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Excerpt

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1 Introduction: The Crisis in International Law

In international law it is today of both theoretical and practical importance to distinguish between the international law of “coexistence,” governing essentially diplomatic inter-state relations, and the international law of co-operation, expressed in the growing structure of international organization and the *pursuit* of common human interests.

Wolfgang Friedmann, *The Changing Structure of International Law* (1964)

International law is the precursor of international government, and international government is nothing more than an intensification of international law. Similar to international society, international law has constantly evolved from its inception. There is no reason to believe that its evolution has ceased. Similar to natural evolution, the evolution of international law responds to changing conditions. This book thus claims that international law evolves functionally: it changes as its constituents determine new uses. The new uses evolve with factors such as globalization, development, demography, technology, and democratization, as well as with our understanding of our situation.

Indeed, international law may grow in a way similar to municipal law: establishing basic property rights and rules of security first and turning to creation of public goods and regulatory purposes later. As Wolfgang Friedmann explained, early international law only needed to be concerned with the right to territory, the commencement and conduct of war, and the treatment of emissaries. These were the requirements in a world where there were few externalities or public goods worth addressing, and in which most cooperation problems could be addressed through ad hoc and informal diplomacy. Under more interdependence, greater international law becomes functionally useful. It is clear that a static vision of the structure and function of the international legal system would be ignorant of this dynamism. Moreover, as the needs addressed by international law grow and its functions broaden, structural changes become appropriate.

The main argument of this book has five principal threads. First, expected changes in globalization, economic development, demography, technology, and democracy suggest greater need for international law in a number of areas of cooperation. These needs can be understood as a broadening of the domain of international law, but in addition, some of these needs will necessitate fortification of the power of international law. As greater issues are addressed among asymmetric states over longer periods of time, a stronger version of international law will be required. No longer will we be able to accept the concept that, to be effective, individual international legal rules must take the form of self-enforcing contracts.

Second, because domestic politics is increasingly insufficient to address important areas of public policy alone, international law's principal function is to serve as a mechanism by which the domestic politics of different states can be linked, in order to construct a formal mechanism of international politics. Within domestic politics, this international political linkage allows for the formation of domestic political coalitions that could not be formed in autarky. International law is thus a mechanism by which the costs or benefits to other states can be brought to bear on national decision making.

Third, although there are many ways in which international cooperation can take place within narrow fields, there are also many linkages, natural and constructed, between different narrow fields. Natural linkages are the types of issues that we generally consider under the heading "fragmentation," where a rule in a particular area has effects on the achievement of policy goals in another area. Natural linkages grow as more areas of international law are developed in greater depth, and these natural linkages are already pervasive. As the volume of international law grows, more natural linkages arise, precipitating the need to determine how different areas of law relate to one another. Constructed linkages may be devised in order to induce agreements that might not otherwise occur.

Fourth, as linkages occur naturally or are constructed, and as the aggregate volume of international law increases, these linkages make it more likely that states will comply with international law. This enhancement of potential enforceability actually increases the utility of international law and therefore induces states to make more international law. It is worth noting that there will still be many instances in which states choose not to establish international law with maximal enforcement power.

Fifth, as more international law is needed in more fields, and as stronger international law is required in some fields, there will be circumstances in which more highly articulated constitutional or organizational structures – including executive, legislative, and judicial functions – will be useful.

The growth of constitutional or organizational structures will benefit from economies of scale and scope and network externalities, and will therefore tend to expand until these economies are exhausted.

In summary, because of social change, international relations will be an increasing proportion of the concerns of citizens and the responsibilities of states. This will drive increasing production of international law and of organizational structures. This increasingly dense body of law and organizations will be seen to perform governmental functions. It is in this sense that the future of international law is global government.

Just a century ago, none of the categories of international law described in the functionally focused chapters of this book – addressing cyberspace, human rights, environment and health, finance and trade, intellectual property, migration, and investment – were very significant. There were good reasons – functional reasons – why they were not. There simply were few international concerns raised by these types of issues.

As Wolfgang Friedmann explained in his classic 1964 work, *The Changing Structure of International Law*, “The principal preoccupation of the classical international law, as formulated by Grotius and the other founders, was the formalization, and the establishment of generally acceptable rules of conduct in international diplomacy.”¹ Note that these were formal rules designed to facilitate informal interaction. They formalized the process of diplomacy, not the substance of international cooperation. That is, this international law simply formed the preconditions for informal and ad hoc diplomatic action, rather than the contractual structure of formal cooperation over international regulatory issues. This was the international law of coexistence. It also included the regulation of war. War was the first area in which cooperation became desirable.

A) CHANGING DEMANDS

As Friedmann explained, the changing demands of international society produced a demand for additional types of international law. In order to know what types of international law and institutions will be required in the future,

¹ Wolfgang Friedmann, *The Changing Structure of International Law* 5 (1964). See also Douglas M. Johnston, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments* (1997). Johnston suggests that the period until World War I was a period of “classical” international law, focusing on constraining the use of force, communication, and settlement of disputes. The subsequent “neo-classical” period until the mid-1960s extended this project to intergovernmental organization, codification, and human rights. For Johnston, the current “post-classical” period is concerned with the establishment of cooperative regimes and the transformation of international society to a world community.

we must ask ourselves how the issues we see today as international concerns, and the issues that we have not yet identified as international concerns, will develop. We must next ask what requirements for cooperation – in terms of both rules and organizations – they will occasion. Of course, we cannot anticipate everything, but we should not ignore the issues that can be anticipated by extrapolation from what we know.

Change has occurred along several major dimensions. First, with industrialization and the development of modern economies, including technological change and urbanization, the state has found it useful to intervene domestically in a variety of regulatory contexts. By the beginning of the twentieth century, we see the rise of the regulatory state in response to externalities, information problems, public goods, and other market failures. Second, with globalization, these interventions and the circumstances to which they respond often cross borders or affect the conditions of cross-border competition. Furthermore, globalization has included greater industrialization of developing countries, increasingly involving poor countries in these concerns. Third, technological change, apart from its contribution to industrialization and globalization, has increased the need for international law to regulate technologies in order to limit adverse consequences. Fourth, demographic change, including shifting population densities contributing to urbanization, will have important effects on the demand for international law.

B) LIBERAL GOVERNMENT AND INTERNATIONAL LAW

Another type of change that will have great effects on the demand for international law is increasing democratization or accountability of governments. As governments become more accountable, their citizens will more effectively demand efficiency in the provision of governmental services. The state is less and less the society of the sovereign, served by the people, and increasingly the society of the trustee government, servant of the people. As such, the trustee government will be forced to admit that in order to serve the people best, there will be situations in which it must give up authority.

In accordance with the principle of subsidiarity, which is a principle of efficacy and efficiency, the state must sometimes give up authority to subnational units; non-territorial but local social units such as professional associations, churches, or schools; global non-territorial and non-state-based social units; and multilateral, regional, or bilateral organizations of states. It gives up authority on behalf of its citizens, in the exercise of subsidiarity driven by accountability, to allocate authority to the social organization best suited to exercise authority in the particular context. As discussed later in the book, this

search for efficacy and efficiency takes place even assuming that government officials are not purely interested in public welfare.

Illiberal governments would have fewer reasons to cooperate than liberal governments, simply because they are characterized by unaccountability. Illiberal governments have self-interested rulers, whose goal is to maintain complete sovereignty, or autarchy, in order to maintain their ability to better themselves at the expense of the population. The recent governments of North Korea and Myanmar are examples. However, self-interested rulers who see themselves in a strong position might be interested in increasing the size of the pie by engaging in welfare-enhancing governmental practices, including international cooperation. But an illiberal government would be expected to sacrifice rather than maximize regarding the size of the pie, in order to maximize its chance to stay in power. Tyrants may be compared to monopolists, providing the minimum consumer welfare and maximizing producer welfare. Purely illiberal governments also conform to the political science “realist” model of the security-maximizing government, insofar as they maximize relative gains versus domestic and international opposition, rather than absolute gains.

Observing the Arab Spring of 2011, increasing accountability of authoritarian regimes around the world, and a contagion of decreasing tolerance of authoritarian regimes by their citizens, one might be forgiven for developing an optimistic anticipation of the reduction of authoritarianism, or at least of the most unaccountable authoritarianism. Liberal governments would more often have reasons to cooperate. By cooperating in appropriate circumstances, they enable themselves to deliver more of the goods that their citizens desire, even if they compromise their own autonomy to do so. “It is curiously true that after trouncing the claim to ‘divine right’ of the absolute monarchs, political theory allowed it to be transferred to the absolute State, and we have suffered it to persist to our own day, though our culture rejects the absolute and our outlook discounts the divine in politics.”²

In his recent book, *The Globalization Paradox: Democracy and the Future of the World Economy*, Dani Rodrik argues that there is a policy trilemma among local autonomy, democracy, and globalization.³ He argues that globalization requires some constraint over national measures. He assumes that domestic autonomy, combined with democracy, will produce unconstrained national measures inconsistent with globalization. He concedes that it would

² David Mitrany, *The Progress of International Government* 71 (1933).

³ Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (2011).

be possible to have globalization with democracy, but only with global government as opposed to national autonomy. However, he views it as unlikely that we will soon move toward the type of global government that would include democratic accountability. Furthermore, among the three, he would preserve local autonomy and democracy at the expense of globalization.

Rodrik seems to discount the possibility that domestic governments, in the exercise of sovereignty or “autonomy,” may recognize that they could achieve greater results in terms of national welfare or political support by accepting constraint over national measures. International lawyers recognize that local autonomy is not an all-or-nothing game, but a selective exercise in which international law is the tool for selectively compromising local autonomy. There is much potential nuance in international commitments, which might require a certain result, but leave it to local autonomy to achieve that result. International legal rules can permit a wide variety of mechanisms for customization or conditional constraint. This incomplete contracting function of international law and organization, allowing international law to apply selectively under particular contingencies, is discussed in greater detail in Chapter 9.

Furthermore, Rodrik seems to assume that democratic accountability can only operate at the level of either the state or international law, but not at both levels. However, the growth of the role of the European Parliament has shown that international democratic accountability may coexist with national democratic accountability, so there is no necessary trade-off between globalization and democracy.

The most characteristic idea of the liberal democratic philosophy leaves the individual free to enter into a variety of relationships – religious, political, professional, social, and cultural – some of them of international scope.⁴ Liberalism requires both vertical and horizontal subsidiarity.

Liberal society requires compromise. In a liberal framework, social groups decide to take certain collective actions; these actions benefit some members of the group more than others, or even harm some members of the group. These compromises are accepted as the price of society. Indeed, liberal society would be highly unstable – and would eventually fail – if, first, the aggregate benefit from collective actions did not exceed the aggregate detriment and, second, the aggregate detriment to a significant subset of members substantially exceeded the aggregate benefit to those members. To be sustainable, liberal society must, as a whole, be collectively and individually rational. It is possible to have an illiberal society in which coercion may maintain stability even where society is collectively or individually irrational. Indeed, the development of enlightened

⁴ David Mitrany, *Retrospect and Prospect* (1975).

societies and the move away from feudalism may be measured in terms of the movement from illiberal government to liberal government, from coercion to choice, and from government as ruler to government as servant.

Within the modern liberal state, we increasingly take this liberal rationality for granted. Constitutions are structured – both formally and informally – to ensure a process that makes decisions that are collectively beneficial and, on a prospective risk-adjusted basis, individually beneficial. Compromise may involve logrolling or even more diffuse structures for reciprocity over long horizons – to provide for satisfactory anticipated distributive outcomes that meet the requirements of collective and individual rationality.

This domestic process is complex and delicate, but we must also make the same kind of analytical move that economists made when they moved from closed-economy analysis to open-economy analysis: we must consider the effects on domestic society of many types of actions by foreign persons. These actions might include security threats, industrial policy, pollution, financial recklessness, and many others. Additionally, we must consider that inaction by foreign persons might have effects on domestic society: the failure to regulate or join in the production of global public goods might have adverse effects.

If national government did not exist, it would have to be invented. In the words of longtime Massachusetts Congressman Barney Frank, “Government is the name we give to the things we choose to do together.”⁵ Modern liberal government functions to improve people’s lives: providing public goods, and regulating in order to achieve collective and individual improvement. The *public choice* critique of government views government as an instrument of redistribution – redistributing from the weak to the powerful. Although this critique has power, it is not a complete critique. Rather, all governments contain facets that promote efficiency, and thus welfare, and facets that promote redistribution. Terry Moe observes as follows:

Political institutions serve two very different purposes. On the one hand, they help mitigate collective action-problems, particularly the commitment and enforcement problems debilitating to political exchange, and thus allow the various actors in politics to cooperate in the realization of gains from trade. On the other hand, political institutions are also weapons of coercion and redistribution. They are the structural means by which political winners pursue their own interests, often at the great expense of political losers. If we

⁵ As quoted in Jim Geraghty, “The Things We Choose to Do Together,” *National Review*, August 27, 2008. Retrieved from <http://www.nationalreview.com/campaign-spot/8984/things-we-choose-do-together>. Of course, Frank’s statement is somewhat overbroad: we sometimes do things together informally, or through social organizations, rather than through government.

are to understand where political institutions come from and why they take the specific forms they do, we have to pay serious attention to both sides of their theoretical story.⁶

An argument that redistribution, or the political, dominates efficiency would be analogous to arguing that the irrationality that forms the focus of behavioral economics dominates the preference orientation of welfare economics. Both public choice and behavioral economics have explanatory power, but they both leave room for *welfarist* analysis. The scope of relative power of these analytical approaches can only be assessed empirically.

Furthermore, the redistributive component may be seen as benevolent – in the form of transfers to the needy, for example – or as pernicious. The main point, however, is that even if the redistributive component is pernicious, it is not necessarily dominant in relation to the efficiency-promoting component. Throughout this book, I assume that government has both purposes: efficiency and redistribution.

C) INTERNATIONAL GOVERNMENT

National government is constantly reinventing itself as technological, social, and other changes drive demand for different public goods and regulation. This change can be more specific, in the form of specific rules or structures, or more general, in the form of decision-making processes or structures. The more general types of processes or structures can often be understood as constitutional in nature. However, there is a bias toward the existing institutional structures, privileging these structures in our discourse. This bias sometimes appears to play a role in resistance to new international law or organizations. We can also observe, however, that given the modern demands of society, if international government did not exist, it would have to be invented. Broadly speaking, government is the name we give to the things we choose to do together through formal rules and organizations, even in the international arena.

I avoid the vague term “governance” in favor of the more concrete term “government.” By referring to government instead of governance, I wish to focus on formal rules and organizations: on law. There are international public goods and regulatory needs that can provide collective and individual improvement. There is a domain for informal action, and for so-called soft law, as well as a substantial domain for hard international law. By using the term government

⁶ Terry M. Moe, “Political Institutions: The Neglected Side of the Story,” 6 *Journal of Law, Economics, and Organization* 213 (1990).

I also reject the idea that a certain institutional intensity or scale is required in order for a mechanism to be considered governmental. Rather, in this book I see government as infinitely scalable, with each rule of international law an element of international government. The interesting question is whether we have the right kind and amount of government.

On this basis, it is easy to say that international government exists. The existing structures of international law and organization comprise a kind of rudimentary government. It has a set of rules that is limited in volume compared to an advanced domestic system. Its legislative system is largely dependent on unanimity, it has little capacity for mandatory adjudication, and it has little executive or enforcement capacity. The description of the international legal system as a rudimentary form of government is only by reference to existing liberal national governments. This comparison is largely inapt, however, because the functions demanded of the international legal system are generally different from those demanded of national governments.

Will international law become a less rudimentary, more elaborate, form of government? The question asked by this book is what changes in international law seem suggested by existing international cooperation opportunities, and what changes are likely to be suggested in the future. So, this book is about the future of international law. Given the understanding of international government described previously, it is about the future of international government. We might hypothesize that in an efficient government system all law that is efficient has already been created. To borrow from a classic joke about economists: there are no \$20 bills waiting on the sidewalk to be found, because if they existed they would already have been found. However, no market is perfectly efficient, and the market for institutions depends on imagination and evaluation – we will not reach efficient institutions unless we engage in an analytical process. Furthermore, a lack of institutional imagination, artificially limiting the possibility for international government, may blind us to the existence of many \$20 bills available to us if we simply had the imagination and evaluative capacity to see them.

Another important respect in which the present international legal system is rudimentary is that it tends to make and administer rules in separate functional categories, often without a clear and effective system for integrating the resulting rules. This is the issue that has come to be known as *fragmentation*. Although fragmentation is not necessarily a problem, there are important ways in which greater integration might be desirable in particular circumstances.

First, there are some natural overlaps between policy measures. Some policy pairs that serve as examples include industrial policy and environmental policy,

human rights and security, or financial services regulation and monetary policy. Second, integration might allow for broader and longer-term reciprocity when making agreements. For example, including intellectual property rights as a topic for negotiation in the Uruguay Round of trade negotiations broadened reciprocity, allowing more complex barter arrangements. These types of complex barter may also serve to promote compliance with international legal rules, providing greater capacity for retaliation in the event of violation. Third, in an embedded liberalism sense, one type of instrument might serve to balance out the distributive effects of another type of instrument. Thus, trade liberalization might be combined with more extensive aid for development. Fourth, there may be economies of scale or scope in the development of institutions. It may not be efficient to create an institutional structure for dispute settlement in connection with disputes regarding division of the international tax base, but if an institutional structure has already been created to deal with foreign investment disputes or trade disputes, adding to the jurisdiction of these structures might be more attractive.

D) INSTITUTIONAL CHANGE

This book is an exercise in institutional imagination, but not in institutional speculation, and not, I hope, in idealism. The goal is to challenge a state-dominated understanding of global society, but not to ignore the continuing importance of the state as the central structure of government for many years to come. Moreover, the goal is to examine real international issues, and realistically evaluate the actual and incipient needs for international law and organization, rather than to speculate about those needs. Finally, this book gives politics its due, by recognizing that, although increased welfare is an important vector in determining international cooperation, most international cooperation must be mediated through national political systems.

Whereas many have criticized the concept or principle of state sovereignty, often with good reason, it does not advance debate, or understanding, or simply reject a concept. Although others have posited state sovereignty as an immutable law of nature, we know that sovereignty was constructed, and is constantly being reconstructed, by real-world social events and international law. Rather than adopt one of these incompletely considered hate or love relationships with sovereignty, it is incumbent on us to look backward and forward, in order to pragmatically evaluate the types of government structures that we need, and to recognize that the state, and its sovereignty, are contingent. As the social context that produced them has changed, so must our evaluation of their utility.