The latter scheme involves the examination of cases in a stepwise fashion, whereby each member of the set is individually subjected to scrutiny at one point in time.[88] The parallel design is typically resorted to when the objective is to test relatively well-articulated theoretical propositions.[89] By contrast, the sequential variant, because it allows empirically oriented scholars to progressively learn from cases as they move forward, is normally adopted in support of theory-building endeavours.[90]

Another frequently referred to distinction is that between retrospective and prospective research designs.[91] Both exhibit a salient time dimension, without which adequate causal explanation may not be attainable, but

78 Coyne 1997:623-630; Gerring 2008:645-684; Seawright 2008:294-308.
79 Coyne 1997:623-630; Gerring 2008:645-684; Seawright 2008:294-308.
80 Yin 2012:7-9.
81 de Vaus 2001:226-227.
82 de Vaus 2001:226.
83 de Vaus 2001:227.
84 de Vaus 2001:226-227.
85 de Vaus 2001:227.
86 de Vaus 2001:227.
87 de Vaus 2001:227.
88 de Vaus 2001:227.
89 de Vaus 2001:227.
90 de Vaus 2001:227.
91 de Vaus 2001:227-228.

they incorporate it in divergent manners.[92] A retrospective design is geared towards, such as through the reconstruction of the history of the case, the *ex post* analysis of the material collected.[93] This differentiates it from the generally less opaque and prone to distortions, but also more fundamentally challenging and difficult to execute, prospective format, which is configured with a view to enabling the *ex-ante* tracking of changes over a period of time.[94]

The handling of multiple cases, not amenable to conventional statistical manipulation, may pose considerable difficulties. A number of methods are available to obviate them.[95] Perhaps the least technically complicated is analytical induction, originally equated with the quest for "universals", or properties that are invariant, in social life.[96] Currently, analytical induction is identified with any systematic exploration of similarities that seeks to forge broad-based conceptual frameworks.[97] As evidence accumulates in the process of empirical examination, cases that appear to fall into the same category undergo a careful comparison.[98] The results serve as a vehicle for defining, developing, and refining widely applicable concepts.[99]

Concrete suggestions have been made to render the undertaking less open-ended than might otherwise be the pattern.[100] One particularly detailed and tightly structured cluster of proposed steps contains the following recommendations:

- indicate what it is you are aiming to explain (the dependent variable);
- put forward an initial and provisional account of the phenomenon you are purporting to illuminate (your theory);
- perform a study of a case selected to test your theoretical assumptions;
- review (and adjust, if necessary) your provisional theory in light of the case or eliminate the case as inappropriate;
- conduct additional case studies to test the (adjusted) proposition and fine-tune it as required;
- continue the process (including seeking cases that might refute the theoretical formulation) and reconceptualise until you arrive at a causal scheme that provides an explanatory foundation for all the cases.[101]

As this elaborate set of guidelines illustrates, the tentative theory that inspires the search, or emerges at an intermediate stage in its evolution

92 de Vaus 2001:227-228.
93 de Vaus 2001:227-228.
94 de Vaus 2001:227.
95 Mushkat 2014a:229-287.
96 Ragin & Amoroso 2011:124-130.
97 Ragin & Amoroso 2011:124.
98 Ragin & Amoroso 2011:124.
99 Ragin & Amoroso 2011:124.
100 de Vaus 2001:263-266.
101 Robinson 1951:813.

may be more clearly and richly conveyed than generally thought. In fact, it may take the form of an analytical frame, a rather specific and multifaceted sketch of an idea about some phenomenon of interest (Figure 1).[102] In theory-testing case studies, pattern-matching may be employed in such a context.[103] This is a fairly sophisticated type of tabular analysis, whereby a series of independent variables (causes; horizontal axis) are matched with a series of dependent ones (effects; vertical axis), in order to predict what patterns the interaction may yield.[104]

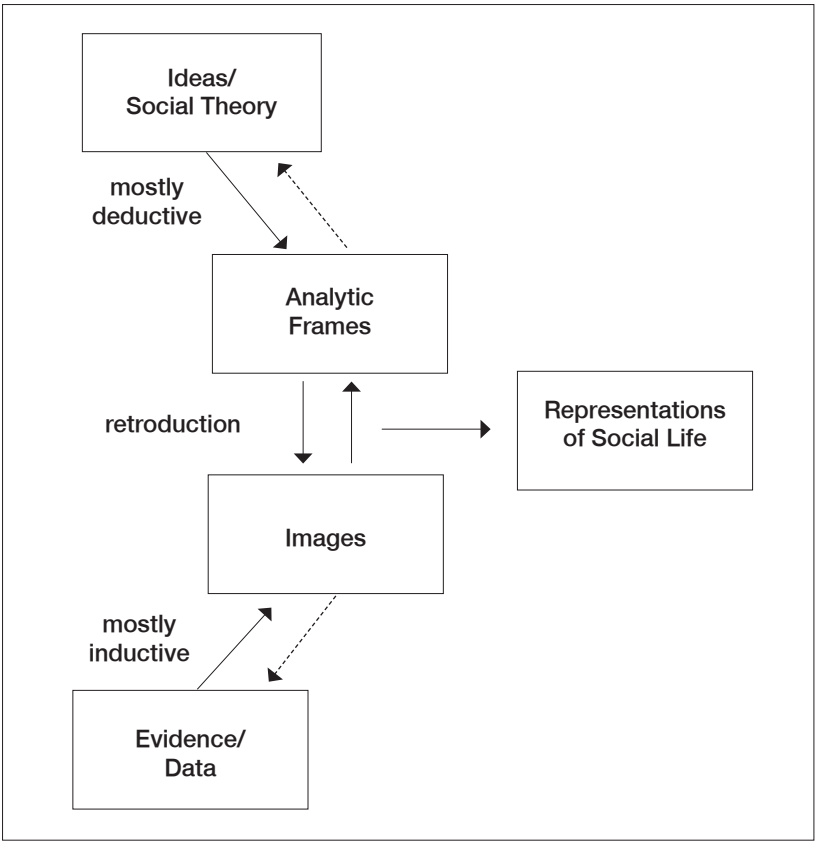

Figure 1: Interpretive model of the case-study process

Adapted from Ragin & Amoroso (2011:60)

A frequently encountered form of pattern-matching, with its own unique characteristics, but rooted in similar logic, is trend analysis.[105] In this

102 Ragin & Amoroso 2011:63-68.
103 de Vaus 2001:253-260.
104 de Vaus 2001:253-260.
105 de Vaus 2001:260-261.

instance, the focus lies on patterns that are the product of the interplay between independent and dependent variables over time.[106] The trends discerned or predicted may be simple or intricate, featuring a handful or several variables.[107] Trend analyses may be interrupted, rather than exclusively uninterrupted, in nature.[108] The former is based on a design reflecting a configuration, whereby a specific event is posited to have occurred somewhere with a sequence of events.[109] This allows researchers to dissect a pattern of events before and after the interruption (or intervention), a practice akin to that observed in before-and-after experimental designs.[110]

Chronological exploration of cases may be regarded as an offshoot of this type of longitudinal study or yet another subcategory of the more encompassing group of techniques falling under the rubric of time-series analysis.[111] It entails the identification or prediction of a sequence of events, or even one of trends, consisting of different occurrences or variables.[112] The purpose of the exercise is to pinpoint or predict what changes might materialise, what events could take place, and in what order.[113] The sequence of events highlighted might be a cause-and-effect chain or a descriptive sequence that portrays particular stages in an evolutionary process.[114]

As implied above and indicated earlier, case studies may, at times, be principally concerned with description, although this does not mean that they are devoid of any theoretical component.[115] Indeed, case descriptions are often structured around theoretical ideas.[116] Even in circumstances where this is not significantly the pattern, the selection and ordering of the facts collected is generally theory driven to one degree or another.[117] Moreover, description and analysis are not mutually exclusive pursuits, as evidenced by the fact that descriptive case studies increasingly involve the construction of typologies, both deductive and inductive, ideal types, and elaborate time-ordered depictions.[118]

There is an inherently problematic tendency in case-study research undertaken in academic disciplines where quantitative techniques are seldom relied upon not to subject the findings produced to sufficiently critical scrutiny. This overly elastic interpretative habit should be avoided

106 de Vaus 2001:260-261.
107 de Vaus 2001:260-261.
108 de Vaus 2001:261.
109 de Vaus 2001:261.
110 de Vaus 2001:261.
111 de Vaus 2001:261-262.
112 de Vaus 2001:261.
113 de Vaus 2001:261.
114 de Vaus 2001:261.
115 de Vaus 2001:224-225, 250-251.
116 de Vaus 2001:225, 250.
117 de Vaus 2001: 225, 250.
118 de Vaus 2001:225-226, 251-253.

as much as realistically possible, because methodological issues such as construct validity (*i.e.*, identifying appropriate operational measures for the concepts employed), internal validity (*i.e.*, the extent to which the causal inferences based on the investigation are warranted, given the risk presented by systematic error or 'bias'), external validity (*i.e.*, the applicability of the findings generated beyond the context of a specific inquiry), and reliability (*i.e.*, whether the procedures resorted to, if repeated, may yield the same results) inevitably surface and cannot be entirely overlooked.[119]

Various analytically underpinned concrete steps have been proposed for minimising deviations from the 'quality standards' reflecting these concerns. They include the use of multiple sources of evidence, establishing a chain of evidence, review by key informants of draft case-study reports (for construct validity), pattern-matching, explanation-building, considering rival explanations, employing logic models (for internal validity), incorporating theory in single-case studies, invoking replication logic in multiple-case studies (for external validity), creating a case-study protocol, and developing a case-study database (for reliability).[120]

One particularly useful tool – when endeavouring to enhance internal validity by engaging in explanation-building, evaluating rival explanations, and experimenting with logic models in qualitative-type settings – is counterfactual thinking.[121] This concept has its modern roots in psychology,[122] but has liberally been imported into many academic disciplines.[123] In its micro incarnation, it constitutes an attempt to reconstruct life events by conjuring up plausible alternatives to those that have actually materialised.[124] More broadly speaking, counterfactual thinking entails precisely what it states: "moving counter to the facts".[125] That is, asking "what might have occurred had certain unrealised events transpired".[126] This often assumes a quintessentially qualitative form, but the underlying disposition to thoroughly question perceived causal structures attests to the importance of subjecting all empirical findings to critical assessment in terms of prevailing scholarly yardsticks, both conventional and unconventional. There are no compelling reasons for abandoning these standards in putting international legal phenomena under the proverbial microscope.

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119 Yin 2013:45-49.
120 Yin 2013:45-49.
121 Kahneman & Tversky 1982:201-208.
122 Kahneman & Tversky 1982:201-208.
123 Gerring 2007:165-168; Fearon 1991:169-195; Hawthorn 1991; Tetlock & Belkin 1996; Ferguson (ed.) 1997; Goertz & Starr (eds.) 2003; Hulsmann 2003:57-102; Mitchell 2004:1517-1608; Levy & Goertz (eds.) 2007; Levy 2008:627-644; Lebow 2010; Rohlfing 2012; Evans 2013; Lebow 2014; Sunstein 2004.
124 Kahneman & Tversky 1982:201-208.
125 Kahneman & Tversky 1982:201-208.
126 Kahneman & Tversky 1982:201-208.

3. Illustrative gap analysis

Academic disciplines vary considerably in their reliance on a host of diverse methods and the extent to which they seek to fruitfully combine them. Some are characterised by a healthy proliferation of data-collection and -processing techniques. This wide range tends to coincide with efforts to reap the benefits of each individual tool through amalgamation that is the product of systematically utilising every relevant instrument available. This is known as the multi-method approach – involving a substantial measure of triangulation or, better still, integration.[127] The strategy is not confined to the quantitative space, but also encompasses the qualitative one.[128]

International Law, both in its doctrinal and empirical incarnations, is not blessed with such methodological abundance. It qualifies as idea- or theory-rich, yet not as an academic domain possessing significant technical breadth and versatility. The plea issued for all branches of the Law to go to greater lengths in that respect[129] is particularly appropriate in this specific context. In this instance, the case study remains virtually the sole tool consistently and productively resorted to in the ongoing quest for knowledge accumulation. It is thus essential to exploit this vital, but not necessarily uniformly robust instrument as effectively and soundly as possible.

Unfortunately, that may have not been the pattern observed. Case studies have featured in different forms in international legal research, and it is neither easy nor desirable to draw inferences across the board. Nevertheless, certain recurring trends may be discerned in the empirical literature, which constitutes the primary focus of this article. Those trends are selectively highlighted in the present section by pinpointing, in light of the principles and practices previously outlined, the methodological limitations of leading contributions to positive (as distinct from normative) international legal theory and similar work pursued on a more modest scale in relation to the behavioural dimensions of International Law (principally concerning the formation of cross-border governance regimes and international legal compliance) in Asia. The latter realm of scholarly endeavour has been selected because of the growing interest in non-Western – notably, but not exclusively, Chinese – attitudes towards International Law.

Perhaps the most glaring aspect of this research enterprise and the larger universe it represents is the persistence of the 'one-shot' case study and the surprisingly heavy weight commonly accorded to it. A recent example is the factually solid account of the trial in China of Cheung Tse Keung, euphemistically known as the 'Big Spender,' and 35 accomplices charged with a series of serious criminal offences committed in both Hong

127 Brewer & Hunter 2006; Seawright 2015.
128 Brewer & Hunter 2006; Seawright 2015.
129 Nielsen 2010:951-975.

Kong and China.[130] The author devotes an entire book to this apparently noteworthy incident because of the qualitatively and quantitatively unprecedented situation stemming from the arrest, prosecution, trial, conviction, and execution of a Hong Kong legal resident in China "under PRC Criminal Law for crimes largely perpetrated in Hong Kong".[131]

The elaborate descriptive survey meticulously traces Cheung's personal history, illegal activities, confrontations with the law enforcement machinery on both sides of the border, and adjudication of his case.[132] This provides a basis for an effective and insightful dissection of the operational characteristics of the Chinese criminal justice apparatus, with special reference to case initiation, investigative detention, criminal charges – which overlap with crucial issues such as the matter of proper venue, specificity of pleadings, appropriateness of charges, and law applied – defence available, role of confession, evidence adduced, nature of verdict, types of punishment, and appeal procedures.[133]

By firmly established and time-tested Hong Kong Common Law standards, this scarcely qualifies as a sturdy and transparent institutional façade. Nevertheless, it is not entirely inappropriate to argue that the reluctance of the Hong Kong authorities to flex their legal muscles by insisting on Cheung's extradition to the territory could partly be justified on pragmatic grounds and that, all things considered, the outcome was not wholly unpalatable from a Hong Kong perspective. Given the fact that drawing such a conclusion is not an altogether unwarranted step, the author feels sufficiently emboldened to push further the boundaries of his narrowly focused case study by venturing deep into Constitutional/ International Law and meta-policy territory.[134]

Specifically, he infers that in complex and fluid circumstances of that nature, an inherent tension inevitably prevails between normative, legally inspired and realistic, and situation-determined approaches to problem management.[135] In confronting this tension and endeavouring to sensibly address it, decision makers face a difficult choice between procedurally (and, because the process entails an assessment that involves value judgement, normatively) 'correct' and merely 'satisfactory' ways of dealing with policy problems.[136] The pragmatic and politically smooth handling of the Cheung cross-border dilemma illustrates the superiority of the latter.[137]

The normative foundations provided by relevant international and constitutional legal instruments, or the Sino-British Declaration on the Future of Hong Kong and the territory's Basic Law, thus have no meaningful

130 Wong 2012.
131 Wong 2012:101.
132 Wong 2012.
133 Wong 2012.
134 Wong 2012.
135 Wong 2012.
136 Wong 2012.
137 Wong 2012.

bearing in such a delicate, dynamic and intricate milieu.[138] Moreover, these legal vehicles are said to lack the necessary determinacy to offer clear policy direction and, at least selectively, have been superseded by events because of the far-reaching cross-border integration, rendering the notion of Hong Kong 'autonomy' at the epicentre of the Joint Declaration and the Basic Law no longer fully consistent with ground-level developments and suggesting that the term 'comity' would furnish a more workable and fruitful basis for managing the tangled, but mutually beneficial cross-border relationship.[139]

It should be noted that no adequate support for any of these overarching generalisations may be garnered from authoritative academic and policy sources.[140] The dichotomy between correct and satisfactory problem-solving strategies is contrived, since enlightened policy action should be guided by both, as well as additional modalities.[141] Environmental complexity and fluidity does not negate the crucial significance of international/constitutional legal instruments whose certain degree of indeterminacy and historical inertia does not detract from their ongoing value.[142] However deep-rooted a two-party relationship, conflict is unavoidable and needs to be dealt with explicitly and properly, rather than being buried under the proverbial carpet and subjected to unconstrained improvisation when it forcefully surfaces.[143]

More importantly, from a methodological viewpoint, no discernible attempt is made to critically assess the potentially tenuous linkages between the obviously modest empirical material and the sweeping propositions in terms of internal validity, external validity and reliability. Does the evidence generated support the inferences arrived at and, if so, to what extent? Is it legitimate to rule out alternative explanations? Can no justification be found for counterfactual scenario construction featuring the possibility of a successful request for extradition, conducive to the rule of law and largely devoid of unintended consequences? Given the availability of complementary and partly overlapping cases, open to different and even conflicting interpretations,[144] should this limited exploration be deemed representative? What is the likelihood of any other scholar, dissecting the same facts without relying on identical cognitive maps, painting a similar picture?

This clearly is a theory-building case study, which may be regarded as a virtue, because, as such, it constitutes a relatively rare example of that particular variant in the empirical international legal space, where *a priori* assumptions commonly underpin the research agenda. When the latter approach is embraced, the conceptual scheme, or analytical frame,

138 Wong 2012.
139 Wong 2012.
140 Mushkat 2014b:231-245.
141 Mushkat 2014b:231-245.
142 Mushkat 2014b:231-245.
143 Mushkat 2014b:231-245.
144 Lo 2009; Mushkat & Mushkat 2010:175-192; Mushkat & Mushkat 2011:49-80.

that provides inspiration for the project is typically less nuanced, and thus possibly insightful, than one likely to emerge in the course of a more open-ended bottom-up inquiry. On the other hand, the top-down strategy tends to be somewhat less arbitrary and more tightly structured.

These characteristics may selectively be seen in a number of case studies designed to formally test, in the Asian context, certain theoretical propositions regarding international legal behaviour. One of these investigations, perhaps the sole example found in the field of International Law of a systematically implemented prospective research design, focused *ex ante* on China's expected compliance with the terms of the Sino-British Declaration.[145] The authors, decidedly rationalist in their conceptual orientation, resorted to group models of politics and utilitarian logic to forecast developments following the 1997 transfer of sovereignty from the United Kingdom to China or, as viewed through Beijing's lens, reunification brought about by the resumption of its rule over the territory.[146]

The journey into the distant and uncertain future, charted with mathematical precision, accorded the greatest weight to groups operating in the Chinese political arena.[147] The 'international community' (a rather elastic notion) and, even more so, prominent local elites (broadly defined, to encompass, for instance, the Hong Kong foreign business community and middle-class activists) were relegated to the analytical periphery.[148] As is common in such circumstances, this asymmetric formulation was attributed to variations in group capabilities and the importance attached by group leaders (functioning as "representative agents") to strategic issues looming large on the unfolding horizon.[149]

On the Chinese domestic front, groups were identified on the basis of their posture with respect to two salient policy questions: political centralisation/decentralisation and economic reform (pro/against).[150] "Centralisers" were thought to be confronting "decentralisers" at the provincial level.[151] The former were also portrayed as "bureaucratic", due to their rigid attitudinal dispositions and operational styles, whereas the latter were depicted as "entrepreneurial", on account of their cognitive adaptability and openness to non-conventional modes of institutional management.[152] In relation to the direction of economic strategy, a distinction was drawn between "conservatives" and "reformers".[153] The military was singled out as another group, ideologically entrenched and steadfastly opposed to any liberal-style experimentation, that was definitely capable of influencing policy outcomes and clearly interested in

145 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
146 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
147 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
148 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
149 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
150 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
151 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
152 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
153 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.

matters concretely impinging on the politico-economic order in the PRC, both its socialist inner core and newly absorbed/reabsorbed capitalist outer ring.[154]

The authors assumed that Hong Kong's promised autonomy, enshrined in International and Constitutional Law, would fall victim to the deleterious machinations of backward-looking centralizers, conservatives, and military cliques.[155] To aggravate the situation, decentralisers/regional leaders were expected to intensify, rather than dampen the pressure because of their desire to enhance the competitive advantages of provinces aspiring to challenge Hong Kong.[156] Elsewhere, it was posited that these groups would become embroiled in intractable conflicts (centralisers versus decentralisers; conservatives versus reformers, and so on), instead of engaging in productive cooperation.[157] The pendulum would oscillate from one end of the strategic spectrum to the other, engendering a climate of instability.[158] In such a charged atmosphere, it would prove exceptionally difficult to effectively adhere to the principles embodied in the international and constitutional documents pertaining to the future of Hong Kong.[159] Further, over time, the power of groups that played a vital role in shaping these documents on the Chinese side would substantially decline, allowing less favourably inclined players greater leeway in the quest to curtail Hong Kong's autonomy.[160]

This would inevitably culminate in the transformation of a vibrant capitalist enclave known for its *laissez-faire* ethos and irrepressible nature into a politico-economic entity firmly steered from above and drifting aimlessly.[161] Significant loss of freedom would be witnessed at the grassroots level (people's daily lives), in the media, at the judiciary, in academia, and even economic conduct would be subject to socialist-style restrictions (*e.g.*, the right to travel might not be granted unconditionally) and manipulation (*e.g.*, contracts might be granted according to political criteria).[162] Progress towards (limited) democracy would also grind to a halt – in fact, it would in all likelihood be reversed.[163]

This analytically and technically sophisticated exercise in crystal-gazing was strictly predicated on the assumption that utility-maximising resource-rich groups, exerting influence over relevant Chinese policies, would persistently engage in forms of competition and cooperation detrimental to the well-being of Hong Kong.[164] The authors surmised, without any

154 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
155 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
156 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
157 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
158 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
159 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
160 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
161 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
162 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
163 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.
164 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.

equivocation, that these groups would not be tangibly constrained by pertinent bilateral agreements (*i.e.*, Sino-British Declaration) and their constitutional derivatives (*i.e.*, Basic Law) – or, for that matter, any other international legal instruments/norms.[165] This is tantamount to stipulating that parochial domestic interests would materially impede, perhaps even prevent compliance with International Law by the State.

Subsequent events have sufficiently diverged from the model-generated predictions to cast serious doubt not so much on the underlying theoretical foundation, which can be said to possess some contingent explanatory power, as the model construction and specification (*i.e.*, structurally significant errors of omission and commission).[166] This methodological failure, glaring in certain respects, may be ascribed to a number of factors.[167] The most important, in the present context, is the attempt to test an intricate theoretical scheme by mechanically embarking on a 'one-shot' case study. By replicating the historical 'experiment' over time, including in the post-1997 period, in conjunction with proper analytical induction, it would have arguably been possible to refine the model, enrich the theory, and produce more satisfactory empirical results.

Multiple-case studies constitute an improvement on such narrowly focused data-collection and -processing practices, other things being equal. The reason why this is not necessarily always true often stems from the limited methodological awareness (errors of omission and commission, again) displayed by international legal scholars. Repeated efforts to assess in a top-down fashion the viability of the two-level game construct as a conceptual tool for gaining insight into China's behaviour in the global arena, including its rule conformity, commendable for their definitional precision and episodic range, but without a genuinely broad and flexible analytical frame, furnish a suitable illustration.[168]

The proponents of this theoretically underpinned explanatory vehicle compellingly assert that foreign policy, encompassing actions that impinge on International Law, is the product of the interplay between overlapping sets of forces that operate, by no means in a frictionless manner, at two levels, domestic and cross-border:

> At the national level domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among these groups. At the international level, national governments seek to

165 de Mesquita *et al.* 1985; de Mesquita *et al.* 1996.

166 Mushkat & Mushkat 2004:229-246; Mushkat & Mushkat 2005:101-125; Mushkat 2009:161-191; Mushkat 2011a:41-69.

167 Mushkat & Mushkat 2004:229-246; Mushkat & Mushkat 2005:101-125; Mushkat 2009:161-191; Mushkat 2011a:41-69.

168 Ross 1995; Jayakar 1997:527-561; Pearson 2001:337-370; Wang 2002:153-171; Chung 2004; Yee 2004a:53-82; Yee 2004b:129-163; Chung 2007:49-70; Gunter & Rosen 2010:270-294; Yee 20120:197-234; Kaelberer & Wang 2006.

> maximise their ability to satisfy domestic pressures, while minimising the adverse consequences of foreign developments.[169]

It is conveniently assumed that the ensuing multi-party bargaining proceeds in two recognisable phases: first, give-and-take between the actors involved in the search for an accord, potentially paving the way for a tentative agreement (level-1 negotiations); secondly, separate exchanges within each group of constituents whose purpose is to ascertain whether there is adequate support for ratification of the blueprint devised (level-2 negotiations).[170] The model dynamics revolves around the notion of a win-set, which is defined, for a given level-2 constituency, as the cluster of all possible level-1 agreements that would win—that is, garner the necessary support among the constituents – when placed on the decision agenda.[171] A number of crucial influences – such as level-2 preferences and coalitions, level-2 institutions, level-1 representatives' strategies, uncertainty, and structural and functional characteristics of the domestic setting – are supposed to determine the size of the win-set and ultimately the bargaining outcome.[172]

The scholars who proposed this analytical tool may have envisaged applications in a milieu where the agreement sought or already in place and serving as a possible benchmark for the negotiating parties (in the latter instance, the question of compliance may arise), may not necessarily have firm legal underpinnings. Their concern was with situation-specific conflict resolution mechanisms rather than the making of International Law and adherence to it. Nevertheless, as indicated, the model has been invoked to shed light on international legal phenomena as well, interestingly in the Chinese context, most effectively with reference to the country's territorial disputes.[173]

Unlike other empirical investigations pursued in a similar vein, such as the thorough dissection of the intricacies of the Sino-American copyright tussle,[174] this particular survey had the distinction of encompassing a number of conflicts with different features and aftermaths.[175] Specifically, it included the Diaoyu/T\Diaoyutai/Senkaku Islands dispute with Japan and Taiwan (a failure), the Chenpao/Zhenbao/Damanky Island dispute with Russia (a success), and the Himalayan and McMahon Line boundary dispute with India (neither a ringing success nor an unqualified failure).[176] Moreover, these episodes did not fully overlap, adding a valuable time dimension to the study.[177]

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169 Putnam 1988:434.
170 Putnam 1988:427-460.
171 Putnam 1988:427-460.
172 Putnam 1988:427-460.
173 Chung 2004; Chung 2007:49-70.
174 Jayakar 1997:527-561.
175 Chung 2004; Chung 2007:49-70.
176 Chung 2004; Chung 2007:49-70.
177 Chung 2004; Chung 2007:49-70.

This multiple-case and partly longitudinal survey provided considerable support to the two-level game formulation, but fell well short of a strong endorsement.[178] Several possible theoretically germane omissions were identified.[179] Unfortunately, this was done in an informal and selective fashion, without systematically pinpointing conceptual gaps and proceeding to suggest an augmented version of the model, reflecting a greater degree of behavioural complexity/diversity, as well as policy dynamics commensurate with patterns observed when the time factor is treated as a variable rather than a constant.[180] These limitations may be ascribed to the absence of a satisfactory analytical induction component, a problem encountered earlier, and the distinctly modest exploitation of the opportunities stemming from the inherently longitudinal structure of the chain of conflicts explored.[181]

That is not to say that time plays no meaningful role in empirical research on international law in Asian/Chinese settings. A number of studies, both broad in scope and narrowly delineated, are, in fact, primarily organised along longitudinal lines. An example that belongs to the former category is an account, within a transnational legal process theory (TLPT) framework, of the evolution of China's international legal compliance across a wide policy spectrum.[182] A somewhat more focused examination traces, from a constructivist perspective, the emergence of the Association of Southeast Asian Nations (ASEAN) governance regime for combatting haze pollution.[183] The landscape shrinks further, with a corresponding increase in intensity, when Japan's adoption and compliance with three notable treaties is subjected to clinical scrutiny bearing (again) the hallmarks of constructivism.[184]

All three top-down retrospective reconstructions are fact-rich and conceptually illuminating. However, the first two have probably more in common with interpretative history than the case study method. Scarcely are any of the principles and practices outlined in the previous section followed by the authors, whether explicitly or implicitly.[185] Alternative explanations are ruled out, as required, but not in accordance with prevailing scientific or quasi-scientific yardsticks.[186] Issues of validity and reliability may legitimately be raised.[187] The third and most focused dissection of international legal realities comfortably falls within the ambit of the case study inquiry, yet it is not consciously designed as such. From a purely technical viewpoint, it poses challenges similar to those presented by its

178 Chung 2004; Chung 2007:49-70.
179 Chung 2004; Chung 2007:49-70.
180 Mushkat 2012:45-89; Mushkat 2013a:178-209.
181 Mushkat 2012:45-89; Mushkat 2013a:178-209.
182 Kent 1999; Kent 2007.
183 Nguitragool 2011.
184 Flowers 2009.
185 Mushkat 2011a:41-69; Mushkat 2014c:252-270.
186 Mushkat 2011a:41-69; Mushkat 2014c:252-270.
187 Mushkat 2011a:41-69; Mushkat 2014c:252-270.

two macroscopic counterparts. In none of these representative surveys is the longitudinal element specified in a form conducive to smooth disentangling of causes and effects.[188]

The prevalence of such gaps in a tentatively charted empirical domain marked by exploratory orientation is not entirely surprising, although greater methodological awareness and focus might perhaps have been expected at what qualifies as an intermediate stage in the evolution of Asia-centred research purporting to enhance the understanding of "how nations behave"'[189] *vis-à-vis* International Law. In the larger, less geographically constrained and more thoroughly examined sphere of data-based theoretical investigation supposedly (a modicum of ambiguity is warranted in this instance, because non-Western experience is mostly overlooked in this context) seeking universal generalisations not confined to any particular set of regional circumstances, notably those cultural in nature, technical standards pertaining to the case-study process might legitimately thought to be closely adhered to.

Yet, that is not necessarily true. The one-shot type of inquiry is now seldom resorted to in the quest for overarching explanations of international legal phenomena, but it cannot be said to be a thing of the past. For instance, in a highly critical and conceptually rigorous survey of prevailing theories of compliance with International Law (realism, enforcement model, liberalism, rational choice, managerialism, reputational paradigm, TLPT, legitimacy perspective, constructivism, and organizational-cultural scheme), the author skilfully highlights the considerable limitations of the available interpretative devices and offers an alternative vehicle, a framework grounded in empirically derived and relevant (especially from the standpoint of international humanitarian law) propositions regarding the impact of leaders' personality on decision-making modalities and outcomes.[190] While the latter is richly supported with multiple cases, the apparent inadequacies of its presumed predecessors are often illustrated with a single example.[191]

This sophisticated, but not fully productive, attempt to substitute a new one-dimensional theory for an array of similarly conceived established models is illuminating because, in addition to serving as a reminder that the scope of the factual evidence relied upon for validating paradigms in international legal research is simply too narrow, it brings to the fore another crucial methodological drawback, encountered earlier, characterizing scholarly endeavours geared towards accounting for patterns of rule conformity in the global arena. Analytical induction, in the formal sense of the term, is either incomplete or missing altogether. When traces of it may be observed, the framework adopted is static and is not

188 Mushkat 2011a:41-69; Mushkat 2014c:252-270.
189 Henkin 1979.
190 Bradford 2004:1243-1439.
191 Bradford 2004:1243-1439.

dynamically adjusted to scrupulously reflect the data as they are gathered and dissected.

Virtually all the principal theoretical schemes identified above are the product of top-down inquiry, rather than bottom-up discovery. However, this is not the source of their single-factor disposition, or one-dimensionality. The reason lies in the tendency to attribute causality to a single factor/variable or a homogeneous cluster consisting of a small number of complementary factors/variables. In addition, the flow of influence is commonly portrayed as unidirectional, exclusively from the "cause" to the "effect", without room for a reverse channel.[192] Moreover, indirect/mediating effects (*i.e.*, intervening variables), whether mutually reinforcing or mutually antagonistic, are not incorporated into the models,[193] and the same applies to feedback loops and contextual influences.[194]

The appeal of the single factor/variable pinpointed is normally demonstrated by providing a wide range of empirical illustrations, which may qualify as a collection of multiple-case studies, but at times merely constitute a set of examples, even if marked by substantial diversity and size. The logic underlying the choice of cases/examples is seldom properly elucidated, giving rise to concerns about "selection bias". Such concerns are indeed justified, because ample factual support is somehow continuously found for a broad array of divergent perspectives which are difficult to reconcile and due to the mystifying resilience displayed by the single-factor/variable explanations in the face of empirical intricacies and nuances (the preferred narrow-based hypotheses are nearly always corroborated and are rarely modified; misgivings and rejections are reserved for competing paradigms).

Despite their distinctly partial and contingent nature, such theoretical schemes cannot readily be stripped of the overarching and universal properties ascribed to them by academic proponents. Nominal definitions of key concepts are overly loose and operational/quasi-operational ones are not systematically furnished. Units of analysis are scarcely ever specified with a significant degree of precision. The relationships between factors/variables are not made sufficiently transparent which, *inter alia*, is reflected in the non-use of valuable tools such as pattern-matching. Given the apparent methodological opacity, assessing validity and reliability, a step not routinely taken by model builders, poses a serious challenge.

These shortcomings manifest themselves most visibly in the non-rationalist space, where setting the 'burden of proof' at a level consistent with stringent technical yardsticks is typically not a paramount consideration. Constructivist formulations and data-centred strategies to substantiate them may conveniently be invoked to demonstrate the lack of adequate grounding in case-study investigative tenets and procedures. Unlike their rationalist counterparts, which draw their inspiration from

192 Britt 1997: 57-60.
193 Britt 1997:84-90.
194 Britt 1997:94-131.

economics, predominantly the neoclassical strand, such formulations have their roots in sociological discourse, principally the structurationist and symbolic variants.[195]

The salient proposition embraced by advocates of constructivism across the sociolegal spectrum is that people, both individually and collectively, act towards objects, including players in multiple arenas with whom their paths cross, directly or indirectly, in a manner echoing the meanings that those objects convey to them.[196] The corollary is that, in grappling with international issues, "States act differently towards enemies than they do towards friends because enemies are threatening and friends are not".[197] Thus, "U.S. military power has a different significance for Canada and Cuba, despite their similar 'structural' positions, just as British missiles have a different significance for the United States than do [Russian] missiles."[198]

Such meanings are assumed to serve as the foundation underpinning social systems at micro and macro levels and the pivotal factor determining their functional configuration.[199] By participating in processes, via which meanings emerge, players of all shapes acquire identities, that is, palpably discernible and role-focused understandings and expectations about self.[200] These defining features are relational ("[i]dentity, with its appropriate attachments of psychological reality, is always identity within a specific, socially constructed world")[201] and may take a range of forms ("a [S]tate may have multiple identities as 'sovereign', 'leader of the free world', 'imperial power', and so on").[202]

Within that conceptual structure, rationalist-style interests are divested of their causal status and repositioned as the inevitable product of identities: "Actors do not have a 'portfolio' of interests that they carry around independent of social context; instead, they define their interests in the process of defining situations."[203] The circumstances faced by decision makers may, at times, be without readily apparent precedent, in which case meaning and interests may need to be constructed by analogy or invented *de novo.*[204] However, social settings tend to exhibit recognisable attributes, allowing those exposed to them to ascribe meanings on the basis of organisationally defined roles, or established identities.[205]

195 Mushkat 2014d:245-278.
196 Mushkat 2014d: 245-278.
197 Wendt 1992:397.
198 Wendt 1992:397. See also Wendt 1999.
199 Mushkat 2014d:245-278.
200 Mushkat 2014d:245-278.
201 1996:111.
202 1992:398. See also Wendt 1999.
203 Wendt 1992:398-399. See also Wendt 1999.
204 Mushkat 2014d:245-278.
205 Mushkat 2014d:245-278.

This causal constellation informs constructivist perspectives on institutions, which are deemed to be relatively stable amalgams of identities and corresponding interests.[206] Such enduring patterns are commonly codified in formal norms and rules, with the latter exerting motivational influence as a consequence of agents' socialisation to, and participation in collective knowledge: "institutions are fundamentally cognitive entities that do not exist apart from actors' ideas about how the world works", although it does not necessarily follow that "they are not real or objective, that they are 'nothing but' beliefs".[207]

The emphasis on the primacy of meanings, norms, identities and the non-material mechanisms, via which they are transmitted as the factors shaping State conduct in the global arena, has yielded illuminating descriptive, explanatory and prescriptive insights, notably in the field of international relations, but also in that of International Law.[208] Nevertheless, the rich ideational architecture fashioned is devoid of a carefully designed methodological element, depriving it of sound empirical reinforcement and detracting from its technical effectiveness. Ultimately, the attractiveness of the edifice erected stems from the values encapsulated rather than the supporting evidence and the process of obtaining it.[209]

The absence of a broadly and thoroughly articulated analytical frame is a key impediment to fact-driven knowledge generation.[210] Crucial variables such as meanings, norms, identities, and socialisation are not expressed in sufficiently concrete form, both at the nominal and operational level (*e.g.*, it is at times difficult to differentiate between norm/identity-motivated behaviour and rule rationality).[211] The challenges presented by conflicting/heterogeneous meanings, norms, identities, and socialisation agents, as distinct from complementary/homogeneous ones, are, to a large extent, overlooked.[212] Findings suggesting that these pivotal variables may be the product of material influences (*e.g.*, patterns of international trade flows), rather than unfailingly the other way around, are mostly discounted.[213] Intervening variables are consigned to the periphery (*e.g.*, are American meanings, norms and identities immune to change as political power shifts from one party to another? Is the personality of the chief executive/president of no relevance?).[214] Context is similarly marginalised (*e.g.*, do meanings, norms and identities play a similar role in crisis situations as in periods characterised by a fairly high degree of tranquillity?).[215]

206 Mushkat 2014d:245-278.
207 Wendt 1992:399. See also Wendt 1999.
208 See, in particular, Reus-Smit (ed.) 2004; Hathaway 2005:469-536; Nagtzaam 2009; Brunnee & Toope 2010; Sinclair 2010; Goodman & Jinks 2013.
209 Mushkat 2014d:245-278.
210 Mushkat 2014d:245-278.
211 Mushkat 2014d:245-278.
212 Mushkat 2014d:245-278.
213 Mushkat 2014d:2455-278.
214 Mushkat 2014d:245-278.
215 Mushkat 2014d:245-278.

An effective analytical frame needs to appropriately accommodate evolution, whether guided or spontaneous, in many circumstances.[216] It is debatable whether constructivist paradigms adopted by international legal scholars adequately serve this purpose.[217] In some contexts, they are entirely static (*e.g.*, the argument that small Sweden waged the Thirty Years War against the mighty Hapsburg Empire for no other reason, and without any feedback-induced fine-tuning, than to validate Swedish identity as a power to be reckoned with in 17th-century Europe).[218] Elsewhere, they equate change exclusively with the endeavours of norm entrepreneurs or external events possessing normative ramifications.[219]

The possibility that the exogenous variable (*e.g.*, compliance with International Law or lack thereof) may impinge on the endogenous one (*i.e.*, meanings, norms, and identities) is also not fully explored.[220] The contention that norm-following is a routine phenomenon (which may prove somewhat puzzling to free-trade promoters uncomfortable with the persistence of dumping, export subsidies, and non-tariff barriers to market entry) and more likely to materialise when the normative underpinnings of international governance regimes and domestic ones tend to converge merely amounts to a modest step in this direction (*e.g.*, the level of economic development, while not the sole relevant influence, sheds better light on shifts in attitudes towards intellectual property rights).[221]

Importantly, merely one substantial constructivist foray into international legal territory bears the formal, or semi-formal, hallmarks of well-delineated case-study research.[222] It consists of an elaborate and theoretically inspired examination of three international environmental regulatory systems: for Antarctic mineral exploitation, whale conservation, and timber preservation.[223] The author marshals evidence in support of the proposition that constructivism offers a superior vehicle to neoliberalism for gaining a solid appreciation of the development of these governance regimes.[224] However, the case-study logic and mechanics are not pursued tightly enough to rule out alternative accounts. Indeed, one could readily infer, on the basis of the material provided, that seeking a finely balanced combination of neoliberal and constructivist perspectives would constitute a more fruitful approach. In addition to the problem of reliability that consequently arises, the issue of external validity surfaces, because there is ample evidence to bolster assertions consistent with fundamentally different interpretations of the emergence of international environmental

216 Mushkat 2014d:245-278.
217 Mushkat 2014d:245-278.
218 Armstrong *et al.* 2012:101.
219 Mushkat 2014d:245-278; Diehl *et al.* 2003:43-75.
220 Mushkat 2014d:245-278.
221 Mushkat 2014d:245-278; Mushkat 2013b:187-214.
222 Nagtzaaam 2009.
223 Nagtzaam 2009:80-311.
224 Nagtzaam 2009:80-324.

regulatory systems, including those structured along quintessentially rationalist lines.[225]

Two books by social scientists positioned at the intersection between International Law and Politics may illustrate what methodological standards ought ideally to be aimed for in dissecting data-rich cases in international legal settings. The first, located in the Asian space, concerns the "resolution" of China's border disputes.[226] Broad-brush ruminations and unfettered meandering through a loosely mapped factual terrain are scrupulously avoided. Instead, meticulous exploration, within a highly coherent and precisely outlined framework, of 23 post-1946 boundary conflicts, both at land and at sea, is systematically undertaken.[227] The findings generated furnish deeper behavioural insights than those delivered by students of International Law following a methodologically unconstrained, traditional-style strategy of inquiry.[228]

Interestingly, the extensive empirical evidence meticulously processed unambiguously shows that, in 17 of the episodes examined, China opted for significant compromise and was content to proffer far-reaching concessions.[229] The flexibility exhibited was quite remarkable, as the territory gained typically amounted to less than half of that which was contested.[230] The sweeping compromises arrived at with often defiant neighbours resulted in border agreements, in which the Chinese abandoned claims to more than 3.4 million square kilometres of lands that were fully controlled by the Qing Empire at its peak in the early 19th century, an astonishing turnabout for a once-great power re-emerging following a severe multi-decade-long decline coupled with painful international marginalisation.[231]

That said, it should be noted that China resorted to force in 6 of the border disputes dissected.[232] Some of these armed confrontations, particularly those with India and Vietnam, were enormously violent.[233] Others, such as those over Taiwan in the 1950s and with the Soviet Union in the late 1960s, took place at the height of the Cold War and featured threats of recourse to nuclear weapons.[234] Yet, the pugnacious rhetoric and military machinations have produced scanty benefits for the Chinese side.[235] Despite the complex manoeuvres and determined muscle-flexing – as well as the heavy financial, human, physical and symbolic toll sustained

225 See, for example, Mushkat 2010:493-542; Mushkat 2011b:1-49; Mushkat 2013c:103-160; Mushkat 2013d:319-378; Mushkat 2014e:252-270.
226 Fravel 2008.
227 Fravel 2008.
228 Tzou 1990; Pan 2009.
229 Fravel 2009:2.
230 Fravel 2009:2.
231 Fravel 2009:2.
232 Fravel 2008:2.
233 Fravel 2008:173-219.
234 Fravel 2008:173-219.
235 Fravel 2008:173-219.

– China gained hardly any land that it did not control before the outbreak of the hostilities.[236]

These seemingly inexplicable manifestations of Chinese conduct in crisis-type situations proved to be seriously at variance with the postulates embraced by international legal scholars of the realist and neo-realist persuasion (signalling that analytical shortfalls are not the preserve of non-rationalist schools of thought).[237] After all, one could legitimately come to "expect a [S]tate with China's characteristics to be uncompromising and prone to using force in international disputes, not conciliator",[238] but this regional power "rarely exploited its military superiority to bargain hard for the territory it claims or to seize it by force".[239]

None of the several grand paradigms imported by students of International Law from the sister discipline of International Relations could adequately account for these behavioural patterns, which were sufficiently persistent not to be dismissed as a statistical outlier.[240] An essentially rationalist four-dimensional explanatory scheme, but one squarely falling into the middle-range category,[241] was eventually adopted, highlighting the role played in such circumstances by the value of contested land, claim strength in dispute, security environment, and prevailing scope conditions.[242] While not entirely fool-proof,[243] this distinctly bottom-up, highly structured and painstakingly systematic coupling of theory and empirical evidence arguably demonstrates the potential of the case-study method, in the formal sense of the term, as a tool for enhancing scientific knowledge regarding situations in which State conduct has international legal ramifications.

The second example given prominence in this instance consists of a collection of case studies designed to shed greater light on the determinants of "compliance gaps", which are the product of divergences between the norms and rules (an operationalised version of the former) embodied in international agreements, or regimes, and the actual conduct of the signatory States, or regime members.[244] Although South Korean performance in the International Monetary Fund and World Trade Organisation contexts is the focus of one of the detailed investigations, this is not an Asia-centred project, but one global in scope. Indeed, African (predominantly international human rights and international humanitarian law-related) international legal issues feature more heavily than those of

236 Fravel 2008:173-219.
237 Fravel 2008:173-219.
238 Fravel 2008:2.
239 Fravel 2008:2.
240 Fravel 2008:2-4. See also Goertz & Diehl 1992.
241 Merton 1949:39-53; Boudon 1991:519-522.
242 Fravel 2008:37-39.
243 Mushkat 2012:45-89.
244 Luck & Doyle (eds.) 2004. Perhaps an even more illuminating example, but elaborate and nuanced to a point whereby conveying its essence may simply not be practical, given the space constraints faced in this article, is Alter 2014.

Asian – or, for that matter, Western – origin. By the same token, virtually every type of an international agreement/regime (*e.g.*, in addition to the two aforementioned categories, arms control and disarmament, environment and trade are accorded close attention) is represented in the sample.

Interestingly, rule conformity in the global arena is not conceived in dichotomous terms, as a phenomenon either to be marginalised in a rationalist fashion or to be extolled in a non-rationalist manner. The acknowledgement that compliance gaps exist by definition implies that adherence to international law is not regarded as a foregone conclusion. Nonetheless, this is not tantamount to contending that it is seldom, let alone never, observed. Rather, compliance is viewed as a variable that ranges widely and, to the extent that divergences between commitments and subsequent actions prevail in one form or another, it is incumbent on international legal researchers to earnestly grapple with them.

More importantly, from a technical perspective, this work has some noteworthy methodological characteristics. First, it appears to be anchored in an analytical frame derived from as many as 7 competing/complementary schools of thought: realist, Kantian liberal, democratic process, strategic, managerial, transformationalist, and transnationalist.[245]

Secondly, this multifaceted foundation serves a source of theoretical guidance without imposing rigid restrictions. Specifically, the findings generated by the scholars involved in the project furnish a basis for refining it and even venturing beyond its confines.[246] The corollary is that the logic of analytical induction seems to be at least broadly heeded.

Thirdly, bivariate relationships, reduced to an absolute core and unidirectional, are not part of the equation. Instead, there is a sizeable set of intervening and contextual variables, as well as some room for feedback loops. This may be illustrated by highlighting certain key factors that, given the evidence produced, are deemed to materially impinge on compliance: to whom the obligations are seen to be undertaken (to people, to the world, or to the nation), domestic influences, shifting geopolitical landscape, patterns of power and equity, robustness of reporting systems, clarity of linkages between reporting outcomes and penalties, availability of self-reporting devices, presence of rapporteurs and inspection panels, exercise of leadership and individual responsibility, quality of national infrastructure and capacity-building skills, setting in motion of interactive processes to sustain fertile cooperation, sturdiness of dispute-resolution mechanisms, degree of institutionalisation, level of sanctions and inducements, recourse to flexible and mixed enforcement strategies versus rigid and static ones, internal reactions to external intrusiveness, spill-over and reputational effects, meaningful coupling of active and inactive (peripheral to the agreement/regime) parties, and establishment of fruitful channels for binding non-State players.[247]

245 Downs & Trento 2004:26-31.
246 Luck 2004:303-314, 322-329.
247 Luck 2004:303-328.

Fourthly, selection bias, while not avoided, is minimised, and validity and reliability are enhanced, by the choice of a multi-paradigmatic (top-down) analytical frame, its revisions thorough data-driven (bottom-up) analytical induction (as suggested above, in both instances), the participation of researchers identified with different schools of thought, reliance on a sampling procedure aimed at achieving a significant measure of diversity and depth of the case studies (which do not constitute mere examples). The sampling 'technique' is not spelt out explicitly but, as indicated, due to the heterogeneity of the 8 agreements/regimes scrupulously dissected, it can be said to bear a general resemblance to the maximum variation method. This well-mapped social science foray into international law territory may thus legitimately be portrayed as another desirable model for researchers in the field who resort to case exploration, in order to draw inferences about how nations behave.

4. Conclusion

The international legal landscape has undergone several marked changes over the course of the post-Second World War era. From an epistemological standpoint, one of the most pivotal has been the embracement, a trend that began in the late 1960s and has gained momentum two decades later, of the empirical/sociolegal mode of inquiry alongside the time-honoured and still dominant doctrinal approach. This has been, to a considerable extent, an exogenously inspired process in that the impetus has largely emanated, particularly during the intermediate and formative phases, from disciplines within the social science space, particularly international relations.

At the current juncture, this is no longer an essentially one-sided configuration almost exclusively shaped by scholars working in academic fields other than law and bringing their specific interests, perspectives and tools into this scientific enterprise. International legal scholars, notably in the United States, where law is a graduate-level subject, requiring proper grounding in other disciplines, are playing an equally important, perhaps even the leading role in setting the investigative agenda, endeavouring to buttress conceptual knowledge and conducting pertinent empirical work, with compliance at the forefront, but not necessarily in a uniform fashion and by no means the sole concern.

These efforts, reinforced by an ongoing flow of inputs from the social sciences, have resulted in a rich tapestry of theoretical insights regarding international legal behaviour. However, the methodological underpinnings of the contributions originating within the law arguably give rise to some challenging questions. The qualitative orientation, reflected in the choice of the case study as the principal data-gathering instrument, is entirely commensurate with the problems examined and practical ways to come to grips with them. However, as shown in this article, cases are often arbitrarily employed as examples to support conceptual schemes put forward, without being comprehensively scrutinised, and the principles and procedures that are an integral component of the case-study technique are

not closely followed. This detracts from the effectiveness of the theoretical façade erected over nearly 5 decades.

It could, of course, be argued that this criticism should primarily be directed at those following the essentially rationalist path. After all, they are the most inclined to subscribe to, and practise empiricism, or assume that knowledge is obtained by objectively exploring the world around us and scientifically converting our observations into conceptual propositions.[248] Viewed from that angle, the appreciation of international legal phenomena rests on a solid foundation, virtually devoid of ambiguity, because it is supported by evidence generated by rigorously trained researchers carefully applying reliable methodological tools.[249] Or, to express it differently, a student of international law pursuing the positivist route is "viewed as a *subject* who is attempting to understand an *object* and is trying to be objective by eliminating the bias that could lead to inaccuracy".[250]

These postulates are not universally shared. Notably, they are disputed by advocates of constructionism who offer an alternative to empiricism (as well as the rationalist belief in the powers of reason) by claiming that an appreciation of the world around us may neither be gained from discovery of external reality nor produced by reason independently of such reality.[251] The emphasis, in this instance, both at the individual and collective level, is on the production and communication of meaning, or the subjective construction of reality and diffusion of perceptual structures. The implication is that it is impossible to fruitfully rely on the human senses to observe the external environment, if one can be said to exist at all, and that a detached quest for theoretical enlightenment is not a viable prospect.[252]

Constructionists are thus anti-foundationalists or non-foundationalists in that they assert that:

> there are no permanent, unvarying criteria for establishing whether knowledge can be regarded as true and there are no absolute truths. The only criteria that are available are those that can be agreed upon, through negotiation and argument, by a community of scientists, at a certain time, in a certain place, and under certain conditions.[253]

These and broadly similar departures from pure empiricism and unadulterated reason should not be overlooked. However, as matters stand, their practical significance should not be overstated in this context. International legal scholars of both the rationalist and non-rationalist persuasion resort heavily to case study-based evidence to buttress their theoretical schemes and, whatever the epistemological and ontological contentions,

248 Blaikie 2007:19.
249 Blaikie 2007:19.
250 Blaikie 2007:19.
251 Blaikie 2007:22.
252 Blaikie 2007:23.
253 Blaikie 2007:23.

the research strategies they employ in the process largely converge rather than diverge. Nor is the need for attaining a degree of consensual validity through dialogue among scientists seriously questioned by rationalists, in the final analysis. Ultimately, one must confront the issue whether case studies undertaken by scholars identified with different schools of thought should be subjected to appraisal by markedly divergent yardsticks. The position adopted in this article is that aspiring to a meaningful measure of across-the-board consistency would be preferable and, if so, there is substantial scope for methodological improvement across the philosophical divide.

A number of other international legal researchers have compellingly argued along similar lines. Three contributions stand out in this respect.[254] Taken together, they reflect an increasingly broader focus and a progressively greater methodological rigor. However, the perspective adopted by the authors is not comprehensively grounded in the extensive literature on the case-study technique. It is hoped that the extra distance travelled in this article, entailing an attempt to place the applicability of that tool to international law in a wider multidisciplinary context, will further heighten awareness of the limitations of current practices and the need to examine cases far more systematically than is presently common, in a manner sufficiently compatible with the principles and procedures followed in standard empirical investigations across the social science spectrum, including criminology and law and society.

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254 Simmons & Breidenbach 2011:198-222; Shaffer & Ginsburg 2012:1-46; Linos 2015:475-485.

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