What Would E.H. Carr Say?
How International Institutions Address Peaceful Political Change

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“What therefore resort to war for the purpose of altering the status quo now usually involves the breach of a treaty obligation and is accordingly illegal in international law. No effective international machinery has been constituted for bringing about changes by pacific means.”

– E.H. Carr

Introduction.

E.H. Carr is invariably described as the father of 20th century realism. As often happens to seminal writers, he is also misremembered, his writings reduced to a handful of aphorisms. Carr is forever the enemy of the utopians, the critic of Woodrow Wilson’s fourteen points and the League of Nations’ folly. This trend is not helped by the fact that his main opus, the “Twenty Years’ Crisis”, has grown scarce on graduate syllabi. The fashion these days leans towards the work of Carr’s fellow early realist, Hans Morgenthau, who put forward a more systematic treatment of some of the ideas he shared with Carr.

Carr’s topic was peaceful change. As he claimed, “to establish methods of peaceful change is therefore the fundamental problem of international morality and of international politics.”\(^1\) The main complaint that emerges from the “Twenty Years’ Crisis” is over the lack of some “international machinery”, as per the opening quote, that might enable change by peaceful means. Carr’s writings are thus highly germane to the set of questions being asked in this volume.

Writing in the inter-war period, Carr was preoccupied by how the rise of an emerging power might be dealt with without resorting to war. The first notable point, then, is that he did not see conflict as an inevitable outcome of even large-scale political change. His view was also thoroughly modern in this respect: he saw conflict as an inefficient means of reallocating resources and settling disagreements among states. Yet the futile attempts to legislate war through the League of Nations represented for him a *utopia*, that is, “an ideal to be aimed at, but not wholly attainable”.\(^2\)

It may thus surprise some to reread the note on which the “Twenty Years Crisis” ends. The hard-nosed realist reveals himself to have hope for a solution. One that, by his own admission, also has a distinct utopian quality. Yet, he explains:

\(^1\) Carr 1939, 222

\(^2\) ibid 222
“...it stands more directly in the line of recent advances than visions of a world federation or blue-prints of a more perfect League of Nations. Those elegant superstructures must wait until some progress has been made in digging the foundations.”

In this article, I want to propose a re-reading of Carr’s view of rules binding state behavior, and identify exactly what is meant by these necessary “foundations”. I claim that the conclusion to the “Twenty Years’ Crisis”, especially, stands in opposition to common readings of his work. In this conclusion, Carr actively engages with the prospect of binding international institutions, and establishes conditions for their ability to ease peaceful political change. The crux of Carr’s claims about international law, in particular, rests on the possibility of law taking into account the protean nature of politics. Much as he argued that economics could not be conceived of as separate from political power, so too was it necessary for law to recognize that which was antecedent to it. Carr had in mind a reflexive aspect of international law whereby the law could somehow adjust itself, or suspend itself entirely, when faced with political necessity. Yet he fell short of fully articulating a mechanism by which this might be achieved.

Today’s international institutions, I argue, feature provisions that attempt just such an adaptation to uncertainty. In this chapter, I focus on two institutional features. First, international law has long recognized, and codified formally in 1969, the principle according to which fundamental, unexpected change can lead to a suspension of a country’s legal obligations. I examine documents surrounding the negotiation of the corresponding clause in the Vienna Convention on the Law of Treaties (VCLT), the text that to this day provides the framework for most international agreements. My goal is to show that negotiators saw Article 62 as a solution to the very type of problem that Carr outlines. Far from an isolated provision, Article 62 is symptomatic of the open contract nature of today’s global governance. International law is a collection of second-best solutions. Much as Carr had indicated, today’s institutions recognize how the inclusion of some measure of wiggle-room for politics to operate in is the necessary precondition for the rules to constrain state behavior in the first place. Secondly, I examine the role courts can play in assuring a balance between political needs and legal requirements. Both these elements—flexibility provisions that mimic Article 62 and the court as an independent international actor—go some way in answering Carr’s challenge, and give us a sense of how institutions might play a role in facilitating political change by peaceful means. Despite going down in history as the foremost critic of the attempt to legislate affairs between states, Carr gives us a useful measure by which to reflect on today’s system of global governance, and its ability to deal with change.

Carr’s objections to law and morality in international relations were not absolute. Not only did he foresee a role for law in dealings between states, but he saw it as the one potential means of assuring peaceful change. He outlined the essential features of a viable international legal system, and he saw none of these satisfied in the international rules of the day. Most presciently, he maintained that no legal system could exist without recognizing its inherently political function. In its essence, Carr’s critique was not of rules per se, but of their design.
The exercise of reading Carr into today’s system of global governance has an interesting corollary. The way in which current provisions of international law can be shown to heed political factors, as I claim Carr was calling for, has the unexpected effect of throwing in doubt the idealized view of law as fully binding political impulses. In other words, the optimal imperfections of law that Carr would find salutary should also lead champions of today’s liberal institutionalism to reexamine their premises. This amounts to a return to the old debate about the epiphenomenality of international law, but with a twist: in order for rules to affect country behavior, they must also cede to state necessity in some agreed-on circumstances.

This chapter proceeds as follows. I begin with an overview of Carr’s well-known, skeptical take on binding law among states, and how it relates to his views on peaceful change. I then focus on the conclusion to the “Twenty Years’ Crisis”, where I argue Carr not only leaves open a role for law, but sees in it the only possible solution to peaceful political change. Finally, I consider today’s international rules in light of Carr’s argument, and ask whether these have responded to the challenges raised by him. I give special consideration to the role of the Fundamental Change of Circumstances clause of the Vienna Convention on the Law of Treaties, and that of the court-as-actor in international law. This discussion has implications about reading Carr’s work, as well as about contemporary views of international law as a mechanism for binding states.

Carr and International Law

When Carr lays out the realist position of law, labeling it as such, he is careful not to come out as wholly subscribing to it himself. He depicts it as one possible conception of law, according to which law is an expression of the will of the state, an instrument of coercion by which stronger nations impose their will on weaker ones. Law cannot aspire to morality in this sense, since it is a temporary reflection of relations among states. As Bismarck had it, it is merely “a constatation of a definite position in European affairs.” Yet, Carr goes on to say, breaking with the strict realist view, no set of laws can be enforced by power alone. What is needed is what we might refer to today as self-enforcement, which comes from some shared recognition of the law serving the common good. Much of Carr’s reasoning from there onwards is concerned with securing this shared recognition in the international realm.

The realist insight that Carr does insist on is the absence of an inherent morality to law. Rendering commands legal does not make them morally sound, Carr reasons. He is at his vaguest when discussing the prerequisites of such a morality, speaking of the need for an international “political community of nations”. What Carr seems to have in mind is acquiescence, something we might today call “legitimacy”. The weakness of law reflects the weakness of the international community. Yet nowhere is this seen as immutable. It is precisely such moral validity that must be sought as a means of achieving self-enforcement.
Moral validity could not be attained without recognizing the source of international law. There could be no such thing as the rule of law in international relations that was distinct from the rule of powerful countries within the small international community. Carr’s main point in this respect is that international rules, more so than municipal (i.e. domestic) law, are the product of state interaction, and that politics are thus antecedent to the law. “The ultimate authority of law derives from politics.” (180) As Carr points out, treaties among states, which are essentially contracts among actors within the international community, are considered part and parcel of international law, whereas no one would conceive of a private contract between two individuals as constituting municipal law. Carr’s point stands to this day: international law is the product of bargaining among states.

Carr saw a crucial transformation in states’ attitude towards treaties under international law, one he believed was taking place before his very eyes: writing in the late 1930s, he pointed to the end of WWI as a threshold beyond which treaties became binding on states.3 If anything, it is surprising that Carr, a historian, trained in taking the long view, did not hesitate to date a fundamental shift in states’ attitude as taking place less than two decades prior. As Carr put it,

“in spite of the universal recognition by all countries that treaties are in principle legally binding, international law before 1914 was reluctant to treat as absolute the binding character of treaty obligations” (182).

Previously, sovereign nations had been thought to have an unconditional right to suspend their treaty obligations. In the words of Teddy Roosevelt, “the nation has as a matter of course a right to abrogate a treaty in a solemn and official manner for what she regards as a sufficient cause.”4 This is also the spirit of Bismarck’s view, referenced above. The state, simply by virtue of its supreme position in international affairs, could never be fully bound. To be sure, those countries favored by the content of a treaty vehemently insisted on its binding nature, but those who were on the losing end of the same treaty had few qualms about breaking their obligations, as soon as power politics afforded them the opportunity to do so. Starting with the end of WWI, however, Carr describes the emergence of a consensus that treaty obligations are legally binding on states.

Yet Carr does not see this legalization of international affairs as a necessarily positive transformation. The distinction he observes between the period prior to 1919 and the post-1919 world is that as international law grows to encompass the law of treaties, leaders actually grow more likely to flout their obligations. In such instances, leaders often admit that their actions constitute breaches of law. Yet they invoke higher grounds to justify them: they make their arguments on the basis of morality, stability among nations, even peace. In today’s terms, they seek to unilaterally delegitimize the rules they are breaking. Carr’s point is that the legal provisions of his day did not sufficiently take

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3 It is worth noting that most of the treaties Carr had in mind, e.g. the Straits Convention that bound Russia’s maritime activities and was signed at the conclusion of the Crimean War, tended to be bilateral in nature, and locked in the preferred state of the world of a war’s victors.

4 182.
into account political factors that made compliance impractical. The result was that leaders went ahead and broke their obligations by referring to principles outside of the laws that bound them. The inability of law to rise to the level of a shared morality meant that countries could admit to breaking their legal obligations in the name of some loftier reason of state. The rigidity of the rules came at their perception as being morally sound.

In pushing this line of reasoning, Carr makes what amounts to an unambiguous empirical claim: the increase he observes in the repudiation of treaties since 1919, he argues, is “due in part to the well-intentioned efforts of the victorious Powers [of WWI] to strengthen those rules and to interpret them with greater rigidity and precision” (185). As evidence of a link between the greater rigidity of international rules, and the resulting increased likelihood of their being broken, Carr cites the British suspension of the Anglo-American War debt agreement in 1933. Britain faced increasing balance of payments issues that made it difficult to come up with the necessary dollars to finance its obligations, and it abrogated the treaty. Britain justified this abrogation on what Carr insists are moral, rather than legal grounds: the government argued that the burden imposed by the agreement was “unreasonable” (186). The then Chancellor of the Exchequer, Neville Chamberlain, reminded the House of Commons that Britain had other “other obligations and responsibilities”, suggesting that “millions of human beings across the world” would be worse off if Britain was made to continue with its payments. The truth was that Germany’s reparation payments were decreasing, and the world was in the grips of the Great Depression. Britain still saw a global role for itself, and believed that servicing its considerable debt obligations would get in the way of performing this role. Absent formal allowances for such exogenous difficulties, leaders in Britain—as well as in France, whose government had repudiated its own debt agreement with the US a few months earlier—began to prod at the legitimacy of the original agreements. As Chamberlain put it to the House of Commons, on the occasion of Britain’s last debt payment to the US before suspending the agreement, “When… the War was over we were left with this huge debt to the United States, incurred for a purpose in the pursuit of which she as well as we had been engaged.” How just had the agreement been in the first place, Chamberlain was asking? And what was the political and human cost of continued compliance?

As Carr saw it, such unilateral suspensions of treaty were typical of the effects of the West’s attempt to legalize international affairs, losing sight of the politics underlying the rules. Insisting on rigid agreements had the unforeseen effect of making it easier to exit. Paradoxically, the inability of rules to recognize the political forces they emerged from made it easier to call into question the legitimacy of those rules.

Contemporary students of international institutions will find much to agree with in Carr’s claim about the empirical consequences of legalization. In their aptly titled article “Is the

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5 https://www.dropbox.com/s/d8ceuoozmprxo8t/Screenshot%202013-10-16%2010.28.04.png
6 http://hansard.millbanksystems.com/commons/1932/dec/14/reparations-and-war-debts-1#column_354
7 ibid
Good News About Compliance Good News About Cooperation?”, 8 Downs, Rocke and Barsoom remind us that as countries make deeper commitments, they necessarily grow more likely to cheat, all things equal, and this is why we need an increase in enforcement to maintain a stable level of cooperation. Depth, in their telling, is the difference between behavior under an agreement and what behavior would have been absent that agreement. Largely building on this work, the depth/rigidity literature outlines a similar tradeoff to what Carr envisioned. 9 One cannot increase the ambition of countries’ commitments without also allowing for additional policy space to face changing circumstances. Without that additional flexibility, an increase in commitments will lead to an increase in the odds of abrogation. 10 Similar findings have found an equally interesting inverse relationship, looking to the economic sphere: when countries have access to some measure of wiggle-room, or flexibility, they end up making more ambitious commitments. 11 In light of this recent theory, Carr’s claims sound plausible: Following WWI, the utopian desire to expand the reaches of law, while insisting on its inflexibility, made it more acceptable to flout international law, as its claim on moral validity was weakened. To pretend that international law can be distinct from politics is to expose it to the vagaries of politics.

Whether Carr’s empirical point was ultimately correct is difficult to assess. Did the frequency with which governments suspended treaties increase post-WWI, and was it due the increased legalism of international rules? Considering the events leading up to WWII, this seems at least plausible, though it bears remembering that 19th century European affairs had largely consisted of treaties signed and almost immediately rescinded. 12 Even in the examples Carr mentions, such as the Anglo-American and French-American debt agreements, actors on the American side seemed well aware of the political underpinnings of the agreement, and the consequences of insisting on payment. Hoover was the first to recognize the stakes in insisting on continued debt payments, and early on he proposed a moratorium on debt payments from Britain. Continuous bargaining over the terms of the treaty, which is what Carr was arguing was missing, is actually not far-off as a description of the facts in these two cases.

Offering a definitive answer to this question is thankfully not the task of this chapter. Rather, I am interested in Carr’s premise: as the scope and rigidity of law increases, does it become more difficult to defend its moral validity? Is the legitimacy of law derived from its flexibility? As Carr put it in another work, “Nationalism and After,” where he was even more critical of efforts to legislate world affairs:

“Any so-called international order built on contingent obligations assumed by national governments is an affair of lath and plaster and will crumble into dust as soon as pressure is placed upon it.” 13

8 Downs Rocke and Barsoom (1996).
9 Johns; Downs and Rocke.
11 Kucik and Reinhardt 2008.
12 Mill
In other words, the fact that countries exchanged commitments that were beneficial at the time of signing does not mean that these become self-enforcing. As soon as pressure on those commitments is increased—Carr seems to have in mind mostly domestic pressure—the government will give in and break its commitment.

Thus we arrive at the crux of the matter. Considering Carr’s critique of the West’s behavior during the inter-war period, his objections to law among states are over issues of institutional design. Carr does not reject the possibility of binding international law out of hand. Indeed, he readily recognizes the need for “effective international machinery” that might address political change in a peaceful manner. Rather, he puts forth two separate objections. The first is that there must be some recognition of the political nature of international law. The second objection is a more concrete one, and an outgrowth of the first. When circumstances change, and the burden of compliance with law grows unbearable, the law must recognize that countries cannot remain strictly bound. Today we might refer to such a prospect as involuntary defection, borrowing Putnam’s phrase.14 Traditionally, addressing this possibility has fallen under the rubric of necessity in law. How might law allow for responses to exigency, without forsaking the force of the law? The challenge Carr sees is, how can the rigidity of the law deal with uncertainty and with unforeseeable changes to come?:

“Financial and economic commitments [...] may be accepted by governments in all good faith, but without full understanding of their consequences; and should these eventually turn out to be detrimental to the standard of living or level of employment in one of the contracting countries, they will be dishonoured, as Great Britain dishonoured her financial obligations to the United States in 1933.”

(Nationalism 30-31)

The full “understanding of their consequences” refers to the inability of negotiators to predict the future circumstances under which they will be required to perform their obligations. In Carr’s view, domestic obligations, when they arise, will invariably trump international obligations. When we speak of revisionist nations, we often have in mind countries whose domestic expectations and international position are out of sync. In these cases, Carr predicts, leaders will not hesitate to break international commitments to meet domestic expectations. How can international law reconcile itself with this fact?

**The Politics of Necessity in International Law**

The question before us is the same as the one Carr was facing. How does the set of covenants, treaties and agreements that make up international law adapt to global shifts of power, or other unexpected developments? If the law is the reflection of one state of the world, favorable to the dominant powers of one era, does it not stand in the way of peaceful political change, by making adjustments more difficult? Law’s rigidity makes

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the global regime akin to a steel bridge: how can such a bridge adapt to changing temperatures without giving way?

One place to start looking for answers is in the text that serves as the legal framework to most international treaties and multilateral agreements today: the Vienna Convention on the Law of Treaties (VCLT), signed in 1969. What has been called the most controversial provision of the Convention is Article 62, titled “Fundamental Changes of Circumstances.”\(^{15}\) Article 62 reads that “[a] fundamental change of circumstances […] not foreseen by the parties” can be grounds for suspending a treaty obligation, if those circumstances were central to the treaty, and if the change “radically” transforms the obligations under the treaty. If there were any doubt as to the aims of the provision, the International Law Commission, which was charged with drafting the text, repeatedly referred to the Article as “an instrument of peaceful change”.\(^{16}\)

The existence of Article 62 constitutes a tremendous concession of law to politics. The question is whether the provision adds to stability, or in turn diminishes it.\(^{17}\) The allowance in the VCLT for fundamental change is a recognition that the commitments states make take place in a particular context, and that the legitimacy of those commitments—what Carr would call their “moral validity”—is contingent upon that context. In an extreme case, an agreement between the victors and the losers of war may lose its validity in short order. The broader implication of Article 62 is that given how the inherent uncertainty of the social world, no contract between parties can predict and provide for under every possible state of the world. Some policy space must thus be granted to allow for fundamental, unforeseeable change. If the designers of treaties could predict every state of the world, then they could also include a provision dictating behavior for every case. They cannot, and that is why there is a need for clauses that seek to define the range of situations that would warrant revision, or abrogation altogether, of the treaty.

Carr was witnessing a major political shift during the rise of the “Twenty Years’ Crisis”, with the rise of revisionist Germany, and Britain’s growingly apparent inability to maintain its 19th century hegemonic function. The drafters of the Article 62 provision were also highly aware of the meaning of political change, albeit of a very different order. 1968, the year during which most of the negotiations took place, was a time of widespread domestic turmoil, from Paris to Prague, as well as the tail end of a significant wave of decolonization—new states were born, and with them, the map of global power politics was being redrawn. Today, as we witness the emergence of great economic

\(^{15}\) Kennedy


\(^{17}\) As the Dutch representative stated, the “fundamental change” provision “... was the only article in the draft which contained a number of ambiguous terms. It was impossible, for example, to know with certainty what was meant by such terms as “fundamental”, “with regard to”, “foreseen”, “essential basis”, “radically”, or “the scope of obligations”, and it would be dangerous to employ such expressions in a legislative text.”
powers that are progressively demanding the renegotiation of the global compact, we can ask whether the design of international rules has risen to Carr’s challenge.

The International Law Commission’s commentary of its discussions about Article 62 is instructive, as it explicitly outlines the objective behind the inclusion of the clause. The Commission reasoned that international treaties may come to represent an “undue burden” on states, and “the dissatisfied state might ultimately be driven to take action outside the law.” These are words Carr could have written himself, and it is the issue that concerns us in this volume. The existence of Article 62 is a testament to the notion that there are cases where noncompliance is inevitable, and that in those cases the law may find it preferable to accommodate the breach rather than to oppose it. As a legal observer of the time put it, “The community interest may be best served, regardless of the parties' earlier shared expectations, by putting an end to obligations which come to be felt so burdensome that attempts to exact their performance threaten general stability and peace.”

Article 62 is not only a legal provision under which the law predicts circumstances that may call for the suspension of a treaty; it is designed to affect bargaining outcomes between states. As the Commission commented, the Article “could serve a purpose as a lever to induce a spirit of cooperation in the other [obdurate] party.” The Commission thus reveals the full intent of the clause. Article 62 is designed not only to address unexpected changes that temporarily make continued compliance impractical, e.g. droughts, famines or domestic upheavals, but it also aims at resolving the consequences of a fundamental shift of power between states. The Commission reasoned that if the status quo power “were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty […] might impose a serious strain on the relations between the States concerned.” Article 62 was a solution to this concern: in recognizing that states’ legal commitments are the result of bargaining, the VCLT thus takes into account, to paraphrase Carr, the political antecedents of law.

Article 62 takes sides. A state having made a set of commitments in a period of relative weakness may later find itself with sufficient power to challenge those commitments if they come to be seen as imposing an “undue burden”. Article 62 unambiguously has in mind such shifts of power. The clause thus comes down on the side of the revisionist, rather than the status quo, power. Insofar as its objective is the maintenance of peace, it recognizes that the maintenance of the status quo—“stability” in the common sense of the word—can come at the expense of stability in the greater sense of peace. As such, Article 62 is an astonishingly pragmatic bit of international law. It also constitutes a

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18 Lissitzky 897
19 ILC
20 ILC
21 This raises issues that had already been foreseen by one of Carr’s contemporaries, the jurist Charles C. Hyde. Speaking of the changed conditions clause in 1945, he writes “Reliance therefore, on a change of conditions which refers merely to the development of the power of such a State to a point where it may safely ignore the terms of its agreement, is an appeal to force rather than to law.” Hyde, 1945. “International law chiefly as interpreted and applied by the United States” p. 1524.
formal legal response to the concerns raised by Carr. As political motives are incorporated into law, the incentive for state leaders to raise higher objectives outside the law to justify their breaches decreases. The trick, of course, is to strike the right balance: all of behavior can easily be covered by the rules, if these are made sufficiently lax, but law then becomes meaningless. The challenge is to bind state behavior sufficiently, while allowing breaches when political pressure grows unmanageable. Article 62 of the VCLT, together with the jurisprudence that has emerged around its interpretation, are attempts at striking this balance.\textsuperscript{22}

Article 62 is not unique. I have considered it here because the availability of the drafting texts allows us a rare glimpse at the reasoning of its creators, and because it pertains to what may be the foundational text of international law. Yet the same reasoning is likely to be at the basis of similar provisions across a range of issue-areas. Article 62 is thus merely an archetype of a widely prevalent type of legal provision. Whether derogation clauses in human rights agreements,\textsuperscript{23} or safeguards and escape clauses in trade agreements, global governance is a collection of second-best solutions. It is a recognition of the fact that entirely rigid rules will be abrogated at the first bump in the road, precisely because law cannot afford to be wholly separate from politics. Wherever hard constraints on country behavior are found in law, there are also provisions that offer states wiggle-room to deal with political exigency.

\textsuperscript{22} The significance of Article 62 should not be overstated. References to the provision in interstate affairs have been few. That, \textit{per se}, is not enough to dismiss its impact. The existence of the clause itself may well be enough to affect outcomes of states bargaining in the shadow of the \textit{Fundamental Change} clause, since countries may try to avoid resorting to it. States may prefer yielding to a demand for suspension of an obligation from a partner, rather than risk setting a lasting precedent that may increase invocations of Article 62. Such is the risk of clauses allowing a suspension of the rules. As the Commission itself recognized, “The circumstances of life are always changing and it is easy to allege that the changes render the treaty inapplicable”. In an effort not to erode the contours of the exception, countries may cede more willingly to demands by revisionist powers than they would otherwise. It is thus difficult to assess with any certainty the true impact of the provision on state behavior. There is little doubt, however, that the aim of Article 62 is to address the very aspects of international law that led Carr to question its effectiveness.

\textsuperscript{23} Hafner-Burton et al., 2011.
International Law, Courts, and Change

Article 62 of the VCLT recognizes how fundamental changes of “critical” circumstances may call for a suspension of the treaty, but it remains a blunt tool. It is not designed for the micro-adjustments to international agreements that the changing social realm requires on an ongoing basis. Moreover, Article 62’s willful vagueness—how else to accommodate change of an unknown nature?—calls for an institutional mechanism which can address this vagueness, applying it to concrete settings, and resolving disagreements over its meaning.

International courts are tasked with just such interpretations. And though it is never their formal mandate to perform the type of micro-adjustments that international institutions may require, they often end up doing just that. In this section, I consider how courts walk the line between accommodation and constraint that Carr had in mind when outlining a role for law in international affairs.

Some adjustments by courts are uncontroversial. International law necessarily leaves some issues unaddressed, often because those issues could not have been foreseen at the time the rules were designed. In these cases, judges may have the task of filling the gap. Applying existing rules to changing scientific knowledge, for instance, provides many opportunities for judges to engage in gap filling. If such “interstitial” legislating by judges is accomplished in such a way that the designers of the agreement would agree with the outcome, then there is little controversy. Courts in these cases act as loyal agents to the institution’s principals.

More interesting, however, are cases where judges internalize the likely objections of governments in rendering rulings over sensitive issues. In the European Union setting, where interactions between the national and the supranational levels are especially intense, scholars have found that courts in some cases tailor their decisions to the political sensitivities of countries. Despite the fact that the very authority of judges comes from being perceived as wholly removed from political considerations, the continued relevance of courts in large measure depends on their ability to take these considerations into account.

What this means is that courts have a function in legitimizing change, and shaping the distributional consequences of these changes. Most often, we expect concessions to politics to take the form of deference to the status quo power. In the case of the North American Free Trade Agreement (NAFTA), for instance, a 2002 decision in an early investment case in favor of the US drew wide criticism from jurists. The consensus among observers was that NAFTA judges had yielded to pressure from an unfavorable Congress. As one legal observer put it at the time, “if Loewen had won, we might not have a Chapter 11 [the dispute settlement provision for investment] today, and maybe

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24 In a famous opinion, Judge Holmes offered that judges do legislate, but that they do so interstitially.
25 GKS
26 Butler Mattli
that's why the tribunal decided the way it did.” In other words, judges saw the stability of the legal regime at stake, and chose not to challenge the superpower’s interests.

In such cases, courts uphold the status quo, by yielding to the status quo power. Yet courts’ political sensitivity means that they may just as well recognize shifting political power, and act accordingly. This is seen most clearly in domestic contexts, when high courts precede legislatures in recognizing societal shifts. Social issues like gay marriage are prime recent examples: when it comes to such politically sensitive issues, legislatures may have an incentive to wait for courts to rule before amending legislation. In these instances, it is courts that write the first page of history.

An important issue where a role for international courts in ushering change is slowly emerging is self-determination. The advisory opinion of the International Court of Justice (ICJ) thus played a role in shaping global attitudes over Kosovo’s self-determination, despite the opinion’s great restraint, in a way that converged expectations on what would make for legitimate secession in the future. The Court did not pronounce itself on Kosovo’s statehood per se, and strategically abstained from setting too strong a precedent, yet in so doing it claimed, for instance, that lawful secession cannot result from outside intervention. This effectively delegitimized subsequent secession movements in South Ossetia and Abkhazia—and at time of writing, Crimea—and conversely bolstered the claims of other territories, like Chechnya. The Court also refused to extend the prohibition on the use of force against territorial integrity to domestic secessionist movements, confirming the view that the proscription concerns only dealings between states. Although it remained circumspect, the Court also left itself space for more expansive pronouncements in self-determination cases to come.

The fact that countries care enough about the rulings of courts to expend resources on shaping those outcomes suggests that rulings matter for converging expectations, in a way that can slow down or accelerate large-scale political change. In the case of Kosovo, Spain was notably among the few EU countries that voted against Kosovo, fearing repercussions on the independence movements within its own borders. Such concerns are an acknowledgement of the court’s strength, even in a case where the ruling itself was narrow and limited, and where there was great emphasis on the uniqueness of Kosovo’s situation, in an effort to keep it from serving as a precedent. Courts can thus not only serve as (de)legitimators of ongoing change, but they also affect calls for subsequent change. It is likely, in fact, that their greatest influence operates through a gradual change of countries’ expectations over a series of opinions, rather than through single rulings that change the course of history.

The fact that in highly politicized disputes, the power of international courts is curtailed by the tolerance of member states is traditionally seen as a reality to bemoan, evidence of

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28
29 http://users.ox.ac.uk/~sann2029/ChathamH_kosovo_ICJ_Paper.pdf
30 ibid.
the weakness of international law. Rarely is it recognized as a means of striking the much-needed balance between the rigidity of law and political necessity. The oft-derided weakness of law thus also makes it more adaptable to change, as international courts are made to react to shifts in the geopolitical landscape. This adaptability may be the required feature for the international legal system’s continuity.

The greater point is that the interpretive judicial process provides wiggle-room. Courts are meant to be credible third parties put in place to provide objective assessments of the matter before them, but they are inevitably also political actors, and are thus prone to political biases. This need not be a bad thing. The sensitivity of courts to countries’ interests means that courts acknowledge the “political antecedents” of the law. It means that they can provide some of the flexibility that is necessary for the meaning of the law to evolve in accordance with its political context.

Conclusion

E.H. Carr—this intellectual father of realism, this anti-utopianist who reminded us that “there are men that govern, but there are no laws that govern”—ended his magnum opus on a hopeful twist that saw a role for law in international relations. Carr foresaw the possibility of a mechanism that would facilitate political change through peaceful means. And despite his skepticism over the possibility of binding commitments on states, he saw formal constraints on states as the solution. Yet an obstacle stood in the way, which he faulted for the increase in the widespread repudiation of international commitments he was witnessed in the late 1930s. International institutions had to recognize their political antecedents, rather than aspiring to an absolute morality they could not credibly attain, being the outcome of bargaining among states. International law had to be designed in such a way as to allow room for political necessity. The hardest thing for law to do is to imagine its inapplicability. Yet that is precisely what Carr was asking of global governance, if it was to be an effective constraint on state behavior.

In this article I have described two features of international law that go some way towards addressing Carr’s concerns. The first is the formalization of the rebus sic stantibus doctrine in the form of Article 62 of the VCLT, on among a range of formal provisions seeking to offer countries some policy space in unexpected circumstances. The thought behind this central provision of international law should give one pause. Not only is it a concession to politics, but it ultimately comes down on the side of revisionist states. It stands in recognition of the fact that investing too much in the preservation of the status quo risks global stability. The law needs some “give”, and Article 62, and other provisions like it, from human rights agreements to trade and investment agreements, are meant to provide it. In view of the source of change in global politics, such flexibility likely comes at the expense of established powers.

Secondly, I have outlined how courts in international law have a role to play in facilitating the micro-adjustments that institutions go through as the social context in which they evolve changes. This function is far from uncontroversial. The claim I have
made is that what is often seen as the weakness of international judges—their vulnerability to political pressure—may also be a means of walking the line between legal rigidity and political need.

What is still lacking today for courts to play a decisive role is some form of compulsory jurisdiction over interstate disagreements. Even the ICJ, the “World Court”, relies on countries willfully accepting jurisdiction under Article 36 of the ICJ Statute. Without compulsory jurisdiction, the very instances that stand to benefit from third party adjudication the most are likely never to reach it, and to be left to political bargaining.

The troublesome conclusion of this article's argument is that international institutions are a second-best solution. States make binding commitments to one another, and create mechanisms to monitor and enforce these commitments. Yet these mechanisms cannot be perfect, lest they fail at the first bump in the road, when states find themselves unable to perform their obligations. International rules, paradoxically, gain from pricking themselves with well-designed exceptions.

Carr claimed the international rules of his day ignored their political origins at a risk. Looking at international governance today, there is no lack of recognition of the political forces that underlie it. One sober takeaway from this view is that this imperfect enforcement function may be as good as international law gets. By increasing its scope and formalization, as current champions of liberal institutionalism call for, we risk the same outcome Carr observed in the interwar period: with insufficient policy space left to sovereign countries, international law risks losing some of its compliance pull. Faced with increased rigidity, it became easier, rather than harder, for governments during the interwar period to question the rules’ foundations. In the face of political change, more law may come at the expense of stability.