Lessons Learned from Historical Precedents in the Norms Formation Process

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Introduction

- Need for appropriate analogies from historical precedent

- Focus on the process underscoring norm evolution and the social, cultural, economic and political context in which they emerge

- Paper embarks on an assessment of how regimes **maximized functional utility**

Methodology

Cyber-security could be approached simultaneously from two separate but connected lens

1)'Cyber hygiene' or technical co-operation through CBMs and sharing of best practices [Not focus of this paper]

2)Work towards shared understanding on the nature of cyberspace; strategies for ensuring its continued relevance and key actors involved [**Focus of this paper**]

Regimes Considered

- The Law of the Seas and its the formation of the United Nations Convention on the Law of the Sea and its constituent Organisations-the International Sea-Bed Authority and the International Tribunal on the Law of the Sea

- The evolution of the norm outlawing the Use of Force and the Development of International Humanitarian Law [Broadly 'international security']

- International Trade Law leading to the General Agreements on Tariffs and Trade and the formation of the World Trade Organisation and

- The evolution of the Paris Agreement

Why These Regimes

- Phenomenon considered was 'entangled' and offered some functional utility to all participating stakeholders

- Contestation between regional or strategic groupings

- Lead to creation of co-ordination mechanism/dispute settlement body

Theoretical Underpinnings

- Co-operation and contestation in regime theory
  - o Reduction of transaction costs
  - o An iterated setting with possibility of 'tit-for-tat'
  - o Facilitation of dialogue and convergence through repeated interactions
- Role of International Law
  - o Change, create or displace the meaning of social norms
  - o Facilitation of positive conflict and framing of common language for identifying bargaining points (Hakimi,2017)
- Finnemore/Sikkink; Zartman/Berman: 'Norm cycle' and three phases of regime formation

UNCLOS Revisited

UNCLOS Negotiations Revisited (1)

- Key to remember that all states wanted a multilateral regime but not for the same reasons

- Diagnostic Phase

  o List of issues produced but no major agenda for future conferences

- Formula Phase

  o Two clear challenges: 1) Rules of interaction and 2) Shared ideas and establishment of a regime

  o Final outcome would have to be a 'single negotiated text'

  o Broad consensus on Exclusive Economic Zone, 12-mile territorial sea and right of transit

UNCLOS Revisited (2): Details

- **Details Phase**
  - U.S. attempts at 'exit' and re-orientation, particularly on issues of the deep sea-bed
  - Voice of G-77 prevailed and they constantly opposed U.S. approach to unlicensed deep sea-bed mining and the ISA was set up with a wide ranging set of powers

UNCLOS Revisited (3): Coalitions

- The Group of 77 comprised of more than 120 states

- Heterogeneous group of members who were differentiated by region - Latin American/Caribbean/African/Asian or by special interest issues stemming from geographic disadvantages, such as being a landlocked state

UNCLOS Revisited (4): Norm Entrepreneurs

- Asian-African Legal Consultative Committee (AALCC)

  o Working Groups and paper presentations (eg: Delegate of Kenya submitted paper on EEZ) at AALCC Meetings

  o Submitted to Second Committee on LOSC

  o Post LOSC Conference in Geneva, the AALCC Secretariat prepared detailed reports to help member states understand their rights and obligations

- Quick reference to ICRC's role in developing The Geneva Conventions and Additional Protocols

UNCLOS Revisited (5): International Law

- Most states sought to modify the 'free-for-all' Grotian regime

- Increasing ideological dogma of a New International Economic Order spurred on the developing world

- Each coalition utilised their own ideological extraction of international law to compete and then synthesize for ultimate co-operation (eg: 'patrimonial sea' as a precursor to EEZ)

UNCLOS Revisited (6): Contestation and Exit

- CONTESTATION
  - Developing world viewed negotiations through prism of NIEO
  - They used it as a tool for contestation on many issues, including the negotiation of the Exclusive Economic Zone and left this ideological concept immune from a bargaining move or trade-offs
  - Fervent use of trade-offs and sub-packages on other issues
- EXIT
  - U.S. announced it would not be signing the treaty in June, 1982
  - Exit did not prevent operationalization as norms had already been crystallised

Quick Run Through of the Key Learnings from Other Regimes

Size

UNCLOS	Use of Force/IHL	Trade	Environment
Multilateral-more than 150+ negotiating states, 150+negotiating issues	Use of Force: Kellogg-Briand Pact had 31 signatories by effective date; 14 states party to the negotiations. Initially, 50 parties signed the UN Charter IHL: Geneva Conventions ratified by 196 states; Additional Protocol ratified by 174,168 and 73 states respectively and had around 120 members participating in negotiations	Started off small-23 countries at GATT 1947 but WTO has 164 members	174 states And the EU were parties; 196 signatories

Formal/Informal Bargaining Process

UNCLOS	Use of Force/IHL	Trade	Environment
Number of informal bargaining groups and sub-committees on various issues	Formal bargaining process driven by heads of states and leading diplomats	**Business style tariff reductions at GATT, more holistic law-driven consensus building at WTO**	**Multilateral process with 'formal-informals'**

Rigidity of International Law Mechanisms

UNCLOS	Use of Force/IHL	Trade	Environment
Output was a single negotiated treaty text	Engraved into Article 2(4) has been recognized as customary international law IHL: Codified body of law in the Four Geneva Conventions and two Additional Protocols	**GATT: Low levels of legal discipline, WTO: Rigid structure of International Law**	Internally Determined Contributions (INDCs)-voluntary compliance

Time

UNCLOS	Use of Force/IHL	Trade	Environment
Took 15 years as there was no time pressure. Diagnostic Phase: 6 years; Formula Phase: 2 years; Details Phase: 7 years	Pact of Paris was negotiated between 1925-1929 although the informal origins of the idea came as early as 1919; UN Charter was negotiated within a year of the Dumbarton Oaks Conference in 1944 IHL: Geneva Conventions negotiated quickly in the aftermath of World War II. Additional Protocols took longer between 1974-77	GATT was negotiated quickly after World War II. Came into effect by 1947. Uruguay Round setting up the WTO took 8 years.	Negotiations officially took between 30 Nov-12 Dec, 2015 but built on 4 decades of environmental jurisprudence

Negotiation Strategies

UNCLOS	Use of Force/IHL	Trade	Environment
Use of trade-offs and packages/sub-packages	Use of trade-offs to determine what the functioning of UNSC would be like and the core norms of IHL	Tariff reductions were the initial trade-off but as the WTO mandate grew to fields such as Intellectual Property, informal mechanisms had to be deployed to facilitate	Use of trade-offs and sub-packages

Decision Rule

UNCLOS	Use of Force/IHL	Trade	Environment
Consensus or near consensus in decision-making	Use of Force: Consensus among the major powers IHL: Majority Vote with negotiation on key substantive issues	Simple majority at GATT; Consensus with every party having a veto at WTO	Indaba negotiation strategy

Exit and Voice

UNCLOS	Use of Force/IHL	Trade	Environment
Multiple coalitions such as the Group of 77 formed to give 'voice' to the needs of developing countries. USA did not sign the treaty in 1982	Entire process was driven by the major military powers at the time. Article 2(4) was driven by the victors of World War II, so there was not much scope for the exercise of 'voice' although there was contestation among the major powers	GATT-Low Legal discipline-High Exit-Low Voice; WTO-High Legal Discipline, fragmentation and the 'spaghetti bowl'	USA has indicated that they will exit the Agreement

Non-State Groups and Individuals

UNCLOS	Use of Force/IHL	Trade	Environment
Largely state-centric process	Academics that originally conceptualised the idea leading up to KB Pact; ICRC emerged as a major norm entrepreneur in the field of IHL	While NGOs are now increasingly coming into the fray, the original negotiations were largely state-centric initiatives	NGOs and specialist groups were invited to the negotiation process and helped drive consensus

Dispute Resolution

UNCLOS	Use of Force/IHL	Trade	Environment
ITLOS; International Sea-Bed Authority	ICJ//UNSC	WTO Dispute Settlement Body	Climate Change Displacement Co-ordination Agreement to tackle forced migration due to environmental reasons

Food-for-Thought
For Cyberspace

Recommendations

- **Recommendation 1:** *There should be an agreement at large that involves all states and invites non-state actors to the table as interested stakeholders.*

- **Recommendation 2:** Ideas, research, and a pre-existing material (drafts and agreements) are critical foundations and should be leveraged.

- **Recommendation 3:** *There must be transparency in the bargaining process at two levels: (1)* Internal Transparency and *(2) Transparency of process and outcomes.*

Recommendations (2)

- Recommendation 4: *Coalitions grouped by common ideology, interests, focus areas or identities **may aid in fostering positive conflict**, identifying key areas for consensus and in the development of a formula in the long run.*

- Recommendation 5: *In order to work out the various formulae, informal negotiation must be encouraged.*

- Recommendation 6: *Voting must seek to facilitate consensus by using tactics such as the Indaba strategy*

- Recommendation 7: *Large regimes are decades in fruition. A small start does not dictate the eventual result.*

Recommendations (3)

- Recommendation 8: *International Law must be used as a tool for the facilitation of positive conflict* *but the cyber norms process must be careful to not delve into the details of its application until a broad formula has been worked out*

- Recommendation 9: *The cyber norms process is not ready for the imposition of rigid, legally binding obligations as a desired outcome yet.*

Recommendations (4)

- Recommendation 10: *Wide participation by non-state actors can be key in negotiation processes.* **Identification of potential norm-entrepreneurs** *and supporting them may be important for a successful outcome.*

- Recommendation 11: *A dispute resolution or co-ordination body is needed but the present legal regime is not robust enough to create a mechanism that adjudges cyber disputes yet.*

Questions

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