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Nomos of the Sea: The Origins of International Law and Maritime Compliance

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Scholarship on international law and institutions is deferential to the study of the international "Nomos," an organizing principle that guides the order and orientation of states to manage the complexities of their interactions and interdependence. The first part of this thesis explores the foundations of international law. International law emerges as an ordering process in response to frictions in the self-help system of anarchy. Recurring "structured domains" subsist in anarchy that require regimes of management. New structured domains result from increasing complexity in the international system. International law is derivative of these management regimes. We generalize the enforcement mechanisms of international law into three categories: hierarchical, decentralized, and internalized enforcement. Nomos, cyclical and shaped by contestations of power and interest, interacts with these enforcement mechanisms to shape the design of management regimes. Wars and shifts in the distribution of power bring fluidity to the international order, weakening management regimes until a new Nomos forms through "habit." This neorealist restatement is pitted against traditional theories of international law through a historical appraisal. The second part of this thesis applies this framework to the law of the sea, tracing the historical patterns of friction begetting management. After establishing the hierarchical and reciprocal mechanisms of enforcement in ordering the rules of the sea, the operation of this general theory is evaluated through two studies. First, an analysis of the historical development of the law of the sea through UNCLOS and contestation thereafter demonstrates the role of the United States in crafting rules supportive of freedom of navigation, and the rise of "excessive jurisdiction" driven by the ascent of China and inchoate multipolarity. Next, a qualitative study of maritime boundary disputes is undertaken to show the reciprocal interests necessary for effective settlements on the delimitation of exclusive economic zones, as well as the strategic determinants of disputes being delegated to arbitration and adjudication.

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Prefatory Note

In writing this thesis, I came across some fundamental problems that nearly led me to abandon the project. Although I was able to overcome this by developing the concept of Nomos, which nicely glued the theory together, reconciling these problems has profoundly altered the structure of the thesis. After exploring the foundations of international law, it became clear my theory was becoming too broad for an argument contained to explaining the law of the sea. To address this, I have divided it into two chapters: the first provides a comprehensive and general theory of international law and the second applies these general principles to the law of the sea. Separating the thesis into two parts has allowed an analysis of the historical emergence of international law in isolation, as well as a more cogent explanation for developments in the law of the sea.

I would like to thank my thesis advisor, Professor Eric Posner, and my preceptor, Dr. Kara Hooser, for their guidance and patience with this endeavor, as well as their invaluable feedback. I was fortunate enough to learn from many brilliant teachers on a range of topics and highly respect and appreciate the advice they gave that culminated in this work, particularly Professor Tom Ginsburg. Finally, I am most grateful for my friends that sustained me through arduous times, listened to my proposals and who I learned so much from, including introducing me to the topic of jurisprudence.

Chapter 1: Exposition of the Foundations of International Law

A) Introduction

International law has been likened to a "global rule of law," a gradual surrendering of state sovereignty setting the stage for a new "world public order."[1] Indeed, laws and legal mechanisms designed to regulate interactions between states have proliferated in the past century. On issues ranging from the use of drones to large-scale invasions, states have also consistently sought to frame their actions as being in accordance with international law. However, whether international law has exerted any independent effect on state behavior remains a highly contested issue.[2] The debate over international law dovetails with many fundamental questions of international relations. Do international institutions constrain state behavior? To what extent do norms matter? When do states cooperate under anarchy? Understanding the role of international law is therefore essential to the study of international relations, as well as of immense practical significance due to the wide-ranging matters it concerns itself with. It could assist us in understanding whether the proliferation of laws has had a progressive effect on interstate relations and how they can be designed to be more effective.

Although much interdisciplinary progress has been made, the literature on international law continues to be divided by the divergent approaches of international lawyers and political scientists. Scholars of international jurisprudence address the nature and function of international law, while political scientists explain when and why states comply with international law and what role this plays in affecting international politics. In other words, the

[1] MacDougal, Myres S., ed. *Studies in the World Public Order*. Vol. 1. Martinus Nijhoff Publishers, 1987

[2] For critical a view, see Goldsmith, Jack L., and Eric A. Posner. *The Limits of International Law*. Oxford University Press, 2005; by contrast, others observe "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Henkin, Louis. *How Nations Behave: Law and Foreign Policy*. Columbia University Press, 1979, 43.

former takes an internal approach to law while the latter takes an external approach. Taking from both traditions, this chapter seeks to present a comprehensive and general theory of international law that addresses its ontology, function, and mechanisms within the milieu of the international system.

While this scope is ambitious, an original unified theory of international law is necessary to address the central puzzles of this paper. Despite being the dominant paradigm of international relations theory, the study of international law has particularly bedeviled realists. Two approaches have developed from this tradition to explain law's epiphenomenal character and the primacy of power politics, but both present extreme positions that are not generally applicable to the empirics of international law. The dismissive, or nihilistic, approach traces back to the debate between realists and "idealists" in the interwar period and has not substantially developed since.[3] The core assumption is that international law fails to shape state behavior and is little more than written rules that would have been obeyed regardless.[4] Regardless of the ample ink spilt discussing international law, this view is clearly contradicted by the legalization of international politics and the considerable, if not enduring, state compliance with the principles of international law. Advocates have therefore fallen back on economic approaches to jurisprudence that use rational actor models to represent how law solves cooperation problems and externalities to advance state interests but lack a clear realist disposition.[5] The hegemonic approach adopts the hegemonic realism of Robert Gilpin in international security and international political economy to suggest international legal rules are prescribed by powerful states to advance their interests under a hegemonic order.[6] However,

[3] Carr, Edward Hallett. *The Twenty Years' Crisis, 1919-1939: Reissued with a New Preface from Michael Cox*. Springer, 2016

[4] Mearsheimer, John J. "The False Promise of International Institutions." *International Security* 19, no. 3 (1994): 5–49.

[5] The critique of traditional international law in Goldsmith and Posner, op. cit. is the standard reference, but self-consciously takes influence from rational-actor approaches in international relations without clear association with any theory.

[6] Gilpin, Robert G. *The Political Economy of International Relations*. Princeton University Press, 2016.

the structural logic of this approach discards anarchy to represent international relations as the production of norms and rules by a dominant hierarchical state and its subordinates.[7] Further, it fails to explain the equalizing nature of international law, its universal appeal, and its commitment to normative goals in the international system. An exception to these approaches is Stephen Krasner's distributional adaptation of regime theory, which shows how the relative power of states shapes which institutional equilibrium states select on the Pareto curve.[8] Instead of presenting an alternative to regime theory, Krasner strengthens the logic of institutionalism by explaining variance in outcomes.[9]

Realism's neglect of the work of international lawyers has played a major role in its crudeness in addressing the subject of international law and cooperation. The joint effort by neoliberal institutionalists and legal scholars in the 1980s and 1990s, later joined by constructivists, produced the prevailing research program of regime theory that has guided scholarship since. The task of this paper is to present an alternative framework to regime theory based on the structural presuppositions of neorealism.

Neorealists conceptualize anarchy as a self-help system producing competitive behavior in pursuit of security.[10] In the absence of a sovereign, even instrumental cooperation among allies with similar goals faces hurdles as they seek to amplify their own interests. Building on this, the complexity of interactions and interdependence among states under this logic instigates "friction" between them, resulting in conflict and disorder in international affairs. This recurring friction necessitates ordering in "structured domains" to stabilize state interactions and areas of interdependence. Structured domains are spaces of strategic interdependence in which mutual restraint and coordination arises because, left unmanaged, recurring friction

[7] Lake, David A. *Hierarchy in International Relations*. Cornell University Press, 2011.
[8] Krasner, Stephen D. "Global Communications and National Power: Life on the Pareto Frontier." *World Politics* 43, no. 3 (1991): 3
[9] See Keohane, Robert O. "Stephen Krasner: Subversive Realist." *Back to Basics: State Power in a Contemporary World* (2013): 28-53.
[10] Waltz, Kenneth N. *Theory of International Politics*. Waveland Press, 2010.

engenders high costs and risks. Structured domains tend to subsist in anarchy unless fundamental changes in interaction and interdependence negate them; similarly, new structured domains emerge when the increasing complexity of the international system creates more pertinent areas of interaction and interdependence. The habitual management of structured domains gives rise to "Nomos," the essential organizing principle that orders and orients states as the antithesis to the natural state of friction in anarchy. The "habit" of management, fashioned through the power, interests and normative goals of states, shapes the structure of Nomos. Structured domains have unique logics, the management of which consists of different enforcement mechanisms based on their spatial and functional features. Nomos interacts with these enforcement mechanisms to cultivate "management regimes," the formalized rules and institutions, including law, that guide state behavior in structured domains.

Nomos is distinct from both the formal rules of international law and the normative structure of world politics. The liberal and constructivist emphasis on ideational factors in international relations gave rise to a normative structuring principle in the literature, encompassing the holistic effects of transnational norms and ideas, but offers too broad a domain to reflect international law and institutions. The international legal focus on the effects of doctrinal rules and customs offered a much narrower area of study. Nomos as an organizing principle precedes law; it is the fundamental strategic ordering and orienting process of states to manage their interactions and interdependence within anarchy. While structured domains are recurring, Nomos is however cyclical. Despite the stickiness of Nomos amid contestation in the international system, the natural order of anarchy reemerges as wars and major shifts in the distribution of power bring fluidity to the international order and weaken management regimes. Nomos reconstitutes itself in a new form through habit, with the design of management regimes reflecting its new dynamics of power and interest within structured domains.

Most of the literature on the effectiveness of international law has assessed it through the lens of compliance in practice. Do states comply with international law, acting in accordance with codified treaties and customs? Have they complied with it by coincidence of interest, or would they have behaved otherwise deprived of the law's existence?[11] By incorporating enforcement, this paper aims to examine international law through a different lens. Compliance with all law requires an enforcement mechanism; something must deter defective actions. The means of enforcement consequently provide a basis for the sources of international law. These processes are reduced to three primary mechanisms: decentralized enforcement, hierarchical enforcement, and internalized enforcement. Additionally, enforcement should not be equated with sanctions, or what John Austin called the ability "to inflict an evil";[12] positive inducement, such as the social construction of shared norms, is enforcement. It is important to understand the mechanisms through which compliance operates to delineate what makes international law effective. By tracing the enforcement mechanisms, we can also better establish what makes compliance with international law work and provide insight into how to strengthen its design.

This paper proceeds as follows. First, we outline and draw from the existing theories of international cooperation and international jurisprudence in the political science and legal literature respectively. Next, we delineate the enforcement mechanisms in international law. We then elaborate on the concept of Nomos, the emergence of structured domains in the international state of nature, the formation of management regimes and law in structured domains through the interaction of Nomos and enforcement mechanisms, and the cyclical nature of Nomos. Finally, we end Chapter 1 by reframing the history of international law through this lens. In Chapter 2, we then turn to the law of the sea to assess the application of this framework to a specific body of law.

[11] Downs, George W., David M. Rocke, and Peter N. Barsoom. "Is the Good News about Compliance Good News about Cooperation?" *International organization* 50, no. 3 (1996): 379-406.
[12] Austin, John. *Austin: The Province of Jurisprudence Determined*. Edited by Wilfrid E. Rumble. of *Cambridge Texts in the History of Political Thought*. Cambridge: Cambridge University Press, 1995, 22.

B) Theories of International Cooperation

International law is essentially an institution, serving as the customs and codified rules regulating state conduct. Placing our discussion in this context, this section reviews the different the major theories of institutional cooperation as presented in Table 1.

Table 1: Theories of Cooperation

Theory	Motives	Institutional Design	Behavior
Neorealist	Relative Gains	Epiphenomenal	Competition
Rationalist	Mitigating Uncertainty	Revealed Preferences	Institutionalization
Neoliberal	Absolute Gains	Multilateralism	Cooperation
Constructivist	Constructed Norms	Identity Formation	Socialization

Whether and when cooperation is possible in international politics under anarchy between competing state preferences has been a longstanding subject of debate in international relations. Waltz[13] defined agents in the international system as facing a self-help structure, which amounted with similar features as the Prisoner's Dilemma[14], to suggest that, in pursuing their self-interests, states are incentivized not to cooperate and fail to realize larger gains.

Others[15] such as Keohane and Axelrod countered that iterated versions of the Prisoner's Dilemma created patterns of cooperation in which states could reciprocate cooperative behavior and retaliate against defections in repeated interactions for absolute gains. These

[13] Waltz, op. cit., 109.

[14] This point is taken from Fearon, James D. "Cooperation, Conflict, and the Costs of Anarchy." *International Organization* 72, no. 3 (2018): 523

[15] Axelrod, Robert. *The Evolution of Cooperation*. New York: Basic Books, 1984; Keohane, Robert O. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton University Press, 1984.

neoliberal institutionalists argued international regimes provided the basis for promoting cooperative behavior on a multilateral basis.

Neorealists reinvigorated the case against cooperation by introducing relative-gains considerations.[16] If states had an intrinsic preference for relative gains, players in a Prisoner's Dilemma could not cooperate over iterative periods. Mearsheimer used the case of relative power in anarchy to argue that international institutions were "epiphenomenal," reflective of state interests and power rather than an independent constraining force.[17]

Rationalists believe institutions are designed to reveal the preferences of states, including their underlying normative distinctions. The international system is characterized by a large level of uncertainty, and such mechanisms are necessary to define strategic expectations in iterated games as a result.[18] States select into their preferred levels of competition and cooperation, a process labelled institutionalization in Table 1, with "noise" disrupting the precision of their institutional designs.

Constructivists take a fundamentally different approach to institutions, in which, although institutions are reflective of the motives of actors, the motives of actors are themselves based on socially constructed norms and identities. Through collective identity formation,[19] states socialize into cooperative or competitive behavior.

C) Theories of International Jurisprudence

Since the topic of jurisprudence is extensive, it is necessary to first demarcate the questions we are interested in. Jurisprudence covers the nature and function of law, its relationship with

[16] Grieco, Joseph M. "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism." *International organization* 42, no. 3 (1988): 485-507.

[17] Mearsheimer, op. cit.

[18] Morrow, James D. *Order Within Anarchy: The Laws of War as an International Institution*. Cambridge University Press, 2014.; Koremenos, Barbara. *The Continent of International Law: Explaining Agreement Design*. Cambridge University Press, 2016.

[19] Wendt, Alexander. "Collective Identity Formation and the International State." *American Political Science Review* 88, no. 2 (1994): 384-396.

morality and normative goals, its relationship to society and politics, theories of adjudication and judicial reasoning, valid sources of law, and legal obligation. Our social scientific approach and international scope limits us to primarily consider the nature, function, and legitimacy of international law. We shall explore the principal approaches of natural law, legal positivism, legal realism, and their progenies in international legal thought.

Natural law is built on the belief that law and morality is intertwined; there exists universal and immutable moral principles in nature that are discoverable through reason and constitute law. The dictum sometimes attributed to Aquinas that *lex iniusta non est lex* [an unjust law is no law at all] typifies this approach; the natural law supersedes written law because all law must be judged based on its internal moral component.[20] Because of the inherent normativity in natural law, political philosophers have historically been attracted to it in explaining international law.[21] Applied internationally, this has been used to develop a "universal moral code" based on the synthesis of naturalism and empirical state practices.[22] Similarly, Dworkin's interpretive theory defends doctrinal international law on the grounds that states have a "duty to mitigate the defects of the world system of nations."[23]

Legal positivists responded to natural law by separating law from morality, distinguishing law as it is from what it ought to be. For Austin, laws were a system of commands by a sovereign backed by the threat of sanction. These sanctions produced a general habit of obedience to the sovereign.[24] For Hart, mere habitual obedience was not enough: rules have an internal component that binds obligation, distinguishing them from habits.[25] Law is the unification of

[20] Fuller, Lon L. *The Morality of Law.* Yale University Press, 1964.
[21] See generally Covell, Charles. *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel*. Springer, 2009
[22] See Lauterpacht, Hersch. "The Grotian Tradition in International Law." In *Grotius and Law*, 469-521. Routledge, 2017.
[23] Dworkin, Ronald. "A New Philosophy for International Law", *University of Buenos Aires Law School Conference,* 2011. Adapted from Dworkin, Ronald. "A New Philosophy for International Law." *Phil. & Pub. Aff.* 41 (2013)
[24] Austin, op. cit., 164-170.
[25] Hart, H. L. A. *The Concept of Law*. OUP Oxford, 1972.

primary rules of conduct that require and prohibit certain actions, and conjoined power-conferring secondary rules of recognition, change and adjudication. The most fundamental of these, the rule of recognition, gives validity to and internalizes primary rules. Authority derives not from coercion but the internal acceptance of rules: in a classic example, Hart suggests a traffic light is not a *sign* that one must stop, but rather a *signal* that they *ought to* stop in accordance to an accepted rule.[26] Two opposing theories of international law stemming from legal positivism stand out. Austin's command theory suggests that international law cannot be law; Austin's sovereign is the "uncommanded commander," and cannot be subjected to any international law. Formal international law is therefore nothing more than international morality.[27] This skepticism of international law influenced sociologists that grounded law in the state as well as political realists.[28] By contrast, the procedural theory takes a formalist stance in accepting doctrinal international law as legitimate. Early international lawyers such as Oppenheim assumed states voluntarily exchanged sovereignty in crafting international law.[29] Additionally, while Kelsen and Hart understood international law to be primitive, proceduralists built on their theories to imply the validity of international law: Kelsen's notion of the international *grundnorm* defended monism and the supremacy of international law,[30] while later scholars developed on Hart to suggest that the procedure of lawmaking, including customs and treaties, validated law through a rule of recognition constituted through consent.[31] It would be wrongheaded to assume, as many political scientists do, that most international lawyers subscribe to this doctrinal view; although most legal scholarship has adopted

[26] Ibid., 87-88.
[27] Austin, op. cit., 112.
[28] Weber, Max. *Economy and Society: An Outline of Interpretive Sociology*. Vol. 1. University of California press, 1978: 35.
[29] Oppenheim, L. "The Science of International Law: Its Task and Method." *American Journal of International Law* (1908): 313-356.
[30] Kelsen, Hans. *Pure Theory of Law*. Univ of California Press, 1967, 320-348.
[31] Dworkin, op. cit., 5-6 makes this point.

proceduralism, this vein of writing has simply coincided with explications of the facts of international law.

With its roots in the behavioralism and functionalism of social sciences, American legal realism shared commonalities in its development with political realism in its approach to law,[32] yet its major figures rarely touched upon the topic of international law.[33] Rejecting the determinacy and abstractness of legal positivism, legal realists, sometimes called rule-skeptics, viewed law as a technology to ends, with a focus on its effects and emphasis on its sociological origins rather than the formality of law.[34] Holmes' concept of the "bad man," i.e. judging law through the lens of a bad man only concerned with material consequences, is archetypical of a predictive theory of law.[35] Three familiar theories of international law follow this approach. The economic theory of international law grew out of economic analysis of municipal law. Law is shaped by economic forces through the rational interest of actors, with its function to maximize utility by controlling externalities, providing public goods, and solving collective action problems. This rationalist assumption is extended to competitive state interests, including security, in international affairs. International law is subject to inefficiency because of anarchy but serves the same role in facilitating cooperation for Pareto improvements among state actors.[36] The configurative theory of international law developed by the New Haven School considered international law contextually as a "world constitutive process of authoritative decision."[37] This holistic scope assessed the modes of regulation of complex interactions and interdependence in the world system through a comprehensive identification of the processes of effective control

[32] Morgenthau, Hans J. "Positivism, Functionalism, and International Law." *American Journal of International Law* 34, no. 2 (1940): 260-284.
[33] McDougal, Myres S., Harold D. Lasswell, and W. Michael Reisman. "Theories about International Law: Prologue to a Configurative Jurisprudence." *Va. J. Int'l L.* 8 (1967): 261.
[34] Llewellyn, Karl N. "Some Realism about Realism--Responding to Dean Pound." *Harv. L. Rev.* 44 (1930): 1222.
[35] Holmes Jr., O. W. (1897). "The Path of Law." *Harvard Law Review*, 10, 457-478
[36] Posner, Eric A., and Alan O. Sykes. *Economic Foundations of International Law*. Harvard University Press, 2012.
[37] McDougal, Myres S., Harold D. Lasswell, and W. Michael Reisman. "The World Constitutive Process of Authoritative Decision." *J. Legal Educ.* 19 (1966): 253.

and authoritative decision. Moving beyond clarification, this theory aimed to build a "policy-oriented jurisprudence" that incorporated normative goals in seeking to advance a "minimum world public order" based on "human dignity."[38] The managerial theory builds on legal process theory to suggest that the discursive process of developing law imbues legitimacy on international law.[39] The incorporation of configurative and managerial theories contributed to explaining the operation of international law in terms of transnational legal processes.[40]

Analysis

Whether international law is truly law may seem to be a dispute purely about terminology in describing the characteristics of what is conventionally called "international law,"[41] however there are distinct features of law that create binding obligations upon actors. In both the municipal and the international context, it is necessary to separate what is law from other patterns of behavior. Our theory will take an eclectic approach, specifically incorporating the Hartian conception of law with insights from legal realism. Positivists and legal realists both tend to acknowledge but marginalize fundamental truths in each other's jurisprudential approach. However, these disparities can unify when extended to the realm of international law, complementing our unified approach. The indeterminacy and sociological foundations of law that positivism neglects become more apparent in international law. The nature of law and obligation, which predictive theories fail to stipulate, become more salient in a primitive system like international law.

Evaluating these different approaches to law, the inherent moral principles that natural law focuses on miss the structural social problems that international legal rules respond to.

[38] Lasswell, H. D., & McDougal, M. S. (1992). *Jurisprudence for a Free Society: Studies in Law. Science and Policy, Volume I & II*, Leiden: Martinus Nijhoff Publishers, 141-202

[39] Chayes, Abram, and Antonia Handler Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press, 1998.

[40] Koh, Harold Hongju. "Why do Nations obey International Law?" *The Yale Law Journal* 106, no. 8 (1997): 2599.

[41] Oppenheim, op. cit., 330-333

Moreover, as Hart points out, moral rules are much too broad to cover the artifice of international law.[42] The conventional international theories of positivism are also inadequate: International law is neither voluntary as proceduralists assume, nor does it lack enforcement mechanisms as command theorists assume.[43] Instead it is structurally necessitated and exists within processes of control and decision. Hart's rejection of international law, characterized as primitive, because of its lack of secondary rules, is more informative. Legal realism's behavioralist approach is particularly suitable in addressing the function of an ordering system as diverse and primitive as international law. Studying different bodies of international law as a sui generis cluster[44] allows isolating the unique enforcement mechanisms and normative purposes of different structured domains. The New Haven School's analysis of international law was particularly pathbreaking in identifying its processes, but ultimately suffered from incoherence in its lack of parsimony and commitment to normativity.

The broad scope of transnational processes is reduced to the analysis of enforcement mechanisms below to explain the origins and functioning of international law in structured domains. International law is situational and contingent, displaying elements of Hart's primary and secondary rules, making it a "moving target" in the life cycle of Nomos. While there exist primary rules that exhibit habits of obedience through these enforcement mechanisms in the international system, the dynamic nature of international politics means this obedience and its mechanisms are always fluctuating in the lack of an international sovereign. The shared understanding of the need for management regimes gives international law normative authority. Hart's secondary rule of recognition exists because law does have an internal

[42] Hart, op. cit., 221-226.

[43] Hathaway underpins her assessment of the nature of international law with these two assumptions. See Hathaway, Oona A. "Between Power and Principle: An Integrated Theory of International Law." *The University of Chicago Law Review* (2005): 469-536.

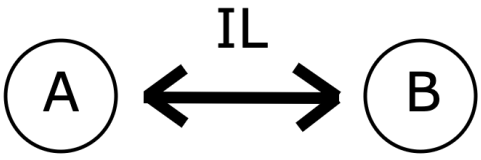
[44] This method is attributed to Llewellyn in municipal law. See Saberi, Hengameh, 'Yale's Policy Science and International Law: Between Legal Formalism and Policy Conceptualism', in Anne Orford, and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law*, Oxford Handbook

character, with states bound to its authority.[45] States internalize international law as a signal[46] on how they should behave within structured domains, rather than purely following habits produced by enforcement mechanisms. That management regimes are formed through coercive processes is extraneous to this ultimate authority. However, this recognition is subject to contestation and obligation is contingent on structured domains, effective enforcement mechanisms, and the resilience of Nomos. Further, the secondary rules of change and adjudication are less apparent in a primitive system as lawmaking is dependent on external coercion and international adjudication remains dependent on consent in its strategic context.

D) Enforcement Mechanisms in International Law

As explored above, the processes of effective control and authoritative decision are essential to the origins and operation of international law in ordering and orienting the management of structured domains. In this section, these processes, which are unique in separate structured domains, are analyzed under the rubric of enforcement mechanisms. We reduce the processes of control and decision to three principal models of enforcement in international law, as represented in the figures below. Figure 1 represents a decentralized relation in which enforcement of international law exists within the interactive behavior of the two states.

Figure 1: Decentralized Enforcement



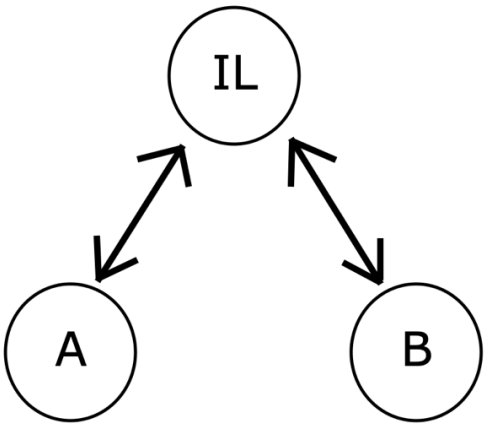
[45] I take this obligation to be a binary variable, rejecting the basis of the concept of legalization. See Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International organization* 54, no. 3 (2000): 401-419.

[46] Hart, op. cit. 88 takes this internalization of rules as "guides to the conduct of social life." These rules should not be equated with the constructivist socialization into shared norms.

Morrow[47] suggests that the laws of war codify normative preferences and hence allows states to set strategic expectations in their behavior. This behavior can in turn be enforced by reciprocity and punishment of defections. For example, both states may have an interest in unilateral strategic bombing but against mutual retaliation; through iterated games, they both have an incentive to reciprocate cooperation against strategic bombardment and retaliate against defections to uphold enforcement. Similarly, other writers[48] have discussed the importance of reputation in allowing decentralized enforcement of international law. States aim to achieve other goals developing a reputation for compliance. In both cases, compliance with institutions is self-enforcing.

Decentralized enforcement must imply that power cannot be determinative in establishing order; institutions simply serve to reveal existing preferences. By contrast, Figure 2 represents a hierarchic relation in which states contribute to international law, through power or collective action, and it imposes a constraining role on states by penalizing defection.[49]

Figure 2: Hierarchical Enforcement



[47] Morrow, op. cit., 354

[48] Simmons, Beth A. "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." *American Political Science Review* 94, no. 4 (2000): 819-835; Guzman, Andrew T. *How International Law Works: A Rational Choice Theory*. Oxford University Press, 2008.

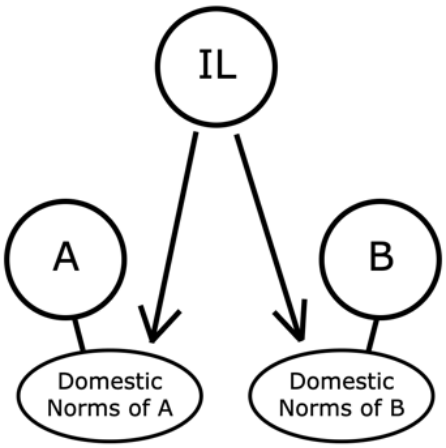
[49] This is a standard hegemonic account of international order. See Ikenberry, G. John. *Power, Order, and Change in World Politics*. Cambridge University Press, 2014.

International law regulates state behavior because it is supported by a hegemonic regime that deters deviation and rewards compliance. This model does not in itself suggest the validity of any single theory of international relations. While the power of international institutions to have a constraining role has been charted by liberal institutionalists,[50] many realists attribute international order to rules imposed by a hegemonic state.[51] The "enforcer" in this scenario could be a single hegemonic power or a multilateral alliance committed to certain norms; what matters is that they lend power to international law to serve a hierarchic role against other states. Further, compliance may result from states wanting to reinforce international rules at the expense of immediate interests.[52] It is also necessary to separate this model from suggestions of universalism: some states may flout the law. Alternatively, international legal regimes may present an autonomous source of hierarchical power.[53] For example, the International Court of Justice and other legal organs may have internal organizational interests independent of states that exert influence on states.

Figure 3 shows international law playing a primarily normative role that shapes state behavior through internalized enforcement; domestic norms and preferences replicate international law onto states, ensuring they act in accordance with it.

[50] For example, see Martin, Lisa L., and Beth A. Simmons. "International Organizations and Institutions." *Handbook of International Relations* 2 (2013): 326-351.
[51] Gilpin, Robert. *War and Change in World Politics*. Cambridge University Press, 1981.
[52] Kaplan, Morton A., and Nicholas deBelleville Katzenbach. *The Political Foundations of International Law*. New York: Wiley, 1961, 341-343.
[53] Consider Barnett, Michael N., and Martha Finnemore. "The Politics, Power, and Pathologies of International Organizations." *International organization* 53, no. 4 (1999): 699-732.

Figure 3: Internalized Enforcement



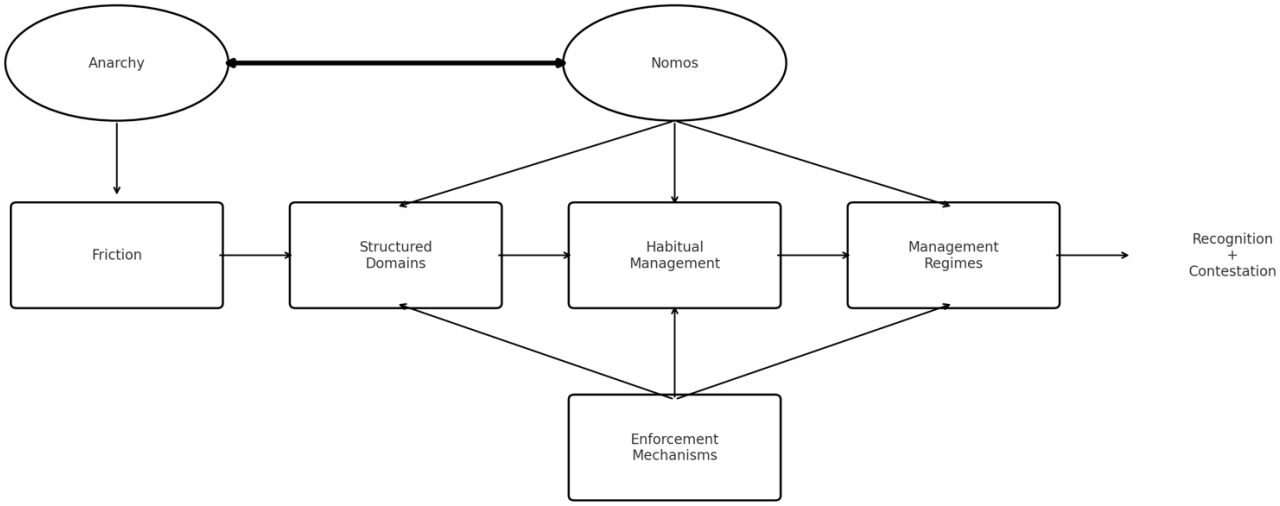
This "internalization" of international law ensures they are domestically enforced, either through congruence with norms as constructivists argue[54] or through democratic publics that legally obligate their states towards norms underpinning international law.[55] Reinforcing this, many national constitutions explicitly adopt provisions for compliance with international law. A fourth possible enforcement model that is not displayed could be enforcement via transnational networks.[56] Transnational actors may reconstitute state interests to advance international legal obligation. Additionally, there may be parameters of normative hierarchy in the creation of international law that are directed by state or transnational actors, wherein states are materially rewarded for acting in accordance with legal norms by such actors.[57] However, for the most part, these processes can be categorized under the previous mechanisms in their direct application to enforcement.

[54] Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International organization* 52, no. 4 (1998): 887-917.
[55] Simmons, Beth A. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge University Press, 2009.
[56] Shaffer, Gregory, Tom Ginsburg, and Terence C. Halliday, eds. *Constitution-making and Transnational Legal Order*. Cambridge University Press, 2019; Klotz, Audie. "Norms Reconstituting Interests: Global Racial Equality and US sanctions against South Africa." *International organization* 49, no. 3 (1995): 451-478; Slaughter, Anne-Marie. "The Accountability of Government Networks." In *The Globalization of International Law*, 471-496. Routledge, 2017.
[57] Consider a structure such as Broome, André, and Joel Quirk. "The Politics of Numbers: The Normative Agendas of Global Benchmarking." *Review of International Studies* 41, no. 5 (2015): 813-818.

E) Anthropological Origins of Nomos

This section will build on the preceding analysis to outline our general theory of international law by developing the concept of Nomos, demonstrating its emergence in the natural condition of anarchy, presenting its operation in forming legal orders, and examining its cyclical evolution. Essentially, this theory extrapolates the features of the international system, extending from the parsimony of neorealism to show gaps from which law *could* emerge through the organizing principle of Nomos. This conceptual framework is presented in Figure 4.

Figure 4: Conceptual Framework



Anarchy breeds friction in the interactions and interdependence between states, producing structured domains of strategic interdependence that necessitate management. Nomos emerges as states habitually interact in structured domains. The habitual management of these domains is shaped by Nomos and the enforcement mechanisms underpinning them, culminating in the design of management regimes, including international legal rules. Finally, international legal rules gain internal authority once they meet the moving target of Hartian recognition but remain contested and lack permanence. Nomos is a cyclical condition that emerges from, stabilizes, and orders anarchy. It exists within anarchy and is ultimately structured by the conditions from

which it forms. Our adoption of the term Nomos is inspired by Carl Schmitt's *Nomos der Erde*[58] but, as will be elaborated below, should not be equated with his theory due to conceptual differences and deep dissimilarities in our approaches towards international law.

The Concept of "Nomos"

The concept of Nomos haunts over the entire literature in international relations devoted to the study of international institutions. While the concept of order is frequently invoked, its features are rarely defined precisely and remain ambiguous. Fundamentally, international order consists of all aspects of international relations, principally the primary organizing principle of anarchy. The international Nomos is devoted to the secondary organizing principle of the ordering and orientation of states *within* the natural order of anarchy; the concept isolates the effects of institutions and other ordering practices. As mentioned in the introduction, Nomos is broader than international law, encompassing the ordering which could fertilize law. Yet it is more specific than the "normative structure of world politics." Liberal theorists have emphasized how state preferences can be transformed through domestic political systems,[59] while constructivists highlight how shared norms alter state identities and relations.[60] Similarly, Bull's classic definition of international order associated it with the "elementary or primary goals of social life" promoted by a society of states within anarchy.[61] These approaches to normative structure are too comprehensive for the study of institutions as they contour the primary organizing principle of international relations. By contrast, Nomos emerges

[58] Schmitt, Carl. *The Nomos of the Earth*. Vol. 321. New York: Telos Press, 2003.
[59] Moravcsik, Andrew. "Taking Preferences Seriously: A Liberal Theory of International Politics." *International organization* 51, no. 4 (1997): 513-553.
[60] Wendt, Alexander. *Social Theory of International Politics*. Cambridge university press, 1999.
[61] Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics.* Columbia University Press, 2002, 19.

endogenously within the natural condition of anarchy as a secondary structure arranging patterns of behavior.[62]

Philosophers have classically ascribed great importance and validity to the meaning of words and concepts with etymological roots in antiquity. The Ancient Greek word "Nomos," which can literally be translated as "law," "convention," or "custom,"[63] is archetypical of this; the ancient philosophers reflected deeply on its ontology and position in society – deliberation that greatly influenced modern political thought. For our purposes, there are three important philosophical insights clarifying the nature of the concept.

First, the ancient philosophers articulated the fundamental relation between "Physis" [Nature] and Nomos. For Aristotle and the successive theorists of natural law, justice and moral law was discovered through reasoning from Physis, deriving universal moral principles. The natural law was distinguished from the convention of positive law, but the true moral law is a reflection of nature.[64] However, a different approach took Nomos to be imposed over the natural order of Physis. This is well represented in the atomic theory of Democritus, who posited that the Physis of the universe was made up of plain atoms, while Nomos covered over this based on the function of human perception: "By convention sweet and by convention bitter, by convention hot, by convention cold, by convention color; but in reality atoms and void."[65] Similarly, Antiphon the Sophist states that the legally just, both wherein law deters and where it encourages, is "inimical to nature."[66] This latter juxtaposition guides my interpretation of the

[62] The association of "Order" with "Normative Structure" is an afterthought of its association with benign or hierarchical behavior. Indeed, I have followed this approach below in referring to the production of friction in anarchy as "Disorder." However, as Joseph de Maistre saw regarding the French revolution, order is visible in disorder. See generally Luban, Daniel. "What is Spontaneous Order?" *American Political Science Review* 114, no. 1 (2020): 68-80.

[63] Strauss, Leo. *Leo Strauss on Political Philosophy: Responding to the Challenge of Positivism and Historicism*. University of Chicago Press, 2021, 207. Weber, op. cit., 319-325 considers these concepts to be intertwined in a continuum.

[64] Ibid., Chapter 9.

[65] Taylor, Christopher Charles Whiston. "Nomos and Phusis in Democritus and Plato." *Social Philosophy and Policy* 24, no. 2 (2007): 2

[66] Moulton, Carroll. "Antiphon the Sophist, On Truth." In *Transactions and Proceedings of the American Philological Association*, vol. 103, 332.

international Nomos. In antiquity, Nomos encompassed all aspects of regulation in the polis. Similarly, the international Nomos represents all ordering in structured domains against the natural order of anarchy in the international system.

Second, as has been elaborated by Schmitt,[67] the etymological nature of Nomos distinguishes it from other organizing principles in sociopolitical life. Suffixes "–archy" and "–cracy" inherently differ from that of "–nomy." Terms such as "democracy," "autocracy," and "technocracy" denote the exercise of power, while the closely related terms such as "monarchy," "hierarchy," and "anarchy" denote the structures of power. The organizing principle of anarchy, being the absence of a sovereign, brings out the competitive and balancing behavior described by Waltz in the international system. Meanwhile, derivatives of Nomos, such as "economy," "astronomy," and "autonomy" denote the orientation and arranged self-management of systems. The organizing principle of international Nomos is distinct in its mechanisms of ordering and orientation, brought about by the structural necessity of self-management of the frictions brought about by international anarchy.

Third, we must clarify the structure of Nomos. It follows from the previous point that Nomos is a spontaneous order.[68] Critical thinkers have long harbored suspicions about the arrangement of such orders: Susan Strange asks "who benefits?"[69] while Schmitt asks, "who decides?" For Schmitt, the international Nomos, which encompassed the ordering and orientation of all aspects of international relations, could not be purely spontaneous, for it originated in the processes of appropriation, production, and distribution.[70] This hegemonic conception was later adapted by Grewe to represent the history of international law as a cycle of hegemonic orders.[71] However, the international Nomos emerges from a dialectic of friction between states

[67] Schmitt, op. cit., 336-350.
[68] Hayek memorably distinguished "cosmos," spontaneously grown orders, from "taxis," made orders. See Hayek, Friedrich August. *Law, Legislation, and Liberty.* University of Chicago Press, 2022, 35-54.
[69] Strange, Susan. *States and Markets.* Second Edition. Continuum, 1998, 18.
[70] Schmitt, op. cit., 324-335.
[71] Grewe, Wilhelm G. *The Epochs of International Law*. Walter de Gruyter, 2013.

rather than a founding act of appropriation. The ordering of Nomos requires standardization and homogenization towards focal points which are often based on equitable principles, blurring the inequalities present in the natural condition of anarchy. Yet the orientation and emergence of such rules and practices follow from the structural process of habitual management, erected through the power and interest of states.

The Emergence of Nomos in the International State of Nature

Theories of international politics begin with foundational assumptions about the nature of states within the milieu of the international system, analogous to the condition of mankind in the state of nature before the organization of a sovereign state. Hobbes laid the groundwork for structural realism by transposing his violent and fearful state of nature to the international system in the absence of a global sovereign.[72] Developing on this, Waltz theorized anarchy as a self-help system inducing a perpetual struggle for security for survival among states, producing competitive and balancing behavior.[73] Two additional extensions to this theory support it against constructivism's taxonomy of different social possibilities under anarchy. First, Fearon, taking profit rather than security as the primary motive of states, posits that international anarchy is endogenously chosen by states as the costs of anarchy to states are exceeded by the costs of pooling sovereignty.[74] Second, Schmitt's friend-enemy distinction, applied internationally, reinforces the existential enmity between groups differentiated by identity such as nation-states.[75] The question begs, how does ordering emerge from this condition of antagonism?

[72] Hobbes, Thomas. *Leviathan*. Oxford University Press, 2008, Chapter 13.
[73] Waltz, op. cit.
[74] Fearon, op. cit., 555-556.
[75] See Schmitt, Carl. *The Concept of the Political*. University of Chicago Press, 2008. Schmitt addresses the "pluralistic" political world to undermine the notion of world government through "depoliticization" in 53-54.

Embedded in the disordered structure of anarchy, friction exists as patterns of competition and conflict in the interactions and interdependence between states. Left unmanaged, friction expands with the degree of such interactions and interdependence in the international system. Friction produces inefficiencies in the international system,[76] exposing states to risk, disputes, and conflict. Nomos emerges as the antithesis of this natural state of friction through structured domains.

Structured domains form as spaces of *strategic interdependence* in friction which structurally necessitate ordering. Recurring friction with these domains creates the potential for management to rearrange behavior in accordance with mitigating friction. It is useful to think of strategic interdependence in friction with a parallel analogy to the theory of nuclear revolution which some neorealists have embraced.[77] According to this theory, the mutual technological development of massive destruction capabilities between two dueling states introduces a new balance of terror, reorienting the characteristic pursuit of raison d'état towards mutual restraint. Similarly, Nomos reconstitutes existing competitive state behavior in alignment with ordering principles to mitigate friction. The management of recurring structured domains is underpinned by their unique enforcement mechanisms and ultimately depends on the cyclical relation between Nomos and anarchy.

The formation and negation of structured domains follows from the complexity of the international system. As technological change renovates the patterns of friction in the system, the patterns of structured domains follow suit. As Waltz states, "The need for management increases as states become more closely interdependent."[78] The scope of Nomos remains restricted as the characteristic aspects of international politics lack strategic interdependence.

[76] Fearon, op. cit.
[77] Jervis, Robert. *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Armageddon*. Cornell University Press, 1989.
[78] Waltz, op. cit., 209.

A structured domain is a *conceptual space*. While structured domains manifest through material friction between states, their management presupposes "reasons for action" and the desirability of duty-imposing rules.[79] In our discussion of jurisprudence, we accepted Hart's normative conception of positive law. States conceive of conflicting rules of conduct within structured domains with an underlying normative logic of how states should behave. However, this discursive process remains contested.

At the outset of recurring friction within structured domains, states pursue public diplomacy, or international legal justification, to communicate their actions and desired rules of conduct. As Hurd states, "At the boundary where states meet the outside world, we find public diplomacy."[80] During this mutual discourse and iterated friction, states develop habits.[81] Habits are social tools for problem-solving at the basis of an actor's engagement with the world.[82] As states face an environment of friction in structured domains, they gradually adjust their behavior towards alignment. Diplomacy guides this social process towards habitual management under rules of conduct that mitigate friction.

As habitual management coalesces, its structure embodies the interaction between enforcement mechanisms and the structure of Nomos. As mentioned, structured domains each have distinct features which are underpinned by unique enforcement mechanisms that shape behavior within them. Nomos emerges through these mechanisms to order and orient behavior towards focal points based on the power and interests of relevant states.[8384] These focal points of habitual

[79] See the discussion of practical reason in Raz, Joseph. *Practical Reason and Norms*. OUP Oxford, 1999, 15-48.
[80] Hurd, Ian. "Law and the Practice of Diplomacy." *International Journal* 66, no. 3 (2011): 581
[81] For clarification, the pragmatist concepts of "habit" and "habitual management" utilized in this theory differs from the Austinian concept of "habitual obedience" briefly touched upon earlier.
[82] Dewey, John. *Human Nature and Conduct*. Courier Corporation, 2002. For an excellent summary and application of this concept to international relations, see Schmidt, Sebastian. "Foreign Military Presence and the Changing Practice of Sovereignty: A Pragmatist Explanation of Norm Change." *American Political Science Review* 108, no. 4 (2014): 817-829.
[83] On focal points, see Myerson, Roger B. "Learning from Schelling's Strategy of Conflict." *Journal of Economic Literature* 47, no. 4 (2009): 1109-1125.
[84] The "interests" of states in this context refers to their desired normative rules of conduct.

management are determined by their agreeability for general compliance, and presuppose existing normative, cultural, and environmental factors.

Nomos and Legal Ordering in Structured Domains

As Nomos develops rules of conduct under habitual management, these rules generate regular state compliance around the enforcement mechanisms sustaining them. Management regimes such as international law develop to formalize these patterns of behavior under institutionalized rules of conduct, such as acknowledged customs and treaties, in order to guide social practices. Contestation continues as states dispute the rules of conduct, but the general adherence to such rules provides management regimes with exclusive legitimacy in normative reasons and characteristic "stickiness" that helps it endure without major changes in the international order. Noncompliance exposes states to friction, so is undesirable unless immediate state interests demand it.

Management regimes gain legitimate authority once their rules are generally accepted as internally valid by states. States begin to accept international law as guides for how they *ought* to act. In addition, they give guidance on how other states *ought not* to act. Hence, a rule of recognition develops that confers binding obligation to law. This binding obligation ultimately rests on the enforcement mechanisms and the strength of Nomos that management regimes are contingent upon, so it remains a "moving target" that is situational and vulnerable to structural changes.

Briefly, we shall assess how this departs from regime theory. The concepts of legalization[85] and sovereignty costs[86] have been used to represent international law as a sacrifice of sovereignty for cooperative gains. Here, law and its precision is structurally necessitated.

[85] Increasing degrees of precision, obligation, and delegation in law. See Abbott et al., op. cit.

[86] Abbott, Kenneth W., and Duncan Snidal. "Hard and Soft Law in International Governance." *International organization* 54, no. 3 (2000): 421-456. The concept of sovereignty costs is tautological.

Obligation is a binary variable that states use as guides to mitigate friction under strategic interdependence. Delegation exacts costs but is entered strategically by sovereign states.

The Rise and Fall of Nomos

The image of international law as cyclical is not original. As Goldsmith and Posner have recently asserted, "international law moves in cycles, with periods of enthusiasm and advance followed by periods of decay and retrenchment."[87] However, other than explanations from hegemonic stability theory, a concrete elucidation of this position that stands in stark contrast to progressive interpretations of international history has not been given.

Nomos primordially emerges from anarchy to stabilize anarchy. It follows from this that Nomos is transformed by fundamental changes in its antecedent organizing principle. While the structure of anarchy is taken as a constant, the international order undergoes fluidity in times of major war and during power transitions. Nomos is "sticky" and persists through lesser structural changes. During major wars, states seek to realize their interests without regard for the constraints imposed to mitigate friction.[88] During power transitions, the rules of conduct and of recognition falter to intensified contestation by dissatisfied revisionist powers. This fluidity weakens management regimes, intensifying friction in structured domains back towards the natural order of anarchy. The erosion of Nomos and the management regimes it fertilizes does not, however, alter the structured domains produced through friction in anarchy. As the international order crystalizes and peaceful relations develop, Nomos reconstitutes itself in these structured domains following the process outlined in our theory. The new Nomos reflects the distribution of power and interest in the new international order.

[87] Goldsmith, Jack, and Eric A. Posner. "The Limits of International Law Fifteen Years Later." *Chi. J. Int'l L.* 22 (2021): 123.

[88] Of course, some bodies of law such as international humanitarian law are specifically designed for the management of war. These rules persist through the enforcement mechanisms in structured domains.

F) The Historical Development of International Law

In this section, we will briefly review the history of international law. Montesquieu's dictum that "all countries have a law of nations"[89] must not only hold, but this law should embody the recognizable patterns of our theory. We expect to find recurring structured domains across history, the formation of new structured domains through increasing friction from the complexity of the international system, the formation of rules based on power and interest, and the cyclical process of Nomos. Naturally, we begin with antiquity.

The Prehistory of International Law

Recognition is the fundamental starting domain for the mitigation of friction between groups. The Greek city-states embodied this in their distinction between other Greeks and "barbarians" for whom law did not apply and friction was unconstrained.[90] While recognition followed a reciprocal logic, the hierarchical exclusion of non-Greeks served to keep them in a subjugated status. The Greeks also developed practices of strategic arbitration for dispute settlement.[91] The effects of unconstrained friction were acutely revealed in Rome, when the custom of diplomatic immunity was violated by Teutra, Queen regent of the Ardiaei, to great offense that prompted escalation through a major Roman expedition.[92] The habitual management of basic structured domains in antiquity led to customary rules of conduct in diplomatic immunity, the conduct of war, and the enforcement of treaties.[93]

International law took a peculiar form in late antiquity and the Middle Ages; practices of management in structured domains persisted but were shadowed by claims of *dominus mundi*

[89] Montesquieu, Baron de. (2001). *The Spirit of Laws*. Batoche Books.
[90] Nussbaum, Arthur. *A Concise History of the Law of Nations.* The Macmillan Company. 1947, 5.
[91] Ibid, 6-7.
[92] Polybius. *The Histories.* Loeb Classical Library, 1922, Volume I, 249-269
[93] Bederman, David J. *International Law in Antiquity*, Cambridge University Press, 2001, 267-280.

[universal dominion] by Roman emperors and the dyarchy of Pope and Emperor.[94] During this time, the sea, which in its primitive state had been understood as open to all, began to generate friction as coastal states staked out exclusive claims against the Papal dominion.[95] This culminated in the cyclical contestation between imperial powers to craft the rules of conduct on the seas in accordance with the principles of Grotius' *mare liberum* or the principles of Selden's *mare clausum*.[96] The nature of these principles were recognizant of the need for management under shared rules of conduct, but the naturalistic laws they proclaimed were reflective of the desired rules of conduct of specific states.

Westphalia and the Modern State System

The concept of sovereignty was not novel to Westphalia and, as we have shown in the last section, the principles of international law were not born there. The concept of sovereignty has been taken as the basis of international law, represented as a universal principle. However, rules of sovereignty are relative and begin as the management of friction generated by "unconstrained sovereignty." Unconstrained sovereignty poses essential challenges to amicable peacetime relations between states, confusing jurisdiction. Westphalia did not achieve the exclusive domestic sovereignty it has been associated with.[97] Sovereign equality was never a concrete reality but provided a guiding focal point in state relations under the new European balance of power.[98] Nevertheless, the treaties of Münster and Osnabrück did signify the triumph of state sovereignty based upon the balance of power following The Thirty Years' War in which Hapsburg hegemony threatening hierarchical religious encroachment was

[94] Grewe, op. cit., 37-50.
[95] Grew, op. cit., 129-133
[96] Vieira, Mónica Brito. "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas." *Journal of the History of Ideas* 64, no. 3 (2003): 361-377.
[97] See Schmidt, Sebastian. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature." *International Studies Quarterly* 55, no. 3 (2011): 601-623.
[98] On the different elements of sovereignty, see Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*. Princeton university press, 1999.

thwarted by France.[99] The normative force of universal Christendom had systemically receded to internal sovereignty in the state system.[100] The rise of British naval mastery following this period lent it the power to guide conduct in the seas over much of the next three centuries.[101] Although Britain enshrined the principle of freedom of the seas, this was concurrently monopolized for overseas expansion and maintaining the European balance of power.

The tumult created by the French Revolutionary and Napoleonic Wars coincided with the invention of nationalism and the transfusion of Enlightenment ideals across Europe.[102] The balance of power restored to Europe and preserved by the Congress of Vienna has been taken as the defining principle of international law in the nineteenth century but mirrored the strategic realities of the international order. The Concert of Europe sought to control the use of force, but this "political equilibrium" was maintained through policy.[103] The new Nomos reasserted the principle of sovereign equality and nonintervention in this context, as deliberation and political agreements became more common in an era of relative stability.[104] At the same time, the exclusive recognition of European states in the new Nomos left territories outside Europe vulnerable to appropriation as friction developed over the division of the world by European powers.[105]

The Hague Conventions and the Contemporary System

The era of legalization began in the late nineteenth century, following the relative peace in this period and the expansion of interdependence that gave rise to comity as the guiding rule in the

[99] Mowat, Robert Balmain. *A History of European Diplomacy, 1451-1789.* E. Arnold, 1928, 59-114.
[100] Hinsley, Francis H. "The Concept of Sovereignty and the Relations Between States." *Journal of International Affairs* 21, no. 2 (1967): 242-252.
[101] Grewe, op. cit., 403-412, 551-574; Kennedy, Paul. *The Rise and Fall of British Naval Mastery*. Penguin UK, 2017.
[102] Bell, D. *The Cult of the Nation in France: Inventing Nationalism, 1680-1800*. Harvard University Press, 2009.
[103] On how British and Austrian diplomacy crafted this "political equilibrium," see Kissinger, Henry. *A world restored: Metternich, Castlereagh, and the problems of peace, 1812-22*. Pickle Partners Publishing, 2017.
[104] Nussbaum, op. cit., Chapter 6.
[105] Schmitt, op. cit., 172-174.

domain of private international law. This process culminated at Hague, which established the Permanent Court of Arbitration (PCA) and codified rules for the conduct of war. Legalization progressed further in the interwar period, galvanized by the experiences of WWI, with the creation of the League of Nations and the Treaty of Locarno. However, the ambitious aims of the interwar period unavoidably made international law more vulnerable to the contestation of the rising axis powers, with the institutions dismembered and friction unconstrained by the beginning of WWII. WWII was waged in a relatively unconstrained manner, with the law of neutrality pushed to its limits and the laws of war disordered and only enforced situationally based on the enforcement mechanism of reciprocity.[106]

The aftermath of WWII resulted in major technological changes and normative problems that created structured domains regarding human rights, decolonization, the global trading system, the law of the sea, the control of fissile materials and nuclear technology, and many more areas that would develop comprehensive frameworks for their rules of conduct under the umbrella of the United Nations. According to Reisman, during the Cold War "there were two systems of international law and two systems of world public order."[107] Similarly, Mearsheimer has developed the concept of "bounded orders" that are spatially related to the spheres of influence of great powers.[108] Implicit in these assessments is that international law forms through shared norms or an unbounded Austinian commander that stands above weaker sovereigns. There is some truth in this – interaction and interdependence increased within these orders. However, the thinner principles of international law were generally supported by both the United States and the Soviet Union, leading to a general mitigation of friction during the otherwise

[106] See Morrow, op. cit.

[107] Reisman, W. Michael. "International Law after the Cold War." *American Journal of International Law* 84, no. 4 (1990): 859-866.

[108] Mearsheimer, John J. "Bound to Fail: The Rise and Fall of the Liberal International Order." *International Security* 43, no. 4 (2019): 7-50.

competitive bipolar era and general recognition of the rules of conduct. Management regimes formed across a wide range of domains and endured after the fall of the Soviet Union.

The end of the Cold War spawned unipolarity and a renewed American commitment to proactively enforce legal rules and advance the normative principles of convergence and interdependence, inadvertently generating friction by challenging state sovereignty. American neoconservatives briefly sought to capitalize on this newfound power by introducing preemptory rules into the international legal system,[109] but this failed to materialize due to domestic and international opposition. Nomos retained its sticky character through the unipolar era due to American adherence. The recognized rules of conduct did shift to accommodate the new powers of enforcement as state sovereignty receded with the expansion of globalization and the advancement of rules of conduct in other structured domains such as human rights.

Current Developments in International Law

With the upswing of crises in recent decades, including the American invasion of Iraq, the global financial crisis, the Covid-19 pandemic, the Russo-Ukrainian War, and the dilemmas of the Israel-Gaza war, the contemporary system of international law has been gradually fraying. Key sources have been the populist backlash to the principles of interdependence and convergence in developed countries, the global diffusion of economic and military power towards inchoate multipolarity, and the general dissatisfaction with the current international order. The lack of power in Nomos to constrain developments in the natural order of anarchy where states lack strategic interdependence is evident in the processes of international security, wherein the use of force and expansion of military power by major powers is uninhibited, and the international political economy, wherein the patterns of trade and prohibition of critical technologies follows the strategic concerns of relative gain. All these factors point to the decay

[109] Yoo, John. *Point of Attack: Preventive War, International Law, and Global Welfare*. OUP Us, 2014.

of management regimes: UNCLOS faces pressures as its rules of conduct that have privileged freedom of navigation under the auspices of American maritime power come under scrutiny from the excessive jurisdiction of rising coastal states such as China and India, the international human rights regime is fraying as its hierarchical imposition is abandoned, many are speculating about a cascade of nuclear proliferation as great powers redirect their attention, the rules of the open trading system are flaunted with reciprocal turns to protectionism, the influence of the International Criminal Court is diminishing, the rate of interstate wars is increasing, and states are frequently targeting the domestic political leadership of their rivals. At the same time as all of this, technological change is producing friction in new structured domains such as artificial intelligence, cyberspace, and new developments in space. Time will tell if this new disorder descends into major war or whether Nomos will reconstitute itself peacefully in a new and more contained form.

Policy Implications: Hawks vs. Doves

The preceding analysis has implications for how we interpret national policy regarding international rules. Domains of strategic interdependence are comparable to iterated coordination games with varying payoffs. The hawkish, or unilateral, approaches to rules of conduct represent a willingness to undergo the costs of friction for relative gain or to habitually reshape the domain's ordering logic. The dovish, or bilateral, approaches represent deference to, though not necessarily the internal acceptance of, the existing rules of conduct. Despite domestic disputes between hawks and doves regarding the best approach, the fluctuating payoffs driving behavior are concrete material interests and structurally driven by strategic interdependence and the strength of Nomos.

Chapter 2: Enforcement Mechanisms in the Law of the Sea

A) Introduction: Key Assumptions and Expectations

In this chapter, we operationalize the conceptual framework laid out in Chapter 1 by applying it to the law of the sea. The law of the sea has been foundational to the scholarship on international law, inspiring the work of Hugo Grotius among others. It is an attractive case to apply our analysis as it balances the mixed interests of states in economic and security affairs, requiring coordination while maintaining features of conflict. The oceans have been characterized as a global commons, similar to Antarctica, outer space, the Earth's atmosphere, and international communications networks.[110] In seeking a comprehensive constitution of the oceans, the United Nations Convention on the Law of the Sea (UNCLOS) established a legal regime dealing with multiple structured domains. These include maritime boundary delimitation, jurisdictional rights of coastal states, marine conservation and environmental protection, and deep seabed mining. With environmental law having its own logic and seabed mining still in its infancy, this chapter concerns itself with the former two, wherein stakes are high, large reordering has occurred, and sovereignty disputes are prominent. UNCLOS, completed in 1982 and ratified in 1994, struggles with a crisis of non-compliance. Churchill notes "There are just over 160 parties to the [UNCLOS], at least one-third of which (and quite possibly more) are in breach of at least one significant provision of the [UNCLOS]."[111] Maritime disputes remain a feature of international politics. A dataset found that only 189 agreements were formed out of 417 disputed maritime boundaries in the period 1960-2008.[112]

[110] Krasner, Stephen D. *The Third World Against Global Liberalism: A Structural Conflict*. University of California Press, 1985, Chapter 9.
[111] Churchill, Robin. "The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans." *The International Journal of Marine and Coastal Law* 27, no. 4 (2012): 813-820.
[112] Ásgeirsdóttir, Áslaug, and Martin C. Steinwand. "Distributive Outcomes in Contested Maritime Areas: The Role of Inside Options in Settling Competing Claims." *Journal of Conflict Resolution* 62.6 (2018): 1293.

Global commons have a uniquely hierarchical mechanism of enforcement as the decentralized networks of interaction and interdependence within them hinge upon the means of access.[113] In the ocean sphere, this structure is underpinned by the balance of maritime power.[114] The dominant maritime power has played an outsized role in crafting the rules of conduct on the seas, but this role is not absolute. Maritime power is intangible and not convertible for general application across maritime affairs. Further, most maritime affairs do not concern the immediate interests of the dominant maritime power. The friction inherent to adjacent water resource management follows a reciprocal logic. By defining agreed-upon maritime zones, states can cultivate peaceful relations, sustainable economic gains, and regulations for environmental protection. It follows from this that the rules of conduct on the oceans are shaped by the vital interests of the dominant maritime powers, the general acquiescence of coastal states for compliance and the decentralized strategic logic of boundary delimitation to mitigate unconstrained sovereignty.

This chapter will proceed by briefly reviewing the history of the law of the sea through this framework, undertaking a more detailed analysis of the creation of and developments in the UNCLOS regime, and assessing the determinants of maritime boundary settlements through case studies. But first, we will outline our expectations in these studies.

Expectations

The history of the law of the sea should demonstrate the cyclical patterns of Nomos, with the rise and fall of maritime powers portending the management of the oceans in accordance with

[113] Farrell, Henry, and Abraham L. Newman. "Weaponized Interdependence: How Global Economic Networks Shape State Coercion." *International security* 44, no. 1 (2019): 42-79.

[114] Posen, Barry R. "Command of the Commons: The Military Foundation of US Hegemony." *International security* 28, no. 1 (2003): 5-46. The interpretation of this balance also depends on the philosophy of sea power one adopts. The implications of Mahan's strategy for command of the sea and Corbett's asymmetric strategy are profoundly different. See Gough, Barry M. "Maritime Strategy: The Legacies of Mahan and Corbett as Philosophers of Sea Power." *The RUSI Journal* 133, no. 4 (1988): 55-62.

the new balance of power and interest. Wars and major power shifts should reveal a relatively "lawless" sea, with friction predominant as states seek to capitalize on relative gains and assert control against rivals.

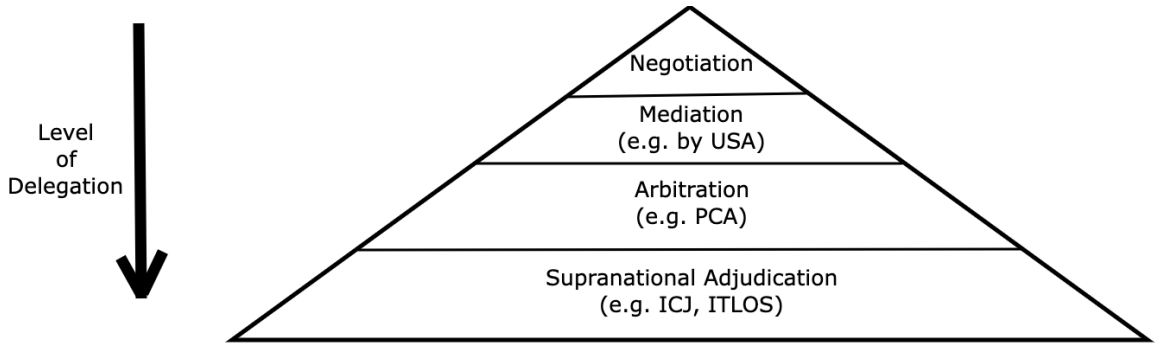
The institutionalization of UNCLOS and its built-in flexibility to adaptation has lent it the reputation of a legitimate and durable constitutional regime to guide state behavior on the oceans towards cooperative ends.[115] However, codification and ratification do not confer recognition; recognition is an internal process of states in accepting the validity of rules of conduct. These rules of conduct may be left unsaid and upheld by practice. Our analysis aims to show that technological change after WWII generated new frictions that necessitated the habitual management of the oceans, culminating in the design of UNCLOS as a management regime that protected core American maritime interests such as freedom of navigation while accepting the limited jurisdiction of coastal waters by states for economic exploitation. Further, we assess the emerging contestation against these rules by rising coastal states asserting "excessive jurisdiction" over their adjacent waters as Nomos recedes.

By contrast, the settlement of maritime boundary disputes has followed a reciprocal logic as the strategic interdependence generated by the friction between states over disputed waters guides them towards Pareto improving settlements on the rules of conduct. Factors hardening relative gains concerns in such disputes increase the political salience of disputes and lessen strategic interdependence, while economic potential from management such as sustainable fishing or hydrocarbon deposits increase strategic interdependence.

[115] Scott, Shirley V. "The LOS Convention as a Constitutional Regime for the Oceans." In *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, pp. 9-38. Brill Nijhoff, 2005.

Delegation in dispute settlement is pursued strategically. International delegation is "a grant of authority by two or more states to an international body to make decisions or take actions."[116] Figure 5 presents the dispute resolution mechanisms available under UNCLOS.

Figure 5: Mechanisms of Dispute Resolution under UNCLOS



Three clear benefits of third-party intervention exist: the apparent neutrality of the association, its expressive potential to reveal information,[117] and the publicity brought to the case to other players.[118] Further, delegation involves a sense of "tying hands"[119] to resolve disputes when negotiations falter. Altogether, delegation is entered strategically, helping states establish focal points for common rules of conduct. This perspective contrasts with the legalist perspective on the judicialization of politics exerting independent authority and exacting sovereignty costs to promote international cooperation. Others have evaluated state selection of dispute resolution methods under UNCLOS. Ginsburg associates the resort to arbitration and adjudication with democracy;[120] Powell and Mitchell appraise domestic legal traditions, suggesting civil law states prefer the ICJ, Islamic law states prefer arbitration,

[116] Bradley, Curtis A., and Judith G. Kelley. "The Concept of International Delegation." *Law and Contemporary Problems* 71, no. 1 (2008): 1-36.
[117] Ginsburg, Tom, and Richard H. McAdams. "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution." *Wm. & Mary L. Rev.* 45 (2003): 1229.
[118] Posner and Sykes, op. cit., p. 99. This includes the potential to sway domestic constituencies.
[119] On the concept, see Fearon, James D. "Signaling foreign policy interests: Tying hands versus sinking costs." *Journal of conflict resolution* 41, no. 1 (1997): 68-90.
[120] Ginsburg, Tom. "The Law of the Sea and Democracy." *Berkeley J. Int'l L.* 41 (2023): 115.

while common law states are amenable;[121] By contrast, this framework views the selection of third-party delegation as a purely strategic calculation by rational unitary states.

B) A Brief History of the Law of the Sea

Before Columbus' expedition to the Americas in the fifteenth century, the seas took a primarily mercantile character, with it being the primary source of commercial trade.[122] For the Romans, the seas were therefore a public good and free to all, as codified in the Code of Justinian; the problems requiring resource management such as overfishing were not yet present.[123] The Middle Ages opened the seas up to appropriation. The fall of the Roman Empire created a scramble among smaller states to control maritime routes.[124] The maritime dominion of enclosed seas allowed city-states such as Genoa and Venice to police piracy and criminals while also extracting tolls from passing ships, while states in Northern Europe sought to regulate fishing.[125]

The discovery of the Western Hemisphere and exploration of maritime routes to Western Africa opened the high seas to friction as European states sought to expand into newly discovered territories. Under Papal guidance, the dominant maritime states, Portugal and Spain, appropriated the high seas under the 1494 Treaty of Tordesillas which demarcated global territories between them.[126] The stability of this management regime was challenged in the early 17th century following the rise of other maritime powers seeking colonial expansion. Grotius' *mare liberum* should be read as a work of public diplomacy critical of the exclusive Portuguese and Spanish access to the Americas bestowed by Papal authority and presenting

[121] Powell, Emilia Justyna, and Sara McLaughlin Mitchell. "Forum Shopping for the Best Adjudicator." *The Journal of Territorial and Maritime Studies* 9, no. 1 (2022): 7-33
[122] Nussbaum, op. cit., 27-35.
[123] Pardo, Arvid. "The Law of the Sea: Its Past and its Future." *Oregon Law Review* 63 (1984): 7-8.
[124] Ibid.
[125] Grewe, op. cit., 129-133.
[126] O'Connell, D.P., and I. A. Shearer (ed.), *The International Law of the Sea: Volume I*, 1st Edition (online edn, Oxford Academic), 1982, 2-3.

alternative rules of conduct on the oceans based on the rising Dutch Empire's interest in trade with the East Indies.[127] The lack of consensus on the rules of conduct led to disorder, with the unmanaged seas being prone to disputes and conflict. Grotius' advocacy of the "free seas" was similarly challenged by others based on their nation's desired rules of conduct, with Seraphin de Freitas defending the Spanish crown's dominion of the seas, and John Selden justifying appropriation of British coastal waters.[128] This latter contention overshadowed the shared British interest in freedom of navigation and sparked the Anglo-Dutch wars of the latter half of the 17th century.

The rise of British maritime predominance in the 18th century cemented the ordering of the oceans in accordance with freedom of navigation and the limited appropriation of coastal waters. This followed the War of the Spanish Succession, in which the Anglo-Dutch navies coalesced to prevent French Bourbon access to the Spanish Empire. The Peace of Utrecht left Britain as the leading naval and commercial power.[129] Britain pursued a policy of "armed diplomacy" to stabilize global maritime commerce and provide a check on Spanish expansion.[130] The new Nomos that developed with the insular rise of Britain guaranteed a relative freedom of navigation on the seas, interrupted by the Seven Years War and the French Revolutionary and Napoleonic Wars in which Britain exploited maritime hegemony to deny access to the seas by her enemies through blockades. A feature of these free seas was the law of neutrality. As the seas were free to military and commercial navigation, disputes over the legitimate conduct among neutrals and belligerents in this tumultuous period were prone to conflict, including sparking the Fourth Anglo-Dutch War, and necessitated regulation.[131] The British interest in global commerce continued to guide conduct following the Napoleonic Wars,

[127] Grotius, Hugo. *Mare liberum*. Vol. 3. Oxford University Press, 1916.
[128] Grewe, op. cit., 257-274.
[129] Mahan, Alfred Thayer. *The Influence of Sea Power upon History, 1660-1783*. Read Books, 2011, Chapter 5.
[130] Kennedy, op. cit., 88-94.
[131] Jessup, Philip C. "Historical Development of the Law of Neutrality." *World Peace Foundation Pamphlet Series* (1928): 1

with the Royal Navy challenging piracy and excessive maritime claims.[132] As a byproduct of this policy, Britain rescinded some of its claims appropriating local seas, repealed the Navigation Acts in 1849 and sought to restrict the global slave trade, in order to foster and control global trade and curtail mercantilism.[133] British maritime power ultimately asserted the principle of the freedom of the seas in the relatively stable period between the Congress of Vienna and WWI.

Concurrently, disputes over fisheries and the territorial sea habituated the limited appropriation of coastal waters. Technological change had changed the perception of ocean resources as limitless, with fisheries being subjected to the "tragedy of the commons." States unilaterally asserted jurisdiction over fisheries up to ten nautical miles (10nms) in their coastal waters.[134] Coastal states also asserted jurisdiction over territorial seas for security. The "cannon-shot rule" associated this with 3nms, the approximate range of a cannon from the coast. However, the exact range claimed varied by states.[135] Lacking the capacity to push further, the customary law of 3nms was developed and enforced by the United Kingdom against excessive fisheries and territorial sea claims by France, Russia, Portugal, and other coastal powers.[136] The association of fisheries with the 3nms limit was further bolstered by the North Sea Fisheries Convention ratified by Britain, Germany, France, and the Netherlands in 1882.[137]

The friction and lack of consensus following the decline of British naval power through WWI, the interwar period, and WWII meant the dearth of common rules of conduct during this period. Britain aimed to utilize control of the seas to blockade her enemies and secure shipping lanes.

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[132] Grewe, op. cit., 551-572.
[133] Kennedy, op. cit., 162-168.
[134] Bederman, David J., ' The Sea', in Bardo Fassbender, and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (online edn, Oxford Academic), 2012, 377.
[135] Goldsmith and Posner, op. cit., 59-66.
[136] Ibid; for example, Jessup argues Portugal "accepted the inevitable" when facing British opposition to their claims beyond 3nms in 1905. Jessup, P. C. (1927). *The Law of Territorial Waters and Maritime Jurisdiction:* Kraus Reprint, 41.
[137] Jessup, Ibid., 60-61.

The existing rules of neutrality frayed amidst unrestricted German submarine warfare and American attempts to maintain commercial freedom and support the allied belligerents.[138] The Hague Conference of 1930 failed to produce agreement on the extent of the territorial seas and future attempts were fractured by rising global tensions.[139] American vulnerability to the effects of the European war led to the adoption of "security zones" around the Americas, further dividing the oceans.[140] The outcome of WWII led to the quick decay of British maritime power and the rise of sole American predominance over the seas.[141] Additionally, technological change had opened new ocean resources for extraction, necessitating a new Nomos of the sea.

C) UNCLOS through the Lens of Nomos

The United States had long shared in the British interest in freedom of navigation, assisting them in enforcing the rule limiting territorial waters to 3nms.[142] However, this limit was insufficient for the developing interests of coastal states as technological progress had profoundly altered the structure of economic exploitation of ocean resources by 1945. Fishing further from the coast at scale had become more feasible, and the discovery of submarine minerals and hydrocarbons.[143] The unilateral Truman Proclamation of 1945 establishing exclusive jurisdiction over the continental shelf off the coasts of the United States marked the new rush to appropriate larger maritime zones, followed by claims in Europe and Latin America.[144] The new friction brought about by these varying and disputed claims generated the need for new rules of conduct over the global oceans, culminating in the four treaties concluded in UNCLOS I at Geneva in 1958. This conference led to partial ratification delimiting the

[138] Grewe, op. cit., 631-636.
[139] O'Connell, op. cit., Chapter 1.3.
[140] Pardo, op. cit., 13.
[141] Kennedy, op. cit., Chapter 12.
[142] Jessup, op. cit., 49-60.
[143] Johnston, Douglas M. *The Theory and History of Ocean Boundary-Making*. McGill-Queen's Press-MQUP, 1988, 41-74; O'Connell, op. cit., Chapter 15.1.
[144] Attard, David Joseph. *The Exclusive Economic Zone in International Law*. Clarendon Press, 1987, 1-10.

continental shelf at 200nms but left other issues such as the extent of the territorial seas and the codified contiguous zone unspecified, as well as the precise sovereign jurisdiction over the maritime zones.[145] While many states proclaimed a territorial sea limit of 12nms, this was heavily contested. However, many states that did not acknowledge a 12nms limit began to assert jurisdiction over fisheries in that zone.[146]

The continued lack of consensus led to the failed UNCLOS II conference in 1960 and the protracted diplomacy that would characterize the UNCLOS III conference, which began in 1973 and culminated in the establishment of UNCLOS as the "constitution of the oceans" in 1982 (entered into force in 1994).[147] Prior to this, the uncertain character of rules on the oceans in the 1960s prompted significant disputes over fisheries across Europe, the Americas, and the Pacific.[148] UNCLOS III, according to Henry Kissinger, involved one of the "most important international negotiations which has ever taken place."[149] UNCLOS established a comprehensive framework to guide the rights and obligations of states on the oceans.[150] Equidistant from their coastline, littoral states were entitled to 1) a Territorial Sea of 12nms, 2) a Contiguous Zone of 24nms, 3) an Exclusive Economic Zone (EEZ) of 200nms, and 4) rights to a Continental Shelf up to 350nms. Beyond this, the High Seas encompassed the oceans beyond the EEZs, and The Area encompassed the seabed beyond the continental shelves. Further, it clarified the internal and archipelagic waters of states and the status of islands. Part XV specified the settlement of disputes through negotiation, conciliation, and the compulsory mechanisms of arbitration or adjudication through the International Court of Justice (ICJ) or International Tribunal for the Law of the Sea (ITLOS).

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[145] O'Connell, op. cit., Chapter 1.4.

[146] Churchill, Robin R. "The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention." In *Stability and Change*, fn 115, pp. 95-96.

[147] O'Connell, op. cit., Chapter 1.5.

[148] Hollick, Ann L. *US Foreign Policy and the Law of the Sea.* Princeton University Press, 1981, 160-170.

[149] Quoted in Sebenius, James K. *Negotiating the Law of the Sea*. No. 154. Harvard University Press, 1984, 6.

[150] United Nations Convention on the Law of the Sea, Dec. 1982.

The competition between the rights of the flag state and the coastal state reflected the United States and its maritime allies' attempt to preserve a system conducive to freedom of navigation against the decentralized interests of many coastal states to maximize their sovereign control of their appropriated waters.[151] To obtain general compliance and police "excessive maritime claims," the United States privileged securing its core interests in a regime that protected freedom of navigation and overflight, as well as the laying of submarine cables, while acceding to the larger claims of coastal states regarding the delimitation of EEZs and the continental shelf.[152] The territorial seas had expanded fourfold, but the right of innocent passage sustained core maritime interests by protecting navigation, including military navigation, in the zone.[153] While the right of innocent passage had some customary basis, its jurisdiction remained ambiguous and was not properly enforced in the 19th century.[154] Through issue-packaging with economic exploitation of resources, the United States also secured extensive rights pertaining to freedom of navigation and overflight in the EEZs in the face of attempts to assert sovereignty comparable to territorial seas.[155] As Kissinger affirmed in 1976 after accepting the 200nms EEZ, "the economic zone remains part of the high seas."[156] The United States ultimately refused to ratify the treaty due to disagreements with the rules of conduct appropriating the deep sea-bed of The Area as a "common heritage of mankind" but accepted the rest of the treaty as customary law.[157] That the United States did not enter the treaty but shaped its structure reinforces the idea that regimes are shaped by the power and interests of states in the

[151] Many maritime powers, including the United States and the Soviet Union, had mixed interests in facilitating control of their coastal waters while some developing countries supported coastal jurisdiction for ideological reasons. See Grewe, op. cit., 689-693.
[152] See Reagan Library, Executive Secretariat, NSC: NSDD Records, NSDD 265 [Freedom of Navigation Program (FON)]. Confidential. March 16, 1987; Borgerson, Scott Gerald. *The National Interest and the Law of the Sea*. No. 46. Council on Foreign Relations, 2009.
[153] O'Connell, op. cit., Chapter 7.
[154] Jessup, op. cit.,120-123.
[155] Haas, Ernst B. "Why Collaborate? Issue-Linkage and International Regimes." *World politics* 32, no. 3 (1980): 357-405. The United States had previously established this rule on the jurisdiction over EEZs through its own practice. See Hollick, 356-359.
[156] Quoted in Hollick, 358.
[157] O'Connell, op. cit., Chapter 12.3.

process of habitual management rather than positive consensus. UNCLOS has enjoyed general adherence in practice and has been ratified by 170 states. As a result of this widespread recognition, UNCLOS garnered legitimate authority despite continued disagreement.

Major shifts in the global balance of power have produced inchoate multipolarity and challenges to American maritime predominance.[158] Alongside this flux in the international order, contestation against the rules of UNCLOS has intensified. Most prominently, major coastal states such as China, India and Brazil have asserted excessive jurisdiction over their coastal waters.[159] Early in the unilateral establishment of EEZs, some Latin American countries had asserted similar jurisdictional rights over such large maritime zones as ascribed in territorial seas, however these positions faltered following the general recognition of the rules of conduct under UNCLOS.[160] As the distribution of power changes, incentives increase for rising coastal states to challenge interpretations of their jurisdiction to secure their frontiers more proactively. UNCLOS locked in interests when countries such as China were weak.[161] Now that their interests include securing their Sea Lines of Communication, they have sought to blur the distinction between their Territorial Sea and EEZ.[162] Suspicious of threats such as intelligence collection, China and India reject many freedoms associated with EEZs; further, they reject many rights of innocent passage in territorial seas granted under UNCLOS.[163] Meanwhile, the United States has sought to defend its interpretation of UNCLOS through Freedom of Navigation Operations (FONOPs) that are designed to demonstrate the continuing

[158] Colby, Elbridge A. *The Strategy of Denial: American Defense in an Age of Great Power Conflict*. Yale University Press, 2021; Mearsheimer, op. cit.

[159] The United States Navy notes 29 countries with excessive maritime claims in EEZs. See O'Rourke, Ronald. "Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes involving China: Issues for Congress." *Congressional Research Service* 24 (2018), 9.

[160] Attard, op. cit., 284-288.

[161] Johnston, Alastair Iain. "Socialization in International Institutions." *International Relations Theory and the Asia-Pacific* (2003): 107-52.

[162] Fravel, M. Taylor, and Glaser, Charles L. "How Much Risk Should the United States Run in the South China Sea?" *International Security* 47, no. 2 (2022): 88-134.

[163] Smith, Jeff M. "UNCLOS: China, India and the United States Navigate an Unsettled Regime." *The Heritage Foundation* 30 (2021); Rehman, Iskander. "India, China, and Differing Conceptions of the Maritime order." *Policy Review*, Brookings Institution (2017).

applicability of principle features of freedom of navigation and overflight under UNCLOS. Enforcement through FONOPs runs risks of escalation through reprisals from coastal state enforcement of their desired rules of conduct in EEZs.[164] This new dynamic of contestation between rules protecting freedom of navigation and rules stimulating excessive jurisdiction is bound to reproduce friction on the seas and weaken the UNCLOS regime if the underlying trends persist.

D) The Resolution of Maritime Boundary Disputes

In this section, we will explore the settlement and persistence of maritime disputes. Our case selection comprises 1) the settled North Sea Dispute between Denmark, West Germany, and the Netherlands, 2) the settled but uncertain East China Sea dispute between Japan and Korea, 3) the settled Bay of Bengal Dispute between Bangladesh, India, and Myanmar, 4) the ongoing Aegean Sea dispute between Greece and Turkey, and 5) the ongoing South China Sea dispute between China and its proximate neighbors. These cases are geographically diverse, vary in their resolution status and time, and allow us to assess the role of delegation.

The North Sea Dispute

The North Sea Dispute arose between Denmark, West Germany, and the Netherlands over continental shelf boundaries in the North Sea and was settled following the ICJ judgement in 1969.[165] There was not a clear consensus on the application and legitimacy of UNCLOS I and the Convention on the Continental Shelf of 1958 to the issues of the North Sea when vast hydrocarbon deposits had been discovered.[166] This discovery created a need for legal certainty

[164] Fravel and Glaser, op. cit.
[165] *North Sea Continental Shelf* (F.R.G. v. Denmark, F.R.G. v. Netherlands) 1969 ICJ Rep. 3 (20 Feb.).
[166] Oude Elferink, Alex G. *The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?*. Cambridge University Press, 2014, 95-97.

to optimally exploit the continental seabed. With the necessity to appropriate the continental shelf established, the three parties proposed different principles to guide this division. Denmark and Netherlands argued that the rule of equidistance in Article 6 of the 1958 Continental Shelf Convention[167] should be applied while Germany sought "fair and equitable" division based on distributive justice.[168] Since information about the precise location of relevant seabed resources was unavailable, Germany sought to divide the continental shelf on equitable geographical lines.[169] With most other boundaries in the North Sea recognized through bilateral agreement, the persistence of this dispute created a search for habitual compromise, leading to partial agreement between Denmark and Germany on their boundaries. However, negotiation failed to reconcile the fundamental difference in approaches between Germany and Denmark/Netherlands.[170] Given the necessity of agreement for resource exploitation, the advantages of delegation became apparent, with all parties reaching a consensus to take the case to the ICJ.[171]

The ICJ determined the case on principles favorable to equity, giving validity to much of Germany's claims. The court's decision provided a focal point from which the three parties could go forward under strategic interdependence. However, the negotiations that followed did not squarely settle the dispute on Germany's terms and have been characterized as a "purely pragmatic solution."[172] The alignment of Denmark and Netherlands allowed them to put pressure on Germany's claims, but the case was ultimately settled on a reciprocal basis.

[167] Notably, West Germany was not a party to this convention.
[168] Friedmann, Wolfgang. "The North Sea Continental Shelf Cases--A Critique." *The American Journal of International Law* 64, no. 2 (1970): 231.
[169] Separate Opinion of Judge Jessup, 73, in *North Sea Continental Shelf*
[170] Elfernick, op. cit., Chapter 5.
[171] Ibid, 165-196.
[172] Ibid, 444.

The East China Sea Dispute

The East China Sea Dispute arose between Japan and South Korea in delimiting their adjacent continental shelves. The two states had overlapping claims, with Japan committed to boundaries based on the principle of equidistance while Korea argued that the natural prolongation of their land territory should apply.[173] Strategic interdependence formed in this dispute after a 1968 report by the UN Economic Commission for Asia and the Far East suggested that this continental shelf "may be one of the most prolific oil reservoirs in the world… close to the one existing in the Persian Gulf."[174] This zone was also disputed by China and Taiwan. Anticipating a negative judgement, Korea rejected Japan's attempt to adjudicate the dispute through the ICJ.[175] Unable to reconcile their desired principles of delimitation and requiring legal certainty for economic exploitation, Japan and Korea began to negotiate on a joint development project.[176] This culminated in the 1974 treaty establishing a Joint Development Zone (JDZ) in 1974, in which the two states would pay equal proportions in development and extract an equal share of the resources, and exploration and exploitation would be conducted under mutual consensus.[177]

After periods of joint exploration, the regime has decayed considerably since 2010 due to differing judgements on the economic utility of exploration. Japan ceased joint exploration, while Korea has insisted on the economic viability of the zone and suggested unilateral exploration.[178] UNCLOS further complicates the agreement, with its provisions on the

[173] Kim, Hyun Jung. "What did the Republic of Korea and Japan mean by the term "Joint Development" in their 1974 Agreement?" *Marine Policy* 117 (2020): 2.
[174] Quoted in Kim, Suk Kyoon. "The Uncertain Status of the Korea-Japan Joint Development Agreement of the Continental Shelf and Its Prospects." *Asia-Pacific Journal of Ocean Law and Policy* 7, no. 2 (2022): 198-199.
[175] Ibid. 201.
[176] Initially, Taiwan was also part of these negotiations but withdrew under Chinese pressure. See Ibid, 200.
[177] *Japan and Republic of Korea Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries.* United Nations Treaty Series, No. 19778
[178] Choi, Jee-hyun. "Korea–Japan JDZ to End in Deadlock?: The Potential for Unilateral Korean Exploration and Exploitation." *Ocean Development & International Law* 51, no. 2 (2020): 162-174.

continental shelf favorable to the initial Japanese position on delimitation.[179] China has also sought to intercede on the agreement, successfully cooperating with Japan on development in an adjacent JDZ signed in 2008.[180] With the treaty expiring in 2028 and strategic interdependence diminished, the future status of the agreement between Japan and Korea remains uncertain. Korea remains committed to renewing the treaty, aiming to lock in its favorable conditions that would be lost upon its termination. However, Japan remains less susceptible to the friction caused by abrogation and is better positioned to negotiate a new treaty.[181] Indeed, some Koreans suspect Japan is waiting for the treaty to expire before claiming the area.[182]

The Bay of Bengal Dispute

The longstanding disputes over the Bay of Bengal concern the maritime boundaries between Bangladesh and their bordering states, India and Myanmar. These disputes persisted since Bangladesh laid out its maritime claims in 1974, soon after its founding, and persisted until the ITLOS judgement (Bangladesh v. Myanmar) of 2012 and PCA ruling (Bangladesh v. India) of 2014. Tucked between the two countries, Bangladesh's EEZ and continental shelf was severely limited by the principle of equidistance that India and Myanmar advocated. Bangladesh therefore responded by proposing straight lines from their coast based on the principle of equity.[183] Despite agreements to negotiate these disputes, the negotiations lasted nearly four decades and failed to reach a settlement. This can largely be explained by Bangladesh's lack of state capacity and the resulting weakness to reciprocally enforce their positions.[184]

[179] Seta, Makoto, and Vasco Becker-Weinberg. "What Next for Japan and the Republic of Korea in the East China Sea? The Law of the Sea Perspective." *International Law Studies* 103, no. 1 (2024): 18.
[180] Ibid.
[181] Ibid.
[182] Ju, Jaehyoung. "Keep an Eye on the Japan-Korea Joint Development Zone." *The Diplomat*, Feb. 24, 2023.
[183] Hasan, Md Monjur, and He Jian. "Protracted Maritime Boundary Dispute Resolutions in the Bay of Bengal: Issues and Impacts." *Thalassas: An International Journal of Marine Sciences* 35 (2019): 326-328.
[184] Ibid, 330-332.

The expansion of strategic interdependence prompted the settlement of the disputes. In the case of Myanmar, friction stemming from the dispute had caused severe strains in the bilateral relationship, with Myanmar's exploration of the disputed area leading to a major naval stand-off in 2008.[185] More importantly, both states were desperate to extract hydrocarbons from the disputed zone; the supply and demand of these resources had improved with the technological capacities of the states. Bangladesh faced severe energy shortages, while Myanmar had large incentives to leverage the resources in their relations with China and India.[186] When Bangladesh submitted both disputes to the PCA in 2009 to find a binding settlement, Myanmar embraced this and proposed delegating it to the ITLOS.[187] The judgement of 2012 provided a focal point for rules that both states could adhere to.

India rejected the jurisdiction of the ITLOS and proceeded under an arbitration panel through the PCA. Although the panel ruled based on principles of equidistance, the 2014 decision gave Bangladesh a much larger proportion of the disputed territory. Indian officials celebrated that the decision removed the impediment to economic exploitation of the disputed zone of the bay.[188] However, the outcome of the dispute between India and Bangladesh poses a puzzle as the weaker country, Bangladesh, clearly came out as the "winner" of the dispute, acquiring most of the disputed territory. Two alternative accounts can be given for India's adherence to the decision: legitimating their positions on the rules of conduct in other disputes, such as with China, and promoting amicable relations with Bangladesh.[189] Notably, the decision coincided with other settlements between the two countries. As Østaghen points out, states consider the totality of their interests when addressing maritime disputes and inconsistency in positions.[190]

[185] Bissinger, Jared. "The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications." *Asia Policy* 10 (2010): 107-110.
[186] Ibid, 111-125.
[187] Ibid, 330.
[188] "Heeding UN Ruling, India Drops Claim to Bay of Bengal Area." *Today Online*, August 1, 2014.
[189] Ibid.
[190] Østhagen, Andreas. "Lines at Sea: Why do States resolve their Maritime Boundary Disputes?" PhD diss., University of British Columbia, 2019, 79-80.

The Aegean Sea Dispute

With Turkey a firm opponent of the UNCLOS regime, the Aegean Dispute between Turkey and Greece consists of many aspects of relations between the two countries, including rights of navigation and overflight, the sovereignty of islands, and the delimitation of maritime zones. With the history of relations between the two countries riddled with conflict, the dispute generates intense hostility.[191] The attempt to adjudicate the dispute through the ICJ in 1976 failed when the ICJ found that it lacked jurisdiction.[192] With the rules of conduct under UNCLOS favorable to their archipelagic geography, Greece advocates following the positive principles of international law which provide support for maritime zones beyond what they currently claim. Turkey argues for unique principles that are equitable to the structure of the Aegean, such as a median line delineating the EEZ and continental shelf based on the two countries' coastlines and 6nms territorial seas.[193]

While the dispute remains unresolved, a delicate balance does exist based on reciprocal enforcement. Both states maintain territorial seas of 6nms in the Aegean, with Turkey suggesting an extension to 12nms by Greece would be a *casus belli*.[194] Given the presently restrained climate between the two countries, their historical beef, and the risk of hostility that friction could incur, there may exist avenues for habitual management. However, bilateral negotiations may not be able to accomplish this alone as their desired rules of conduct remain vastly distant. Similarly, adjudication and arbitration remain difficult since Turkey is not a party to, and does not abide by the rules of, UNCLOS. Softer methods of strategic delegation,

[191] Vassalotti, Julia. "Rough Seas: The Greek-Turkish Aegean Sea Dispute and Ideas for Resolution." *Loy. LA Int'l & Comp. L. Rev.* 33 (2010): 387-389.
[192] Ibid, 391.
[193] Ibid, 390-398.
[194] Siousiouras, Petros, and Georgios Chrysochou. "The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation." *Laws* 3, no. 1 (2014): 48.

such as mediation by the European Union, may be able to play a constructive role given this condition.

The South China Sea Dispute

The South China Sea Dispute concerns the expansive claims of China over islands and maritime zones in the sea that conflict with Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. Many of these states have their own disputed claims, but they are dwarfed by the power and scale underlying the Chinese claims. China claims control over the Paracel and Spratly islands and jurisdiction of the wide "nine-dash line" as their EEZ based on historical rights.[195] Due to the threat posed by Chinese power, other states have moved further towards keeping their maritime claims in conformity with UNCLOS and negotiating their bilateral disputes so that they may form a common bloc against Chinese claims.[196] The bargaining position of the other states is strengthened by American support through FONOPs and their closer alignment with the rules of UNCLOS. The Philippines utilized this latter fact to publicize the dispute by submitting it to arbitration under the PCA, with the PCA finding China's references to historical waters incompatible with the rules of UNCLOS. However, China rejected the arbitral panel and ignored this ruling.[197]

As mentioned in the previous section, Chinese excessive maritime claims are largely driven by security motives to secure their SLOCs in the international system.[198] Other factors, such as nationalism, and the desire to control the fisheries and hydrocarbon deposits, also guide their pursuit of maximal control over the rules in the South China Sea.[199] The result of these factors

[195] Beckman, Robert. "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea." *American Journal of International Law* 107, no. 1 (2013): 142-163

[196] Ibid.

[197] Pemmaraju, Sreenivasa Rao. "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility." *Chinese Journal of International Law* 15, no. 2 (2016): 265-307.

[198] Fravel and Glaser, op. cit.

[199] Seo, Youngmin. *The South China Sea Dispute as International Law and Politics: Discovering the Role of Law in Times of Power Shift*. Vol. 13. Brill, 2024, Chapter 3.2.

is that the desired rules of conduct are driven by core national interests under anarchy. There is a clear lack of strategic interdependence in the South China Sea: the contestation over the rules of conduct is considered indivisible and zero-sum. Naturally, friction predominates, and Nomos is absent.

Takeaways

The cases show that amidst the friction generated by disputed maritime boundaries, states are habitually driven towards management on a reciprocal basis by strategic interdependence. Requiring common rules of conduct for effective exploitation of ocean resources, strategic interdependence forms as the costs of friction expand and make unilateral assertions unsustainable. Like the neorealist assumption about alliances, orientation in disputes is instrumental to maximize self-gain rather than reflective of underlying cooperation. The recognition of boundary rules is contingent on strategic interdependence and reciprocal enforcement that prevents states from pursuing rules more conducive to their interests.

The legalist perspective that common and universal legal standards are the best way to reach compliance is also shown to be misleading. Delegation is pursued when negotiations fail to establish common rules of conduct but strategic interdependence necessitating management persists. As shown, states begin with advocating rules of conduct that align with their interests and management corresponds with habitual compromise. The role of courts and written law is to provide focal points in this process. Overlapping jurisdiction has ambiguous effects: forum shopping produces additional focal points for states to choose from but, as was evident in the role of UNCLOS standards in the East China Sea dispute, these additional focal points can intensify contestation. The underlying political factors are ultimately determinative.

Conclusion

This paper provides the foundation for a structural realist intervention into international law. The neorealist commitment to parsimony and failure to acknowledge the limits of its basic theoretical assumptions has left it inadequate to address developments in international law and the challenges stemming from regime theory. By taking a unified method that incorporates both political science and jurisprudential approaches to law, we extend on the presuppositions of the neorealist paradigm to develop a general and comprehensive theory of international law that demonstrates its emergence and operation within the international system.

The recurring friction and unconstrained sovereignty generated by interactions and interdependence within the competitive system of international anarchy produces structured domains of strategic interdependence that necessitate ordering. This necessity cultivates a secondary organizing principle of Nomos that sets the order and orientation of structured domains, based on the dynamics of power and interest. Nomos forms through the habitual management of structured domains by states until it is formalized as rules under management regimes. Nomos interacts with the enforcement mechanisms within structured domains to shape these management regimes. We extend from Hart's jurisprudence to show how rules gain internal validity. As wars and major power shifts bring fluidity to the international order, management regimes recede back towards the natural order of anarchy until Nomos reemerges in a new form, demonstrating the cyclical nature of international law. Our theory flips regime theory on its head: rather than a gradual process of legalization towards a new world public order, international law emerges from and stabilizes the present system of anarchy.

Reframing the historical development of international law through this lens presents a dramatically different interpretation of the principles of international law: rather than enlightened progress in history, the structural necessity of rules of conduct have been a constant and recurring feature of the international system. Rather than shared understandings of efficient

behavior or normative agreement, the rules of conduct form through perpetual contestation. Rather than the centralization of universal principles derived from cooperative state practices, international law emerges from and is contingent on the antagonistic friction inherent to state relations within anarchy. This process has been shown through the operation of the law of the sea. The law of the sea developed through competing rules of conduct to manage friction rather than naturalistic principles. Despite its codification, pivotal rules of UNCLOS remain vulnerable as systemic change heightens contestation against the generally recognized rules of conduct. This is most evident through the increasing assertion of excessive jurisdiction by coastal states. Despite the persistence on dispute resolution and the judicialization of maritime boundary delimitation under UNCLOS, the settlement of disputes continues to follow the logic of reciprocity, with delegation following from strategic reasoning.

The absence of a realist approach to international law has been one of the striking features of the burgeoning scholarship on international institutions in recent decades, with the entire profession of international lawyers sometimes presented as a rejection of its conceptual framework. The direction ahead is clear: political scientists must further engage the legal literature to clarify the "internal" aspects of international law and realists in particular must join the recent promising advances in social scientific approaches to international law. In this thesis, I applied this conceptual framework to developments in the law of the sea. The puzzles in other bodies of law, such as international environmental law, international trade law, regional legal regimes, and the workings of international dispute resolution mechanisms also merit further discussion. Much has been said about the need for international legal scholarship to embrace the methods of social science;[200] future research by social scientists should also embrace the study of law.

[200] Abebe, Daniel, Adam Chilton, and Tom Ginsburg. "The Social Science Approach to International Law." *Chicago Journal of International Law* 22, no. 1 (2021).