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978-1-107-04896-6 - Order within Anarchy: The Laws of War as an International Institution

James D. Morrow

Excerpt

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## 1

**Introduction**

During the night of June 19, 1945, aircraft from the U.S. Eighth Air Force conducted an incendiary bombing raid on the city of Fukuoka, Japan. The bombing destroyed 22 percent of the buildings in the city of 323,000.

At noon on August 15, 1945, Emperor Hirohito of Japan broadcast to his nation that Japan would surrender to the combined forces of the Allied Powers. After listening to the broadcast, a group of Japanese officers at Fukuoka led by Colonel Yoshinao Sato, Chief of the Intelligence and Air Defense Sections of the Western Army headquarters, took seventeen captured U.S. airmen to Aburayama outside of the city. There they executed the airmen with blows to the airmen's necks using their samurai swords. First Lieutenant Hiroji Nakayama, who was accompanied by a young lady from the Intelligence Section, made certain that he and the other Japanese did not decapitate their victims as such was considered insulting to the victims in Japanese tradition. They acted under the provisions of Japan's Enemy Airmen Act of 1942, which classified air raids on Japan as violations of international law punishable by the death penalty or prison terms of at least ten years. This Act sought "to prevent further [air] raids [on Japan] by giving stern disposition to enemy airmen, thereby inculcating fear in American mothers and possibly resulting in an anti-war movement in the United States (Francis 1997, 480)."

On December 29, 1948, Colonel Sato and twenty-four other Japanese officers were found guilty of the murder of these prisoners of war and others; seven other defendants were acquitted. Sato and eight other officers were sentenced to death by the Commission. Upon review, General Douglas MacArthur commuted the death sentences on July 9, 1950, instead sentencing Sato to "hard labor for the term of his natural life."<sup>1</sup>

<sup>1</sup> Francis (1997) discusses this case and related executions in detail. I have also drawn on the trial summaries available at the U.S. Archives.

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Atrocities breed outrage, charges of war crimes, and revenge. How can outrage at wartime atrocities be directed into a system of law that controls such actions? During the twentieth century, states developed international humanitarian law to regulate conduct during wartime. The record of success of such treaties is mixed. The chemical weapons treaties have generally been followed, limitations on targeting civilians have often failed, and regulations for the handling of prisoners of war has worked in some cases but not others. Why have some of the laws of war succeeded and others failed?

This question leads directly to the more general question of how international law operates. States have created a large body of international law to regulate their interactions. This legalization of international affairs is a distinctive property of the international system in the twentieth century. As this body of law expands, understanding how it operates is critical for understanding international politics in the contemporary world.

These questions of international law also address one of the great questions of international relations: does the normative structure of the international system matter? Principles of right and wrong have always been applied to international politics. The existence of such standards, however, does not mean that they have any real impact on behavior. Scholars of international relations have debated this question throughout the twentieth century, with implications for the international politics of their times. The realists and idealists faced off during the interwar period (Carr 1946); the British School (e.g., Bull 1977) challenged the dominance of American realism (e.g., Morgenthau 1978) after the Second World War; now the constructivists (e.g., Wendt 1999) oppose the neorealists (e.g., Waltz 1979). The proliferation of “isms” in international relations theory demonstrates the lack of consensus on the role and effect of normative standards. If these norms matter, the world can be changed through moral force; if not, the law of the jungle rules.

In the broadest scope, I also address a profound question about politics. International law works only to the extent that the parties can enforce its provisions and procedures on themselves. Political institutions, including international law, must be self-enforcing. Successful political institutions are machines that run on their own. If effective political institutions are necessary to protect the values we hold most dear, how can such institutions induce the parties to protect those values?

This is an ambitious list of questions, and I do not purport to give final answers to any of them. I do hope, however, that this book will help the reader understand better why the laws of war have restrained violence during war in some situations but not in others, how international law works, what the role of norms in international politics is, and how political institutions are self-enforcing.

LAW FOSTERS STRATEGIC EXPECTATIONS

For the law of war to limit violence during war, states and their soldiers must follow its prescriptions. Consider two stories from World War II, one of law limiting violence and the other not:

[A] member of a patrol along the river Roer was wounded and left lying helpless on the bank in advance of American lines. “Pulling on his Red Cross bib, Doc stood in the open to make sure the Germans spotted him. He then walked slowly toward the river.” The medic, while able to bandage the soldier’s wound and ease his pain with morphine, realized that he would be unable to carry him to safety, so he returned alone, retrieved a wheelbarrow, and started back. “Men yelled across the river to the Germans, ‘Okay, hold it, hold it,’ and the Germans hollered back, ‘Okay.’...” Though the rescue “proceeded in agonizingly slow motion” and one German rifleman continued to fire, Doc was finally able to propel his makeshift ambulance the quarter of a mile to safety. “As he finally pushed the wheelbarrow into an alley behind a ruined house ... a cheer went up from every man in K Company”(Linderman 1997, 103).

Marine officer Frank Hough described the Japanese soldier in the South Pacific as one who “would as soon kill a chaplain administering the last rites to the dying as he would an active enemy. Nothing delighted him more than killing our wounded lying helpless between the lines, unless it was killing the doctors and hospital corpsmen who went out to attend them.” That medics were not armed – “not at the beginning, anyway” – was important, thought Hough, because it *drew* the Japanese to attack them. Aidman Robert Thobaben, when accompanying patrols on Peleliu, carried a carbine: “I never did have a red cross painted on my helmet. I thought ... that ... was insane. It ... was only a target”(Linderman 1997, 149, italics in original).

In the first story, Doc is willing to advance out from cover because he expected that the Germans would not shoot at him once they recognized he was a medic seeking to treat a wounded man. In the second story, Aidman Thobaben did not seek the protection of the symbol of the Red Cross because he expected that the Japanese would not respect the legal protections of the latter and so needed to arm himself in violation of the law of war. War creates the grim logic of kill-or-be-killed; restraining that logic requires expectations that others will observe the law. When soldiers believe that grim logic will not be restrained, they will take measures to preserve themselves, including committing their own violations as Aidman Thobaben did.

Strategic expectations – what state leaders and soldiers think the other side will do – are key to producing a restrained battlefield. These expectations determine whether soldiers believe they will receive the protection of the law and so take the risk of acting in accord with the law themselves. They determine whether state leaders adopt policies that support or breach the law. Social life is structured by such strategic expectations, even under the chaotic conditions of war.

Creating and sustaining expectations of restraint requires meeting six challenges. First, soldiers on both sides need to recognize which people and sites receive protection under the law. In the cases quoted earlier, medics are supposed to be inviolate because of their roles in aiding the wounded, and the Red Cross serves as the symbol so that both sides know which people and sites receive that protection. Without the public sign of the Red Cross and the shared understanding that people and sites displaying it should not be attacked, medics would find their job of tending to the wounded on the battlefield much harder, as was the case in the second example.

Second, warring states and their soldiers need to understand exactly how war will be limited, because many systems of limits are possible. The law of war obligates medics to treat enemy wounded as well as their own. German medics during World War II sometimes killed their own wounded to end the suffering of a dying man (Linderman 1997, 108). How would U.S. soldiers, whose medics did not practice mercy killing, view German medics killing a wounded U.S. soldier in their care? In the absence of agreement on what limits apply, one side could believe the other has violated limits on violence when the latter thought it was observing those limits.

Third, novel situations may arise, and the parties need to be able to work through what restraint means in those situations. Failure to do so can lead to escalation to unrestricted violence by both sides. During World War I, Germany launched the first major attack using chemical weapons by releasing them from cylinders, in part because that means of delivery was not explicitly banned in the Hague Conventions as “projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases” were (Roberts and Guelff 2000, 60). Within eighteen months, Germany, Britain, and France were all using gas shells – a clear violation.

Fourth, some states do not wish for violence to be limited during war. In the second story quoted earlier, Japanese treatment of medics and the wounded resulted from training in the Japanese military that saw the wounded as an impediment to fighting and so not worthy of protection. Expectations among U.S. servicemen changed with their experience of fighting the Japanese.

Fifth, not all soldiers will follow the law even if their military wants them to. One German continued to fire his rifle during the spontaneous cease-fire for Doc to evacuate the wounded soldier. These violations by individuals can corrode expectations of restraint and force soldiers to abandon their legal responsibilities to protect themselves.

Sixth, these expectations need to be shared across both states and their armies. All need to know what the rules are and when they apply. They also need to know that they are expected to follow them and that they can expect the other side to follow them as well. Finally, they need to know that both militaries will try to discipline those soldiers that commit violations on their own.

International law fosters and sustains these strategic expectations by addressing the six challenges. Treaties specify how violence during war should

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be restrained by creating protected classes of people and sites, how they should be identified, and what protections they receive. Principles of restraint undergird treaty law, which allows the parties to address novel situations. Public acceptance of treaties through ratification screens out those parties that will not respect limits on violence during war. Military training instructs soldiers in their rights and responsibilities under the law; military discipline enforces those responsibilities.

Expectations of restraint are difficult both to form and to sustain in the face of the violence of war. Although Doc expected the Germans not to fire on him, he made sure they recognized what he was doing, and both sides confirmed that they would not fire while he evacuated the wounded man. Even with those reassurances, one German continued to fire. Some soldiers in even the best disciplined armies violate the laws of war, and those violations can corrode expectations of restraint. Uncertainty about whether the other side is committed to restraint opens room for suspicion of their intent. International law helps to restrain violence by fostering expectations, but it does not guarantee that everyone will follow its precepts in every situation.

## SELF-ENFORCING INSTITUTIONS AND INTERNATIONAL LAW

For international law to succeed at creating shared expectations of restraint during war, it must be self-enforcing. International law is a political institution and, as such, must meet the same conditions that allow political actors to enforce institutions on one another, thereby bringing order to political life. Political institutions serve as the “rules of the game” for political actors (North 1990). They embody the collection of considerations beyond the control of an individual – norms, organizations, and formal processes and rules – that impinge on his or her choice of action. Political action depends both on what an actor wants to accomplish and the institutional setting that he or she faces. Institutions describe the rules that actors are to follow and the roles that the actors fill, and prescribe the consequences if an actor fails to follow the rules. Although this view of institutions has primarily been applied to domestic politics, it also holds true for international institutions.

Political institutions are designed to make political life and economic exchange regular and predictable (North 1990). Actors may wish that one another will act in a particular way when they create an institution, but they will act in accord with the incentives that the institution produces. Because the actors themselves fill the roles in the institution, only they can make the institution work. The initial question faced by institutions is: Given that each actor will pursue his or her best interest within the incentives that the institution creates and the actions of others, what stable collections of behavior do those incentives produce? Successful institutions induce stable behavior and incentives that support that behavior. Unsuccessful institutions fail to provide the incentives needed to check defections from the prescribed order. Institutions do

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not directly cause outcomes or force actors to behave in accord with the order they prescribe; they influence how actors understand and pursue their interests, and so affect outcomes by changing how actors behave.

The value of institutions lies in their persistence. Actors, however, are free to change institutions at any time. Because institutions affect outcomes, some actors may always wish to change institutions. A successful institution must ward off these demands for change. Actors opposed to a change must have the ability to defend existing institutions for those institutions to persist. The second question faced by institutions is “Why do institutions persist given the demands to change them?”<sup>2</sup>

Drawing on game theory, we can think about political institutions as equilibria of some game (Schotter 1981; Shepsle 1986; Calvert 1994, 1995; Greif 2006). An equilibrium in game theory is a configuration of behavior in which no actor wishes to change his or her behavior given the actions of the other actors. Equilibria are patterns of behavior that can persist, making the concept of equilibrium a useful way to think about how political institutions persist and operate. Institutionalized behavior must be an equilibrium of the game underlying the social situation.

An equilibrium in game theory requires two things. First, the actors’ behaviors are *mutual best replies*. No actor believes he can improve his position by changing his plan of action. Second, the actors share a *common conjecture* that one another will play according to the equilibrium. The shared understanding of a common conjecture is necessary for the players to understand that their equilibrium strategies are indeed the best actions for themselves. Because the outcomes of social situations depend on the possible choices of more than one actor, each needs some stable expectations about each other’s actions to understand how to act in her own interest. Common conjectures assure that the actors form accurate expectations about what others will do. Political institutions require a shared understanding to allow the actors to anticipate one another’s actions and then act within that institution. Without such an understanding, there is no reason to believe that the behavior will persist.

I elaborate this view by defining an institution to be a *constellation of equilibria that address related strategic problems* rather than an individual equilibrium.<sup>3</sup> The different but related strategic problems must all be addressed to create a stable institution. Each equilibrium depends on the others because each problem in isolation assumes an answer to the other problems. Different sets of actors play in each of these different but related games and so must take

<sup>2</sup> These two questions are those of institutional equilibrium and equilibrium institutions (Shepsle 1986).

<sup>3</sup> Tsebelis (1990) considers the similar idea of nested games, but his emphasis is on how the linked games change the payoffs of the players across them, leading them to make strategic choices that seem surprising within the context of any one game in isolation.

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those other equilibria as given in the strategic settings they face. For example, an effective trial system of criminal law requires – at a minimum – addressing the related problems of conducting a trial as a contest between the prosecuting and defense attorneys, a political issue of disciplining prosecutors so they pursue only appropriate cases, the relationship between the defendant and his attorney to ensure proper representation, and the issue of providing judges with incentives and training to act on behalf of the law as opposed to other interests. Because each actor plays in only some of these games, he or she takes the equilibrium behavior in the others for granted. All the equilibria depend on one another; in some systems, trying to bribe the judge is the best defense strategy, whereas in others it would only hurt the interests of the defendant.

Abstract principles knit together the common conjectures of the equilibria within an institution. In the earlier example of criminal law, the abstract principles center on judging cases on the evidence using the appropriate laws. All of the problems concern ways in which a case might fail to be judged on its merits, such as if the defense attorney fails to mount a cogent defense of the accused. These principles explain why the actors should expect that others will act in accordance with the institution in the games in which they do not play. Will the judge rule on principle instead of prejudice? These principles, like the common conjectures, must also be shared across all actors. Additionally, they also aid the players in modifying the institution as conditions change.

International law helps actors develop the strategic expectations that parallel the common conjecture and establish the abstract principles that coordinate different equilibria underlying certain institutionalized behaviors in world politics. Although such a shared understanding can arise simply through a history of interactions, public negotiation and agreement on the principles of that shared understanding could help confirm both what the understanding is and who holds it. International law embodied in multilateral treaties negotiated as public documents and formally ratified by states helps to create shared expectations of how states and their agents will act. Treaty law aids states by helping them anticipate one another's behavior more fully.

A shared understanding alone is insufficient to ensure that the parties will comply with the principles embodied in that understanding. Actors still have to be willing to act in accordance with those principles. Here mutual best replies reenter the picture. Those shared understandings that do not produce a self-enforcing pattern of behavior will fail in practice. Not only do we need to know the legal specifics of international law, we also need to understand the motivations and incentives of the parties under that law. Law could fail under two conditions: (1) when a party explicitly rejects that law, signaling that it does not intend to comply with the law; or (2) when the law fails to induce the parties to comply with its provisions. Legal principles must be married to practical politics for international law to succeed.



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The laws of war are the most dramatic example of this argument about political institutions and equilibrium. Because the parties are already at war, they have no recourse to a higher sanction to enforce legal obligations on one another. Laws of war can be effective in limiting violence during wartime when the warring states understand what the limits are and act to live within those limits. Additionally, the laws of war create obligations and rights for individual soldiers as well as states, because these laws address the related strategic problems of violence on the battlefield, the strategic competition between states at war, and how states control their soldiers as their agents. As discussed later, *when* states comply is a complicated question. The combination of shared understanding and restraint through self-interest can fail in many ways. This book seeks to illuminate those difficulties by examining the strategic logic of the laws of war and the historical record of their successes and failures in the wars of the twentieth century.

#### INSTITUTIONS AND NORMS IN INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW

As mentioned earlier, scholars of international relations have long argued whether standards of right and wrong play a role in world politics. The current version of this long-running debate matches the neorealists and the constructivists. Both camps agree that international politics is an anarchy; actors cannot appeal to a higher authority to enforce agreements and resolve their conflicts. Neorealists argue that anarchy forces states to distrust one another and rely on their own capabilities to defend their interests. Calculations of power and interest trump principles of right and wrong. Constructivists contend that shared understandings shape international politics and allow states to transcend the effects of anarchy. In the memorable epigram of Alexander Wendt (1992), “anarchy is what states make of it.”

Neorealists believe that the necessities of international competition compel states to act in the ways they do. The anarchic system means that a state’s power alone is the ultimate guarantor of its continued existence. In some cases, threatened states may be aided by others who benefit by providing that aid, most commonly through defeating the power that threatens them as well. The balance of power does not work automatically, however, and states cannot assume that others will come to their aid when they are threatened by an aggressor. Consequently, some states seek to increase their power, even through war if necessary, creating a threat to the security of other states. In all these decisions, states choose on the basis of a calculation of power and interest. Neorealists place no value on normative commitments to defend others, as in a system of collective security. If one state fights to save another, it does so because it is in its interest to do so. To quote John Mearsheimer, “[r]ealists ... believe that institutions [defined by Mearsheimer as ‘a set of rules that stipulate the ways in which states should cooperate and compete with each other’] cannot get states



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to stop behaving as short-term power maximizers” (Mearsheimer [1995b, 82], quoting Mearsheimer [1995a, 8]).<sup>4</sup>

Constructivists believe that norms and identities shape international politics to the extent that they constitute power and determine interests. They link the two concepts of norm and identity; norms are “collective expectations for the proper behavior for a given identity” (Jepperson, Wendt, and Katzenstein 1996, 54), whereas identities are “images of individuality and distinctiveness held and projected by an actor and formed through relations with ‘significant others’” (Jepperson, Wendt, and Katzenstein 1996, 59). I focus here on identity as a social role because that concept of identity naturally links to norms and is more widely used by constructivists in international relations.<sup>5</sup> Social roles prescribe norms of conduct for the given role, and actors share an understanding of what role each holds in a given situation. The shared understanding of which role is active in a given situation is essential because actors have multiple identities. A simple illustration may help. I hold several identities; one is the father of my children, another is a university professor who teaches undergraduate students. Both of these social roles prescribe norms of acceptable and unacceptable behaviors, and I and others know which role I am supposed to fill and so what conduct is appropriate and what is inappropriate by the current social setting. Acts that are appropriate for one identity, say, inviting my children to sit in my lap while we talk, are completely inappropriate for the other. Returning to international relations, constructivists describe how the identities of states and the norms attached to them have changed over time. Wendt (1999) criticizes the realists as assuming that the role of states as suspicious competitors cannot be changed; he argues that states under anarchy could hold identities as enemies, rivals, or friends, all of which entail different norms of international relations. These identities trump the nature of anarchy to determine what they expect from one another and how they behave toward one another.

Scholars of international law separate along parallel lines on whether legal obligation to that law restrains states. Realists, such as Jack Goldsmith and Eric Posner, argue that international law and compliance with that law by states is a product of their interests. “It [international law] is not a check on

<sup>4</sup> Realists do not agree completely on the corrosive effects of anarchy. Mearsheimer (2001) argues for offensive realism in which all states must pursue power in the short term; whereas Glaser (2010) contends that states may be able to resolve some of the insecurity of anarchy under the right conditions. Even for Glaser, structural factors, such as the offense-defense balance, rather than ideational factors, such as a shared commitment to defend the peace and sovereignty of other states, are the key to overcoming anarchy.

<sup>5</sup> I do not consider intrinsic identities of individual actors if they are not recognized to entail norms of behavior. I also collapse Wendt’s four types of identities – personal or corporate, type, role, and collective (1999, 224–233) – into one because they all share the two key elements I discuss: norms linked to each identity and a shared understanding of which actor has what identity in what situation.

state self-interest; it is a product of state self-interest” (Goldsmith and Posner 2005, 13). Their position is not that international law is ineffectual, but that the beneficial effects of international law lie in clarifying state positions and aiding states in reaching mutually beneficial agreements. Law exists because states see it as a way to advance their interests, and so it exerts no independent pull toward compliance. Most scholars of international law believe, however, that international law creates obligations which bind state action, the parallel of the constructivist position that norms appropriate for an actor’s identity help to constitute that actor’s interests. Thomas Franck (1990) argues that international law gains legitimacy and so the power to obligate states to comply with it through four mechanisms: (1) determinacy – a clearly understood rule aids transparency in judging what obligations are and when they have been met; (2) symbolic validation by states reinforces their acceptance of a legal standard and the values it codifies; (3) coherence – a rule which is applied consistently in accordance with the principles motivating it both reflects existing legitimacy of the rule among states and reinforces it; and (4) adherence – the extent to which law is both supported by secondary rules that explain how to apply it and embedded within a larger structure of law to which it adheres. Franck does not argue that the compliance pull of international law is absolute, only that it exists and strengthens with the legitimacy of that law as measured by his four mechanisms. States comply both because they believe the norms encased in legitimate law are proper and because they wish to affirm their identity as a lawful state with the privileges and obligations that come with that status.

The intersubjective nature of identities and the norms they entail is essential for them to operate as social structure. Actors cannot choose their identity freely for a given situation because if they could, identities and norms would not shape their choices. I have a large collection of baseball caps from the days when I attended games in many different cities, where the caps allowed me to assume the identity of a fan of the home team regardless of my true loyalties. If identities were like baseball caps, identities would not constrain actors because actors could change their identity freely, much in the way that I – simply by wearing a cap of the home team – can avoid any unpleasant consequences that might follow from being a fan of the visiting team in the midst of hometown fans who have been drinking.<sup>6</sup> Because identities are social phenomena (other actors recognize an actor’s identity for a given situation and expect that actor to live up to the obligations of that role), an actor is not free to choose whatever identity suits its purposes of the moment. This is not to say that identities do not change; indeed, the central thrust of constructivism explores how identities and the norms associated with them are socially constructed over time. Instead, the intersubjective nature of identities and norms

<sup>6</sup> Having attended Dodger-Giant games in Candlestick Park in the past, I have seen the threat of violence present in the fans of the bucolic sport of baseball.