Interactional International Law

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Introduction

Seven years ago, we began working on security aspects of shared freshwater resources. Our work formed part of the “cooperative security” discussion that tried to move security studies away from its traditional preoccupation with military issues and to conceive of human security in broader terms. We soon began to feel a sense of dissatisfaction with our own framework for analysis as we explored the literature of international relations (IR) theory. Why was it that international lawyers seemed so often simply to assume the relevance of law? Why did IR theorists so rarely even pay attention to the international legal framework? Slowly, our work evolved to put these questions front and centre.2

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We have become increasingly interested in precisely how it is that international law influences the conduct of international actors. In working with different strands of IR scholarship, we were first struck by the absence of any distinctions, in terms of their respective features and effects, between legal and non-legal norms, and amongst the various types of legal norms. This lack of attention to possible differences may result partly from the prevailing assessments of law’s role in international society. In the eyes of many IR scholars, law merely serves the interests of states. At most it can create predictable rules and stable institutional structures for state interaction, but cannot exert any independent influence on state conduct. We found that the inclination of many IR theorists to attribute only a very limited role and independent effect to law (or none at all) in turn correlates with an underlying formalistic and positivist conception of law, drawing heavily upon assumptions rooted in domestic law. Typically, ‘law’ is assumed to be hierarchical ordering, deriving its power from particular sources, from form and precision, and from its enforceability. Not surprisingly, international law, because of its horizontal structure, does not fare well when measured against such formal indicators of law. We hasten to add that these assumptions about the essence of law are shared by many international lawyers, who have laboured within an at least implicitly positivist framework to justify international law as ‘real’ law. Their conceptions have, in turn, influenced the way in which IR theorists have viewed international law.3

We venture to say that this shared, narrow, understanding of law is precisely what has hindered the interdisciplinary debate and has caught much of the writing in IR and international law in a vicious circle of sorts. International lawyers have turned to IR theory for new insights that could help explain the distinctive influence of law. Yet, many potentially useful IR insights are based upon conceptions of law that have limited explanatory power in a horizontal system.

An Interactional Conception of International Law

Constructivist IR theory, read with the legal theory of Lon Fuller, offers avenues of escape from the vicious circle and can help direct our attention to fruitful lines of inquiry. By focusing on identities as generators of interests and illuminating how identities are shaped through social interaction, constructivism can explain the influence of law in a horizontal system. Seen from a constructivist standpoint, law is not hierarchical control but is generated and shaped through interaction. At the same time, law is not inevitably subordinate to the interests of states but can influence actors’ behaviour by affecting their identities and, thereby, their interests.