CONTRADICTION & THE COURT: HETERODOX ANALYSIS OF ECONOMIC COERCION IN INTERNATIONAL LAW

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In its decision on provisional measures in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Iran-U.S.*), the International Court of Justice (ICJ) announced a seemingly futile order for relief against ongoing U.S. actions. With this paper, however, I propose a reading of the order by which it is neither futile nor against U.S. action. My reading of the order in context includes an argument that international law favors certain actors and associations by enabling economic coercion, while disfavoring others by selectively disabling other possibilities for coercion. By this reading, the practice of international law simultaneously supports and is supported by a certain (im)balance of forces, and the practices of the ICJ and international law generally over time contribute *by design* to historical imbalance in distributions of resources and other values globally. The imbalance is constitutive, including privilege and particularity baked into the United Nations Charter: coercive activity by economically powerful states underwrites the maintenance of relations under the Charter regime.

On that basis, ongoing support by economically powerful states constitutes the first mandate for the continuing performance of the United Nations, including the ICJ. To make the argument clear, I have adapted heterodox methodological borrowings and provisionally sketched their operation together within an overall framework applied to the case study here. The heterodox borrowings are designed to expand the ways of observing and knowing international law and legal practice, what they comprise and achieve, and in the process to demonstrate what can or cannot be observed with traditional tools and techniques. The objective is transparently to use method to convey an argument about economic coercion and international order.

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I. INTRODUCTION: STABILIZING AUTHORITY

In its recent decision on provisional measures in the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Iran-U.S.*), brought by Iran against the United States, the International Court of Justice (ICJ) announced a seemingly futile order for relief against ongoing U.S. actions.[1] With this paper, however, I propose a reading of the order by which it is neither futile nor against U.S. action. My reading of the order in context includes an argument that international law favors certain actors and associations by enabling economic coercion, while disfavoring others by selectively disabling other possibilities for coercion.[2] By this basic reading, the practice of international law simultaneously supports and is supported by a certain (im)balance of forces, by which I mean materially-backed associations among international actors. Understood in this context, the practices of the ICJ and international law generally over time contribute *by design* to historical imbalance in distributions of resources and other values globally.

The imbalance is constitutive, including privilege and particularity baked into the United Nations Charter (Charter). Coercive activity by economically powerful states underwrites the maintenance of relations under the Charter regime.[3] On that basis, ongoing support by economically powerful states constitutes the first mandate for the continuing performance of the United Nations, including the ICJ. In other

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1. Alleged Violations of 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Request for the Indication of Provisional Measures, 2018 I.C.J. 623 (Oct. 3).

2. *Cf.* Lianne J. M. Boer, *'Echoes of Times Past': On the Paradoxical Nature of Article 2(4)*, 20 J. CONFLICT & SECURITY L. 5 (2014) (discussing the effects of this disjuncture in another context, organized around an inquiry into purported differences, or lack thereof, between traditional military force and cyber-hostilities).

3. *See* Bruce Cronin, *The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations*, 7 EUR. J. INT'L REL. 103, 112–13 (2001) (describing expectations that a hegemon will act consistently with its role to maintain an international order).

words, international law occurs in an ecology of distributive networks stabilized by ongoing practices to maintain an imbalance of coercive potentialities over time. Historically, the U.N. system, together with the ICJ as its juridical apex, was founded in coercion.[4] Their continued performance relies on reiteration and continuation of a consistent coercive regime with economic coercion at its foundation. The coercive regime that underwrites the continued performance of the United Nations and the ICJ is complemented by the coordinate suppression under the Charter of other possibilities for coercive action, embodied most clearly in the restriction on the use of armed force attributed to Article 2(4).[5] This is the basic regulatory framework for coercive activity capable of underpinning the maintenance of relations under the Charter regime, the ongoing possibility of which remains the first mandate for the continuing performance of the United Nations and the ICJ.

I suggest that this is not exactly a normative argument, though I pose it polemically and mean it to support a normative argument. The current imbalance of coercive relations under the Charter regime might well represent precisely the sort of associative connections, distributions, and social conditions that a given reader will prefer (just as it might support the opposite), and besides, no real political situation exists free of coercion and coercive potential. By examining the coercive underpinnings of the Charter regime, however, I mean to shed light on ongoing practices of international law and thereby describe the operation of international law so constituted according to the choice of *this* coercive design. By relying on a single order in a single case before the singular court of the ICJ, I offer here only a plausible example of this constitutive condition in action. The larger investigation that this example encapsulates goes beyond the scope of this article. For that reason, this contribution is a proposal and framework for further inquiry rather than a complete study in itself. For the same reason, a primary objective of this paper is to develop a method suited to the task, designed to research factors that stabilize specific performances of authority in international law, with the further intent to establish how and why they do so successfully. For that purpose, I have adapted heterodox methodological borrowings and provisionally sketched their operation together within an overall framework applied to the case study here.

II. METHOD, ANALYSIS, AND ARGUMENT

Method, analysis, and argument are closely intertwined in what follows. Every method is an argument as well as a mode of analysis: each asserts a way of observing and knowing conditions in the world. Likewise, each structures, makes visible and coherent the problems or opportunities that thereby become apparent or legible in a

4. *See* MARK MAZOWER, NO ENCHANTED PALACE 58–65 (2009) (discussing how the United Nations was founded in a manner that coerced the globalization of European values as opposed to independence). For a curious little discussion piece, but representative of contemporaneous debates around the organization of the United Nations, see Hans Morgenthau, *The Machiavellian Utopia*, 55 ETHICS 145 (1945). I cite it for Morgenthau's blunt description of the United Nations, at the moment of its founding, as a political enterprise predicated on coercion covered in Machiavellian strategy.

5. U.N. Charter art. 2, ¶ 4.

given complex of things and actions, or processes.[6] In routine cases, disciplinary methods describe particular, recognized—and recognizable—ways of observing things and actions, or processes in the world. The argument behind them may be taken for granted. Heterodox and interdisciplinary methods are designed to build on those recognized tools and techniques to expand the ways of observing, and in the process constitute arguments about what can or cannot be observed with traditional tools and techniques. The objective here is transparently to use method to convey an argument.

The several methodological borrowings that I incorporate may be more or less familiar, but, in any event, are not typically used in combination. Sometimes they are construed as incompatible. They include actor-network theory (ANT)[7] and Bourdieusian critical sociology[8] assembled within an overarching framework developed out of critical realism. ANT was developed largely out of sociology of science studies but has been applied to myriad fields of social endeavor. A guiding principle behind ANT is not to predefine the social subject of study: assumptions about what a given social subject includes or entails will be suppressed to understand how it is constituted in actual practice.

For example, Bruno Latour, a foremost ANT scholar, studied the practice of law by observing closely the actual day-to-day workings of the Conseil d'Etat, France's highest constitutional court.[9] There he observed law to be assembled from a variety of routine interactions among relatively homogeneous people and things, with legal arguments taking the form of stratified layers in a file of documents.[10] In contrast with ANT, Bourdieusian critical sociology studies its subjects with focus on the work done by assumptions inculcated into the way the subject is appreciated in relevant context. For instance, where the subject is the field of U.S. legal practice, critical sociology may attend to the markers that structure hierarchy, like a law school degree, or markers that denote status, such as a manner of dress, or those markers that condition communication, like recognizing some vernacular speech but not others.

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6. The process is similar to what Foucault describes as the principle of intelligibility by which individuals and groups conceive social phenomena so as to act consciously or strategically on and within them. *Cf.* Michel Foucault, 22 March 1978, *in* SECURITY, TERRITORY, POPULATION, LECTURES AT THE COLLÈGE DE FRANCE 1977-78, 285, 290–95 (Michel Senellart et al., eds., Graham Burchell trans. 2007) (discussing a change in how European states understood their own existence, which modified behavior vis-à-vis other states).

7. BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ÉTAT viii (Marina Brilman & Alain Pottage trans., Polity Press 2010) (2002) (defining actor-network theory as the belief that social explanations, such as from science, religion, politics, technology, economics or law, should not provide the source of explanations but rather the result of connections, or associations, that are established by scientific, religious, political, technological, economic or legal connectors).

8. Richard Nice, *Foreward* to PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE vii (Jack Goody ed., Richard Nice trans., Cambridge University Press 1977) (1972) (describing Bourdieu's theory of practice in sociology as requiring adequate scientific discourse into human behavior as opposed to a lack of reflection on scientific practice).

9. *See generally* LATOUR, *supra* note 7 (studying of the daily practice of the Conseil d'Etat).

10. *See id.* at 70–106 (describing the process of forming a file in the Conseil d'Etat).

Let me bracket critical realism for the moment, except to note that it demands better explanations of social constructions that may otherwise be taken for granted, to stay with the relationship between ANT and critical sociology. ANT and critical sociology are understood to be mutually antagonistic, especially with respect to issues of structure and agency. ANT was developed, at least by Latour, largely in opposition to structuralist elements of Bourdieusian critical sociology (i.e., against a tendency to allow preexisting social structures to define the actors situated within or among them).[11] Whereas critical sociology observes orders (or fields) structured according to a variety of underlying conditions and predispositions that define and redefine the possibility of acting, ANT observes orders (or networks) according to relatively spontaneous or horizontal formations defined and redefined by performances and acts of translation.[12] By performances, I mean acts that constitute relations according to the actors' program or goal active in that moment. By translations, I mean differentiated acts applying a wider program but according to the particular vantage of the actor(s) in question. In successful cases, performances of so many compatible translations will constitute altogether a working network on the basis of these varied commitments organized around common elements.[13]

The tension between these methodologies is also the reason for my heterodox reliance on them. I mean to retain a possibility to investigate structural conditions, understood as a balance of materially backed associations or relations, without allowing them too much constitutive work. The temporal dimension implicit in both methods is key to their compatibility, despite their differences. While ANT aims to "flatten" the analytical terrain by suppressing unseen or immaterial dimensions, material objects (or actants) provide resilience over time, stabilizing associative networks and carrying forward elements of past programs inscribed in the body of the material object.[14] A hydraulic door-closer, for example, will carry forward for a relatively protracted period of time a commitment to regulate the rate at which people, air, or other things can pass through a doorframe.[15] The temporal element exhibits a vertical character (arguably "unflattening" the analysis) that applies to the resilience or reproduction over time of horizontal networks otherwise constituted and reconstituted by spontaneous performances.

Conversely, Pierre Bourdieu's otherwise vertically or hierarchically sensitive

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11. *See* BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY 155 (2005) (discussing how ANT is incompatible with any structuralist explanation).

12. *See id.* at 242 (discussing ANT's claim of flat network of formations).

13. Bruno Latour, *The Powers of Association*, 32 SOC. REV. 264, 267–68 (1984).

14. Bruno Latour, *Technology is Society Made Durable*, *in* SOCIOLOGY OF MONSTERS: ESSAYS ON POWER, TECHNOLOGY AND DOMINATION 103, 103–31 (John Law ed., 1991); *see* Michel Callon & Bruno Latour, *Unscrewing the Big Leviathan: How Actors Macro-Structure Reality and How Sociologists Help Them to Do So*, *in* ADVANCES IN SOCIAL THEORY AND METHODOLOGY: TOWARD AN INTEGRATION OF MICRO- AND MACRO-SOCIOLOGIES 277, 299–300 (K. Knorr-Cetina & A.V. Cicourel eds., 1981) (describing the flattening of analysis by treating macro-actors as micro-actors due to their equivalent simplicity).

15. Jim Johnson, *Mixing Humans with Non-Humans: The Sociology of a Door-Closer*, 35 SOC. PROBS. 298, 308–10 (1988). Note that Jim Johnson is a pseudonym for French philosopher Bruno Latour.

work deploys, with its focus on practices, a fine-grained method of study in a comparatively horizontal register. Bourdieusian practice theory is attuned by design to the quotidian operation of structural conditions and as a result is much more in the moment, so to speak, than structuralist explanations typically allow.[16] Symbolic capital, or the tokens that Bourdieu observes to denote status within the field, may be understood to communicate, reward, and thereby align and stabilize translation practices over time, thereby holding a network together. Ultimately, my goal is to exploit these possible (temporally grounded) points of overlap to investigate the factors that stabilize performances of authority in international law and establish why. To get there, I start with an inquiry into contradictions associated with the Court.[17] The critical realist framework, designed to make contradiction legible (as I will explain below) is particularly well-suited to this starting point.

The so-called World Court exhibits a number of contradictions, so much so that it metaphorically resembles a tangled knot so intractable as not to be worth sustained energy or attention. Workarounds and perseverance, despite the knotty dilemma, seem more promising. In the post-ontological world of international law, the idea of the World Court as a contradictory institution operating according to conflicted authority is neither new nor an insurmountable impediment to its continued functioning.[18] To belabor just several of the classic contradictions: the highest court of international law operates only by consent of the parties that appear before it; its decisions are not formally applicable outside of the case for which a decision is pronounced; its judgments are only enforceable by the parties themselves; and its authority is consistently questioned and denied in the most meaningful cases, including cases of collective security at the heart of the Charter system that the Court was designed to adjudicate.[19]

I argue, however, that the World Court does not function despite these and other contradictions. Rather, these contradictions are definitive of the Court's effective practice or performance. They arise out of disjunctures in the tangle of networks that interact with and condition the Court's own networked operation.[20] But the knot (I will continue to rely on this metaphor) is neither an obstacle nor a dysfunction, at least not on its surface. It is what holds the Court together as a coherent institutional

16. *See* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE viii (Jack Goody ed., Richard Nice trans., Cambridge University Press 1977) (1972) (mentioning how Bourdieu's theory was written in a manner that contrasts with the structuralist theories that dominated France at the time the book was written).

17. I refer to the ICJ also as the Court and the World Court.

18. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995) (explaining how challenges to international law's basic legitimacy have instead given way to questions of its effectiveness and fairness).

19. For the first three, formal limitations, see the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. For the challenges to the Court's authority, see Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867, 867–81 (2003).

20. By networked operation, I mean the combination of associations and audiences that go into the production and reception of communications and pronouncements by the Court. By disjunctures, I mean separations or conflicts among constituent elements in the network of associations or relations by which the Court operates.

actor. It represents a sort of stitching or suturing operation performed at the site of the Court, binding its disjunctures to keep them from widening or rupturing. Accordingly, here, I propose to study the Court's contradictions for their productive capacity. Further, reexamining what the suturing operation achieves—or what work the tensions in the knot are doing—facilitates investigation into the combination of associations by which the Court operates as one of the principal institutions of international law.

In this context, I rely on close analysis of the decision by the ICJ to grant provisional relief to Iran in its case against the United States. Following the award, the United States immediately signaled the likelihood that it would not comply and additionally began a process of withdrawing from a number of treaty commitments further to rebuke the Court. This sequence of events recalls the perennial concerns, alluded to above, about the "real authority" of the Court, or lack thereof. It raises the old performative contradiction by which the highest court of international law, singularly established pursuant to the Charter of the United Nations, is also an ineffective one in the most important cases. Using this first seeming contradiction, I will explore additional conflicts that become apparent by means of the critical realist framework to assess the Court's activity within a constellation of associations that condition the performance of international law. Ultimately, I will describe a conjuncture that holds together a number of programs running concurrently and in loose coordination to reproduce status quo conditions among associations of multiple, linked communities.

Below, I will first provide a bit more detail about the *Iran-U.S.* case in question, with attention to the underlying sanctions regime, for the factual context in which the case proceeds. Thereafter, I will return to my analysis and argument, elaborating on them together with the heterodox method that I mean to assemble within a critical realist framework. I will conclude with observations about a system of law founded on economic coercion, followed by a brief coda revisiting the purposes of mixing method, analysis, and argument as I do here.

III. THE IRAN-U.S. CASE

In the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*,[21] Iran has brought the United States before the ICJ on the jurisdictional basis of the treaty of the same name. Iran seeks a decision on the illegality of the unilateral re-imposition by the United States of its sanctions regime against Iran, ostensibly to prevent Iran from developing a nuclear weapons program.[22]

Let me here offer some context on the U.S. sanctions in question. Within the United States, sanction application and enforcement resides with the Office of Foreign Assets Control (OFAC), which is part of the U.S. Department of the

21. Alleged Violations of 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings, ¶ 2 (July 17, 2018), https://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf.

22. *Id.*

Treasury (U.S. Treasury) in the executive branch of the U.S. government.[23] This vests the use of sanctions in an administrative body and largely shields its decisions from judicial review. Other relevant actors have been active in the development and deployment of economic sanctions, but I will focus in the limited space here on the history of sanctions against Iran pursued by the U.S. federal government. The United States has been building a concerted sanctions regime against Iran since 1979.[24]

The United States resorted to coercive sanctions in response to the hostages taken at the U.S. embassy in Tehran in 1979. The sanctions included a ban on purchases and imports into the United States of Iranian oil and a broad freeze on Iranian assets, public and private, held in the United States or on deposit in overseas branches of U.S. banks, amounting to roughly $12 billion.[25] The trade embargo was lifted after the release of the hostages, and the asset freeze was resolved pursuant to the Algiers Declarations of 1981.[26] Of the $12 billion, $5 billion was appropriated and directed to U.S. banks holding Iranian debt.[27] Another $1 billion was placed in an escrow account to back awards granted by the Iran-U.S. Claims Tribunal (IUSCT), which was established pursuant to the same Declaration to hear claims from U.S. parties for losses to interests held under the government of the Shah prior to the Iranian Revolution.[28] The IUSCT has heard over 3,900 cases and has reportedly awarded over $2.5 billion to U.S. claimants.[29]

The next round of sanctions was imposed by the United States in 1984 in response to the 1983 bombing of a U.S. military compound in Lebanon.[30] The sanctions were initiated by designating Iran a "state sponsor of terrorism," which had the effect of blocking loans and assistance, including funds from international organizations such as the World Bank, as well as certain technologies and goods deemed usable for military purposes.[31] These so-called dual-use goods included parts and services for civil aviation, beginning sanctions on that industry, which have increased over time.[32] Further economic sanctions were imposed in 1987 during the fallout from the Iran-Contra scandal in the United States in which the Reagan

23. *OFAC FAQs: General Questions*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic (last visited Feb. 12, 2020).

24. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 1 (2020).

25. Ray Takeyh & Suzanne Maloney, *The Self-Limiting Success of Iran Sanctions*, 87 INT'L AFF. 1297, 1299 (2011); KATZMAN, *supra* note 24, at 1; Patrick Clawson, *U.S. Sanctions*, *in* THE IRAN PRIMER: POWER, POLITICS, AND U.S. POLICY 115, 116 (Robin Wright ed., 2010).

26. Clawson, *supra* note 25, at 116; Declaration of the Government of the Democratic and Popular Republic of Algeria, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 224; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 230.

27. Clawson, *supra* note 25, at 116.

28. *Id.* at 115–18.

29. Communiqué, Iran-United States Claims Tribunal, No. 16/1 (May 9, 2019), http://www.iusct.net/General%20Documents/Communique%2016.1%20(9%20May%202016).pdf; KATZMAN, *supra* note 24, at 1.

30. Clawson, *supra* note 25, at 116.

31. KATZMAN, *supra* note 24, at 4–5, 17.

32. *Id.* at 4, 10.

Administration had been selling arms to Iran despite its 1984 prohibition, directing the proceeds to the Contra insurgency against the government in Nicaragua.[33] Following the revelations, but again under the pretext of opposing Iranian support for terrorism, then-President Reagan banned the import of Iranian goods into the United States.[34]

In 1995, in response to a $1 billion dollar deal between Iran and Conoco (a U.S.-based oil company) for the development of Iranian oil fields, the Clinton Administration imposed a ban on any involvement by U.S. firms in the development of Iranian petroleum.[35] Within the year, the Clinton Administration extended the ban to a comprehensive embargo on trade and investment, also extending the 1987 sanctions.[36] The following year, the U.S. Congress passed the Iran and Libya Sanctions Act, providing for punitive measures directed at foreign firms to deter them from working with and investing in Iranian industries, especially in Iran's energy sector.[37] Following the attacks of September 11, 2001, the United States froze the assets of Iranians, other individuals, and firms around the world for alleged links to terrorist organizations.[38] The United States also escalated sanctions on the sale of parts and services for Iranian aircrafts. Further, in 2001, under Section 311 of the USA PATRIOT Act, the U.S. Congress provided for sweeping new powers to impose reporting and other requirements on banks and firms and to enable on-demand-monitoring for transactions with prohibited entities, which included the entirety of the Iranian state.[39] Failure to comply with the reporting requirements can lead to prohibitive and even crippling penalties for otherwise uninvolved banks and firms.

Though not frequently used in the first years after its enactment, Section 311 has become a uniquely effective tool. From 2005 onwards, in the wake of its own invasion of Iraq, the United States began systematically freezing the assets of Iranian firms and individuals on a variety of pretexts, with Iran's alleged development of nuclear weapons becoming increasingly prominent among the rationales offered by the United States.[40] In 2005 and 2006, Congress also expanded the power within the U.S. executive branch to freeze assets of individuals with a series of measures

33. Clawson, *supra* note 25; *Intra-Contra Affair*, HISTORY (Aug. 20, 2017), https://www.history.com/topics/1980s/iran-contra-affair.

34. Clawson, *supra* note 25, at 116.

35. Elaine Sciolino, *U.S. Checking if Conoco Violated Sanctions with Iran Contract*, N.Y. TIMES (Sept. 15, 2000), https://www.nytimes.com/2000/09/15/world/us-checking-if-conoco-violated-sanctions-with-iran-contract.html; *Burned by Loss of Conoco Deal, Iran Says U.S. Betrays Free Trade*, N.Y. TIMES (March 20, 1995), https://www.nytimes.com/1995/03/20/business/burned-by-loss-of-conoco-deal-iran-says-us-betrays-free-trade.html.

36. Exec. Order No. 12,959, 60 Fed. Reg. 89 (May 9, 1995) [hereinafter Exec. Order No. 12,959]; KATZMAN, *supra* note 24, at 8.

37. Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 1701 (1996).

38. Exec. Order No. 13,224, 66 Fed. Reg. 186 (Sept. 23, 2001) [hereinafter Exec. Order No. 13,224]; KATZMAN, *supra* note 24, at 6.

39. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 298–304 (2001) (codified in scattered titles of U.S.C.).

40. KATZMAN, *supra* note 24, at 27; Clawson, *supra* note 25, at 116.

culminating in the Iran, North Korea and Syria Nonproliferation Act.[41] Around this time, the U.S. Treasury began to make expanded use of powers conferred under Section 311, targeting third parties for dealings with Iran and Iranian entities.[42] It is this expansion that has effectively choked off Iranian economic activity, drastically curtailing the ability of Iran and Iranian firms and individuals to do business with third parties of any size, anywhere.

Between 2006 and 2008, the United Nations Security Council (UNSC), following U.S. initiative, passed three resolutions imposing sanctions against Iran.[43] In 2010, UNSC Resolution 1929 further authorized member states to sanction certain civilian sectors of Iran's economy.[44] The United States in 2011 further expanded its restrictions on the Iranian aviation industry, targeting the full scope of that industry under Section 311, bringing the upkeep of Iranian-owned Boeing aircrafts to a near-total halt.[45] Under the U.N. regime, pressure on Iran mounted until détente was reached in 2015 with the eventual Joint Comprehensive Plan of Action (JCPOA), a multilateral agreement establishing limitations on Iran's ability to develop an infrastructure for nuclear energy, including weapons-related enrichment activities and regular inspection to confirm compliance.[46] In return, sanctions were lifted internationally. As of this writing, Iran has remained in compliance with the agreement, at least in principle.[47] The United States, however, withdrew from the JCPOA in 2018 and re-imposed many of the sanctions it had previously lifted.[48] In response to the United States' withdrawal, the European Union has announced two measures designed to allow economic interaction to proceed as under the JCPOA—namely a blocking statute and a vehicle for transactions with Iran.[49] Both appear toothless: the vehicle is incapable of shielding participating firms from U.S.

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41. *See* 50 U.S.C. § 1701 (Supp. 2017) (listing legislative history of several sanctions programs against Iran).

42. Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903, 911 n.47 (2012).

43. S.C. Res. 1737 (Dec. 23, 2006); S.C. Res. 1747 (Mar. 24, 2007); S.C. Res. 1803 (Mar. 3, 2008).

44. S.C. Res. 1929 (June 9, 2010).

45. *Fact Sheet: Treasury Sanctions Major Iranian Commercial Entities*, U.S. DEP'T TREASURY (June 23, 2011), https://www.treasury.gov/press-center/press-releases/Pages/tg1217.aspx.

46. Joint Comprehensive Plan of Action, July 14, 2015, https://www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf.

47. Keith Johnson, *Is Iran Abandoning the 2015 Nuclear Agreement?*, FOREIGN POL'Y (Jan. 6, 2020, 12:45 PM), https://foreignpolicy.com/2020/01/06/is-iran-abandoning-2015-nuclear-agreement-jcpoa/.

48. *U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign*, U.S. DEP'T TREASURY (Nov. 5, 2018), https://home.treasury.gov/news/press-releases/sm541.

49. Press Release IP/18/4805, European Comm'n, Updated Blocking Statute in support of Iran nuclear deal enters into force (Aug. 6, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4805; Commission Delegated Regulation 2018/1100, 2018 O.J. (L 199) (EU); Ladane Nasseri et al., *EU Unveils Iran Trade Vehicle as It Vows to Salvage Nuclear Deal*, BLOOMBERG NEWS (Jan. 31, 2019, 10:34 AM), https://www.bloomberg.com/news/articles/2019-01-31/eu-registers-financial-channel-for-iran-trade-diplomat-says.

punishment and the blocking statute is unlikely to offset or deter penalties.[50] Consequently, both have been apparently unsuccessful in maintaining economic activity as conducted under the JCPOA.

This brief overview underscores the character of U.S. sanctions against Iran since 1979. Especially pertinent for present purposes, the history of economic sanctions coincides clearly, and by design, with categories and concepts related to coercive force and war under international law. The several sanctions all resemble historical categories of the use of force in conflict, such as reprisals, punitive measures, or preventive self-defense. Once, these categories all described aspects of so-called imperfect or even unjust war.[51] In nearly every case, the sanctions represented coercive force in a situation of armed hostility or were justified (however expansively) according to a logic and purpose of self-defense. If warfare has been construed as politics by other means, these acts suggest a historical twist that the U.N. Charter ban on the use of force produces: political economics as warfare by other means. This, some argue, is precisely the point: the Charter system privileges economic coercion as a normative choice, preferable to military engagement.[52]

At the same time, there should be little question, at least since the U.N. sanctions regime against Iraq, about the destructive and even killing capacity of economic sanctions, with effects on bodies and things not unlike the use of kinetic weapons.[53] The progressive elaboration of the sanctions regime over time also makes clear relevant strategic developments in U.S. practice. They include rhetorical links to themes of conflict and security, framed especially in terms of terrorism, and an escalation over time towards measures aimed at third parties with increasing extraterritorial effect. It is this last development, the extension to third parties operating internationally, that has been the most powerful—capable of sealing off the Iranian economy, drastically curtailing the flow of goods and money into and out of the country. The U.S. campaign has succeeded in isolating Iran from global partners. This extraterritorial extension of the campaign notably tracks the time frame of UNSC involvement, accelerating from 2006 onwards. As such, the expansion of the coercive regime mirrors the demise of neutrality under the law of

50. David Osler, *Iran 'Blocking Statute' Will Mean Little for Shipping, Experts Warn: EU Move to Allow European Firms to Continue Trading Rendered Ineffective by Washington's Insurance and Dollar Banking Restrictions*, LLOYD'S LIST (Aug. 7, 2018), https://lloydslist.maritimeintelligence.informa.com/LL1123774/Iran-blocking-statute-will-mean-little-for-shipping-experts-warn; Lili Bayer, *EU Shield Looks Flimsy Against Trump's Iran Sanctions*, POLITICO (July 19, 2018, 8:09 AM), https://www.politico.eu/article/iran-sanctions-donald-trump-eu-federica-mogherini-business-shield-looking-flimsy/; Richard Goldberg, *Europe's Sanctions-Blocking Threats Are Empty*, FOREIGN POL'Y (Feb. 20, 2018, 3:50 PM), https://foreignpolicy.com/2018/02/20/europes-iran-deal-threats-are-empty-trump-iran-eu/; Matthias von Hein, *EU-Iran Instex Trade Channel Remains Pipe Dream*, DW (Jan. 31, 2020), https://www.dw.com/en/eu-iran-instex-trade-channel-remains-pipe-dream/a-52168576.

51. *See* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 119–130 (2005) (discussing reprisals and self-defense as forms of imperfect war).

52. OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD xv – xix (2017).

53. Abbas Alnasrawi, *Iraq: Economic Sanctions and Consequences, 1990–2000*, 22 THIRD WORLD Q. 205, 207–14 (2001).

war in the Charter era: once the UNSC has blessed the use of force, there can be no neutrality with respect to the Security Council's disposition.[54] Before, this meant that in the rare cases where the UNSC found a threat to the international community, there could be no denying it under international law. Today, with the expansion of the UNSC's powers into targeted sanctions against accused terrorists under the regime established by Security Council Resolution 1267, all member states are bound to enforce a targeted sanctions regime that subjects individuals to an economic death sentence on the basis of obscure administrative processes.[55] In sum, the U.S. sanctions regime represents coercive force historically recognized under international law and consistently privileged under the Charter, even as the Charter proscribes coercive force in other forms.

The 2018 order of the Court to award provisional relief is an acknowledgment of the coercive nature of the sanctions regime and its deadly force. The order was predicated on recognition that the sanctions already raise the possibility of suffering at a level triggering urgent humanitarian concern.[56] The United States adduced that it had provided for exceptions designed to avoid any humanitarian situation.[57] The Court, however, suggested that the scope of the sanctions rendered exceptions inevitably insufficient with the total block of economic activity making the likelihood of irreparable harm too great.[58] In other words, the Court's order recognized and pushed back against the destructive potential of economic warfare as waged by the United States, tout court. It bears noting, however, that the Court's order for provisional measures was just that, an order, not a determination of law, a point to which I will return.[59] In the wake of the order for provisional relief to Iran, the United States immediately signaled that it would not likely comply and further announced actions to withdraw from a number of treaties, including the underlying treaty in the case.[60]

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54. *See* NEFF, *supra* note 51, at 351–52 (noting that the U.N. Charter did not permit states to claim neutrality in Security Council action).

55. S.C. Res 1267 (Oct. 15, 1999); GAVIN SULLIVAN, THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS AND THE POLITICS OF GLOBAL SECURITY LAW (forthcoming 2020).

56. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Request for the Indication of Provisional Measures, 2018 I.C.J. 623, ¶¶ 91–93 (Oct. 3), https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf.

57. *Id.* ¶¶ 86, 89, 92.

58. *Id.* ¶¶ 89, 92.

59. As a ruling it carried echoes of the *Oil Platforms* case, also brought by Iran against the United States. In its decision in that case in 2004, the Court went out of its way to reject an assertion of self-defense argued by the United States, though the Court found that Iran had no case against the United States to begin with. Both decisions show a Court disapproving of coercive measures taken by the US, though without legal effect. Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6).

60. Nicole Gaouette & Jamie Crawford, *U.S. Blasts International Court on Iran Ruling, Pulls Out of 1955 Treaty*, CNN (Oct. 20, 2018, 11:18 PM), https://edition.cnn.com/2018/10/03/politics/pompeo-icj-iran-ruling/index.html.

IV. METHOD AND ARGUMENT ELABORATED

The first contradiction raised by the case reflects a classic take on the seemingly hollow authority of the ICJ: its ruling appears destined to be ignored and the Court's toothlessness is underscored in the facts of the case by the real bite of the U.S. Treasury. The contradiction points to a related, broader contradiction. That broader contradiction concerns the perceived ineffectiveness of international law, famously articulated as the Austinian observation that international law is not law at all due to its unenforceability, or alternatively articulated as international law's epiphenomenal character, etc.[61] These familiar and persistent contradictions underlie others, which I will discuss in a moment.

To get there, I begin here with the elaboration of my method, starting with the critical realist framework. Critical realism establishes a framework to uncover underlying causal connections in complex cases, especially in situations that contain paradoxes or otherwise defy explanation.[62] Sometimes referred to as scientific realism, critical realism aims expressly to adapt methods from the hard sciences for use in the social sciences, especially with respect to questions of causality. Like the hard sciences, which recognize that adequate explanations for subsurface level phenomena may be obscured by prevailing assumptions and mistaken common sense, critical realism holds the same in complex social environments—actual causal connections can be obscured by the state of common knowledge and learned routines.[63] For this reason, contradictions offer valuable entry points for analysis: they manifest the inconsistencies that prevailing assumptions do not account for, raising the demand for new or better explanations.

Let me return to the first contradiction, concerning the ineffectiveness of the highest court of international law, to suggest how it is possible to view a decision that is ignored by the party to whom it is ostensibly directed as effective. For years, the traditional consternation around the perceived ineffectiveness of the ICJ and other mechanisms of international law largely masked the substantial and proliferating amount of work done by international law and international lawyers.[64] Even today, the expanding field of international law remains colored by a perception of irrelevance. The American branch of the International Bar Association, for instance, recently put on a major multi-day conference, with former Legal Adviser to the U.S. Department of State Harold Koh delivering the keynote, to explain "Why

61. *See* Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. U. L. REV. 1293, 1294 (1984) (explaining how some do not consider international law as law at all and how John Austin thought of international law as merely "positive morality.").

62. *See* ANDREW COLLIER, CRITICAL REALISM: AN INTRODUCTION TO ROY BHASKAR'S PHILOSOPHY, 107–134 (1994) (discussing stratification and composition in the context of critical realism). *See generally* ROY BHASKAR, THE POSSIBILITY OF NATURALISM: A PHILOSOPHICAL CRITIQUE OF THE CONTEMPORARY HUMAN SCIENCES (3d ed. 1998).

63. *See generally* MAKING REALISM WORK: REALIST SOCIAL THEORY AND EMPIRICAL RESEARCH (Bob Carter & Caroline New eds., 2004) (exploring the meaning and academic study behind critical realism).

64. *Cf.* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004) (expressing a satisfaction with humanitarian projects but offering a critique of international humanitarian work and how good intentions could lead to harm).

International Law Matters."[65] At the risk of being obvious: at a major, annual gathering of international lawyers and members of the International Bar Association, the former legal adviser to the U.S. Department of State used the keynote to explain why the practice of international law matters, presumably to rebut the perception that it does not.

Seeing through the contradiction entails a closer look at the work that a decision of the Court may make even when it is ignored, but this is not a terribly new agenda. Even when ignored, the Court establishes an exception (U.S. transgression) to the norm (progressive community) contemplated by international law in practice, which is validated in the breach. In this way, the ICJ does what is expected of it and does so effectively, communicating the adequacy of international law as a sort of beacon.[66] From this not-unfamiliar perspective, the first contradiction disappears, but another contradiction calls for explanation, namely the effective opposition by the ICJ to a manifestation of the same states' powers by which it exists. This second-order contradiction provides more opportunity for investigation. Before proceeding, however, let me further elaborate aspects of the methodological framework.

Critical realism includes several categories designed to make the analysis of underlying phenomena intelligible. They include ontological realism, epistemological relativism, and judgmental rationalism.[67] Ontological realism avoids immaterial idealism, staying attuned to material conditions in the world and ensuring their intelligibility as objects of study. Epistemological relativism, however, cuts in the other direction, acknowledging that knowledge about even material conditions is always socially constructed and context-dependent and that the material world is not unambiguously accessible as perfectly transparent data.

When the ICJ decides in favor of provisional measures granting Iran relief from U.S. sanctions, several ontological and epistemological phenomena are engaged. In the first place, ontological realism recognizes the materiality of goods such as oil and aircrafts. The sanctions regimes in question rely on concrete materialities that underlie the Iranian economy. This allows sanctions regimes tangible pressure points, where the production and flow of material goods and basic provisions can effectively be stopped, and hunger and illness can be induced as a consequence. Epistemological relativism, on the other hand, holds that the social and institutional arrangements by which those and other concrete materialities are valorized will

65. The program includes a number of luminaries in the field and is available online at *Why International Law Matters: Can International Law Rise to the Challenge?*, *in* 97TH ANNUAL MEETING OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION (2018), https://abila01.s3.amazonaws.com/media/uploads/2018/09/15/ilw_2018_draft_2018-09-14.pdf. Still more recently, the British branch of the International Law Association has organized a conference in part around the question: What Is the Use of International Law? *See* THE LONDON CONFERENCE ON INTERNATIONAL LAW, http://thelondonconference.org/ (last visited April 5, 2019).

66. I address this communicative function elsewhere. *See* Geoff Gordon, *The Time of Contingency in International Law*, *in* SITUATING CONTINGENCY IN THE COURSE OF INTERNATIONAL LAW (Ingo Venzke & Kevin Jon Heller eds., forthcoming 2020).

67. HEIKKI PATOMĂKI, AFTER INTERNATIONAL RELATIONS: CRITICAL REALISM AND THE (RE)CONSTRUCTION OF WORLD POLITICS 8–9 (2002).

inevitably be relative, context dependent, and conditioned by subjectivity.

The concrete underpinnings of social and institutional relations, for instance between the Iranian economy, the U.S. Treasury, and the World Court, will not be transparent on their face. Judgmental rationalism then holds that under conditions like these, some theories about why political economic conditions are the way they are and work the way they do can be better grounded than others (though none will be final).[68] In keeping with the attention to tendencies that obscure everyday observation of causal actions that may be discovered by scientific investigation, the test that judgmental rationalism poses here is to account for causal questions such as why and how a particular institutional arrangement or knowledge practice works simultaneously to sustain and obscure a discernible set of material conditions.

To isolate and explain causal mechanisms, critical realism posits two additional, related features: stratification and emergence.[69] Stratification means that entities with causal powers exist in a sort of vertical relationship. More basic entities are positioned towards the bottom, more complex entities towards the top, and the distinct levels are not reducible one to the other. A typical example puts atoms at the bottom, followed by molecules, followed by compounds, etc. The more basic entity may be necessary to help explain the existence of a more complex entity, but the latter is not reducible to the former: The more complex entity is greater than the sum of its parts.[70]

For example, water is not reducible to either of its component molecules, just as a bar association is not reducible to any one of its lawyer-members. Likewise, the new characteristics of the more complex entity give it causal powers that do not belong to the more basic entity. Water puts out fire in a way that hydrogen does not, and a bar association keeps some applicants out of the field of legal practice in a way that individual lawyers cannot. Emergence is the condition of causal powers that come into existence—or emerge—from different entities interacting at different levels of stratification at different times. I mean to use this device to bridge aspects of critical sociology and ANT. Stratification, in turn, describes an ordered structure among actors but corresponds equally with a network that "works" on the basis of performances within it, in interactions between the people and things it comprises.

Stratification in social context calls for establishing a vertical order or hierarchy among effective actors, offices, or things. Some state institutions will be candidates more for fundamental actors in this ordering exercise, including those by which so-called authority may be instantiated or enacted. In the context of coercive forces, military institutions are exemplary, operating according to a weaponized chain of command, but stratified structure applies equally to other institutional assemblages (material and relational) that demonstrably exercise measures of control over matters

68. *See id.* ("Judgmental rationalism means that, in spite of interpretative pluralism, it is possible to build well-grounded models and make plausible judgements about their truth.").

69. Jonathan Joseph & Colin Wight, *Scientific Realism and International Relations*, *in* SCIENTIFIC REALISM AND INTERNATIONAL RELATIONS 11–12 (Jonathan Joseph & Colin Wight eds., Palgrave Macmillan 2010).

70. *See generally* COLLIER, *supra* note 62, at 115–18 (explaining the relations of compositions and the two alternative theories of atomism and holism).

of day-to-day welfare.[71] The U.S. Treasury, in combination with other institutions and actors, demonstrably conditions behavior among banks by recourse to coercive sanctions. Its agents convince their counterparts in private and public banks to disassociate from potential economic partners, leading to some means of material production and distribution going disused while others do not, with corresponding effects on welfare.[72] This capacity enjoyed by the U.S. Treasury is not a spontaneous development: it may be understood as an emergent product of engagements with other stratified actors, offices, and things. As such there are at least two dimensions to the representation, horizontal and vertical.

The horizontal level, per ANT, extends in part from government offices to bank offices to industrial management offices, each connected by complementary translations of a common call to action occurring simultaneously or in sequence. The authority that the U.S. Treasury exercises is not recognized (by ANT) in the abstract; rather it takes form in so many individuated interactions in which networked relations are leveraged in the moment to realize interests present then and there. To call them horizontal is to train attention to the ways in which the network operates at the level of so many contemporaneous, individual transactions. In contrast to this horizontal perspective, the vertical one follows a relatively protracted temporal logic. For its ability to shut down banks, the U.S. Treasury relies on built networks including material elements that endure over time. The individuated interaction is conditioned by the material assemblages on which actors may rely for leverage. Material dimensions of built networks carry inscriptions from past programs, inscriptions that limit the ability to write new programs without having to recreate or transform material foundations by which the still-active program otherwise operates.

The foregoing also points to the final element in the framework sketched here: incorporating symbolic capital. Symbolic capital has been a subject of interest in international legal scholarship lately, contributing to investigations into the character of the field of international law and the sorts of markers that connote or condition achievement within it.[73] Symbolic capital, however, may include more than tokens denoting authority or standing predetermined elsewhere, as critical sociology

71. *Cf.* Gavin Sullivan, THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS AND THE POLITICS OF GLOBAL SECURITY LAW (2020) (arguing the importance of showing how security issues are governed and how global legal regimes may be assembled).

72. *See generally* Carter & Farha, *supra* note 42.

73. *See generally* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 421 (2014); Shashank Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012*, 25 EUR. J. INT'L L. 893, 916 (2014); Mikael Rask Madsen, *Reflexivity and the Construction of the International Object: The Case of Human Rights*, 5 INT'L POL. SOC. 259, 269 (2011); Dianne Otto, *The Security Council's Alliance of "Gender Legitimacy": The Symbolic Capital of Resolution 1325*, *in* FAULT LINES OF INTERNATIONAL LEGITIMACY 240–41 (Charlesworth & Coicaud eds., 2009); Guillaume Sacriste & Antoine Vauchez, *The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s*, 32 LAW & SOC. INQUIRY 83, 85 (2007); Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC. REV. 27, 33 (1995).

sometimes holds. It may also include objects (or actants) capable of causal power or their own sort of agency. A temporal dimension is again key, insofar as the circulating items of symbolic capital carry with them inscribed programs over time, operating in the present to stabilize associative networks around elements of past programs. Stabilizing associative networks involves stabilizing the interests and expectations they comprise, to enable consistent translations of a common call to action among members and along points of a network. Inscribed for temporal staying power, objects of symbolic capital facilitate or constrain select practices over time, thereby enabling a network to run a program and reproduce itself over generations.[74] International law generally, and the ICJ in particular, both apply here. Consider broadly the civilizing mission traced by Koskenniemi across nearly a century, featuring indices of symbolic capital pertaining to culture, style, and ethos.[75] At the ICJ, discrete professional communities have maintained consistent identities over time, including similar membership profiles, backgrounds, and habits.[76]

Altogether, the combination of vertical and horizontal relations, combined with symbolic capital, sheds light on a question that underlies the interest here in contradictory conditions. Namely, it indicates *how* divergent realities can be constructed in parallel, with actors or institutions, such as the ICJ, more or less connected to one or another. The Court may be relatively disconnected from networks organized to make plain its ineffectiveness, for instance, among the generations of realist international relations (IR) scholar but more fully connected to other networks organized around performances keyed to different sets of interests, expectations, and the reality of international affairs—such as among the international regulatory bodies responsible for countless technical operations every day around the world. Members of either network might emphasize abstract or idealistic qualities apparently rendering the other unreal. The IR realist points to international law's failure in cases of core interests backed by violence—the international lawyer points to the artificiality of the realist's reductive models and theories of human behavior.[77] Yet even abstract or idealistic normative regimes may support quotidian realities insofar as the former may be routinized in the everyday over time. Symbolic capital plays its role here, making abstract distinctions tangible in the day-to-day working life and mutually-reinforcing experiences of generations of diplomats or international lawyers and their associates. When IR realists have held high posts in state departments and foreign offices, their artificial models have created the concrete stuff of foreign policy. The same happens in economic circles with respect to very real effects of economic policy driven by artificial models, even when the models are flawed on their face.[78] When international lawyers assume the

74. *See* Bruno Latour & Shirley Strum, *Redefining the Social Link: From Baboons to Humans*, 26 SOC. SCI. INFO. 783, 786–93 (1987).

75. *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001).

76. Kumar & Rose, *supra* note 73, at 916.

77. *See generally* Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L L. 395 (2009) (criticizing predominant theories of international law).

78. *Cf.* Yuval Millo & Donald MacKenzie, *The Usefulness of Inaccurate Models: Towards an Understanding of the Emergence of Financial Risk Management*, 34 ACCOUNTING, ORGS. &

reality of an idealized international community, their shared imagination creates the working stuff of networks that yield salaries, social expectations, professional obligations, and all of the real-world consequences that come with these realities. In this way, the ICJ may produce an ideal, ethical normalcy that is also an actually existing status quo for those associated with the Court, even as it apparently contradicts a coercive, political normalcy that is also an actually existing status quo for others. It remains, however, to address *why* this contradiction persists, going beyond these questions of *how*. I take this task up in the next section.

V. COVERING FOR COERCION

Let me return to the second contradiction, bound up in the opposition between the Court and the United States. The foregoing analysis suggests how two seemingly contrary positions may be maintained, but it does not address why seemingly contrary positions have come to be. A combination, however, of vertical and horizontal considerations in material context points to possibilities. The ICJ, like the U.S. Treasury, relies on diverse elements of its networks for the ability to communicate its normative program over time. Those elements include a built environment (e.g., the Peace Palace), communications apparatuses for disseminating its orders and judgments (including everything from hard copy documents to an official website and email), and networks of associated parties who will consume and reproduce those orders and judgments according to their own related interests. Associated parties include the law faculties tasked with reproducing international law; NGOs with an interest in a given case or the general jurisprudence of the Court; and foundations such as the Carnegie Foundation, which hosts the ICJ in the Peace Palace. The City of the Hague actively advertises a resident network of more than 200 intergovernmental and nongovernmental organizations anchored by the ICJ.[79] These actors and entities networked around the Court rely in turn on other built environments (like law offices and meeting spaces), communications apparatuses, and other interested parties, including beneficiaries, clients, and the funders who support them.

Some such diverse elements are directly engaged in making viable a performance of the Court's arguably ideal normative program. The performance of the idealized normative system enacts an actually-existing status quo in practice: this is the normative program (i.e., international law) as the work product of so many international lawyers (an output that is consumed via various media by many additional observers and potential associates).[80] Some material elements will underwrite that performance and condition its reception in basic but comparatively indirect ways. International lawyers, for instance, earn salaries and work in buildings with offices connected to infrastructural resources. They maintain their positions

SOC'Y 638, 638 (2009) ("Ultimately, the events in the aftermath of the market crash of October 1987 showed that the practical usefulness of financial risk management methods overshadowed the fact that when financial risk management was critically needed the risk model was inaccurate.").

79. The Hague makes clear its vested interest in these associative networks with an active advertising campaign. *See The Brand, The Hague*, THE DUTCH GOV'T, https://www.brandthehague.nl (last accessed Jul. 21, 2019).

80. *Cf.* ROBERTS, *supra* note 73.

within a professional ecology and overall political economy in which entities such as the Treasury represent influential actors. Consider the vested interests of The Hague just mentioned above. The Hague advertises its "brand," the "City of Peace and Justice," to encompass two sets of complementary networks: the 200+ organizations centered by the ICJ and the 400+ organizations centered by security interests.[81] In short, the material basis of working life at the ICJ is not disconnected from material, political, and economic conditions that the U.S. Treasury works to consolidate in the name of security. Moreover, the ICJ benefits from them: the U.S. Treasury works to secure and maintain economic conditions that underpin the institution of the Court and determine in part the lived experiences and expectations of the professionals who practice at the Court. In this way, U.S. actors associated with the U.S. Treasury and the ICJ arguably represent coordinate institutions interacting as stratified constituents in an ordered continuum spanning a wide scope of associations, despite the apparent distance between them. Further, symbolic capital may reveal still greater connections traveling across this ordered, material continuum. By pursuing these points of deep connection, though not apparent on the surface of things, even the apparent contradiction between the ICJ's decision against U.S. sanctions and U.S. acts to sustain sanctions may be resolved.

Let me present the same point another way. Fulfilling a classic role, the ICJ apparently speaks truth to power. The vitality of the ideal that it represents persists, and is demonstrated to persist, by U.S. recalcitrance. This ideal, moreover, is not unreal for its adherents, though it is defied by the reality of U.S. transgression. It is part of a normal day-to-day performance, productive of a status quo organized around the recognition of a normative system by the professionals who earn their living practicing the same, as well as select audiences who follow that work for their own purposes.[82] By this reading, U.S. recalcitrance does not diminish the ICJ so much as define its performance (in the breach) and even underscore its urgency. The same observation, however, works in reverse: the ICJ's performance, communicating a normative ideal, does not undermine U.S. coercive authority any more than U.S. coercive authority undermines the ICJ's idealistic authority. Rather, the ICJ exists as an ethical apex of a chain of associations that include, as substratum, the coercive agencies of the United States. In this light, the ICJ articulates more perfectly the ideals that the United States otherwise embodies and thereby supports the United States' coercive enterprise, even in criticizing it. The ICJ fulfills a role as the ideal counterpart to the U.S. real, its imaginary point of future progress. In this capacity, the ICJ performs a sort of ethical cover for U.S. acts of realpolitik. The possibility of the ICJ's ideal guarantees the material program exercised by the United States, much as the coercive U.S. program materially guarantees the ideal of ICJ

81. *Welcome to the Hague: City of Peace and Justice*, THE BRAND: THE HAGUE, https://www.brandthehague.nl/city-peace-and-justice (last visited Feb. 10, 2020); *The Hague: Facts & Figures*, THE BRAND: THE HAGUE, https://www.brandthehague.nl/facts-figures (last visited Feb. 10, 2020).

82. Though it is strictly anecdotal, Sir Ian Brownlie, a British barrister who specialized in international law, is rumored to have translated Tom Franck's post-ontological claim into terms that are relevant here: When challenged to demonstrate the proof of international law, he adduced his bank account.

practice.

VI. CONCLUSION: THE TANGLED THREADS ARE THE SOLUTION

In sum, the ICJ's seeming ineffectiveness may not be a casualty of U.S. power but is bound up with it—returning to the language of the knot but now as the explanation rather than the dilemma. Likewise, the ICJ's normalcy may not be opposed to conditions of material domination by coercion associated with the United States, so much as a function of them. This possibility returns me to the point raised in the introduction concerning the coercive constitution of the regime maintained under the U.N. Charter. For this, I return also to the vocabulary of disjuncture and suture. The United States and ICJ positions each support and are supported by a distinct status quo: there exists disjuncture between the normal affairs of one and norms projected by the other. But the disjuncture itself has a purpose, suturing over the arguably unethical aspects of U.S. coercive agency, or conversely, suturing over the futility of the ideal represented by the ICJ. The ICJ, by its performance, attracts political energy to its stabilizing projection of ethical normalcy, while the United States expends political energy in a parallel performance to stabilize and maintain the normality of everyday material conditions (and power over them). The one projects an ethical ideal; the other projects concrete coercive power. The two projections in this case, of material control by the United States and an ethical ideal by the ICJ, are aligned. The ethical ideal is predicated in part on material distributions guaranteed by the United States, while the material distributions guaranteed by the United States are facilitated by the ethical legal and political ideals guaranteed by the ICJ. The performance by the United States does not diminish the performance of the ICJ by this reading; likewise, the ICJ's decision does not undermine the material conditions of U.S. domination. Rather, each enhances the other.

The arrangement is not a historical accident. It is the consequence of a system of collective security designed from the outset to disallow certain forms of coercion while countenancing others.[83] As noted earlier, the Court's order for provisional relief in *Iran-U.S.* was not a ruling on the merits. The ethical order leaves intact the legal framework for violence. This practice makes sense: Coercion is written into the code of the U.N. Charter.[84] The Charter universally forbids the use of force but defines the category narrowly to allow with economic measures what it disallows with bombs and guns. The allowance is not an arbitrary one, nor was it established without debate, as economic coercion was repeatedly put forward and rejected for

83. *See* Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AMERICAN J. INT'L L. 405, 410 (1985) (discussing how the Charter directly addresses violence and military coercion over economic coercion); HATHAWAY & SHAPIRO, *supra* note 52 at xv–xix (discussing how in the period preceding World War II, U.S. economic sanctions and the Japanese response were both legal resorts to coercive force under a traditional reading of the law of nations); *see generally* MAZOWER, *supra* note 4.

84. *See* DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 259–63 (1987) (describing how the U.N. Charter may prohibit the architecture of war, but the language does not ultimately protect peace).

inclusion in the Charter's prohibition in the process of its drafting.[85] I suggest again that my observation of this allowance is normatively ambivalent. Though I do not exactly share the optimistic outlook, it is possible to read the allowance of economic coercion as a necessary concession or even positive good to allow certain preferred states sustained levers of unilateral control over international affairs beyond the collective mechanisms of the Charter.

There remains, however, an inescapable inconsistency in allowing privileged states to kill with economic sanctions while enacting a universal prohibition against the use of force otherwise defined, a prohibition predicated on territorial and political integrity for purposes of peace, security, and human dignity.[86] It is that inconsistency that the role of the Court sutures over as can finally be seen in a decision that goes to the root of the Court's central contradictions, such as the decision in favor of provisional measures in *Iran-U.S*. The inconsistency is not an odd byproduct of a historically awkward system, as some explanations might allow, but rather part of what makes it possible in the first place and enables its reproduction over time. The mix of methods proposed here is designed to open up this productive inconsistency to further study.

Let me add a word about the judges of the ICJ. The critique elaborated here is not to impugn their personal ethics or professional intentions. On the contrary, my limited personal experience suggests strongly that the judges and people who staff the ICJ and similar institutions are thoughtful and well-intentioned people. They are not engaged in a nefarious plot to cover for coercion, let alone a possibility of abuse in or of the international system. I, at least, am convinced that they intend to do good and work hard to make it so. This is precisely the point: it is not enough to accept at face value that their ethical integrity and best intentions are sufficient to make the stuff of their professional practice a progressive good. Their best intentions, our best intentions, are part of the same materially-backed structures of justification and right as the acts of coercion that they and we speak to and with. Their and our legal and ethical consciences are not divisible from the networks in which they manifest. This indivisibility is why a heterodox mix of methods organized under critical realism is valuable, to trace structural connections across ostensibly distinct but networked domains. In these networks, the ethical mandate of the ICJ occasions a translation exercise with respect to an overall goal, one shared with the powers that underwrite the United Nations and the international system in the first place. Translation exercises in a functioning network do not counteract one another; they complement—even if, on the surface, they do not appear to do so. Otherwise, the

85. *See* J. Dapray Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 195–96 (1974) (mentioning how countries like Bolivia submitted definitions of aggression that were ultimately rejected in Article 39 of the Charter); Stephen Neff, *Economic Warfare in Contemporary International Law: Three Schools of Thought, Evaluated According to an Historical Method*, 26 STAN. J. INT'L L. 67, 83 (1989) ("[The] international community instituted a direct prohibition on 'the threat or use of force' in the UN Charter . . . [while] a substantial segment of the international community was pursuing a similar goal on the economic front through the General Agreement on Tariffs and Trade (GATT) of 1947."); *see generally Summary Report of the Eleventh Meeting of Committee*, 331, 334–35, U.N.C.I.O. Doc. 784 I/1/27 (1945).

86. *See generally* U.N. Charter.

result will be observable in terms of a non-functioning network. But the international system founded on economic coercion continues to function, and with lethal effectiveness. The question becomes how the translation exercises function mutually but relatively independently to support the overall action of the network. That is what the method I have developed here within a critical realist framework is designed to make legible.

VII. CODA: RETURN TO METHOD

At the workshop that served as the basis for this special issue, a fundamental question was put to me in two variations: are you not on more solid ground if you stick to one of the several methods employed here and does this eclectic mix of methods not result only in deferral, constantly avoiding any final justifications for the claims it yields?

Let me address the issue through the latter variation. The question as put to me linked the dissatisfying possibility of deferral with the work of David Kennedy. Kennedy, among others, has done work over time to throw light on the technique of deferral in international legal practice and discourse. As part of the oeuvre, his work on the rise of international institutions in the twentieth-century charts, in structural terms, the development of an eclectic practice among international lawyers and legal academics.[87] He demonstrates how the pragmatic orientation of international institutions drove a practice of opportunistic borrowings.[88] What the practice lacked in coherence, it gained in practical utility. The trade-off entailed, however, that the developing institutional legal practice was less concerned with justificatory logic and rationales than with "getting the job done." When getting the job done supplants the final rationale or justificatory grounds, two things happen: internal coherence degrades while the object or ends of the job, together with its justification and rationale, must come from an external source (i.e., wherever the job comes from in the first place). Legal practice defers its own rationale, its coherence and justification, to an external source (where more deferral may be as likely as not).[89] In any event, the rationale for legal practice, wherever it comes from, is not coming from the law or legal discourse itself.

Kennedy's recent work explores deferral in a changed, still more contemporary register of managerialism.[90] In today's international milieu, characterized by

87. *See, e.g.*, David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 266–67 (1985) (discussing how legal theory has been influenced by structuralism).

88. *See* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 986–88 (1987) (evaluating the move from law to pragmatic practices that represents a continual sense of institutional becoming that has built on other systems throughout the world).

89. *See* David Kennedy, *The International Style in Postwar Law and Policy*, 10 AM. U. J. INT'L L. & POL'Y 671, 715 (noting how a realist or pragmatic approach to public international law requires invoking a world of facts outside of the law in order to interpret the law).

90. *See, e.g.*, DAVID KENNEDY, OF WAR AND LAW 16 (2009) [hereinafter KENNEDY, OF WAR AND LAW] (discussing the delegation of duties between actors in the different branches of Government within the United States); DAVID KENNEDY, WORLD OF STRUGGLE: HOW POWER, LAW AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 173 (2016) (discussing the use of law

ubiquitous managerial expertise and informal law-making, deferral marks a constant retreat from any assumption of final authority. In a fragmented system characterized by technical standards and plural legal, political, and material interests, everyone involved is responsible for a diminishingly small aspect of a larger complex for which no one assumes final responsibility.[91] This condition might also be described as professional modesty and looks like an ethical consequence of eclecticism and pragmatism metastasized: lawyers, regulators, and administrators are just doing their jobs in so many ad-hoc situations, using whatever particular tools may be at their disposal. As a consequence, no one acknowledges "making the rules" in any properly normative sense.[92] Likewise, no one is responsible for their ultimate rationale or justification, only their context-specific application.

Kennedy gives the example of lawyers alongside an array of military planners, strategic experts, and others in the prosecution of armed hostilities—each plays a small part in a larger operation for which no one is clearly and finally responsible.[93] Final responsibility, whatever the field of endeavor, is deferred together with any acknowledgment of final authority. In the meantime, however, consequential decisions are taken with distributive and political consequences. As international institutions have grown together with managerial practices and expert authorities around the world, so has the share of global governance enacted in a perpetual state of deferred final responsibilities and authorities.

The question put to me, however, referred to Kennedy not for his diagnosis of deferral, but for using this same "trick" of deferral. Kennedy's diagnostic work mimics its subject in a sense, borrowing from diverse and sophisticated theoretical and methodological supports. The final product has a lot of moving parts and no apparent center. But if the diagnosis of deferral should hold any critical urgency, the adoption of the same techniques that enable it would seem cynical and prone to the same failures—such as a failure of responsibility for any finally definitive or authoritative statement or justification. This is the criticism aimed at my heterodox methodological construction. The criticism demands attention to the cynical hazards built into the mixed methods here. Let me further respond to it in steps, staying a moment longer with Kennedy. His work should at least make clear that deferral is common practice in institutions associated with international law and global governance. But there is more to this, something that perhaps gets lost in the specificity of Kennedy's subject or style. Deferral may seem like an offshoot of

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and legal process to give vile acts a form of legitimacy).

91. *See* David Kennedy, *One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 647–54 (2007) [hereinafter Kennedy, *One, Two, Three*] (noting the delegation of authority within historical international legal systems).

92. *See* David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 1, 7 (2005) (describing how national actors are disincentivized to adopt rules that directly impact economic strategies, opting for a thin net of legal rules in topics like transport and immigration).

93. *See* KENNEDY, OF WAR AND LAW, *supra* note 90, at 16 (listing the various entities within a wide range of private and public institutions that collectively contribute to global policymaking and avoid individual responsibility).

institutional enthusiasms or a quotidian consequence of bureaucratic working conditions. By both of these readings, deferral appears to be a sort of externality or incidental by-product, perhaps unfortunate but not a core issue in and of itself. These readings, however, miss a crucial observation: deferral itself has become a mode of power, arguably even a defining mode of power in the social world regulated by institutions of international law and global governance.[94]

By mode of power, I mean firstly that deferral is a technique to condition the conduct of people and things, a particular and particularly effective way of exercising regulative authority across global contexts today. This makes it a mode of politics as well: the exercise of regulative authority in this mode holds ramifications for the distribution of values and resources, both ideological and material, around the world. In short, deferral is a dominant mode of politics and exercises of power globally. Deval Desai and Marieke Schomerus, for example, describe the front lines of negotiations for U.N. Security Development Goals (SDGs). They observed a high-level meeting to hammer out indicators by which to implement the SDGs, which meeting produced "an economy of policy implementation" by "*deferring the time and place of policy decisions*," such that the indicators under consideration "continued shifting between urgency and deferral, in the present and the future, both 'now' and 'never.'"[95] Desai and Schomerus suggest that the indicators thus "offer the potential for anyone to convert deferral into decision at any moment, as histories of other types of bureaucratic documentation and knowledge production suggest."[96] But offering the potential for anyone to activate the potential for decision is not to say that just anyone will be in a position to do so. A person's position in a given field and her connection to the right networks will determine both the possibility to be in a position to make that decision and likewise will structure considerations that go into the same. In sum, deferral vests certain actors with particular powers, such as in the case described by Desai and Schomerus, to determine the distribution of resources for purposes of global development projects.[97]

Against this backdrop, the eclecticism of my method is also a deliberate intervention into the same mode of politics and power. I expressly mean to adopt and adapt a similar technique. I mimic the technique to stage an argument and analysis about the interoperation of key institutions in networked systems of governance, focusing in this case on the World Court and the U.S. Treasury. Let me restate the overall argument in the specific context of deferral: the ethical posture of the World Court operates by deferring (to political and economic actors such as the U.S. Treasury) the public authority for everyday structural conditions and the value

94. Kennedy emphasizes at points the possibilities this mode of power entails, which perhaps accounts for perceptions of ambivalence in his treatment of the subject. *See, e.g.*, Kennedy, *One, Two, Three*, *supra* note 91, at 644–46.

95. Deval Desai & Mareike Schomerus, *'There Was A Third Man . . . ': Tales from a Global Policy Consultation on Indicators for the Sustainable Development Goals*, 49 DEVELOPMENT AND CHANGE 89, 92, 101 (2018).

96. *Id.* at 111.

97. *See id.* at 109–11 (highlighting the allocation of responsibilities between actors like academics and policymakers throughout knowledge production in global governance).

distributions they effectuate. Political and economic actors such as the U.S. Treasury, in turn, operate strategically in part by deferring consideration of ethical and other normative constraints to institutions such as the Court. Meanwhile, both of these institutions are linked by network and social field, both staffed by pools of similarly-trained professionals mutually acting and interacting with respect to areas of common concern. In addressing such networked nodal points of global governance, plenty of critical analytical ink has been spilled but is often also limited by restriction to one intellectual enclosure or another. Networked governance meanwhile presents a moving target, each linked office deferring acknowledgment of the scope of its powers. Analysis can be left behind, so to speak, when it tries to capture the action with bounded theoretical constructions. In contrast, to analyze and assess governance in these conditions, a like facility—call it a moveable method—seems propitious. The research framework in its various parts can move with and stay attuned to diverse actors in their diverse capacities, actors who are not concerned with perfect consistency, overall coherence, or any singular, final justification for the powers they wield.

Finally, the idea of a tool or method tailored by design to its object of analysis is neither new nor controversial. But that does not mean it is without risk. By adopting this method embracing deferral, which I observe in dominant modes of politics and the exercise of power globally, I arguably extend the reach of the latter into an area dedicated to their critical analysis. Such a method runs the danger of reproducing that which it would analyze and critique. This danger is a strong reason to stay trained on the work that the analysis and critique purport to do alongside that which it actually achieves. At the very least, this calls for reflexive acknowledgment that my critique operates within the structures of knowledge to which it is applied, not from any external, arguably superior vantage.

I contend, however, that this is not grounds to reject the eclectic method without more, and for the simple reason that even straightforward, single-model methods will ultimately suffer a similar dilemma. No one method or theory today will ultimately claim the final truth of its analytical outputs. Each will be conditional, which is to say that at some fundamental level, each will defer or relativize final justifications for its conclusions. This is the historical reality of overall knowledge structures in which foundational claims are also the sources of relativity in physics, metaphysics, and everyday life.[98] Under these conditions, every analysis is also always ultimately an argument, which may be better or worse depending on its factual grounding and depth of analysis. Analytical outcomes in this context are not final truths; they are claims with more or less plausibility and utility, judged by their ability to make legible and coherent one way of seeing and acting on things or another. In this light, there is no reason to reject the methods of deferral otherwise deployed in the overall normative apparatus that I or another would critically analyze. If anything, to withhold these methods from scholarship seems itself a tacit political argument, designed to disempower.

98. In physics, it is Einstein's theory of relativity; in metaphysics, it is Descartes' solipsistic subject; in everyday life, it is a popular notion of equal rights.