INTRODUCTION: THE RESORT TO NORMS

I HISTORICAL RECOLLECTION AND THE ESTABLISHMENT OF "FIELDS"

This book examines the role of norms in international life. To the extent that the focus is on interactions in the international arena, it is a book about international relations. To the extent that the investigation is interested in legal norms it is a book on legal theory. Insofar as issues of "interpretation," "precedent," and "sources of law" will be discussed, it is in a way a treatise on jurisprudence. To the extent that rules and norms are viewed as means to maintain social order, it is a book on social theory. Finally, to the extent that the analysis is occasioned by the re-reading of some of the classics of international law and political theory, it is – at least indirectly and without wanting to claim comprehensiveness or completeness – a study of political thought.

Locating the inquiry at the boundary or intersection of various established fields has obvious dangers because it may satisfy none of the respective specialists and draw the ire of all of them. Nevertheless, interdisciplinary works, when successful, have their own rewards. Two justifications can be tendered in support of such an enterprise. First, an interdisciplinary approach can pose new and theoretically interesting questions. It can show important conceptual and empirical links which are lost in the more specialized inquiries that take a well-defined "field of study" for granted. Second, although the present regime discussion in international relations[1] has sparked renewed interest in the investigation of the role of norms in the international arena and thus has legitimated new types of inquiry, its treatment of norms suffers from a variety of epistemological shortcomings.[2]

Thus, while even the most promising approaches in political science are of limited help in illuminating the workings of norms in domestic and international affairs, traditional conceptualizations of law do not

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fare much better. They either depict law as a static system[3] of norms or as a normative order which becomes "legal" through its sanctioning character.[4] Powerful attacks against either of these conceptualizations have been launched during the past few decades. Nevertheless, a new consensus has now emerged and law as process, exemplified, for instance, by the prolific writings of the McDouglian "New Haven School,"[5] contrasts sharply with the more traditional approaches predominant on the Continent or in Latin America. In addition, there are some norm-types which do not clearly fall into the traditional Procrustean scheme and which have therefore to be characterized largely in terms of negative analogies. A case in point is the conceptualization of "soft law"[6] exemplified by the I.M.F. exchange agreements (gentlemen's agreements) or by the Helsinki Accords, which do not qualify as either law in the strict sense or as mere political statements with no legal consequences. Thus, the concept of law itself has become increasingly problematic.[7]

These two justifications suggest that perhaps something has gone fundamentally wrong in the conventional divisions of fields which provide the perimeters of our normal investigations. I suspect that it is our reliance on the unquestioned dichotomy between a "domestic order" and the international "anarchy" which is to blame for the continuing theoretical embarrassments.[8] By making social order dependent upon law and law, in turn, upon the existence of certain institutions – be they the existence of a sovereign or central sanctioning mechanisms – we understand the international arena largely negatively, i.e., in terms of the "lack" of binding legal norms, of central institutions, of a sovereign will, etc. As inappropriate as this "domestic analogy"[9] may be for understanding *international relations*, the conceptual links between order, law, and special institutions remain largely unexamined even for domestic affairs.

Given the increasing incoherence, it might be useful to rethink the whole set of problems. Two strategies offer themselves for this purpose. One would be to start anew with certain assumptions concerning the role of norms and deductively trace their implications. The other approach is largely embedded in a historical recollection. It raises new issues by attempting to rid us of the amnesia of what usually we take for granted and by rearticulating the unstated assumptions of our practices and theoretical understandings. As Charles Taylor reminds us:

> If one tries to identify the reasons for (the) differential placing of the onus of proof from age to age; why certain views have to fight for credence, how they can only acquire plausibility through creative re-

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> description while others are so to speak credible from the start, the
> answer is to be found in the background of practices, scientific,
> technological, practical, and the nature of their organizing principles
> . . . the dominant interpretations and practices may be so linked with
> a given model that this is, as it were, constantly projected for the
> members as the way things obviously are . . . Freeing oneself from
> the model cannot be done just by showing an alternative. What we
> need to do is to get over the presumption of the unique conceivability
> of the embedded picture. But to do this, we have to take a new stance
> towards our practices. Instead of just living in them and taking their
> implicit construal of things as the way things are, we have to
> understand how they have come to be, how they came to embed a
> certain view of things.[10]

In this context Hobbes's creation of a paradigm of international
relations is particularly instructive. It has always been noted that one of
the apparent great inconsistencies in Hobbesian thinking was its
failure to espouse a Super-Leviathan above the states, a solution to
which the logic of the model necessarily leads. Actually, it was only the
"idealists," the world government advocates, who drew this logical
conclusion.[11] Hobbes, on the other hand, having invoked inter-
national relations as a justification for the construction of the ahistori-
cal state of nature,[12] himself cast doubt upon the appropriateness of his
analogy. To that extent, Hobbes never committed the mistakes which
much of theorizing in international relations made when it started
from the domestic analogy. A further brief discussion seems required.

How do the two arenas of domestic and international politics differ,
or rather, given the radical individualism of the construct, how do the
different incentive-structures prevalent in these arenas influence the
actors' choices? In the case of the Leviathan among individuals, all
persons have a negative as well as positive incentive to leave the state
of nature, i.e., the fear of violent death and the prospects of "com-
modious living." Hobbes realized, however, that neither of those
incentives is strong enough to motivate *states* to leave the state of
nature. Most of the benefits from a division of labor (i.e., the positive
incentive) can be realized through the establishment of a com-
monwealth. In addition, states are also able to overcome the negative
incentive, i.e., the fear of violent death. They do not share the
infirmities of individuals, which prevent the latter from securing their
own survival. While even the strongest man has to sleep sometime,
and, therefore, can be overpowered, communities can institute shifts
in guarding the safety of their members. Consequently, the reality of
international life is quite different from the state of "war of all against
all."[13]

But if this argument is correct then the international arena is far different from, and not so terrible as, the situation in which man is like a wolf to his fellow man ("homo homini lupus"). Thus, although Hobbes adduced international politics[14] to give some plausibility to his construct, his own arguments disclose the questionable nature of the analogy. Since the laws of nature are always obliging in the individual conscience ("in foro interno," as Hobbes says), but not in actual conduct until institutional safeguards are provided,[15] it follows that as soon as international reality can be shown to differ from the state of nature, these "natural laws" provide a set of rudimentary understandings for regulating interactions among "persons of sovereign authority." It was precisely this conclusion which legal theorists such as Pufendorf[16] and Christian Wolf[17] drew from some of the Hobbesian premises and it is more the ignorance and amnesia of our contemporary specialists which make out of these theorists advocates of some type of mysterious "natural law."

Our initial efforts to counteract the "genesis amnesia"[18] by reconstructing the original Hobbesian argument turn out to have not only historical interest but also tremendous theoretical implications. It is not merely important to realize that we have misinterpreted Hobbes – although this is certainly true. After all, the charge of misinterpretation could easily be countered by pointing out that what Hobbes originally meant is irrelevant; what matters now is how *we* presently perceive the international arena, and to that extent the present neo-realist interpretation is what people believe to be "reality."[19] Nevertheless, it is our present reality which is, through the drifts and fundamental changes, out of tune with our models and understandings. In this context material factors such as the changes in the technology of destruction have to be noted, as have the changes in our ideas concerning issues of legitimacy, sovereignty, governmental powers, etc. Recovering the original is, therefore, not an idle undertaking.

But understanding the "original" is only a first, although indispensable, step. The second step entails going beyond the conventional conceptual divisions and their constitutive assumptions, and casting a fresh and unobstructed look of how – in the case of my research – norms and rules "work," i.e., what role they play in molding decisions. For that reason, I consider it useful not to select too prematurely a concept of law and then decide by more or less explicit verbal definitions whether the status of norms in international relations satisfies the criteria of a given concept of law. Precisely because the concept of law is itelf ambiguous, I propose to investigate the role of rules and norms in choice-situations *in general*. At a later point I

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introduce distinguishing characteristics which allow us to separate legal from other types of norms. Furthermore, I intend to examine in a second step the respective roles norms play in the domestic and international arena. In casting the net much wider than is traditional, I am following a type of inquiry which once gave rise to "international law" as a special discipline. None of the original founders of the "law of, and among nations" (*ius gentium*, *ius inter gentes*) limited his investigation to narrow legal issues in international life, and for good reasons. From Grotius[20] to Vattel[21] and Triepel,[22] treatises on international law were always inquiries about law in general, and they concerned a wide variety of historical, political, and philosophical issues.

The revival of this kind of philosophical inquiry seems timely since the classic international lawyer writing and teaching public international law is more and more superseded by several specialists. This trend has serious implications for our understanding of international reality. While the lawyer-bureaucrat, attached to the policy-making machinery, may influence the creation of legal norms through (state-) practice by proposing and accepting new "standard solutions," such impact is no longer mediated through the development of a conceptual framework which is in tune with the changes of international reality.[23] The specialists in tax law, in corporation law, in the conflict of laws, etc., can win cases without a general understanding of international relations. Similarly, the scholar of the international political economy focuses on an equally specialized set of problems,[24] and "security studies" develop largely by following the "logic" of new weapons technologies. By reviving a more philosophically oriented discussion which attempts to assess the role of norms in decision-making, if all goes well we not only counteract such an unwarranted narrowing of focus in regard to international relations, but also gain a better picture of why actors in the international as well as in the domestic arena *have to resort to norms*.

The last question is of decisive importance for the substance of this investigation as well as for the choice of my methodology. In particular, I shall argue that our conventional understanding of social action and of the norms governing them is defective because of a fundamental misunderstanding of the function of language in social interaction, and because of a positivist epistemology that treats norms as "causes." Communication is therefore reduced to issues of describing "facts" properly, i.e. to the "match" of concepts and objects, and to the ascertainment of nomological regularities. Important aspects of *social* action such as advising, demanding, apologizing, asserting, promis-

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ing, etc., cannot be adequately understood thereby. Although the philosophy of ordinary language has abandoned the "mirror" image of language since the later Wittgenstein, the research programs developed within the confines of logical positivism are, nevertheless, still indebted to the old conception. I shall argue in this book that only a fundamental reorientation of the research program is likely to overcome these difficulties. However, before we can hope to develop a more appropriate approach we have to understand how the social world is intrinsically linked to language and how language, because it is a rule-governed activity, can provide us with a point of departure for our inquiry into the functions of norms in social life.

II   THE RESORT TO NORMS

Since human beings possess only weak instincts it has been a tenet in political analysis, at least from Aristotle on, that the human world is one of artifice.[25] Precisely because actors are seldom impelled by a stimulus, they have to make choices. In this context Aristotle points to the decisive importance of language.[26] Although some communication is possible by means of signals ("voice," as Aristotle calls it), language is significantly different from the signaling systems available to animals such as bees or wolves. Signals depend for their success in communication upon situation-specific, appropriate interpretations. Warning yells are called forth by the appearance of an enemy, and exclamations such as "ouch!" communicate quickly and without the intercession of words or reasons. Language, on the other hand, utilizes symbols whose communicative function is separate from the sounds used in signaling. Thus, the sound of a long "o" as in "hope" no longer has anything to do with the transmission of astonishment for which "oh" is used within the signaling system.

Language therefore not only enhances our ability to communicate through the use of abstract concepts, but also frees us from the here and now and thus makes remembrance and planning possible. Furthermore, through language we can learn from others not merely through imitation (*mimesis*) but through following their suggestions which encapsule their experiences. For example, the instruction "do not use anything less than a 2 × 12 in spanning a distance of more than 10 feet in any weight-bearing part of a construction" incorporates an important experience based on the causal texture of the world. We are thereby enabled to pursue our goals by simply following the instruction-type rule. Doing so, we can be confident that our efforts will not be frustrated and we need not re-invent the wheel every time.

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Many communications, however, concern even more complicated matters. In pursuing our goals we are likely to interfere with each other. Unless we immediately give up attempts to communicate with the other, and prefer an exchange of blows, we utilize a variety of communicative acts.[27] We demand, warn, threaten, claim, criticize, assert, consent, suggest, apologize, pressure, persuade, praise, grade, promise, forbid, appoint, authorize, contract, or even bet, in order to further our goals. The list of these types of action-words seems very large, and Austin[28] has suggested that there are more than one thousand of them in English. Their function can be analyzed through "speech-act" theory.

But what is speech-act theory, and how does it help us to understand these actions and their underlying logic better? The first thing we notice in the above examples is that they represent action words of a peculiar kind. While, for example, the word "riding" stands for an action, it functions differently from promising or claiming, in that riding is an activity which takes place independently of referring to it by language. Fishing, hammering, washing, etc., are similarly action words of the latter category. But when I bet, claim, promise, etc., I am not only referring to an action, I am "doing" it, i.e., I perform the action itself.

The second important point is that all the action words of the latter category have a *normative* component. This can be seen most clearly when we authorize or appoint, forbid, grade, or praise, since such actions would not make much sense if there were no underlying norms which provided the meaning for these actions. Similarly, when I make a contract, or promise, I (at least obliquely) have to refer to the rules and norms. Only with reference to the rules and norms constitutive of a practice does, for instance, the utterance of "I do" in a marriage ceremony mean that I have committed myself. In other words, rules and norms constitute a practice within which certain acts or utterances "count" as something.

Finally, speech-act theory and the theory of communicative action[29] allow us to analyze the problem of the conditions of effective communication in a new and illuminating way. Conventional analysis focused solely on the propositional content of an utterance and its reference. It held that effective communication takes place when the propositional content of the message matched empirical reality. All other messages were either metaphysical or nonsense. Consequently, since normative statements containing such words as "ought," "must," etc., provided no match with objects of the outer world, they could only refer to certain mental or emotional states of the speaker,

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such as to his/her preference or values. On this basis language could be neatly divided into two mutually exclusive sets of "is" and "ought" statements. Debates about normative concerns outside of the goal–means context of instrumental rationality, therefore, had to be considered useless because of their lack of "reference."

This conceptual framework created numerous puzzles in the theory of reference and meaning which need not further concern us here.[30] For our purposes it is only important to note that problems of obligation could not be analyzed within that framework. Consider in this context the "I promise" mentioned above. It is neither a statement about facts nor one about values and thus it fits neither category. Furthermore, to construe this sentence as a statement about the speaker's state of mind is also missing the point; since insincere promises are "obligatory," we cannot reduce the deontic component of a statement to an indication of the psychological state of the speaker. It is here that speech-act theory provides us with more appropriate tools. It distinguishes between the *locutionary* dimension of an utterance (saying something), the *illocutionary* force of the utterance (doing something by saying something such as, for example, making an assertion, promise, etc.) and the *perlocutionary* effects of a statement (i.e., the impact it has on the hearers). These distinctions provide a framework for specifying the conditions under which communication becomes effective.

However, these remarks have implications far beyond the scope of the traditional concept of "obligation." One of the examples above included "threatening" as a speech act and thereby suggested that threatening is a norm-governed activity. Threats seem to be particularly characteristic of international relations, and their link to coercion and violence makes it appear that threats stand in opposition to norms, law, and order. Promises and threats, however, might actually have much more in common than is assumed in this conventional dichotomy. The effectiveness of both might depend on certain common normative understandings. I do not want to push this point too far at present (since it will be taken up in chapter 2); it is sufficient to notice that even in our common-sense understandings we sometimes conceive of threats as "negative promises." While such an analysis leaves much to be desired,[31] it nevertheless points to a commonality which the traditional dichotomy obscures. Furthermore, we seem to be able to add emphasis to our resolve by adding to a threat an additional "this I promise you," even if such a use is somewhat at odds with our normal conventions. When Vito, an enforcer for the Cosa Nostra, "suggests" that "If you do 'x' I'll break your legs, this I promise you," it

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is quite clear what is meant. What is less clear, and what needs further
elaboration, is why such an addition reinforces the message. In
addition, since threats, unlike promises, need not be cast in verbal
form, the similarities and differences between these two speech acts
give rise to some interesting problems, such as "tacit understandings"
and "unspoken rules" which rely on signaling and unilateral
imputations.[32]

The upshot of this argument is that there does not seem to be a *prima
facie* contradiction in claiming that the making of threats is rule-
governed (like that of promises), while at the same time holding that
any particular threat itself might violate fundamental norms. The first
set of norms or rules concerns the conditions under which communica-
tion is effective; the second set deals with the issue whether the
utilization of the practice of threats or promises, etc., is allowed or
enjoined by a normative order. Mixing up these two issues, i.e., the
conditions of the validity of a speech act with those of securing social
order through particular normative arrangements, has led to the well-
known confusion in the regime debate concerning the (in)appropriate-
ness of the regime approach to security issues. From the fact that
unauthorized threats are not permitted but quite common in inter-
national politics, it was inferred that norms do not exist, or play no role
in making threats, or that threats cannot result in expectations which
have some type of normative standing as, for instance, in the case of
"rules of the game."[33]

Actors also have to resort to norms when they want to air their
grievances and establish the various obligations that result from
general prescriptions and the utilization of certain speech acts. Thus,
when Bill promises Jane to look after her terrier, "Professor Higgins,"
in her absence, he has an obligation. It can be overridden only by
exceptional circumstances. Bill's serious injury will serve as an excuse,
as might the sickness of Bill's mother, which makes Bill's leaving town
necessary. His claim that he changed his mind will simply not do.
Similarly, when Antigone and Portia plead with Creon and Shylock
respectively, they do not doubt the existence of certain legal obliga-
tions, but rather they adduce "reasons" which could provide defeating
circumstances for their obligations. In order to arrive at decisions
which are not only based on idiosyncratic grounds but which com-
mand assent, such pleas will have to satisfy some formal criteria and
certain substantive norms which are widely held in the society. The
formal criteria in such a discourse on grievances and obligations largely
concern conditions of equality in the claiming process, as well as the
acceptance of the no-harm principle as a baseline from which we

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argue. The more *substantive* understandings enter our arguments when we have to decide what is, for example, due care, what is an adequate compensation, what represents the proper functioning of an institution (which allows for the assessment of whether and why certain activities fall within its authority), or which duty or right overrides others.

At this point, a definitional clarification as well as an explicit statement of the three assumptions underlying my inquiry is in order. The *clarification* concerns the usage of the terms "rules," "norms," "principles," and "directives." Since, for the moment, I am mainly concerned with the action-guiding function of these devices, I will use the terms "rules," "norms," and "principles" more or less inter-changeably until the task of distinguishing among different norm-types in chapters 3 and 4 warrants further distinctions. For now, I shall simply note that while all norms are directives, not all directives function like norms, and while all rules are norms, not all norms exhibit rule-like characteristics. Furthermore, the term "prescriptions" is here used as a summarizing concept that encompasses all types of rules and norms, with the exception of direct commands.

My three *assumptions* concern the grounds for choosing a particular research strategy as well as my substantive commitment concerning the "nature of the beast" I intend to study. The *first* underlying assumption in regard to my research strategy is that it is useful to study the role of norms in shaping decisions from the baseline of an abstract initial situation which is defined, more or less, in public-choice terms. Thus, I begin with the analysis of a world in which self-interested actors with non-identical preferences have to make choices in the face of scarcity and with the prospects that they have to interact again with each other in future rounds. I maintain that one of the most important functions of rules and norms in such a world is the reduction in the complexity of the choice-situations in which the actors find them-selves. Rules and norms are therefore guidance devices which are designed to simplify choices and impart "rationality" to situations by delineating the factors that a decision-maker has to take into account. Although it will soon become obvious from my second and third assumption that my approach differs in significant respects from the public-choice approach,[34] I find it useful to take such an initial situation as a point of departure. Furthermore, as in the public-choice literature, the term "actor" refers in my discussion variously to individuals and collectivities, and often inferences are made from individual to collec-tive-actor behavior without explicit attention being paid to the prob-lems that occur on various levels of analysis. While neither I nor

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