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Introduction

The study of international law has, in some ways, undergone dramatic changes over the past centuries, but it has also stayed remarkably the same. The subject matter with international legal components has expanded dramatically and the depth of international law's reach has also increased. From an early reliance on theological writings and natural law, international law has evolved substantially to include a variety of sources for rules, most notably custom and treaties. Early international law focused extensively on the territory of states and the regulation of the use of armed force. Today, its parameters have broadened to include human rights, the environment, and trade, among other emerging areas (see UNGA, 2006). As a result, the practice and practitioners of international law have also increased substantially, providing previously unavailable pools of data and experience to analyze and to test. There has also been an explosion of institutions – notably, the recent growth in the number of international judicial institutions – as well as international processes for scholars to examine. Thus, international law has expanded in volume, content, structure, and process, but the methods of scholarly inquiry have not kept pace.

The predominant mode of international legal analysis is still descriptive and expositive. International law scholars typically seek to uncover what international rules exist (e.g., see chapter 3 of Arend, 1999) with a view to suggesting where rules may need modification in order to be effective. Although there are a variety of approaches to this method, the primary purpose of these inquiries is to determine the present state of the law, and to examine such rules within a given political environment. This method of divining the law or searching for it in treaties and other documents dates back hundreds of years. Another important framework is primarily prescriptive, undertaking critique and analysis as a basis for advocating what the law *should be* in light of perceived inadequacies or failure rather than describing what it is. In neither approach is there an ability to explain or predict the actual development of international law

and the dynamics behind the evolution; notable exceptions are Charney (1993), Goldsmith and Posner (2005), Raustiala (2005), Guzman (2008), Helfer (2008a), and Trachtman (2008). This book provides a new framework to analyze international legal processes that is specifically designed to help us understand the tremendous changes that have occurred in international law over the last sixty-plus years as well as ones that are likely (or not) in the future. Consistent with that framework, we offer a theory of legal change, focusing largely on factors endogenous to the international legal system. The orientation of the book, however, is not to offer an analysis of one (e.g., human rights) or even a handful of international legal concerns – the trees – but rather the international legal system writ large – the forest.

We begin with a more dynamic and interactive orientation to studying international law. We agree with treatise writers who see international law as the basis for political discourse among members of the international system (see for example, Schachter, 1991; Henkin, 1968 and 1995; Friedmann, 1966; Fawcett, 1968; Janis, 1993; Cassese, 1986; Higgins, 1994; and Shaw, 2008). This discourse does not necessarily imply or guarantee consensus, but it does foster the ongoing interaction needed to provide conceptual clarity in determining legal obligations and in generating the capacity to implement them. In playing this role, international law performs two distinct functions: one is to provide the parameters and mechanisms for cross-border interactions, and the other is to shape the values and goals these interactions promote. We call the first set of functions the *operating system* of international law, and the second set the *normative system*.

The book examines the basic components of the operating and normative systems to construct a dynamic framework for analyzing and understanding international law. The operating system deals with the basic "structures" of international law. It functions in some ways (but not others) as a constitution does for domestic political systems by allocating power, identifying legitimate actors, specifying sources of law, and providing remedies and enforcement mechanisms. It serves as a general repository of modes or techniques for change available to the entire system no matter what the specific subject matter. For example, rules on criminal and court jurisdictions determine which actors have access to what venues in addressing violations of torture proscriptions. Thus, the operating system is concerned with creating and maintaining the modalities that can create and give effect to international law's norms. The normative system of international law includes the values and goals

that guide the conduct of states in the international system. It establishes general standards in the international arena whereby the values of the international system are identified and general prescriptions and proscriptions for behavior are established. For example, the prohibition of genocide is a legal norm that is designed to restrict state behavior.

Using the framework provided by the specification of the operating and normative systems, we seek to understand how these two systems interact and thereby explain and predict when and how changes in one system precipitate changes and create capacity in the other system. To do so, we construct a punctuated equilibrium theory of system evolution, drawn from studies of biology and public policy studies. That theory provides the basis for delineating the conditions for change and helps explain a pattern of international legal change that is often infrequent and suboptimal. A norm that functions at a suboptimal level is quite different from a norm that does not exist. Nonetheless, the popular perception that suboptimality creates is that international law does not exist or does not function.

Implications

There are several theoretical and policy implications that flow from this new framework. First and most broadly, we hope to marry international legal scholarship with social scientific research. The former has too often been characterized by static analyses whose purpose is to assess the status of legal norms, with little or no concern for the behavior of states over time or broad theoretical generalizations. Our framework and accompanying theory of legal change is predicated on the assumption that general patterns of behavior on legal issues exist across different time periods and within different contexts. These patterns are further conditioned by what precedes and what follows. Accordingly, our analysis seeks to provide greater explanatory depth beyond asking what the law is to include what cumulative effects the law has and what prospects exist for changes in the future.

The movement away from pure description also presents the potential for international relations theory. More broadly then, our framework and theory answer the call to bridge international legal and international relations theories. Too often, such calls have occurred more frequently (Beck, 1996; Slaughter, 1998; Ku and Weiss, 1998; Yasuaki, 2003) than efforts to fulfill those suggestions. Thus, we aspire to develop explanations for international legal phenomena with a general theory of legal

change and specific arguments for particular kinds of legal change. The application of theoretical expectations to empirical cases in those chapters illustrates the application of social science to international legal problems, as well as the breadth of our approach to international law writ large.

Just as the study of international law has been stilted by lacking reference to international relations, so too has the latter been limited by largely ignoring international law. As Joyner (2006: 248) notes:

> Academicians who study either international law or international politics share a dirty little secret: both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is reluctant to admit the necessity of the other.

Illustrative of this, most scholarship has been devoted to how international norms arise (e.g., Klotz, 1995; Finnemore, 1996), with special attention to the moral character of the norm and how it became accepted broadly by the international community. Such scholarship has not often paid attention to the ways in which the international community has sought to ensure that such norms actually influence state behavior or the needed capacity to give norms effect. Either this was assumed to be a tautology (some argue that behavior modification is an essential component of a norm – see Goertz and Diehl, 1992) or it was dismissed as a fundamentally different question. Our analysis seeks to extend the concern with how norms develop to include how the international legal system gives them effect, or in a number of cases does not provide this service, as well as why this is the case.

Although not exclusively concerned with international "regimes" (for a review, see Hasenclever, Mayer, and Rittberger, 1997), our framework and accompanying theory have implications for how regimes are designed and what mechanisms exist for their maintenance. As Slaughter (1998: 385) indicates, "effective regime design requires a theory of why states cooperate through institutional arrangements and why those arrangements might not succeed." We hope to offer some insights on when states will build institutional as well as other mechanisms to ensure that regime norms are not empty ideals. In effect, operating system provisions become a necessary part of the legal regime in a given issue area. Thus, understanding how normative change prompts operating system change (and vice versa) could be a key component of

understanding the development and ultimately the effectiveness of international regimes.

Although integrating international law and international relations scholarship is an important contribution, we were initially motivated by two central and more specific concerns in the scholarship of international law. First, we found existing frameworks and taxonomies for international legal scholarship inadequate. In a number of cases, no framework or taxonomy is specified. To the extent that one is evident, directly or indirectly, it tends to emphasize the descriptive and static qualities of international law. Our review of international legal scholarship below lays bare these limitations. This stifles the specification of theoretical questions and thereby inhibits the empirical examination of propositions derived from models that seek to offer answers to those questions. Problems with those frameworks in particular make it difficult to carry out queries related to how and why international law evolves.

Our dynamic framework for international law also allows scholars to raise (and answer) new questions that are impossible in static frameworks. For example, why are new legal norms and standards created in the international system when that system lacks the capacity to ensure compliance with those norms or mechanisms for compliance arise only decades later? A number of human rights provisions have been adopted in the last sixty years, such as the Convention on the Elimination of Discrimination Against Women (CEDAW), but few legal avenues are available to ensure their precepts are followed. Such vital questions never crop up if the overarching framework for analysis is purely descriptive or prescriptive.

Second, we move beyond the specification of a framework for analyzing international law and develop both a general theory of legal change and specific models for particular kinds of institutional and normative change. Understanding when and how change occurs can provide important insights into the capacity of any individual norm to meet its objectives. Current legal scholarship does not generally posit causal relationships, much less subject them to empirical examination. In particular, legal change is not generally the focus of those efforts. Furthermore, broad treatments of international law (e.g., Guzman, 2008; Goldsmith and Posner, 2005) rely extensively on conventional and exogenous influences, such as the power or interests of leading states. Although we don't dismiss such influences, we place considerable emphasis on some of the endogenous or internal components of the international legal system as impetuses for change. To the extent that

they evaluate disputes and the resolution of disputes as part of an ongoing cycle of normative change in the international system, international relations scholars are looking within the system. Nevertheless, their work touches on the evolutionary cycles of specific norms to explain change within the entire system (Sandholtz and Stiles, 2009). In contrast to other works, we offer a general theory of legal change and then provide specific models that are derived from that theory to account for specific incidences of change.

The framework and theory presented here do more than make scholarly contributions to international legal and relations study. Our emphasis on the dynamics of international law allows us to offer some policy-relevant conclusions. Barrett's (2003) analysis and subsequent approach to climate change provides an example of how understanding the international legal operating system can assist with more effective treaty design. He points to the inherent difficulties in the effective monitoring and implementation of the Kyoto Protocol. Barrett's approach is to find ways to build a climate change treaty that draws on existing practices within the international system that can work to enforce the treaty's obligations. His approach is therefore to rely on the existing operating system in this case, the setting of technology and building incentives to comply with these standards as a means to achieving compliance. "International agreements need to be self-enforcing, and so must restructure incentives" (Barrett, 2003: 398) to take advantage of structures and procedures in the system that already work for other rules.

Our framework and theory provide insights into the kind of changes in international law one might anticipate. For example if a new human rights provision, such as one recognizing new rights for ethnic groups, is adopted, what kind of institutions or processes might be adopted to give that new norm effect? When might limited changes occur (or none at all) such that the norm becomes little more than an ideal rather than a reality in the international legal system? Yet the failure to give the norm effect in our "operating system" does not necessarily mean it will remain unobserved or without influence. As we note in Chapter 4, there are adaptive mechanisms that serve to supplement the international legal system or compensate for its inadequacies. Policymakers may be cued to when they will need to build in compliance or other mechanisms in a treaty as opposed to when they can rely on extant process when adopting a new norm.

Our analyses in subsequent chapters might also help national leaders and international lawyers recognize when adopting new processes, such as an adjudicatory structure or allowing universal jurisdiction for some

crimes, will have a spillover effect in the creation of new norms, unintended at the time that the court or legal principle was created. In this way, the expansion of international law into a given topic area does not have to begin with grand forethought, but may be facilitated (or inhibited) by the presence of structures and processes already operating in other subject areas (see Aviram, 2004). For example, allowing individuals or corporations to have greater legal standing to file claims or assert rights, independent of their home states, might have the effect of expanding the rights and responsibilities of those actors in other areas of the law.

In the following sections, we provide an overview of international legal scholarship, with special emphasis on the frameworks used to analyze law in the world community and models of legal change implied or derived from those frameworks. We begin with a brief summary of the major approaches from the early days of international law. This is not intended to be a comprehensive review, covering all approaches and ideas since the beginning of international law (see Nussbaum, 1954 for such a survey). Rather, we note several of the highlights in order to place our approach in contrast to that early work and to establish our place in the progression of international legal scholarship. We then describe more modern approaches, focusing on those found exclusively in international legal study as well as those designed to study legal systems and processes more generally. The purpose of such an exercise is more than for the simple edification of the reader. Presenting these approaches allows us to identify the inherent limitations of these approaches, as well as providing segues for the presentation of our new framework and theory, which is designed in part to address the problems with past approaches, in Chapter 2.

Historical antecedents from antiquity to the early modern period

In the pre-modern, early history of international relations, efforts to understand relations beyond a particular nation were often closely associated with religion, ecclesiastical study, or philosophy, and relations were framed as those between the preferred self and outsiders or barbarians. In his study of international law in antiquity, Bederman (2001: 287) concluded that even though there was "no single, cohesive body of rules for a law of nations, recognized by all States in antiquity or that such rules were proximate to those that we regard today as being part of 'modern' international law . . . there was a common *idea* held in antiquity that international relations were to be based on the rule of law."

Ancient efforts to address international relations were all based on some belief in a universal order. As Kennedy (1986: 96) explained: "primitives elaborated a coherent vision of authority in radically diverse theoretical and doctrinal texts." The well-developed and widely recognized system of law used by the Roman Empire may have provided international law analysis with something of a false start because of its use of the term *jus gentium*, Latin for the "law of nations" and referring to law governing interactions with outsiders. At best, this might have covered "inter-municipal" relations, but did not include a "broad conception of the family of nations" (Nussbaum, 1954: 9; see also Walker, 1893). Thus, to the extent that any theoretical structure for international law existed, it was based on a crude "us versus them" conception.

The fall of the Roman Empire limited the further development of international law, and eventually led to a consideration of a legal order based largely on natural law. Accordingly, the framework for analyzing international law was based on religion, most prominently Catholicism. The medieval collecting of the ecclesiastical decrees that guided the Catholic Church from its founding over time produced the Code of Canon Law. Because of the Catholic Church's reach, canon law became an important basis for activity following the decay and collapse of the Roman Empire. The components of canon law were promulgated to operate separately from any national law and derived from the Pope's authority as head of a universal church with authority over the entire Christian world. As supreme pontiff, all final legislative, executive, and judicial authority therefore resided with the Pope (see Arrieta, 2000 and Martin de Agar, 2007). To the extent that international law was part of canon law, it had little need for any separate intellectual basis or tenets. Indeed to have suggested a need would have been regarded as heretical. Such practices as regulating warfare through the Truces of God during the medieval period were therefore carried out as part of the Church's ecclesiastical authority with little further theoretical or doctrinal justification regarded as necessary.

The era in which canon law predominated did not provide a framework under which international law could be analyzed. The process of lawmaking was said to be divinely inspired and therefore not transparent. Furthermore, the idea that law could change was not recognized; only new revelations could produce additional legal rules.

St. Augustine's (354–430) work on just war perhaps can be seen as a turning point in moving international law from traditional religious dogma to something with a more reasoned basis (St. Augustine, 1958).

This was still in the mode of ecclesiastical inquiry, but it provided some doctrinal underpinning beyond correct conduct. Even this modest beginning, however, was constrained by an almost exclusive doctrinal focus on the prevention of war as was also the case with the work of Thomas Aquinas and other scholastics. Nevertheless, there was now at least an external and visible standard by which to judge the legality of actions, albeit one still heavily influenced by religious precepts.

In the realm of political philosophy, Niccolò Machiavelli (1469–1527) and Jean Bodin (1530–96) provided alternatives to religious hierarchy and doctrine as the bases for human behavior and the exercise of power. Bodin introduced the concept of sovereignty "as the absolute and perpetual power over the people, unrestrained by human law" (Bodin, 1992). The power of the state thus became the centerpiece around which law might be analyzed. The study of international law in these conceptions was somewhat divorced from religious roots, but still lacked a coherent framework to understand its origins and evolution. At best, more rationalist standards replaced religious ones in what was still an exercise in normatively evaluating international law rather than scientifically explaining it.

The Spanish Dominican Francisco Vitoria (1480–1546) and the Spanish Jesuit Francisco Suárez (1548–1617) worked in the area of theology, but provided some further elaboration in areas that touch on international law. The notable shift was away from discerning moral principles or rational calculations for the purpose of identifying international law. Instead, scholars and other analysts should look to the *practice* of states to identify international law, a precursor to the development of positivism. Thus, the analytical framework for international law was shifting away from religious and philosophical texts to patterns in real world events. This also opened up the possibility for changes in the law over time (from practice) as opposed to immutable and divine truths as the basis for law.

This brings us to the work of Hugo Grotius (1583–1645), a colorful and talented figure who is widely cited as the "father of international law." Ironically, it may have been his deep-seated desire to find a way to reconcile the Protestants and the Catholics that caused him to adopt neutrality with regard to aspects of religious doctrine that has made his work valuable as a foundation for international law. Accordingly, Grotius saw law as secular and did not assign any special role for religious officials. He did give credence to Roman jurists, but for the strength of the legal reasoning rather than from some privileged position (Nussbaum, 1954).

Grotius (see Grotius, 1925) referred to continued practice for the *evidence* of law, but he grounded its *authority* primarily in consent, and so ultimately in the Moral Sense of Rational Humanity (Nussbaum, 1954: 107 and Walker, 1893: 104). The idea of consent as a central framework for detecting international law is a considerable break from religious conceptions of law granted from above. Grotius also saw international law as a unified whole rather than composed of disparate pieces, foreshadowing some conceptions of international law as a system, although Grotius never used those terms or developed such ideas further. Grotius is associated with the concept of the *Mare liberum* ("freedom of the seas") that advanced the interests of his Dutch masters, but would over time become international law in contrast to the rival concept of the *Mare clausum* ("closed seas") advanced by John Selden (Selden, 2003) on behalf of the English who were challenging Dutch maritime interests around the world. Although not embedded in their approaches *per se*, this is one of the first indications that "national interests," especially those of leading states, might be examined to understand international law, a conception that has found its way into some important later works (e.g., Goldsmith and Posner, 2005).

Although a philosopher and mathematician, Christian Wolff (1676–1756) further systematized international law and contributed the proposition that every right is based on a duty (Nussbaum, 1954; Wolff, 1934). Despite the lack of evidence or documentation in his work, Wolff's approach provided shape and definition to international law. Later writers, such as von Martens (Martens, 1803), would acknowledge Wolff's effort to produce "an organic, strictly scientific exposition of international law" (Wolff, 1934: xxxi). Again, this is a precursor to a system-level approach that is reflected in our theory. This effort also had the effect of separating international law from natural law and introduced positivism by taking into account agreements and customary practice (Wolff, 1934).

Appraising early efforts

The writings of towering figures such as Grotius and Wolff clearly shaped the early study and indeed the development of international law. Yet they tended to focus on establishing the ground rules for identifying the law rather than providing an analytical framework for understanding the process of that formation or the impact of the law on behavior. As such, pre-modern writers "tended to emphasize the moral imperative of law between nations and were part of a natural law tradition – a 'common