

A Foucauldian Approach to International Law

Descriptive Thoughts for Normative Issues

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Chapter 1

Introduction

The purpose of this book is to offer alternative conceptions regarding the operation and potential role of international law within the international system. Via various notions proposed by Michel Foucault concerning our methodological modes of perception and the role of discourse formations, coupled with his approaches to power and knowledge, this book will shed light on inherent inconsistencies, and begin to propose some form of solutions, for a range of key topics within international law.

Referring to Foucault as a means of understanding and enhancing international law at first glance seems counterproductive. Foucault eschewed any notion of law or norms as maintaining an elevated position when compared to other forms of social forces and attendant developments. Further, he was involved in demonstrating methodologies that were decoupled from a formalised legal system or normative order, maintaining (among other things) that analysis of these systems tended to ignore other external realities and the underlying processes that actually served as the driving force. An international system that tends to centralise the role of the sovereign state for example is problematic for Foucault, where the demand for a particular mode of analysis merits not only the incorporation of other actors, but also a wholly distinct form of scrutiny.

Recognising such an attitude towards law however need not lead to dismissing Foucault from consideration. Rather, it is important to remember that Foucault was not necessarily offering a theory as such, but rather analytic devices and forms of interpretation. Thus, one purpose in referring to Foucault throughout this work is to allude to his descriptive model as an avenue towards interpreting and further examining events and existing conceptions within the international system. The goal is to create a context for examination pursuant to Foucault's notions regarding social activity and forms of relations between the various actors.

Part of the difficulty with Foucault is that he provides questions, not answers, given that answers are reflective of merely temporary perceptions. Further, Foucault is linked to notions of disorder and resistance, preferring

to consider the struggle and resistance surrounding interactions rather than actual (unattainable) solutions. Thus, referring to Foucault does not always imply an adoption of his ideas, but rather the means for initiating the development of a new line of thought, thereby addressing an at times chaotic international system beset by a host of influences and interests. The unique nature of Foucault is that one can grasp a number of disparate social developments and state concerns, and emerge with a context from which to initiate the advancement of an interpretation.

The proposal herein is to identify a framework that will not necessarily ameliorate all the various perceptions concerning international law, but begin to offer the means for grasping the surrounding changes and constantly shifting positions of the actors involved. International law is essentially stuck either within an outmoded statist approach, or an overly broad understanding of the significance of external actors like international organizations whose standing and influence are not altogether clear. Current interpretations of international law are rooted in a narrow attempt to demonstrate a functioning normative structure, deconstruct international law without offering a viable alternative, or interpret developments as reflective of an emerging and somewhat unwieldy ethical, legitimate, or constitutive (social) global order. The problem is that these approaches do not fully capture the essence of the changes and shifts to the international system nor allow for incorporation of different viewpoints and perspectives, especially when moving towards a relative or localised approach or shying away from a state-centric model. Additionally, it is interesting to consider that despite grand claims for a changed world with greater integration and broader representation, we are still beset by ethnic, religious, and national conflicts that limit the capacities for an improved international process and at times tend to create greater confusion within the desired normative order.

As Foucault operated within a particular ethos of inquiry, reference to his ideas can begin to extricate the international system from an overly systematic analysis, while at the same time maintain some of the underlying viability of an international normative order. Particularly, what is important is not the standards or elements of international law as definitive factors, but the manner by which the distinctions and associations are established within a system or political sphere. Thus, it is imperative to address the constant change and ongoing resistance of the international framework, a difficult task for any system that intends to impose some form of normative structure as a means of regulating the actors therein.

For Foucault, the state is a creation of our discourses and is not representative of a unified whole. Hence, power is coextensive with all forms of relationships, the state being merely one aspect of such power relationships given the possibility for influence of, as well as to be influenced by, the actions of others. Further, Foucault proposed notions of power and the relationship with knowledge that can assist the international subsystem of non-state actors in understanding surrounding events without necessarily abandoning the state and the international framework. Rather, in line with Foucault's descriptive approach, the goal is to consider a framework of understanding that would enhance the international system while at the same time allow for consideration of a variety of viewpoints. Thus, the book considers the engagement of the ongoing shifts and changes inherent in any politicised system as a means of discerning the contexts of operation. The goal herein is to allow for methods that would consider a broader context of operation from which to distil an understanding of what is transpiring and developing in international law.

Each of the book chapters addresses various aspects of international law from a Foucauldian perspective. The idea is to account for some of the fundamental problems within international law, with the view towards relying on Foucault's understanding of the structure of society and manner of interaction. The chapters then will assess and consider the underlying problems posed by each doctrine, and offer an alternative approach and treatment by which to consider the specific topic of the chapter.

Chapter 2 refers to international legal theory, considering a variety of viewpoints and approaches to international law, including recent assertions that have accounted for the incorporation of non-state actors as well. Moving away from an overly critical analysis, the chapter will offer Foucault's transgressive approach to overall social relations, including his understanding of the role of law and the state. Coupled with his perception of power and knowledge as forming an ongoing re-interpretation of the relevant relations, one emerges with an encapsulation of Foucault's basic notions that can assist an international system caught up in too narrow an understanding of power and the role of the state, and broaden the context of examination and operation. This chapter shall serve as the basis for understanding Foucault and the manner by which he will be referred to throughout the book.

The third chapter moves from theory to relations between states, particularly regarding the manner by which a state might acquire standing and personality within the international system via international recognition. Referring specifically to the recognition of states allows for an accounting of a doctrine that operates in a political context, despite attempts to accord it some form of normative status. A host of inadequately considered external considerations and influences also maintain relevancy for recognition. The proposal in Chapter 3 is to adhere to a process-oriented form of recognition, one that commingles notions of politics and policy with norms, with the process of recognition serving as the focus rather than the eventual outcome between the states. Acknowledging that recognition is essentially a matter of behavioural modulations (including political factors that drive forward a decision) as well as a reflection of relational power as understood by Foucault, one can emerge with a better understanding of recognition and the manner by which it can be referred to within the international system.

Chapter 4 addresses a key source of international law, that being customary international law. Custom as a source of law possesses a host of recurring fundamental problems, including the processes used to identify the norm, the weight accorded the principal elements of custom, and its actual application. Recognising that assertions pertaining to a customary norm derive from subjective interpretations generally pursuant to a state's unique interests, custom does not necessarily represent the truth of the assertion but is the result of the utilisation of emerging norms for use by the state. Customary norms are subject to ongoing change due not only to the subjective nature of the process, but also because external influences outside the purview of the sovereign state continuously force alterations to its composition and status. Hence it seems of greater beneficence to inquire why a particular claim regarding custom reflects the so-called 'truth' of the assertion at a given stage and how did one reach the point whereby an individual, state or international body can maintain grounds for making an assertion regarding the status of a customary norm.

Additionally, Chapter 4 will incorporate Foucault's understanding of discourse formations. Custom is not only a matter of ascertaining the amorphous notion of practice among the states, but also is a reflection of the social condition and historical development that serves to influence and change the actions of a state and other relevant actors. The 'discourse' that forms a part of custom incorporates a broad gamut of international and domestic actors, including the individual, non-governmental organisations, the state, and international bodies. Asserted thoughts are treated as objects in their own right, rather than examining the actual content of the thoughts, with a view towards ascertaining and understanding the process by which such assertions arose.

Moving away from the state and towards other international aspects, the remaining chapters shall examine more recent developments within the international system that implicitly rely on a broader notion of international law beyond the state. The issues to be examined incorporate other actors and internationally developed norms both from a top-down approach, such as international human rights as derived from treaties, as well as from a bottom-up perspective, such as the role of non-governmental organisations and the emergence of human security as a means for addressing some of the current problems in the world at large.

Starting with international human rights, Chapter 5 considers the role of human rights via reference to the right to freedom of religion or belief. Freedom of religion or belief is a fundamental right beset by problems of misapprehension and misapplication. Foucault is enlightening due to his approach towards social relationships and development of human ideas, such that all entities exercising power or espousing a human right are part of a broader framework of social relations. Thus, the power of a human right norm is not only that it represents a right per se, but also that it serves as a form of producing individual and social reactions and furthering the continuing social discourse. Particularly concerning the human right to freedom of religion or belief, it is important to account for the social dimensions that the right entails. Foucault's approach to power then can assist not only with positioning human rights within the international system, but also to integrate an atomist oriented human rights system into the broader social discourse.

Chapter 6 turns towards the notion of human security, a relatively recent and still emerging concept that has been touted as an important inroad into addressing a variety of concerns within the international system. Specifically, human security has been identified for addressing problems of less-developed states and the means by which to correct their ills, as well as various normative lacunae within international law that has been difficult to incorporate changed circumstances, such as within the humanitarian law context. The problem has been one of context, especially how to conform notions of human security into the international system. Human security however serves a process-oriented function, focusing on local necessities and recognising the role of a variety of actors according to their specific needs. Such an approach involves the conceptualisation of an operative method without necessarily being linked to a strict normative framework. Thus, Foucault's attitude to norms and his understanding of power provides a strong contextual framework for the actual operation and implementation of human security notions. Foucault recognises the

capacity for a process-oriented context, without being weighed down by a normative framework.

Chapter 7 engages newer paradigms within international law and the manner by which they can assist the international system. Part of the problem with the liberalist approach has been a lack of critique, an almost complacent acceptance of the market oriented approach via a sound rule of law as the sole means towards peace and stability. Turning specifically to global civil society and non-governmental organisations, the goal of the chapter is to account for what has been understood as new directions within the international framework. Recognising in particular the variety of problems associated with non-governmental organisations, especially internal and external accountability issues, the chapter will offer the means for engaging an approach to international relations and international law that incorporates various non-state entities as viable actors. In particular, Foucault's understanding of power is quite apt here and assists the international system in according an active role to the variety of players in the global civil society framework.

The concluding chapter offers additional suggestions for further study via the approach of Foucault. It is hoped that the book can serve as a starting point from which to consider other aspects that have emerged within the international system that can be better understood, leading to better applications, via a Foucauldian perspective. As noted at the outset, the goal is not to critically de-construct the international system, but to explicate emerging concepts that have served to alter the underlying structure of international law and international relations especially given the emergence of new actors and concepts, such as to allow for a better overall functioning system that properly addresses the needs of all actors participating therein.

Chapter 2

Theoretical Grounds for International Law

Introduction

Public international law is beset by issues questioning its legitimacy, viability and at times the very existence of such law. Even for those in the

For recent overviews of approaches to international law, or at least representative examples of some of the different perspectives that have been asserted, see Kingsbury, B. (2005), 'The International Legal Order', IILJ Working Paper 2003/1 (History and Theory of International Law Series) available at: www. iilj.org (relying on Grotius as a means to combine both the source and content of the rules); Rajagopal, B. (2003), International Law from Below: Development, Social Movements and Third World Resistance (Cambridge University Press, UK) (social movements as a better reflection of international law and its development); Raustiala. K. (2002),'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', 43 Va. J. Intl. L. 1 (transgovernmental networks as a means of entrenching international cooperation and liberal internationalism); Guzman, A. (2002), 'A Compliance-Based Theory of International Law', 90 Calif. L. Rev. 1823 (compliance as reflected by rational, self-interested, states); Stark, B. (2002), 'After/word(s): "Violations of Human Dignity" and Postmodern International Law', 27 Yale J. Intl. L. 315 (embracing the fragmented nature of public international law); Kennedy, D. (2000), 'When Renewal Repeats: Thinking Against the Box', 32 N. Y. U. J. Intl. L. and Pol. 335; Simpson, G. (2000), 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power', 11 E. J. Intl. L. 439-465 (critiquing Byers, M. (1999), Custom, Power and the Power of Rules (Oxford University Press, UK) and offering an overview of different approaches within international law and international relations); Georgiev, D. (1993), 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', 4 E. J. Intl. L. 1-14 (referring to legitimacy as a means of grounding international law); Allot, P. (1992), 'Reconstituting Humanity - New International Law', 3 E. J Intl. L. 219–252 (a cosmopolitan approach, asserting that law can actualize social objectives); Carty (1991), 'Critical International Law Recent Trends in the Theory of International Law', 2 E. J. Intl. L. 66-96 (adopting deconstructionist approach, with goal of understanding allegations of states in terms of cultural presuppositions); Koskenniemi, M. (1989), From Apology to Utopia: The Structure of

international law field who recognize some form of consensual structure or agreements between states, the issue of deeming international law as 'law' constantly lingers in the background. Notions of a universal system are too easily dismissed due to instances where states have acted contrary to a norm, assertions of relativism in the application of the law, or cries of neo-colonialism deriving from a favoured leaning towards a Western orientation within the international system. Similarly, consensus has been too easily undermined by the will of hegemonic states or political influencing within the confines of international organizations that stymies the emergence of an international legal order.

Within the context of international relations, international law has been caught between realist assertions of state interests as superseding international law, institutionalists that accord some form of role for international legal making organizations, or cosmopolitan assumptions of moral state behaviour with a view towards the identification of an existing social order. Each approach is of course beset with inherent problems, whereby examples of state behaviour can be demonstrated to either prove or disprove the asserted position. Thus, while international organizations might actually serve to entrench international law or have some form of norm-creating role, enough examples exist of states in the breach, or counter-examples where an organization acted contrarily in a similar situation, to call into question the notion of international law as law.

It seems that attempts at discerning the underlying drive of international law has moved beyond the notion of universality or consensus, to one of unearthing the differences between the players and treating inherent conflicts as the reality. Alternatively, many have jumped on the realist bandwagon, asserting that international law does not exist as such, acting as a tool of the state and merely standing as a reflection of particular interests. Less extreme realist views contend that while not wholly normative, international law might reflect some form of underlying understanding between states, recognizing that the application will be subject to the relevant whims or interests of the state.

What have been difficult to consider are attempts to transgress this seemingly dichotomous battle, be it between a critical and positivist or consensualist approach, or between a universalist or cosmopolitan view and a realist position. International law too easily succumbs to a deconstructionist position or folds to realist assertions regarding the actual

International Legal Argument (Finnish Lawyers Pub. Comp., Helsinki) (critiquing key approaches within international law, as discussed *infra*).

behaviour of states. Acknowledging that state discourse is latent with political interests and inherent values makes it quite difficult to emerge with a standard when accounting for the key sources of international law that heavily rely on such discourse.²

Part of the underlying problem has been considering a framework for changes that have developed within international law over the past century given the growth of international and regional organisations, a move towards globalisation with its attendant local and international effects (economic and social), and the rise in influence by actors external to the state. The assertion herein, and throughout the rest of the book, is that an alternative approach as dictated by the theories of Michel Foucault can begin to address some of the problems. The proposal centres on a framework that allows for inherent contradictions, given what can be called a transformative understanding of the international system and a transgressive approach to one's perception of international society. The advantage in referring to Foucault is the possibility to ameliorate contrasting viewpoints by addressing the underlying changes to the system. A clearer image of present day international law and the role of such law in the international framework can be better elucidated.

Following a brief overview of some of the proposed approaches to international law, this chapter shall offer a methodology to international law considering it from a descriptive standpoint given an alternative understanding of power and its link with knowledge, which will serve as a blueprint for analysis of the specific issues in the ensuing chapters.

Some Approaches Thus Far

The problems identified with international law have centred on the ambiguity of the process, given the link between international law and political (along with legal) processes. Even more profoundly than in domestic jurisdictions, where laws also result from a political process, the international system is problematic because there is no actual 'legal' system; the states are creating the law for their own regulation. Thus, unlike in domestic jurisdictions, enforcement aspects are lacking or are weak to the point that the existence of some form of legal system per se does not adequately exist.

² See discussion infra at Chapter 4.

This lack of a viable framework comparable to a domestic one is rather frustrating for legally trained individuals. The infusion of inherently contrasting state interests among the states leads to ambiguities in the variety of documents and treaties that serve as sources for international law. This usually is because such sources of law result from high-end political negotiations where the goal is to protect and preserve the state and its interests rather than solely create a viable and enforceable legal norm.

Indeed, in attempting to address this problem of international law's open-ended nature, some have concluded that international law is inherently ambiguous.³ Following from this, international law is accused of being a fragmented process and structure,⁴ with little notion of state accountability, thereby making any attempt at assessment a difficult exercise. International lawyers are left to either assert their position pursuant to their predetermined interests or those of the state, or to acknowledge the inherent problems and attempt to construct some form of viable ongoing system that recognises international law.

Additionally, the lack of a network leads to inherent inconsistencies within international law. That is, the law as such might derive from a particular definitive source, like a treaty, but the state will pull the particular norm or edict towards its own direction and towards a particular meaning that best serves its interests. This of course brings to bear the issues surrounding the place of international law and its role, if at all, in the regulation of states and their actions.

International legal theories have proposed a number of approaches by way of explaining what is happening within the international system. For example, Koskenniemi places the framework of the issue within the context of normative versus consensual endpoints. A normative approach recognises international law as operating to create specific norms that are binding on the state. It is an attempt to identify an objective application of international law to all the relevant actors (principally the states).

The attempt to objectify international law is problematic given the political aspects that are implied by the system. Because international law is founded on the notion of the will of states, the latter will tend to cancel out any form of objectivity. Either international law is too political

³ Stark (2002); Carty (1991).

⁴ Stark (2002).

⁵ Koskenniemi (1989).

given the reference to state's will and its capacity to assert power, or international law is unrealistic given the tie to utopian ideals of normative objectivity.⁶ In essence, the claim is that international law would be hard pressed to exist without some form of concreteness based on state's will – at least as a means of providing a social context. Presumably, a consensus derives from the overall understanding of the various states involved. At the same time however international law also must have some aspect of objective normativity to allow for effective operation and application. Yet, combining the two (concrete state will and objective normativity) proves to be rather difficult given their pull in seemingly opposite directions.

Other attempts to identify the basis for international law have proposed some form of dichotomous distinction. Thus, Kennedy frames the issue within the context of the natural law approach and the imposition of some form of objective standards, as opposed to a positivist understanding of law dictated by the states. Objective standards are linked to the so-called natural law of states, thereby preventing anarchy and preserving some form of state-to-state relations. A positivist understanding is looking more at the interests of states and the actual means by which the process is carried out in a practical, more realist, manner.

The former of course begs the question regarding objectivity, associated with many of the challenges to the natural law approach regarding its creation and identification. The problem is further heightened upon factoring in non-Western states and relative approaches to law based on religion, culture, or other epistemological differences. The latter positivist approach raises the issue of consent among states and whether that is an attainable outcome.

Kennedy frames the distinction as one of sovereign equality (objectivity) as opposed to acknowledging sovereign authority. States are either independent and acting without any overarching authority, or are linked to notions of sovereign equality with the proper application of international law when appropriate. Thus, one is stuck between doctrines of law versus the actual practice of law, similar to Koskenniemi's linking the issue to concreteness (based on practice) versus normativity (based on doctrine).

⁶ See also Koskenniemi, M. (1990) 'The Politics of International Law', 1 E. J. Intl. L. 4-32.

⁷ For an outline of Kennedy's ideas (and more), see Kennedy, D. (2000), 'When Renewal Repeats: Thinking Against the Box', 32 N. Y. U. J. Intl. L. and Pol. 335.