Introduction

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The contributions to this volume provide a birds-eye view on some fundamental elements of international law from the perspective of economics. International law lagged behind compared to other areas of law in benefiting from the influence of economic analysis of law. As Parisi and Pi (Chapter 4) point out, one possible explanation for the delayed attention of law and economics scholars to international law is given by the fact that international law was perceived to be governed by informal rules and enforcement mechanisms that resisted formal economic analysis. This volume will hopefully reveal that, contrary to this perception, economics can also successfully illuminate the understanding of informal mechanisms such as those of international law. In this vein, this volume aims at providing a pathfinder through the recent literature and, in pushing the economic understanding of international law, identifying new areas and issues for research in international law and economics.

This volume is organized into four main parts, beginning with the building blocks of the nation state, and continuing with the sources and the enforcement of international law, and various applications and extensions. What follows is a brief review and presentation of these contributions.

I. BUILDING BLOCKS

The chapters contained in Part I of this volume review some approaches to international treaty law from an economic perspective, focusing on the 'building blocks' of international order and exploring how and why, from an economic perspective, states form, determine their boundaries and collapse.

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First, Enrico Spolaore lays out the relationship between economies of scale and heterogeneity costs derived from heterogeneous preferences for public policy, which are themselves derived from ethnic, religious, socio-linguistic or other cultural differences of different populations, which are more likely to be subsumed into a polity as the polity increases in size. Spolaore examines border creation through four approaches: pure efficient border-creation, border-creation via democratic process, border-creation as a byproduct of a world of rent-seeking leviathans, and border-creation as a result of war/conflict. He ends his contribution with formal explications of these.

In Chapter 2, Bridget L. Coggins and Ishita Kala advance the value of a ‘rational choice’ approach to questions of the creation and dissolution of polities. They prefer the less-popular ‘constitutive’ theory of state-recognition to the ‘declaratory’ theory. They then move to examine what incentives motivate the recognition of new states and the ‘posthumous’ recognition of failed states, focusing particularly on Kosovo and Somalia.

In Chapter 3, Abraham Bell examines the role of economic analyses in questions of territorial sovereignty. He repeatedly analogizes sovereignty issues to questions of property law, and explains how economic analyses in property law may be helpful to sovereignty questions. Nevertheless, he clearly states that sovereignty is a fundamentally different question from property, and thus proposes a continuum of property/sovereignty, starting with questions of pure private property on one end, moving through state-owned property, and then examining questions of pure sovereignty at the other end.

II. SOURCES OF INTERNATIONAL LAW

The contributions in Part II of this volume consider the sources of international law, providing an explanation and an economic analysis of the mechanisms through which international actors create international legal rules and obligations, namely treaties, customary rules and other accords that lack formal authority, often referred to as soft law.

The focus on sources of law is fully warranted in international law. From a theoretical point of view, international legal rules are unique and difficult to analogize to conventional sources of law in national legal systems. A critical feature of international legal rules is their consensual nature. The formation of both treaty law and customary law is governed by principles of consent. Unlike conventional sources of law, such as legislation or judge-made law that bind all subjects, whether or not they agreed to the creation of the rule in question, treaty law and customary

law are binding only on states that either affirmatively (by entering a treaty agreement) or implicitly (by not opposing an emerging custom) agreed to be bound by it.

Treaties are agreements between states and/or international organizations. In Chapter 4, Francesco Parisi and Daniel Pi further develop Goldsmith and Posner's (2003) explanation of international agreements with reference to rational self-interest rather than vague, quasi-moral universal norms. They examine incentives to either form or accede to treaties as opposed to other agreements (primarily as a form of signaling, since, without an international enforcement authority, treaties may not be terribly 'binding' in a traditional sense). They further examine game-theoretical concerns regarding who will attempt to form or accede to a treaty, and how to manage high-cost/low-benefit scenarios, particularly in cases where mutual reservations are possible. Finally, they analyze the evolution of treaty law over time, giving particular attention to issues of ratification and fragmentation.

In Chapter 5, Andrew Guzman and Timothy Meyer examine states' incentives to invest in 'soft law', that is, international accords which lack binding authority. After clarifying some of the confusion surrounding the definition of the term, Guzman and Meyer move to a discussion of the role of soft law in the international legal order. States may be incentivized to use soft law over 'hard' law because it is generally less costly to develop soft law and also less costly to violate it or change it. Further, it is a helpful way to maintain flexibility in the face of uncertainty, and is also helpful as a way to solve coordination games. It may also be a way to handle domestic political complexity surrounding international agreements – a soft law choice may be a helpful compromise between two domestic parties, one of which wants hard law, the other of which wants no law at all. In the case of countries like the United States, where hard law requires the involvement of the legislature, the executive branch may choose to invest in soft law so as to avoid entangling the legislature. Finally, they analyze the incentives for states to create soft law through intergovernmental institutions, which can create a form of 'international common law' by applying non-binding gloss to existing hard law requirements. Guzman and Meyer argue that states will deploy this international common law as a way of sending costly (and therefore sincere) signals to each other about what they believe to be required by the hard law.

In Chapter 6, Parisi and Pi examine the emergence and evolution of international customary law. Legal theorists define customary law as a practice that emerges prior to the recognition of binding legal obligations and constraints. The process of formation of customary law is quite

unique and different from the process of formation of the other sources of domestic law. The legal system eventually adopts and enforces practices that international actors have followed outside of legal constraints, out of a sense of obligation. The process of custom formation has been described by Parisi and Fon (2008) as a form of ‘direct legislation through action’. The resulting rules emerge gradually through the spontaneous and voluntary adherence of the international community rather than through political deliberation or adjudication. Parisi and Pi summarize the ‘traditional’ account of customary law, examine Goldsmith and Posner’s contributions to the topic, and then provide a formal model of incentives in customary international law. Traditionally, customary practice is distinguished from mere habitual or coincidental practice by ‘*opinio juris*’, an intention to be bound by the customary law. Goldsmith and Posner, however, developed a game theoretic model which suggests that parties accept customary law less out of a belief that it is binding and more for reasons of rational self-interest. Parisi and Pi provide formal models explicating Goldsmith and Posner’s theory, examining the emergence, evolution and exceptions to customary law from the perspective of incentives. They finally conclude that, with the exception of coordination games, customary law may be less likely to generate efficient rules than treaty law due to the various ways in which parties’ heterogeneous incentives impede the formation of efficient customary law.

III. ENFORCEMENT OF INTERNATIONAL LAW

Legal scholars have often identified enforcement as the most puzzling and intellectually challenging characteristic of international law: what binds states to fulfill obligations undertaken toward other sovereign states or toward the international community at large is very much unlike the set of remedies that render obligations enforceable in a domestic legal system. Yet the absence of typical enforcement mechanisms is no impediment to the functioning of international law. Explanations of this characteristic abound. Scholars have argued that the absence of compensatory or injunctive remedies for unfulfilled international legal obligations is replaced by normative and moral factors that create incentives and constraints that differ in nature from those created by formal legal remedies. In the literature, Goldsmith and Posner (2003) have further argued that international agreements are closer to letters of intent than to proper contracts. This led to theories explaining the workings of international law in terms of cooperation, coordination, and signaling. Law and economics scholarship unsurprisingly starts from the assumption that

international actors undertake choices motivated by self-interest, and that obligations undertaken in international law should be viewed as instruments for the pursuit of those interests.

The contributions collected in Part III of this volume address the issue of enforcement, explaining how states are incentivized to enforce international law against one another and how international law and international courts interact with domestic institutions. In Chapter 7, Paul B. Stephan examines recent scholarly treatment of several questions related to the enforcement of treaties. He finds it important to distinguish between actions taken to pursue a state's interest versus those taken to enforce legal entitlements derived from treaties, emphasizing the reputational methods of treaty enforcement, although these reputational sanctions are not unique to treaties. He finds both benefits and problems associated with 'preference for cooperation' theory when applied to states with regard to treaties. He analogizes to 'non-contractable terms' to evaluate why states might prefer informal enforcement of treaties, while asking for further research about whether treaties, by formalizing obligations, allow 'informal' enforcement to be more effective. He is hesitant to draw a sharp line between treaties and soft law. He further analyzes the nature of third party dispute resolution under treaties, pointing out that while some tribunals have sanctioning authority, others do not. Finally, after talking about differences in domestic enforcement of treaty provisions, he theorizes about the effects of varying levels of enforcement on domestic welfare. The nature of regional jurisdiction for such things may disincentivize parties to do business in states that heavily enforce these treaty obligations.

In Chapter 8, Tom Ginsburg focuses on economic analysis of the interaction between domestic and international law, treating states not as unitary actors, but rather considering both the international and domestic legal levels in the same framework. He begins by modeling the interaction between domestic and international law as a series of 'nested jurisdictions', which vary in terms of scope and depth. Power is allocated amongst these nested jurisdictions in order to produce public goods, resolve commitment problems, and reduce agency costs. He then explores several characterizations of this interplay, primarily examining the adoption of international law as a substitution for domestic legal change, as a complement to domestic systems, and as duplicative signal-sending. Finally, he examines the ways in which the availability of international devices affects the internal balance of power within a state's constitutional system. For instance, the ability of many executive branches to bind states to international agreements without the agreement of the other branches shifts the balance of power in the executive's favor.

IV. APPLICATIONS AND EXTENSIONS

Part IV focuses on applications and extensions, examining how theories in law and economics can lead us to a better understanding of the use of atrocities and war, and how behavioral economics may serve as a more helpful model for international law than pure rational choice theory.

In Chapter 9, James D. Morrow seeks to analyze when and why warring states and militaries engage in ‘atrocities’, that is, acts which violate international agreements, and further analyzes how developments in international law can influence parties away from such atrocities. He begins with an analysis of inter-state wars, first looking at a series of non-legal explanations for why states do or do not turn to atrocities. He suggests that ratification of treaties serves signaling and screening functions, and clearly delineates what sorts of conduct will constitute a ‘violation’ of international law. He then analyzes how and why democracies kill enemy civilians, which several studies suggest they are more willing to do than autocratic regimes, though they attempt to hide this behavior from their own citizens via rhetorical means, and while offering at least a flimsy legal justification.

Morrow then moves to a discussion of civil wars, which tend to be much less regular than inter-state wars and thus often feature proportionally more atrocities, particularly ‘mass killings’ perpetrated by the government against rebel-allied civilians. After thoroughly explaining the characteristics of both guerrilla and ‘conventional’ civil wars, Morrow examines why atrocities take place and who is most likely to commit them, focusing in particular on the ‘war for information’ in guerrilla civil wars. The evidence seems to suggest that a more ‘restrained’ (that is, less violent to civilians) approach to guerrilla war is generally (though not always) more effective. Morrow concludes by suggesting that although international treaties do not play much of a role in conduct in civil wars, a state’s willingness to adopt the Rome Statute serves as a commitment device to reduce the likelihood of a civil war continuing or starting in the first place.

Finally, in Chapter 10, Anne van Aaken and Tomer Broude focus on the use of behavioral economics in the study of international law. Although most law and economics approaches to international law have centered around rational choice theory, van Aaken and Broude propose that the tools of behavioral economics can add much to the discussion. Rational-choice-based understandings of international law assume that collective actors such as states maximize their utility from a stable set of preferences and accumulate an optimal amount of information. van

Aaken and Broude instead propose a form of behavioral economics which includes lessons learned in cognitive psychology, and which suggests individual humans (and thus collective actors) have 'bounded' rationality, subject to various biases and heuristics. After briefly pointing out the frequent use of rational choice theory in international relations scholarship, they move to a discussion of various challenges and methodologies for the application of behavioral economics. They first suggest that states are probably even less perfectly rational than individuals, thereby making behavioral economics even more appropriate. Second, they suggest that although there are difficulties inherent in behavioral study of international action, this is just as true of any other empirical theory. Finally, they move through an analysis of treaty design using behavioralist terms, explaining why states may be hesitant to embrace new treaties even if the new treaty would be fully within their rational self-interest.

REFERENCES

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