

## A CRITICAL APPROACH TO INTERNATIONAL LAW

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We have been discussing critical method in law: how does one enter a field of law and develop a critical project? To my mind, this is less a theoretical question than a practical one. I've rarely seen it done as the application of a theory. People do it step by step. They have some kind of critical impulse, they find themselves in a field, they borrow this or that and try to figure out what they think, how it works, how things hold together, how they don't add up or go off the rails in some way. They watch other people whose sense about these things seems compelling, at least in part. They read things, dig around, become infatuated with one or another theorist, fall out of love again. And slowly their own ideas come together, they find a place to intervene and pursue a project.

Let me briefly develop an example from my own engagement with international law. I want to go back to the moment I first encountered the field as a student and work my way up to today – as quickly as I can tell the story. So in 1976, I was a guy with a general interest in foreign places and diplomatic history, and the vague intention of doing something good in the world. After college, my idea was to get a professional education and work somehow to make things better. It seemed like law would be a good profession, but also that I'd need to know more about economics and development and international relations than I did. So law school,

graduate school. Before law school, I hadn't heard of "international law" – people often encounter specialized fields as they become specialized in them. In law school I encountered the field of "international law" as a place where you might professionalize, stay interested in the world outside the United States and not forsake the ambition to somehow make that world a better place.

When you encounter a field like "international law," what do you encounter actually? And then how do you come to terms with it, with the shape it gives your ambition, with its "politics," its strengths and weaknesses? Well, you take courses and you encounter the people with projects – your teachers. In my case, people who carried a brief for international law, thought it was a good thing and there should be more of it, expressed their frustration in class that others didn't see it that way. Who exactly didn't see it that way was less clear. Their colleagues? Our other teachers – that seemed plausible. Our classmates, once grown up? Diplomatic people, professionals and politicians, perhaps. As students, we were seeing a kind of backroom preparation and after action report for battles going on elsewhere over the importance and significance of what we were learning. It wasn't clear whether "the field" was open to participation by people who weren't academics, or how the academic field related to anything one could aspire to do.

Then there are the practitioners who get brought in to show you the lives you could have. Maybe you encounter them in jobs somehow or through friends of your family. I somehow got the idea that Washington firms were the place to be, and interviewed at one with an elderly gentleman who had been head of the ILO after the war. That summer I worked on a variety of corporate lobbying jobs – blunting the legislative fall out of the Three Mile Island nuclear accident for a consortium of nuclear utilities, figuring out how to get the DC10 up in the air after the Chicago crash on behalf of Asian airlines, that sort of thing. What they were practicing was not exactly what I had been learning – or maybe they were just looking at it from a different angle, more horizontal, engaged, less focused on how it adds up and whether its law. We were assessing a regulatory terrain, costs and benefits, the distributional impact of rules, rather than worrying about how it all fit together or whether (and how) one could say that there was such a thing as “international law.” There was lots of law, many countries were involved – end of story.

As you professionalize, you see your field everywhere, just like when you buy a red Volkswagen and suddenly everyone seems to have one. Snowden, Iraq, Syria, a factory fire in Bangladesh: suddenly all the news has an international law angle. And you begin to think maybe you could both have a job and pursue a political project within the field. This requires that you figure out the field as a terrain of positive engagement. It won't work if you end up feeling the field is not that central – or is part of the problem rather than the solution. Then it won't fulfil your ambition for professional engagement. In other words, you enter the field with an interest, a bias: that the field should be worth it. You have to get with the program, understand that coal fired plants also kill people – steadily and predictably – and that the blunt application of overly broad airline safety rules can also be unsafe, undermining the safety regime as a whole.

For international law to be your ticket to meaning, it will need to be able, at least once you have reformed or completed it, to deal with conflict and underdevelopment and global warming and injustice and whatever else you are worried about through law.

When you enter a field, you also encounter a whole bunch of legal materials. There are more or less well organized norms, doctrines and institutions about an odd variety of things. They are not hard to learn – but they are hard to systematize. Is it just one odd case after another – a kind of Borges list of rules and principles and institutions? Luckily, there are articles and commentaries explaining how it fits together. In those commentaries, you encounter a whole series of absent or dead people who share a set of reference points that hold them together as a community. By learning these things, you can join in. So you learn a short history of the last three hundred and fifty years – every international lawyer in the world knows that very important date, 1648, and probably 1919 and 1945, but they will not have any relationship to 1848 or 1929. They have made a selection. The United Nations is significant although just how is unclear – it is the Charter or the institution, is it the central stage or just one place you might get a job? Some courts are significant at an international level, some countries are significant and others are not that significant. So they are arranging the world for you and you are learning about that. You encounter the field as an arrangement of the world.

You also encounter the field as a set of questions – one set, rather than another. International legal writing takes place at a pretty high level of generality. We spoke about economic development and the resolution of conflict, but not directly. The real question, the professional question, was the possibility of international law itself, which might then tackle issues like that. The leading authors are often quite critical of one another – there were feuds and spats and method wars. When I

was a student, their positions were arranged in schools of thought: there were positivists and naturalists and neo-positivists and neo-naturalists and Grotians, there were the Europeans, the British and the Americans, there was the Yale school and everyone else.

At the same time, the projects all these people were pursuing seemed hard to distinguish – actually, they all thought international law was possible, if for slightly different reasons, and that it functioned, if for slightly different reasons. And that it was misunderstood, its possible usefulness overlooked, its viewpoint disregarded. It seemed that we were studying these debates to learn their moves, to be able to make *all* these arguments to other people, to outsiders who might doubt the significance of international law.

Nor was it clear hung on their different points of emphasis. Were these political differences? Matters of intellectual taste? Everyone in the field seemed to agree that the existing international legal arrangements were hard won achievements that functioned pretty well, under the circumstances. They all tended to chalk up most of the bad stuff that happened to the doctrines, tools and institutions being misused or disregarded. Of course they often had different positions on big political issues: Vietnam, the potential for detente, the possibility for resolution of conflict between Israel and its neighbours. But they shared a sense for the inevitability of the system we have, with various reforms, and the long term promise of an international law that might one day be rightly theorized, constructed and implemented. In this way, I encountered the field as a commitment and project: to serve as a kind of advance guard for the will to complete and implement what had been started. With our help it can be completed, reformed, expanded, implemented and enforced. People encounter a field as a posture toward the established order – for us, the posture of optimistic modest reformism – and toward the significance of the

field itself. To be an international lawyer was to be *for* international law, properly understood.

So you have all these pieces: the teachers, the practitioners, the world newly arranged, the doctrines and academic commentaries. It is difficult to figure out, in part because it sends so many mixed messages. An example: on the one hand, nobody practices international law, it is impossible, it hardly exists, you should study banking. On the other hand: anywhere two people are gathered in its name, there is international law. Figuring this kind of thing out generates a posture: in 1976, the default was a kind of determined fealty. The new object of our professionalized affections needs our help: it is fragile, misunderstood, a soft complement to hard power. The posture the field proposes is doubtless different now. For one thing, there are far more opportunities to specialize and find work: all those NGOs and civil society actors, pro bono opportunities and an expanded foreign policy establishment filled with humanitarian specialists.

As you enter a field, you compare its political sensibility to your own. In 1977, I took the U.S. foreign service exam and got through to the interview, where a very nice man informed me that were I to join up, I would be representing the foreign policy of the United States in all my activities, public and private, and asked if that would ever pose a problem for me. Somehow that had never occurred to me: I had thought I would be *making* U.S. foreign policy, not representing it as it was. So I excused myself. International law seemed more promising – global, cosmopolitan, a restraint on statecraft. Yet perhaps it shared something of this idea: if I joined up, I would be representing the field's own sensibility of modest institutional reformism, of international law as the universal response to intractable policy challenges, of ethical denunciation in the name of a few universal norms.

In 1977, this didn't seem completely implausible – but it did seem a stretch. There were the Watergate

hearings – all those lawyers asking tough questions and ultimately bringing down the President. And there had been civil rights – even if that already seemed a long time ago. But internationally? International law hadn't stopped the war – the Vietnam War – which was a pretty big deal for people who wanted to be Kissingers-for-good. Few international lawyers had opposed it professionally. Watergate had exposed the underbelly of foreign aid – its implication in Cold War covert operations and links with nefarious multinationals. So you have to re-evaluate, over and over – does this field express my critical impulse, or stand athwart it?

The more I got into it, the more I began to feel international law was at least as much part of the problem as of the solution, although it was not at all clear *how*. The people were uniformly nice, cosmopolitan, liberal. Like me, they were disengaged from the American cult of procedure and the latest decision of the Supreme Court. They were enormously kind to me personally, welcoming, fatherly. The field's promises – however far off on the horizon – were alluring. Their central texts were inventive, flexible and eclectic. Intellectually, they were attractively interdisciplinary. They had absorbed bits and pieces of psychology, sociology, history, political science, economics. If you thought they were missing something, it was hard to say what it was. It was not obvious that interdisciplinary borrowing would provide a perch for understanding what was missing in the field. In all these ways, the international law community was more attractive than a great deal of the rest of the American legal academy at the time. It seemed to be a field worth investing in.

An important moment was the realization that the field's internal method wars were somehow not about what mattered to me. Take the central preoccupation: is legal order even possible, theoretically or practically, among sovereigns? There were lots of reasons to think so. None seemed particularly persuasive, but taken together

they were persuasive enough to get on with it. Actually, if anything, the world seemed saturated by law. Continuing to discuss whether law was possible seemed to serve a function: keeping the project of international law's continued construction urgently stretched out before us, while avoiding questions about the dark sides the legal arrangements we already had. As a colleague admonished me: how can you criticize it – we've haven't constructed it yet! Part of the critical impulse arises from the feeling that a whole field had somehow missed something or gotten on the wrong track, however hard it was to figure this out in the available academic vernacular.

International law, then as now, makes three kinds of promises. The first is a promise to be a map of how the world is in fact organized and a plan for how it should be organized. These are the actors, these are the procedures, these are the rights and duties of states, and so forth. The map may be sociological description or constitutional mandate, but this is how the world works. Second, the field promises to provide tools to do things. Whether you are concerned about the water problem in Laos, the plight of refugees, the prospect of global warming, here are some ways in which you could become engaged. These are the institutions, the techniques, the principles, the norms. With international law at your back, you could denounce somebody – or you could burrow into the machinery of state power, taming it one practical project at a time. And third, the field promises a method or a language for articulating the values of civilization and for naming and shaming the uncivilized.

These are powerful promises and the critical impulse may arise as a feeling that they have not been met. This is not a good map, actually, of how powers are organized in the world, anymore than the U.S. Constitution is a good map of what goes on in Washington. It is a deceptive, puzzling substitute for an actual map of powers. Nor is it a good program of action: even if the world were organized this way, the

problems you care about would not be addressed. And the tools are not up to the job. Even if everybody passed the Kyoto protocol, we would still have global warming. Even if the Human Rights Committee were reformed, people would still be getting tortured. And perhaps civilization does not have a common set of values, maybe people differ more than that, maybe people you care about have been left out of the “universal.” Or maybe the whole idea of universal value claims is a mistake – it can be so easily stretched and elevated as the expression of one or another particular.

So let us say that an initial encounter with a field gives rise to a critical impulse. What then? One possibility would be to test the field against a theory. If we had a theory of justice or a theory of legal coherence or a theory of global order, we could determine whether international law measured up. If we have a theory of rights, do these rights measure up? Is this legal order constituted as constitutional theory demands? This has never appealed much to me as a possible strategy. The field is too diffuse, supple and open to revision. Even if you could demonstrate that it failed to embody your theory, why should that matter? Who would care, other than people in the cult of that theory? People in the field are not committed enough to any particular theory for a criticism of their practice along these lines to matter much. And other people – well, wouldn’t they care more about the field’s promises than its theories? Is it a good map of power? Does it provide tools for action? Is it the expression of universal values? To my mind, these are sociological questions: is this how things are, is this what works, is this what humanity shares?

The field has absorbed – had already then absorbed – lots of criticism of this kind. Somehow, it seemed only to return international lawyers and legal scholars ever more insistently to field’s central projects. Of course the map remains a dream, the tools remain rudimentary, the vision partial: that’s why we have to

keep going. This attitude suggested a different kind of inquiry, internal to the materials of the field. We ought not to keep going if the materials we were using were flawed, contradictory, incoherent. To figure that out required a kind of suspension of sociological questions and a focus on the patterns of argument in doctrine and commentary.

If you were to snip up all the doctrines and commentaries into little arguments and rearrange them by types, and by their relationship to one another, patterns emerged. Across lots of areas, there are some types of argument you cannot make and still be within international law’s recognized vernacular. You cannot say, for example, “I want that territory just because I want it and I have the power to take it.” Nor can you say “I want that territory because God gave it to me and it would be just for me to have it now.” On the other hand, you can say “it would be just for me to have it in terms of the ethics everyone shares” or “the territory is being appropriately governed and is under my effective control.” That is, you have to mix together elements of justice and elements of power, elements of your own will and elements of common agreement. And somehow the result makes sense as an international legal argument. It may or may not be persuasive – the other fellow may also have a lot to say – but the overall discussion sits on the back of a shared vocabulary of arguments. The point is not that the arguments are *right* – but that they are plausible and may (or may not) work.

In teaching international law, if you ask how many states must agree for a rule to be a customary norm – a majority, a hundred, the most important? – students will try to figure it out theoretically. There will be lots of arguments for more or less, but no resolution. Such questions have no clear answer. Nor do they need one. If instead you say “you represent State X and want State Y to acknowledge this norm – how many states do you need to persuade him and which states?” The answer

is obvious – enough to persuade him. Most persuasive may be his own practice or that of his allies. Reoriented from theory to practice, the key is persuasion rather than validity. And now the structured incoherence – or the ambivalence – of the materials begins to make sense. They are not about resolution. They are about function and use. Which opens the door to ask about the function of irresolution and contradiction and promises deferred. Perhaps there was another way to understand how all those arguments and doctrines fit together, a way that could make sense of the field's deferrals and repetitive promising.

It turns out people in the profession are doubled, across a variety of lines. They have a will to power and a will to be marginal, to harness right to might and to tame force with rules. They think they really do need clear and firm rules – but they also believe law works better with pliable standards. And they have no clear theory about when which – or rather, their theories about how to combine them and when to choose are also doubled. Incoherence in the field's materials is not a logic crime. It becomes a crime when it enables diabolical power: the reproduction of violence, inequality and injustice in the name of a constantly receding promise of peace and justice.

All right. So what to do? It seemed to me there were at least two ways to proceed. One would be to focus on understanding these professional practices by looking at biases and blindspots and professional deformations of the sort: to a guy with a hammer everything looks like a nail. Are some problems easier to see and some harder to see? And if you are obsessed with 1648, do you know what was going on in China in 1648? Are things that are private left out, things that are local or global, or below the waterline of sovereignty, left out? Are economic matters left out? Does the field's story of historical progress turn into a program or harness the profession to its own promotion until building international law

might substitute for actually working on a problem. Do the field's solutions and programs come in fashions? So one year courts are the thing, the next year they want non-governmental organizations for every problem, and then it is the criminalization of everything, to responsabilize whoever it is that has done a violation. It cannot be that in a given year the same solution works for every kind of problem, so it must be possible to stack those up and arrange them as having something to do with the internal development of the field rather than the actual ability to address problems on the ground. You can pursue this kind of inquiry in a comparative way. Is the way they do it in public international law different from, better than, or worse than, the way they do it in international economic law? Do the two fields share an overall sensibility? Are the two fields engaged in a kind of *pas de deux* and, if so, does it do more to occlude than to illuminate? To defer than promote solution?

The next step seemed to me to be to operationalize all this. To figure out dynamically what goes on when these materials and these arguments are brought to bear on some particular kind of problem. You could try to do that as an individual, by going and being a human rights activist and paying attention to what was going on in your head and trying to figure out the situated psychological problems that arose for you as you tried to do the work. Watch how *you* deal with ambivalence and contradiction and say something about that. How was ambivalence functional for the pursuit of the project, when was it important to use and when not? Or you might look at the operationalization of international legal doctrines in a particular institutional setting.

When I was starting out as an international lawyer, the UN High Commission for Refugees had a project to promote the idea that everyone who was a refugee ought to have a "right to asylum." They had proposed hundreds of doctrinal ways to turn the status of refugee into the status of asylum but in some odd way, they seemed to

be repeating and entrenching the gap between being a refugee and being an asylee even as they tried to bridge it. There was something that was not functional in the way in which they developed their possible solutions. And when you start working on refugees you realize that the UNHCR sits alongside the immigration officers, particularly here in western Europe, and helps them to decide whom to exclude. So you think, “Something else is going on here than protecting people. They are protecting people, but they are also not protecting people.” And it seemed to me that the incoherence of the legal arguments for a link between refugee status and asylum facilitated the entanglement of UNHCR in national projects of exclusion.

I have always been struck that students can find it hard to imagine international law helping the person who wants to burn down the rainforest or protect the person who wants to torture somebody or kill civilians. Textbooks rarely arrange human rights materials to focus on the defense of a human rights abuser. But if you want to terrorize your population and you have a lawyer, he or she could certainly advise you on the organization of your terror campaign. So there are a lot of dark sides – dark sides enabled by the internal ambivalences of the field’s materials and by fealty to the professional promise of the profession to set things – and to set itself – right.

Let me close with this. If you take the topic of today’s panel, which I now get to, “Human Rights and War”, you could imagine, oversimplifying, three archtypical groups of people with different strategies. Human rights people, who have the strategy of speaking truth to power, naming and shaming. Red Cross people, who have the strategy, “rather than naming and shaming, we infiltrate with the military and confidentially talk them into exercising their power in a way that comports with right.” And then we have the military people, whose job it is to present an authorized force as right.

So three groups of lawyers in some kind of complicated conversation. Is there some way of modelling this?

If we were to start with the good guys, the human rights people and the Red Cross people, there are some characteristic defects in each of their strategies which are not resolved by their partnership. The human rights people have the difficulties or idolatry: in denouncing, you disconnect from responsibility for the practices of power, substituting fealty to the norms for assessment of outcomes. An ICRC person faces the corollary problem of complicity and loss of critical focus. We might imagine that by marrying these strategies, we could reap the benefits of both. The current idea that human rights ought to apply on the battle field and be fused with international humanitarian law expresses this kind of hope. But you may also get the defects of each. And as both begin to argue with a military assertion of right, they will soon come to speak the same language: to defend and critique bombing this village in the languages of both entitlement and just consequences. The military person will be motivated to speak the language of the ICRC in response to the claims of human rights – and the reverse.

As this goes on, the language of law becomes ubiquitous precisely by refusing resolution. It becomes a vernacular of legitimacy through use on all sides. It is not surprising to discover that when Human Rights Watch wanted to hire somebody to assess the legality of targeting in the Iraq war they hired the guy who had assessed the legality of targeting for the Pentagon. So he was going back over the targeting assessments he had already made to try to figure out whether or not they comported with international law. This kind of merger, it seems to me, is all over the place. And it is accompanied by splitting. The military speaks the language of human rights and of ethical consequentialism. Kofi Annan was pious in the morning and pragmatic in the afternoon. If we step back, it seems the practice of the field over time has turned

opportunities for political decision and contestation into judgments, professional assessments, contributing to the de-responsibilisation of the participants in international affairs. Thank you.