Introduction

This is not a book that provides easy answers. It is a book that aims to challenge our unthinking assumptions about law. It has three audiences. Most obviously, this is a book for international relations (IR) theorists who work on international law. It is motivated by a desire to correct what I see as serious errors which produce poor theorisation of international law and its place in international politics. But it is also a book for *all* IR theorists. International law is now pervasive in international politics; it is hard to think of an area of international politics which remains unaffected by it. Witness how the world since 9/11 has been shaped by law. The language and conduct of politics has become increasingly legalised. But more than this, an understanding of law at a general level is crucial for all IR theorists because legalism percolates through every level of our society. It is both what we understand justice to be and how we achieve it. It frames our understanding of human relations and gives a language of rights with which to articulate them. The questions this book raises go the heart of jurisprudence and how we understand law's relation to politics. Focusing on the cross-over between international law and international politics, this book will also provide some useful insights for lawyers concerning both international politics and how IR theorises it.

This book is divided into two halves: a theoretical first half followed by an empirical second. I will start by exploring IR theory's best efforts to understand international law. This, I argue, is constructivism and chapter 1 is an in-depth engagement with constructivism's theoretical foundations in the work of Nicholas Onuf and Friedrich Kratochwil. Their work also merits inclusion because it explicitly addresses the questions of law and international law and therefore offers two of the best accounts of international law in both constructivism and IR theory more broadly.

Having set the scene I introduce the notion of a common-sense idea of law. I argue that we all internalise certain messages about law and, unless we are legally trained, our understanding of law will not develop beyond them. Chapter 2 fleshes out what these ideas might be and unpicks them.

It also serves a second purpose: to introduce the reader to the basics of legal methodology. The reason for this is that, unless IR theorists have at least some basic knowledge of how law actually works, we cannot hold more theoretical ideas about law with any accuracy. We must learn to walk before we can run. A knowledge of international politics unfortunately will not translate into a knowledge of international law, and the assumption that it will has produced some dubious theorisation.[1]

The third and final chapter in the theoretical half continues in a similar vein. Just as some knowledge of legal methodology is needed, so too is some knowledge of 'critical' jurisprudence.[2] The majority of IR theorists who write about law are familiar with natural law theory and legal positivism. There is far less familiarity with legal thinking outside of this mainstream. The purpose of chapter 3 is to correct this but also to be more ambitious than that. Many of the questions raised by critical jurisprudence will reappear throughout the empirical second half. What is the relationship between law and society? And between law and power? How do we view society: as consensual or conflictual? Critical approaches also question how law works in practice. What is the difference between law in books and law in action? Critical thinkers reject the methodology of formalism and charge that law does not operate with the certainty or determinacy formalism says it does. Instead, critical approaches argue that law is indeterminate and, for some, law is *radically* indeterminate. This means that there is no logical or necessary connection between the facts of the case, the law and the decision. The outcome of any legal case is arbitrary. And, because it is not law which determines decisions, it must be something else.

And this question of indeterminacy is crucial. The radical indeterminacy thesis led many legal thinkers to reflect more deeply on how they could reconcile the day-to-day reality of law with the charges laid by the critical approaches. The question in essence is how indeterminate law is and for many 'middle way' thinkers law is not completely determinate. The nature of legal argumentation, the principles the laws enshrine, and the socialisation and professionalism of legal practitioners limits

[1] Abbott, Keohane, Moravcsik, Slaughter and Snidal, 'The Concept of Legalization', 401–19; Finnemore and Toope, 'Alternatives to "Legalization"', 743–58.

[2] I use the term 'critical' approaches because, while this covers a broad church of approaches, from American legal realism to feminism or Marxism, they do share one key trait: they define themselves to contradistinction to natural law theory and legal positivism. Their intellectual *raison d'être* is to critique and challenge the assumption of natural law theory and legal positivism, hence my labelling of it as critical jurisprudence.

law's potential indeterminacy. In Thompson's words, social relations are expressed 'not in any way one likes, but *through the forms of law*'.[3] And this implies that the forms of law restrict the possible range of arguments put forward, what will be convincing and, ultimately, the legal decision itself. And it is not simply the case that the decision is not arbitrary but that there is a connection between the limitations that the legal form places on decision-making and justice. But is this true? Does law contain the seeds of its own limitation? And does this limitation translate into justice?

Having set up these questions, I turn to the empirical second half and its three case studies: *Brown* and desegregation in America; rape legislation and reform in the United Kingdom; and torture since 9/11. Each case study raises different questions about our understanding of law. *Brown* represents law as it should be and is one of its finest moments. *Brown* is a legal icon and holds a hallowed place in American culture. On 17 May 1954 the Supreme Court ruled that segregation was unconstitutional and remedied a long-standing social injustice. Or so the story goes. The reality of *Brown* is somewhat different. First of all, the suit was not a class action: it only applied to the five school districts that were party to it. Moreover, only desegregation in *schools* was deemed unconstitutional, not the entire policy of segregation itself. Segregation was not actually overturned until 1957 in *Simkins* v. *City of Greensboro*,[4] and the first clear statement of its overturning by the Supreme Court was not until 1970.[5] And finally, *Brown II*,[6] the Supreme Court's ruling on remedy, intentionally made implementation slow. State authorities were charged with desegregating with 'all deliberate speed' which in practice gave cover for time-wasting and procrastination. This was *not* an unintended consequence of *Brown* but its precise purpose: the Supreme Court had strayed dangerously far into politics in finding desegregation to be unconstitutional. *Brown II* attempted to soften the blow to the South by giving the Southern states ample time to get used to it. As a consequence, no significant desegregation happened until at least a decade after *Brown*.[7]

[3] Thompson, *Whigs and Hunters*, p. 262, emphasis added.
[4] 149 F Supp 562, 564 (MD NC 1957), aff'd *Greensboro* v. *Simkins*, 246 F 2d 425 (4th Cir 1957).
[5] *Oregon* v. *Mitchell*, 400 US 112 (1970).
[6] *Brown* v. *Board of Education*, 349 US 294 (1955).
[7] In the ten years from 1954 to 1964 the percentage of African American children in elementary and secondary school with white children only rose by 1.199%, from 0.001% to 1.2%. In the ten years after 1964, this percentage rose by an incredible 89%, from 2.3% to 91.3%.

In 2001 Balkin asked America's top legal experts to play Supreme Court judge and rewrite *Brown*. In Bell's dissenting opinion, he argues that the decision did not go far enough and did little for African Americans. It was white Americans who benefited from *Brown* because the decision enabled them to 'solve' the race problem in America in one fell swoop. Law, in Bell's argument, functioned to soothe white America's conscience while in reality failing to improve the daily lives of African Americans. Law did not produce social justice; it just masked the reality of de facto injustice.

In contrast to the high drama of *Brown*, we will turn to a more mundane case study: rape legislation and reform in the United Kingdom. This is valuable because it provides an insight into how courts rule in actual cases and, crucially, views them together to discover broader trends. There is a danger in trying to understand law that we focus on individual cases and spend our time picking them apart and analysing rulings. When we do this we cannot see the wider, systemic effects a case may have, or how wider systemic factors may impact upon it. Exploring the legal treatment of rape over a thirty-year period, and attempts to solve the 'rape problem', provides us with a vantage point from which to view the operation of law in society.

It also gives us an opportunity to assess how effective reform has been. The legal treatment of rape, from reporting to trial, has been the focus of repeated reform and yet the 'rape problem' seems more acute than ever: a low conviction rate, a high attrition rate, juries plagued with 'rape myths'. Can reform succeed? And if it cannot, does this mean that the law is not capable of providing justice to rape victims? Or are we expecting too much from the law: to transform a complex and deeply embedded set of ideas about men, women and appropriate sexual behaviour?

My third case study concerns the return to torture in the wake of 9/11 and it gives me the opportunity to return again to constructivism. While chapter 1 explores constructivism's theoretical foundations and its treatment of law, chapter 6 will bring in more contemporary constructivist research and explore the norms literature, specifically the idea of norm evolution. In norm evolution, as the name implies, norms evolve from being held by a small number of actors to spreading throughout a community. Once a certain number of actors adopt the norm, a tipping point is reached and the norm cascades throughout the rest of the community: all that remains is legalisation and internalisation. In the legalisation stage, treaties are signed and ratified and the norm becomes enshrined in law. But law also works to internalise the norm, first by

giving it the legitimacy of law and, secondly, by punishing transgression. Law is depicted as a terminus; a final stamp of approval after the political battle has been won.

The case of torture post 9/11 questions this picture. The norm against torture was considered as the archetypal internalised norm. As Sussman argues: 'In philosophical and political discussion, torture is commonly offered as one of the few unproblematic examples of a type of act that is morally impermissible without exception or qualification.'[8] It was also a powerfully legalised norm: numerous treaties and conventions prohibited it and it was, and arguably still is, a peremptory norm from which no derogation is permitted. But derogation happened. Chapter 6 will explore how and what this means for our understanding of law. It will also ask whether the norms literature's failure to see the possibility of normative backsliding, either in theory or in practice, is caused by its undertheorised understanding of law.

Constructivism's perception of law owes much to the common-sense idea of law. Law is seen as (a) good. It is 'a force of linear progress, a beacon to lead us out of darkness':[9] the darkness of politics. In this respect more sophisticated constructivist ideas of law stray towards the middle way: that you cannot argue anything you like (and win). But the case of torture powerfully challenges this assumption. The Office of Legal Counsel *did* argue precisely what it wanted. The prohibition on torture was absolute and the legal norm against torture had achieved the highest level of legal normativity: torture was a peremptory legal norm. It is almost impossible to find an international legal norm of comparable strength. And yet it was overturned with shocking ease. And what is most striking is that its overturning happened because of and through the forms of law. The law and its method were sufficiently flexible to justify that which it prohibited. These restrictions may not be as powerful as we would hope, nor do they give law the capacity to solve society-wide injustice. Relying upon the assumption that law contains within it the seeds of its own limitation, and thereby justice, produces questionable theory.

The problem is two-fold. First, a lack of engagement with law leads IR theorists to fall back on common-sense ideas of law that see it in broadly benign ways. Secondly, constructivism's theoretical foundations

[8] Quoted in Bellamy, 'No Pain, No Gain'?, 121–48, at 129.
[9] Smart, *Feminism and the Power of Law*, p. 12.

predispose it to seeing law as operating in the same way as social norms: i.e. that social norms evolve through a process of articulation and argumentation between actors who are more-or-less equal. The first problem is ignorance, the second is constructivism. I hope that by removing some of the former, the latter will be improved.

1

The theoretical foundations of constructivism and its treatment of law

Introduction

This chapter will provide the bedrock of the book: it will introduce and explore what I consider to be the best efforts of international relations (IR) theory to understand law in general and international law in particular. As noted in the introduction, IR theory has not engaged with the question of law in any sustained manner. The school of thought which has, I believe, made the greatest attempt to understand law is constructivism, and within constructivism, two authors in particular stand out: Onuf and Kratochwil. There are two reasons for this. First, both authors were instrumental in the creation and development of constructivism as a school of thought. In exploring their work therefore, I will be exploring the theoretical foundations of constructivism. The theoretical focus of their work also predisposes it to addressing questions about the nature of society, norms and ultimately law. Constructivist analysis was definitively shaped by Keohane's injunction to answer empirical questions of international politics.[1] Throughout the 1990s therefore a substantial portion of constructivist work was empirically oriented and this drew attention away from questions of law. I will return to more empirical constructivist work in chapter 6 to see what role law plays in their analysis and specifically address the question of normative backsliding.

But, to return to Onuf and Kratochwil, there is a second reason for selecting them from all other constructivist writers: they explicitly write about law. As noted in the introduction other IR theory accounts of international law suffer from two flaws. Moreover, they approach the question of law in an explicitly theoretical way and this gives us a far better chance of answering the questions

[1] Finnemore and Sikkink, 'Taking Stock', 391. Keohane was speaking at the International Studies Association Annual Convention in 1988.

about international law that IR theorists are interested in answering: what should we expect law to be able to do for us? What is law's causal power?

This chapter will start by exploring the work of Onuf then turn to Kratochwil before drawing them together. I will argue that there are a number of significant similarities between Onuf and Kratochwil's work and that they share a number of flaws and ultimately these flaws have percolated through into later, empirical constructivist work and its understanding of law.

ONUF

Introduction

Onuf's landmark book, *World of Our Making*,[2] announced the birth of constructivism and aimed to do no less than reconstruct the discipline of IR. Such a reconstruction is necessary because IR fails in one of its central tasks: understanding that our social reality is constructed. Onuf's task is to investigate what IR has so far taken for granted: that rules themselves are a matter of language.

Language for Onuf is the key to understanding rules, and in turn, understanding the social world. It enables Onuf to connect individual conduct and social rules. Onuf quotes Fish's observation that: 'ruleness, in which any normativity hinges, begins in speech'.[3] By making an assertion, you do something social but you must have an audience; they may accept or reject the assertion but they must be there. Utterances which nobody hears have no social import. Provided that speech acts have an audience, they may themselves change the world. In fact, for constructivists the social world and words are mutually constitutive, and the key to understanding how the world works lies in unpicking this process of mutual constitution. For Onuf the way to do this most effectively is through a systematic analysis of rules with the aim of producing a fully fleshed out 'topology of rules'.[4]

Onuf sets out to create this system using Habermasian speech act theory.[5] According to Habermas, a speech act is the 'act of speaking in

[2] Onuf, *World of Our Making*.
[3] Fish quoted in Onuf, *World of Our Making*, p. 85.
[4] Onuf, 'Do Rules Say What They Do?', 386.
[5] Habermas, *The Theory of Communicative Action*.

a form that gets someone else to act'.[6] Language is therefore performative rather than merely descriptive and Onuf uses Habermas's tripartite division of speech acts into locutionary, illocutionary and perlocutionary acts:

> Through *locutionary acts* the speaker expresses states of affairs; he says something. Through *illocutionary acts* the speaker performs an action in saying something . . . a statement, promise, command, avowal, or the like . . . 'I hereby promise you (command you, confess to you) that p [propositional content – state of affairs].' Finally, through *perlocutionary acts* the speaker produces an effect upon the hearer. By carrying out a speech act he brings about something in the world . . . to say *something*, to act *in* saying something, to bring about something *through* acting in saying something.[7]

Rules

Onuf defines rules as 'general, prescriptive statements'.[8] Speech acts acquire normativity and become rules through frequent iteration and acceptance. As time goes by and the statement is repeatedly expressed and accepted, a speech act may be institutionalised as a rule. Whether or not a rule or would-be rule is accepted depends on how well it fits with the context and this is why an analysis of rules, rather than context, is more productive. In fact, attempting to theorise context may be a fool's errand: 'Recourse to the context of a rule's use may help resolve some ambiguities, but introduces others. Context tends to invade a rule's content even as it aids in clarifying the rule's function, and the rule begins to lose its distinctive position in offering guidance.'[9] Those, such as Kratochwil, who look at discourse instead of rules 'flounder because they have not found anything functionally distinctive in what they construe as specifically legal discourse'.[10] The best way to 'get at' context or culture is therefore to study rules and Onuf does this by looking at practices: '[a]ll the ways in which people deal with rules'.[11] We can infer what rules are by looking at practices. However, practices are not just a realisation or an operationalisation of rules. They are 'the content of carrying on'[12] in relation to rules and this includes being aware of them

[6] Onuf, 'Constructivism: A User's Manual', p. 66.
[7] Habermas quoted in Onuf, *World of Our Making*, p. 83.
[8] Onuf, 'A Constructivist Manifesto', p. 7.
[9] Onuf, 'Do Rules Say What They Do?', 396. [10] *Ibid.* 404.
[11] Onuf, 'Constructivism: a User's Manual', p. 59.
[12] Onuf, *World of Our Making*, p. 152.

in a practical or even reflective way. It is through practices that people change rules and alter outcomes[13] and every response to a rule has an effect on that rule and its position.[14] This produces a picture of human society as constantly in flux and as fluid, in which every individual has a degree of power over the rules which make up their world. No one is powerless.

Agency

This brings us to the question of agency and where it is located. Onuf argues that while rules tell us how to 'carry on' they 'cannot provide closure for the purposes of carrying on because rules are not the sufficient agency whereby intentions become equivalent to causes'.[15] Rules provide guidance; they do not determine behaviour. In most situations multiple rules can potentially apply (just like the law) and individuals have to choose which one to follow.

But, Onuf argues, we cannot construct just anything we like; we are limited by 'materiality', that is, material and social limits.[16] We have to recognise these limits and 'evaluate the consequences of ignoring or defying' them.[17] It is unclear precisely what would count as a material or social limit and Onuf is not explicit. He hints at two, opposing meanings. First, he writes that: 'Human beings, using whatever equipment nature and/or society provides, construct society, and society is indispensable to the actualisation of whatever human beings may "naturally" be; society constructs human beings out of the raw materials of nature, whether inner nature or, less problematically, the outer nature of their material circumstances.'[18] He also refers to 'our sensory experience of the world and of our bodily selves in that world'[19] which reinforces the sense that material limits are physical or biological. This is backed up by his choice of examples: we are unable to fly because we do not have wings.[20]

But according to Zehfuss, when Onuf argues that the material is a limit, he legitimises it: 'His view of how we make our world seems to pay insufficient attention to how this asymmetry is already invested into what he calls the raw materials of our constructions. He therefore

[13] *Ibid.* p. 101. [14] Inter alia Zehfuss, *Constructivism*, p. 165.
[15] Onuf, *World of Our Making*, p. 51. [16] Onuf, 'A Constructivist Manifesto', p. 9.
[17] *Ibid.* p. 9. [18] Onuf, *World of Our Making*, p. 46. [19] *Ibid.* p. 292.
[20] Onuf, 'Constructivism: A User's Manual', p. 64.