



*International Law
and
Institutions*

PS93D

11/29/2006

International Law

Poll:

Do you think that international law and institutions pose a significant challenge to the state?

OR

Do you think they offer little or no challenge to states?

Agenda

- What is international law and how does it function?
- How might it pose a challenge?
- What problems do scholars face?
 - Endogeneity
- What does the empirical record tell us?
 - Regulatory agreements
 - Human rights and humanitarian intervention

What is International Law? (Definition)

- Doctrine of SOVEREIGNTY
- “[International law is] the body of rules and principles of action which are binding upon civilized states in their relations with one another” (Brierly, *The Law of Nations*, 1949:1)

What Does This Mean?

- ANARCHY \Rightarrow international law \neq domestic law
- States, not individuals (usually!) are subjects under international law
- Two essential questions:
 - **WHO gets to make international legal decisions?**
 - AND*
 - **WHO do these decisions affect?**

What is International Law? (History)

- Congress of Paris in 1814 -- Declaration for the "freedom of navigation on international rivers" (Brierly, 1949:87)
- Dispute resolution without resort to force
- Bilateral agreements not always efficient
 - International Telegraphic Union, 1865
 - Universal Postal Union, 1874
 - International Institute of Agriculture, 1905
 - Radio-telegraphic Union, 1906

Success Story – Coordination via Institutions

- Universal Postal Union
- Challenge to sovereignty?
- Institutions for solving **coordination problems**
(remember this!)

Types of International Law

- CUSTOM

- *unwritten* -- not based on formal agreements between states.

- TREATY

- (a.k.a. conventions, agreements, charters, pacts, or covenants)

- *written and signed* agreements between states

How is Customary Law Made?

- state practice
 - something that some states do
- *opinio juris*
 - “opinion of right” = other states recognize the practices as legitimate and acceptable
- *NOT* through force alone
- *Example*: ambassadorial protections

How Are Treaties Made?

- Any bilateral or multilateral agreements signed by states
- Binding **ONLY** on the signatories
- self-executing
- *Example:* The Charter of the United Nations, signed by 191 states, on which it is binding

U.N. Charter - Use of Force

- Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”
- Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”
- Article 42: The U.N. Security Council may authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

What About International Courts?

- International Court of Justice (ICJ)
 - state \Leftrightarrow state
- European Court of Human Rights (ECt.HR)
 - individual \Rightarrow state
- International Criminal Court (ICC)
 - international community \Rightarrow individual

European Court of Human Rights

- Enforces the European Convention on Human Rights
 - example of human rights law – exception to typical international law where sovereign states are the subjects
 - signed by the 46 states that are members of the Council of Europe; OBLIGATIONS for states and RIGHTS for individuals

International Criminal Court

- Crimes for which the ICC may try individuals:
 - Genocide
 - Crimes against humanity (i.e. widespread or systematic attack directed against any civilian population, including murder, enslavement, and forcible deportation)
 - war crimes (i.e. crimes under the Geneva Convention, including torture or inhumane treatment)
- complementary jurisdiction

What Does This Mean?

SOVEREIGNTY

- **WHO gets to make international legal decisions?**
- **WHO do these decisions affect?**
 - For CUSTOMARY LAW – Which states get to decide?
 - For a U.N. RESOLUTION – Who is responsible for responding and enforcing?
 - Other TREATIES – Who gets to make the decisions?

The Problem of Endogeneity (1)

- Downs, Rocke, and Barsoom (1996)
- **Endogeneity** happens when an outcome variable is the result of a causal variable that is correlated with another causal variable that falls into the error term but is not specified in the model.

The Problem of Endogeneity (2)

- A simple model to describe the theory that international law determines state behavior:

State Behavior = International Law + e

$$y = x1 + e$$

Endogeneity problem if STATE INTERESTS (which is in the error term [e] because we have not included it in our model) is correlated with INTERNATIONAL LAW (x1) as well as with STATE BEHAVIOR in general (y)

The Problem of Endogeneity (3)

- This makes sense, because we assume states sign only treaties they have an interest in signing
- Problem: We don't know whether the real cause of state behavior is international law or state interests
- Need to control for the effect of state interests on international law

Regulatory Agreements (1)

- Downs, Rocke, and Barsoom (1996)
- Range from arms control to environmental protection policies to trade agreements
- Sometimes look like mixed-motives Prisoners' Dilemma game, rather than a coordination game.

Regulatory Agreements (2)

- Mitchell (1994)
 - Compliance with expensive equipment regime
 - vs.
 - Non-compliance with less-expensive OILPOL regime
- Good news? Only if regime design addresses coordination *and* cheating

Human Rights and Humanitarian Intervention (1)

- Human rights law -- different from other international law
- Is it eroding sovereignty?
- Kathryn Sikkink (1993)
 - Hypothesized causal mechanism: NGOs provide information on human rights abuses to the international community, which pressures offending state \Rightarrow change

Human Rights and Humanitarian Intervention (2)

- PROBLEM: Were power differentials actually the motivator?
- Does this take us back to the idea that enforcement determines compliance when interests do not?
- Transparency is important -- but is it sufficient on its own?

Human Rights and Humanitarian Intervention (3)

- Martha Finnemore (2003) -- military intervention always a challenge to sovereignty
 - Argument: changing legal norms \Rightarrow > humanitarian intervention
 - (expanded definitions of human rights)
 - expectation of **multilateral** rather than **unilateral** action

Human Rights and Humanitarian Intervention (4)

- PROBLEM: Includes NATO intervention in Kosovo as an example of legitimate multilateral humanitarian intervention.
- BUT this action is widely considered by legal scholars to have been ILLEGAL, although arguably morally correct.

Human Rights and Humanitarian Intervention (5)

- This raises an interesting question. If international law condemns actions that are arguably *morally* legitimate, what does that say about the effectiveness of international law?
- WHO HAS RESPONSIBILITY?

1948 Genocide Convention

- Article 3: “The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.”

1948 Genocide Convention

- Article 5: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3.”
- Article 8: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article 3.”

Human Rights and Humanitarian Intervention (6)

- Remember Article 42 of the Charter of the United Nations?
 - Article 42: The U.N. Security Council may authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”
- But what if the U.N. doesn't take that action?
- *Examples: Bosnia and Kosovo*

Human Rights and Humanitarian Intervention (7)

- **Bosnia**: U.N. Security Council established a no-fly zone (*Resolution 781*) and authorized member states to take “all necessary measures” to preserve it (*Resolution 816*).
- NATO bombings explained as legally justified for serving that purpose.

Human Rights and Humanitarian Intervention (8)

- **Kosovo**: U.N. passed Resolution 1199 in September 1998 saying that the “humanitarian situation” in Yugoslavia needed to improve and that it would “consider further action and additional measures”
- BUT China and Russia threatened veto
- So NATO acted without authorization

“*Challenge*” to *International Law*?

- Does this represent a “challenge” to international law itself from sovereign states?
- Did the legal mechanism fail?
 - If so, is this a problem that can be solved?
- Were NATO’s actions *morally* right?
- What do you think?

Critical Perspectives

- Some scholars argue that because NATO action was unauthorized, and thus illegal, it was also wrong.
- Others disagree -- legal scholar Fernando Tesón, argues that the U.N. Security Council itself has a “legitimacy deficit” and that NATO, a “liberal alliance” has a stronger claim for legitimacy on issues of human rights (Tesón 2005:389)
- What do you think?

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Further Readings

If this is a topic that interests you, here are a few works that might be helpful:

- J.L. Brierly (1963) *The Law of Nations*. Oxford University Press: Oxford.
- Fernando Tesón (2005) *Humanitarian Intervention: An Inquiry into Law and Morality*. Transnational Publishers: Ardsley, N.Y.
- Martha Finnemore (2003) *The Purpose of Intervention: Changing Beliefs About the Use of Force*. Cornell University Press: Ithaca, N.Y.
- Kathryn Sikkink, "Human rights, principled issue-networks, and sovereignty in Latin America," *International Organization* 47.3 (Summer 1993): 411-441.
- David Chandler (2002) *From Kosovo to Kabul: Human Rights and International Intervention*. Pluto Press: Sterling, VA.