SW 41: Disciplinary Perspectives and Legal Truth

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- What is your science's epistemic goal?
- What are your science's prevailing methods (i. e.: how do you assess the validity of an argument, when do you consider something "true", proven, or: falsified)?
- (For non-lawyers:) How are legal rules and institutions relevant for your science? Can you give normative input?
- How high is your science's "export potential" (i. e.: how difficult will it be for another science to (i) understand (ii) use findings of your science)?

I will offer the perspective of a public international lawyer. I briefly set out the different epistemic goals of international legal scholarship as I perceive them and then concentrate on the goal of the identification and interpretation of legal norms. I will make the argument that the positivist legal method which I believe is the core of a specifically legal science encounters difficulties with respect to international law. I wish to explain this argument with reference to two specificities of international law: firstly its frequent vagueness and low institutionalization and secondly the appearance of new forms and instruments of international governance.

The tasks of international law scholarship

1. What is the law, what is its structure, its basic concepts and principles, how is it to be interpreted and applied in individual cases? It is this question on which I would like to focus in a bit more detail in a minute and in relation to which I believe one can speak of law as a legal science that is different from economic, historical, philosophical or sociological analysis.

2. Related to the task of the exposition of the law, its structure and foundational concepts is the task of giving a historic account of the development of legal norms and institutions. For international law Jospeh Weiler has specified that it might be even more useful to adopt geology of international law as an approach to the past of international law in order to illuminate the present. He writes: “[W]hereas the classical historical method tends to periodize, geology stratifies. History emphasizes change; geology emphasizes accretion. Typically, a geological snapshot is taken and then the accumulated strata of the past are identified, analyzed, conceptualized. By stratifying -- geology folds the whole of the past into any given moment in time – that moment in which one examines a geological section.

This method turns out to be crucial for th[e]...understanding of the international legal system."[1]

3. Evaluation of the law and instances of law application

This can be and is being done according to a variety of standards. Of particular relevance in international legal scholarship currently are three such standards:

- Economic: do legal rules yield efficient results?
- Democratic theory: increasingly applied to determine the conformity of international institutions and their activities with democratic standards
- Morality and global justice

4. A further goal of legal science (if not an epistemic one) is the development of the law. Legal scholars partake through their writings and legal opinions to Law's development. In international law this is explicitly recognized by Art 38 of the Statute of the International Court of Justice. This provision is generally regarded as an exposition of the sources of international law. Apart from international treaties, customary law and general principles of law it mentions next to judicial decisions "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Exposition of the Law

Exposition of the law in my view forms the core of legal science. If I say that it forms the core I do not want to say that this is what most lawyers do nor that this is what most lawyers should be doing.

Many scholars of public international law deal with other questions and usefully so. Many address for example the question why states comply with international law. The reason why these enquiries in my view are not legal enquires is that the methods employed are derived from other disciplines. Thus, for example, Eric Posner and Jack Goldsmith employ economic analysis to arrive at their much criticized thesis that international law is merely epiphenomenal that it cannot induce compliance where compliance is not in the self-interest of states.[2]

Another example is Ryan Goodman from NYU who employs sociological tools and explains compliance as a process of acculturation, the – very simplified – meaning being that: states follow other states' example in e.g. the ratification of human rights treaties to become a bit more like these other states.[3] The approach of these scholars is an external one, they make important statements about the law but not within.

[1] J. Weiler, The Geology of International *Law*: Governance, Democracy and Legitimacy, 64 *Heidelberg Journal of International Law* (2004), 547, at 549.
[2] J. Goldsmith, E. Posner, *The Limits of International Law*, 2005.
[3] R. Goodman, D. Jinks, International Law and State Socialization: Conceptual, Empirical, and Normative Challenges, 54 *Duke Law Journal* (2005), 983.

Now with respect to the exposition of international law, the question what constitutes international law and its main concepts and principles and how it is to be interpreted and applied I wish to contrast two main approaches or methods:

On the one hand positivist legal method, or doctrinal constructivism and on the other hand accounts of law that link the normativity or validity of law to its conformity with extralegal standards such as standards of morality or global justice.

What characterizes the positivist method is:

1. The insistence on the seperability of law and morals: immoral or illegitimate law does not lose its validity for the reason that it is immoral or illegitimate.

2. Valid law is identified -- if the positivist follows Kelsen – by reference to the basic norm of state consent and pacta sunt servanda or -- if he is a Hartian -- with respect to a social convention.

3. The aim of the positivist method is abstraction from individual instances of law application and systematization through the identification of legal concepts and principles.[4]

The dichotomy between a positivist and a moralized approach is of course a simplification, but I think it is a simplification which very much reflects the large bulk of today's international law scholarship.

Two specificities of international law which make apparent the obstacles to the positivist method in international legal scholarship

First: Legal provisions in international treaties are often vaguely phrased, frequently no binding adjudication mechanism, and only weak enforcement mechanisms exist.

Example: Prohibition of the use of force in Art. 2:4 UN Charter:

> 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, or in any other manner inconsistent with the Purposes of the United Nations.

The UN Charter recognizes two exceptions to this prohibition: use of force for the purpose of self-defense or the use of force if mandated or authorized by the UN Security Council under Chapter VII of the UN Charter upon an identification of a threat to or breach of the peace

[4] A. v. Bogdandy, The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe, 7 *International Journal of Constitutional Law* (2009), 364.

There are not a great many judgments that clarify the content of this norm. A further notable characteristic of the law of force was pointed out by Martti Koskenniemi: namely that application of this norm usually takes place in situations of crisis.

Its interpretation and application became the focus of scholarly attention during the Kosovo conflict in the late 1990s. The legal question that arose was whether NATO could legally intervene in Kosovo and employ military force in order to put an end to grave violations of human rights despite the fact that the SC even though it had determined a breach of the peace had not authorized the use of force.

The Second specificity to which I intend to relate the positivist and the moralist method is the emergence of new forms of governance at the international level.

Art 38 of the ICJ statute is generally taken as an exposition of the sources of international law. It lists as sources international treaties, custom and general principles and as subsidiary means for the determination of legal rules judicial decisions and the teachings of the most highly qualified publicists of the various nations.

Increasingly, however, governments, non-state actors and international institutions engage in governance activities which do not take the form of international treaties and which are also not captured by custom or general principles.

Examples are the adoption of non binding codes of conduct by international institutions or networks of government officials, policy assessments or the identification of best practices.

The question for legal scholarship engaging in the exposition of international law now becomes:

Are these instruments legal instruments? And secondly which legal framework is to be applied to such instruments in order to determine their legality?

After this short exposition of two specificities of international law, let me now return to the first constellation: vague and open norms and the example of Kosovo:

Contrary to the scenario of the new forms of governance I just mentioned, here we have undisputedly a source of international law: the UN charter as an international treaty which came into force because states consented to it and ratified it.

The question is “merely” how to interpret and apply it in a specific case such as Kosovo. Or formulated differently: the question is which norm follows from this source in this specific situation. As you probably know there was a division among legal scholars.While most held a humanitarian intervention by NATO in Kosovo to be desirable from a humanitarian perspective one camp held that the intervention was illegal but legitimate, the other camp held that it was legal. Among the latter were those who argued intervention was legal *because* it was legitimate

The first view was held by scholars that consider themselves to be positivists such as Thomas Franck and Bruno Simma, who adhere to the seperability thesis of positivism that there may be legal but immoral norms and that considerations of legality and legitimacy may not be collapsed. With respect to international law these positivists generally hold that the ground for the validity of norms lies in state consent to a norm. This view then influences their interpretation of norms. In the case at hand this means that interpretation of the prohibition of the use of force must not only stay within the limits of the actual wording of the provision but furthermore must be linked to state practice and other emanations of the opinions of governments as to the interpretation of the legal norm.

However, there have been important departures also within the positivist strand from a strict reliance on state consent. Scholars such as Bruna Simma who refers to himself as an enlightened positivist recognize that there are international norms which protect community interests such as human rights norms and which bind states beyond their will.[5] Doctrinal concepts that intend to protect such community interests are the concept of obligations erga omnes or jus cogens. Since these concepts find recognition in international treaties they may however also be linked back to state consent.

There remains an important tension within international law which affects its scholarship: namely the tension between a focus on sovereign equality of states and concurrently state consent on the one hand and on the other hand an increased focus on the individual through the protection of human rights and the promotion of democratic forms of governance.

To take up again the image proposed by Joseph Weiler, while we have a stratum of international law which emphasizes state sovereignty and consent we have another stratum which emphasizes the individual and community interests.

This tension is difficult to resolve for a legal positivist. To look again at Bruno Simma: He openly confesses his own political preference for a strong protection of human rights, but for theoretical and also pragmatic reasons he remains guided in his interpretations by emanations of state consent which – according to him -- may however also be found in resolutions of international institutions such as the GA.

On the other hand then we have scholars who take a different view, namely that the identification and interpretation of norms should be guided by a coherent value system. Thus for example the New Haven School promotes the view that all interpretation of international law should be guided by the common value of human dignity. For such an approach it is much easier to defend an interpretation of Art. 2:4 UNC that does not prohibit humanitarian intervention in a situation in which a government engages in egregious abuses of the rights of its own population even in the absence of a SC authorization.

In a similar vein Dworkin recently also defended an interpretation of international l aw which is guided by the aim to protect the dignity and rights of individuals.[6] According to Dworkin international law such as the UN Charter needs to be interpreted so that it makes best sense of the

[5] See e.g. A. Paulus, B. Simma, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 *American Journal of International Law* (1999), 302.

[6] Oral presentation at the conference „Constitutionalism in a New Key?" at the Wissenschaftszentrum Berlin, January 29, 2011.

text given the underlying aim of international law. According to Dworkin this aim is the creation of an international legal order that protects political communities from external aggression and protects citizens of those communities from domestic barbarism. Thus he criticizes an interpretation of the UN Charter which considers legal obligation to be created by consent. Rather he proposes that legal obligation follows from moral responsibility. Consequently he advocates a moralized approach to international law. As I understand him, it is particularly for the features I mentioned at the outset, namely that there is little institutionalized adjudication and enforcement, that a separation of moral and legal argumentation is premature. If law was understood as a specialized part of political morality, doctrines would, according to Dworkin, crystallize over time and the roots in morality would grow less prominent.

I now come to the second constellation: the emergence of new forms of international governance such as through the adoption of soft law, policy assessments of international institutions or the identification of best practices.

Here it seems that positivist and moral accounts of the law are collapsing at the moment. He questions dealt with after a descriptive account of governance activities are:

- Which of these new instruments constitute law?
- Which legal norms and principles should they conform to in order to be considered legal?

The aim of international legal scholarship in this area is firstly to identify normatively relevant activities in particular by international institutions.[7] The justification for legal scholarship to engage with these activities in the first place are their normative effects.

Examples;

- Codex Alimentarius non binding standards gain normative effect through reference in WTO norms
- PISA study has large impact on domestic education systems

To identify which of these instruments constitute law or by which law these instruments should be governed legal scholarship has recourse to standards of legitimacy, in particular: transparency, participation and accountability.

[7] J. Alvarez, *International Organizations as Law-Makers*, 2005; see also the various publications emanating from NYU's Global Administrative Law Project.

Theoretical grounding:

- Harts positivism by attempting to link these requirements to convention

However given the diversity of states and in particular governance systems which do not all subscribe to these principle the finding of a social convention is highly problematic.[8]

- Other point of departure for this scholarship is Lon Fuller's morality of law, which demands of law to conform to certain procedural standards such as prospectivity, publicity or consistency, which Fuller himself referred to as procedural natural law.

- Global justice including substantive standards of distributive justice

And here again we clearly leave the positivist realm. To conclude with a thesis:

In light of the particulars of international law, most importantly the absence of a constitution and a significant body of adjudicatory practice, international legal scholarship which aims at going beyond merely restating legal provisions and decisions or giving policy advice needs to proceed from an account of legitimacy. The prevailing accounts of legitimacy in international scholarship currently are based on democratic theory. It is my guess, however, that there will be a turn to global justice and substantive standards of equality given the experiences of growing inequality and social unrest we are currently making in western democracies.

[8] Cf. A. Somek, The Concept of Law in Global Administrative Law. A Reply to Benedict Kingsbury, 20 *EJIL* (2009), 985.