Can International Law Lead to a Fundamental Transformation of Politics?

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**Can international law lead to a fundamental transformation of politics?
How do realists, classical liberals, and constructivists each respond to that question?**

Baylis, Smith, and Owens (2011) provide a broad definition of international law when they refer to it as "the formal rules of conduct that states acknowledge or contract between themselves" (p. 567). Defined this way, even the most hard-boiled of realists accept international law as having some relevance. Indeed, as Hans Morgenthau (1948/2005) writes, international law has been, for the most part "scrupulously observed" since 1648 (p 285). However, classical realists maintain that international law cannot radically alter the behaviour of states; international law cannot satisfy the unyielding thirst for power. This paper will begin by examining the realist view of neutrality in international law, after which it will provide two alternative viewpoints. First, liberals such as Andrew Moravcsik and Anne-Marie Slaughter offer insight into the diverse nature of states and how transnational networks influence the enforcement of neutrality law. Second, constructivists such as Alexander Wendt and Thomas Franck show how identity formation affects state behaviour and why states perceive some laws as legitimate. The paper will examine the violation of Belgian neutrality in 1914 from the perspective each theory. Ultimately, this author will conclude that a broad synthesis is required not only for understanding international law but for transforming the international system.

Before examining the classical realist perspective, it is necessary to address the institution of neutrality. Neutrality in international law, the focus of this paper, is defined as:

legal status arising from the abstention of a state from all participation in a war between other states, the maintenance of an attitude of impartiality toward the belligerents, and the recognition by the belligerents of this abstention and impartiality (Britannica Encyclopaedia, par. 1).

The three fundamental elements of neutrality are thus: *abstention, impartiality, and recognition*. These three concepts will be returned to throughout the paper, especially the concept of recognition.

In the world according to classical realists, human nature is forever fixed and individual states, the primary actors in international politics, compete for power in an anarchic world (Baylis, Smith, and Owens, p. 86). States are sovereign, meaning they recognize no other power above themselves. Statesmen must be concerned with the "national interest," that is guaranteeing the security and prosperity of their people within a state. Statesmen must not be concerned with domestic morality; international politics is amoral. With that worldview in mind, international law is, on the whole, weaker in its binding in its binding power when compared to the domestic law of states because of the decentralized nature of international society—Morgenthau (1948/2005) calls international law "primitive" (p. 285; Carr, 1939/1970). There is no Hobbesian sovereign to enforce agreements, unlike the domestic realm where the sovereign imposes the law from above (Carr, 1939/970). At the same time, domestic law is seen as having binding power not only because of its coercive element but because, in the words of EH Carr, it "is an instrument of the common good" (p. 177). By contrast, international law is created by necessity (as opposed to coercion) and mutual consent (Morgenthau, 1948/2005).

By "mutual consent," Morgenthau means that all states have an interest in following a particular rule, and by "necessity," Morgenthau means the balance of power (p. 285-286). Carr puts it most aptly when he says that the "ultimate authority of law derives from politics" (p. 180). This explains why an international system of embassies and diplomats has existed and flourished over the past several hundred years. Indeed, all states have an interest in guaranteeing diplomatic immunity. If a state did not offer immunity to foreign diplomats, then it would run the risk of putting its own diplomats abroad at risk. For realists, such a system is an element of international law. International law can and does mitigate the effects of international anarchy. Yet, realists warn, because of the flawed nature of mankind and the survival-driven nature of states, states will not obey laws when they have no interest in doing so. In 1940, for example, Britain did not pay much credence to neutrality law when it invaded neutral Iceland in anticipation of a similar move by Nazi Germany. Recognizing the neutrality of Iceland would have been counter to the "national interest."

A rather poignant example that both Morgenthau and Carr point to is the violation of Belgian neutrality in 1914. Today it is well-known that Germany violated the Treaty of London of 1839, whose signatories (including Britain, France and Germany) recognized the new country of Belgium and agreed that it would be neutral. What is perhaps less well-known is that the view of the British government on the treaty was quite nuanced. In 1908, Under-Secretary of State for Foreign Affairs Lord Hardinge wrote that if France were to violate Belgian neutrality by invading it to attack Germany, Britain would not feel compelled to act; they would probably "not lift a finger." If Germany were to do so, however, "the converse would be the case" (Carr, p. 183, originally in British Documents on the Origin of the War, ed. Gooch and Temperley, viii pp 377-388).

To return to the three pillars of neutrality, abstention, impartiality, and recognition, the third is the most important. When Germany violated the agreement, Britain used that as a pretext for declaring war on Germany. This was not out of some sense of altruism towards Belgium but out of fear of, and interest in countering, German expansion. Germany may have originally recognized Belgian neutrality with its signatory status to the 1839 agreement, but once it believed that it could benefit from attacking France through Belgium (the Scheifflen Plan called for an attack on France through Belgium to ensure a decisive victory), then it had no use for the treaty.

It is plainly clear, say the classical realists, that international law cannot reduce the competition among the major powers. There was no "mutual interest," to quote Morgenthau, from the perspective of Germany, although there was an element of "necessity," from the perspective of Britain, to enforce it and maintain the balance of power. The realist view, however compelling, should not be accepted before considering additional perspectives. It may be true that states follow the law only in so far as they require it, but up to what point is it not in their interest to abide by it? A classical realist would point to the importance of material capabilities and whether or not the law advances or limits the power of a state. The constructivist critique, in particular, will seek to examine the issue of legitimacy in greater detail. For now, however, the paper turns to a liberal view of international law.

Liberals reject the realist understanding of international law, especially the conviction that the state is the sovereign and ultimate authority. They question the Westphalian maxim of "*cujus regio, ejus religio,"* the implication of which is that "the prince" is the ultimate source of authority in a state (Slaughter, 1993, p 537). For theorists such as Anne-Marie Slaughter (1993) and Andrew Moravscik (1997), what happens at the domestic level is critical to understanding the international society, and as a corollary, to understanding international law. States are not homogenous entities nor are they the primary actors; states represent a multitude of interests, not just the interests of "the prince," and it is the individuals and the groups within the state that are the primary actors. Neutrality international law has greater legitimacy than acknowledge by realists, as it intersects with groups and individuals within the state and can influence the behaviours of actors.

In this sense, state behaviour is not only exogenous—that is, determined by interaction with other states—but is endogenous, that is, determined by change coming from the bottom-up. In addition to determining individual state preferences, domestic actors also affect the behaviour between states. There is an element of interdependency, Moravcsik writes, to the international system. For example, while realists would point to the security dilemma as determining an arms build-up between states, liberals would point to the ideologically-driven nature of a ruling elite committed to expansion (p. 521). Anne-Marie Slaughter (1993) describes a hypothetical world composed entirely of

liberal democratic states. In such a world, domestic institutions (such as courts and legislatures) interact across borders. This is not unlike the interdependency that Moravscik describes. This dialogue means two states are more interested in signing an extradition treaty, for example, because of the confidence they have in one another with regard to their judicial system (p. 530).Ultimately, for liberals, the state is a "representative institution" and not a homogenous entity, and the domestic elements of the state affects its behaviour.

To return to the example of Belgian neutrality, classical realists argue that the British were more concerned about the balance of power when they defended international law. A realist might ask: "would Britain have acted to defend international law if France had violated Belgian neutrality?" Such a question assumes that Britain in the 1914 was a homogenous entity. In actuality, Britain was not. In the The Guns of August, Barbara Tuchman (1965/1990) examines discussions between British, French and Belgian diplomats in the early 20th century. Belgian diplomats made it plainly clear to the British that they would fight against any power that violated their sovereignty. Britain was warned that if their forces were to land in Belgium before the Belgians had formally requested assistance, then the British would be fired upon. The British relayed this concern to the French, insisting that France must not, under any circumstances, be the first power to violate Belgian neutrality. In this regard, neutrality international law had a clear effect on the strategies and behaviour of different actors.

Yet the importance of this example goes even further. The British Foreign Secretary Edward Grey was especially concerned with domestic politics. As Tuchman writes: "[i]t was…clear to Grey that only violation of Belgium's neutrality would convince the peace party [Liberal Party] of the German menace and the need to go to war in the national interest" (p 109). Indeed, there were concerns that members of the Liberal Party cabinet would resign if Britain were to declare war and while the Prime Minister Asquith could have garnered support from Conservative opposition members, he had "no desire" to declare war with a divided Parliament (p. 135). The implications of this are clear: if France had been the first to violate Belgian neutrality, it is possible that Britain would not have done anything to defend Belgian neutrality, as classical realists like EH Carr and Morgenthau suggest. However, it is questionable that Britain would have been as likely to have entered the war to counter German aggression, or, had it done so, Britain might have been more limited in its action due to a divided parliament. Here, domestic constraints played a major role in determining the formation of foreign policy and those constraints were, at least, partly informed by international law.

Can international law lead to a fundamental transformation of the international system? Classical realists would be sceptical of the importance this author has placed on the relationship between domestic constraints and international law. For one, the argument above boils down to conjecture; it is impossible to know for certain how Britain would have acted differently. Realists would counter that Britain still would have gone to war with Germany and that the statesmen were more concerned with the "national interest" in mobilizing parliamentary support, as opposed to a sense of obligation to international treaties. At the very least, though, the decisions of actors were partly informed by neutrality law. Individual decision-makers *within* Britain recognized the Belgian claim to impartiality and abstention from the impending conflict, and that recognition was reflected in the representative institution that is the state.

As international law scholar Yasuki (2003) writes, policy-makers today are just as concerned about the consequences of breaking international law after having signed a treaty (p. 112). In liberal democracies especially, governments are concerned with the costs of violating international law (p. 120). While this constraint is less powerful on non-democratic states, international law is continually referred to in the international public discourse (p. 122-123). Having examined international law from the perspective of realism and liberalism, the paper now turns to a constructivist perspective.

Constructivists challenge the realist paradigm on the grounds that institutions such as anarchy are automatically given within international society. Consider the article by Alexander Wendt (1992) "Anarchy Is What States Make Of It." For the purposes of this paper, international law is what states make of it. Institutions such as international treaties are not fixed and their perceived legitimacy changes over time. This section will examine how actor identities affected the behaviour of Belgium and the relationship between international society and the legitimacy of law.

From a realist point of view, a rational decision would have been for Belgium to accept the passage of German troops through her territory. Did Belgium put too much stock in the binding power of the neutrality treaty when it knew for certain that it was likely that one of the great powers would violate that agreement? Emile Waxweiler (1916) provides an answer. Belgian resistance in the face of Germany was the natural outcome of several decades of nationalism in Belgium. He writes that "the will of the nation to live…has been the directing force of Belgium's foreign policy" (p. 13). Indeed, as the Minister of Foreign Affairs in Belgium said in 1840, "neutrality is not impotence" (p. 16). Constructivists, like Wendt, would point to the above example and argue that identity of an actor is determined by interaction with other actors. Identities are tied to the interests that an actor pursues. As he says, "security interests" and "identities" are in constant flux with one another (p. 418).

The year 1914 was not the only time when Belgian sovereignty had been threatened before. In 1870, Belgian diplomats believed that the treaty would be seen non-binding by other states. New treaties were therefore signed with Berlin and Paris (as Germany and France were preparing for war), asking those two countries to respect Belgian neutrality. In particular, there was concern that the Treaty of London of 1839 could not be binding if it could not be grounded in the situation at hand (Lingelbach , 1933, pp. 66). This raises the question of legitimacy. Why do states view a law as legitimate? Why do they not?

Thomas Franck (1988) argues that international treaties are neither binding in the way that domestic laws are (where a sovereign enforces laws from above) nor simply voluntary (meaning states could disregard agreements on a whim) (p 755-756). Consider the international law dictum of "pacta sunt servanda," that agreements are binding and must be kept in good faith. States, Franck says, "act as if they were bound" by a treaty (p. 756). Simply by being a member of the international community, states implicitly accept the principle of equality of members. In a similar sense, Wendt argues that states respect the sovereignty of other states in order to ensure the recognition of their own sovereignty. Sovereignty is "practiced" by members of the international community, so that the concept of sovereignty is reinforced and stable understandings emerge between actors (p. 412).

Franck may be correct in his argument that states "act as if they were bound," but it would seem the international society he is describing is not a competitive one. Europe of the 19th and early 20th century was undoubtedly what Alexander Wendt refers to as a "competitive" model of international society, marked by a realist understanding of survival and the presence of actors which pursue a policy of "predation" (p. 406-409). Iterated interaction between actors from 1839 to 1914 reinforced this socially-constructed competitive system.

For several years, Germany was concerned whether or not Belgium would be on the side of France in the event of war. In one instance, the Kaiser of Germany warned the King of Denmark that in the event of a war, whoever was not with Germany was against Germany (Tuchman, 29). On the eve of war in 1914, a German diplomat argued that it was a "matter of life and death" that Belgian neutrality be violated, lest it be defeated by the French and Russians, and a British diplomat responded in turn that it was a "matter of life and death" that Britain honour its obligation, lest it find itself isolated diplomatically down the road. Consider the following account of a British diplomat concerning his meeting with the German Chancellor shortly after Germany had invaded Belgium and Britain prepared to declare war:

His Excellency [the German Chancellor] at once began a harangue, which lasted for about twenty minutes. He said that the step taken by His Majesty's Government was terrible to a degree; just for a word – "neutrality," a word which in war time had so often been disregarded – just for a scrap of paper Great Britain was going to make war on a kindred nation who desired nothing better than to be friends with her (Hance, 2009, p. 330).

Once again, it is clear that international law is "what the state makes of it." Both states acted in a competitive system, as described by Alexander Wendt, but perceived the 1839 treaty in remarkably different ways. Britain saw honouring the treaty not necessarily out of a sense of obligation, but to maintain its reputation as being true to its word. Germany saw the treaty as an impediment and the concept of neutrality as being invalid.

This difference in perspective can be further explained by the phrase "void ab initio," or that the law is invalid from the outset. An international agreement is invalid if it is counter to the interest of the international community (Franck,

p. 757). One could take this claim a step further by saying that the law is invalid if it conflicts with the type of international system in which it is created. In this way, the treaty of 1839 was not compatible with the competitive nature of the international society from 1839-1914. It is possible, from the point of view of constructivists, to change the way actors behave one another by altering identities and therefore interests of actors. Unfortunately, the competitive system of the early 20th century reinforced certain intersubjective meanings, such as security-driven identities.

According to the constructivist account, then, can international law facilitate a transformation from a competitive international system to a cooperative system? Certainly, from the example of Belgian neutrality it seems clear that international law did not significantly alter the international system, although it was a major determinant of Belgian identity and behaviour. While constructivism can account for the violation of international law, it is questionable if the international community has ever moved away from a competitive model driven by power politics. Realists would point out that international law violations still take place today, making it clear that international law is "primitive" compared to domestic law. At the same time, the violation of a law does not necessarily mean that the law is invalid.

Thus far the paper has presented three major theories of international relations, classical realism, liberalism, and constructivism, to examine the issue of international law. Specifically, the paper has used the issue of Belgian neutrality in 1914 as a case-study. This author finds that all the theories have compelling arguments about neutrality law, but none are on their own adequate to explain it. Constructivism offers an interesting analysis of Belgian identity and of law, but this author finds the liberal analysis more powerful: domestic actors in a representative institution that is the state are sometimes influenced by international law. On the other hand, it is possible that liberalism overemphasizes the importance of domestic constraints such as the case of a divided British parliament. That particular argument could be seen as conjecture, for while domestic institutions are obviously important, it is impossible to know how Britain would have acted differently if France, and not Germany, had violated the treaty. Still, realists underemphasize the importance of treaty law and, as Carr points out, realism lacks an end-goal. Unlike liberalism or constructivism, it does not allow for change.

What functions can international law, in particular, treaty law, play in the contemporary world? The balance of power and its centrality to international events must never be underestimated by states residing in a competitive international system. The balance of power and international law have a history of clashing with one another. The Treaty of London (1839) was meant to apply at all time and in all situations, but by 1870 Belgium found such a stance unworkable and sought to secure more contemporary agreements with France and Germany. Yet, strengthening transnational networks of individuals and groups could serve to affect state preferences and move states away from a competitive system to a more collaborative one in which international laws will not be agreements between states so much as they will be agreements between individuals and groups within the state. Such a shift would not be far off from what Antonio Gramsci envisions when he describes social forces, including intellectuals, forming the "historic bloc" to work towards gradually overturning prevailing norms and institutions (Cox, 1983, p. 167). Thus one function of international law today is to facilitate the strengthening of shared norms and institutions across state-borders. Put more concretely, international law can align with one another the preferences and behaviours of societal actors of different states.

This paper has taken the violation of Belgian neutrality in 1914 as a case-study, and has provided an analysis of the events from the perspectives of realism, liberalism, and constructivism. It seems that no theory can on its own provide a clear understanding of neutrality law, and no theory on its own can provide a means to transform the international system. A broader understanding is needed of the international system. The place of international law in the contemporary world is in fostering stronger links across state-borders to ensure greater constraint on the state and to alter the preferences of the state. It is true as Yasuki argues that citizens in any state will tend to view domestic law as having greater legitimacy than international law. In spite of that, as the example of Belgian neutrality illustrates, domestic institutions can be influenced by international treaties. International law is neither "primitive" nor panacea.

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