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HOW DOES INTERNATIONAL LAW CHANGE? THEORIES AND CONCEPTS OF LEGAL CHANGE

This panel was convened at 3:30 p.m. on Thursday, March 30, 2023, by the ASIL International Legal Theory Interest Group. The panel was moderated by the International Legal Theory Interest Group Chair, Melissa J. Durkee of the Washington University in St. Louis School of Law, who introduced the speakers: Nico Krisch of the Geneva Graduate Institute; Sivan Shlomo Agon of Bar-Ilan University School of Law; and Benedict Kingsbury of New York University School of Law.

Introduction: Theories and Concepts of International Legal Change

*By Melissa J. Durkee**

The theme of the conference is "the reach and the limits of international law to solve today's problems." This panel is sponsored by the International Legal Theory Interest Group, and it considers the following question: What happens when law reaches a limit? How does it address that limit?

In some ways, international law is constantly changing. The subjects and objects of international legal regulation shift as old problems change, new problems emerge, and different constellations of states and other actors win and lose geopolitical power. There are standard accounts of how international legal change unfolds: crises provide inflection points and generate lawmaking moments, customary law evolves through state practice and judicial elaboration, laws can crystallize through "bottom-up" processes, and so on. At the same time, international law's mechanisms of change have not produced satisfying responses to major recent challenges such as a global pandemic, illegal use of force, and the rapidly unfolding climate crisis. In the conference's thematic framing, these challenges have offered opportunities to witness international law's "limits," and they are significant.

This session asks how—in light of these limits—international lawyers might find productive new ways to understand processes of international legal change. How might standard accounts of international legal change blinker legal actors to new modes of cooperation, new ways of understanding global governance, or new forms of law? How might new ways of thinking about international legal change help various actors facilitate that change? At bottom, the session is meant to inspire discussion about new ways to *conceive* of international legal change. How can we understand or reconceive international legal change so as to surmount some of the system's limits?

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React or Proact? The Course and Pattern of Legal Change in International Law

By Sivan Shlomo Agon and Michal Saliternik***

I. Reactiveness and International Legal Change

When one thinks about change in international law and how such legal change should transpire in today's world—a world featured by an accelerated pace of social and technological transformation[1]—a fundamental question that needs to be considered is: how does international law actually transform and evolve? More concretely, what is the course and pattern of legal change and development in the international domain?

As our research shows, when looking closely at the discipline, it soon becomes noticeable that international law has long followed a rather reactive pattern of change. For the most part, international law has transformed and developed in response to specific crises and events, be they wars, pandemics, environmental disasters, economic breakdowns, or technological advancements.[2] Along these lines, Philippe Sands has noted: "International law tends to be responsive, to war, atrocity or other disasters. We are struck by events, and only then do we act. As international lawyers, when it comes to actions, we tend to follow rather than lead."[3]

In line with this reactive pattern of change in the international legal domain, international norms and institutions have often been devised with a view to offering concrete solutions to events and crises encountered, seeking to address *ex post* observed problems and shortcomings. In this way, past events have assumed a constitutive role in the international legal system.[4] They have turned into "norm-indicators" and "norm-generators" in international law,[5] steering its development trajectory, defining the rights and duties of international actors, and shaping the form and substance of international rules and institutions for years to come.

Illustrations of international law's reactive paradigm are consequently abundant and can be traced in normative and institutional arrangements throughout the different sources and regimes making up the international legal order. The reactive paradigm is well evident, for example, in the architecture of the UN Charter and institutions as devised in response to the specific trauma of World War II. This paradigm is also apparent in international humanitarian law, with most, if not all, legal instruments in the field negotiated under the influence of yesterday's wars, based on the assumption that these past occurrences serve as useful indicators of the future. The same reactive pattern likewise dominates the international legal regime for the fight against terrorism—a

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[1] On the phenomenon of acceleration, see Hartmut Rosa & William Scheuerman, High-Speed Society: Social Acceleration, Power, and Modernity (2009); Hartmut Rosa, Social Acceleration: A New Theory of Modernity (2013); The Sociology of Speed: Digital, Organizational, and Social Temporalities (Judy Wajcman & Nigel Dodd eds., 2016).

[2] On the centrality of crises and events in the development of international law, see, e.g., Fleur Johns, Richard Joyce & Sundhya Pahuja, *Introduction*, *in* Events: The Force of International Law 1 (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., 2011); Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 Mod. L. Rev. 377 (2002); Marina Aksenova, *COVID-19 Symposium: Quantum Leaps of International Law*, Opinio Juris (Apr. 7, 2020).

[3] Philippe Sands, *COVID-19 Symposium: COVID-19 and International Law*, Opinio Juris (Mar. 30, 2020).

[4] Events, *supra* note 2, at 3.

[5] These terms are borrowed from Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, *in* International Incidents: The Law That Counts in World Politics (Michael Reisman & Andrew Willard eds., 1988).

regime that has been constantly lagging behind the "realities of terrorist conduct," with each international treaty or UN Security Council resolution adopted in reaction to a specific "headline-grabbing" terrorist attack by non-state actors, whose past acts the international lawmakers sought to address.[6]

Clearly, there are many rationales for international law and its makers to follow a reactive pattern of change and development. Above all, reactiveness implies certainty; it is about building legal norms and institutions on the basis of a known past or present, rather than devising legal tools that grapple with a remote and uncertain future. Drawing on insights from rational choice theory and behavioral economic analysis, in our research we elaborate on the various ways in which this element of uncertainty, along with other factors, works so as to push the makers and operators of international law to focus their regulatory efforts on reacting to concrete events from the immediate past or present instead of taking action in the face of longer-term global problems and advances that have yet to materialize.

Thus, for example, the uncertainty associated with future global challenges leads states to be less inclined to compromise their sovereignty and agree to early international legal interventions in the face of prospective challenges, as such interventions can only offer states and their constituencies distant and obscure gains. In contrast, international legal interventions in response to past or present-day problems can yield immediate, concrete benefits that make the sovereignty costs entailed by international regulation more justifiable and acceptable at home. Alongside such rational cost-benefit calculations, there also exist a range of cognitive biases—such as the availability bias, the status quo bias, or over-optimism—which hinder governments and other international actors from recognizing, understanding, and taking collective action in the face of uncertain future threats and advancements.

Beyond the various factors that may explain international law's reactive predisposition, it should also be admitted that the reactive approach to the development of international law has some notable merits. This approach has facilitated the adoption of practical solutions to concrete problems faced by the international community and ensured the continuous normative responsiveness of international law to social reality.[7] In this vein, the reactive approach has also served to confer legitimacy on the legal arrangements applicable at the international level, as these arrangements are grounded in, and justified by, actual facts and real-life experiences.

That said, the reactive approach, we argue, has some profound limitations with critical implications for international law as a governance system. This approach, by which international law evolves and changes through the response to sporadic, previously observed events, renders the discipline rather passive, backward-looking, and short-sighted in nature. It shapes the thinking of international legal actors in a way that curbs their imagination and hinders them from vigorously acting in anticipation of long-term challenges and trends. Consequently, the reactive approach with its translation of events from the immediate past or present into the legal standards of the future, often leaves international law ill-positioned to cope with global challenges previously seen distant and uncertain once they materialize.

The recent struggle of international law and institutions in the face of COVID-19 vividly illustrates this state of the discipline. Equipped with the International Health Regulations as formulated in 2005 in response to the SARS outbreak in the early 2000s, international law and institutions

[6] Kimberly N. Trapp, *The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression*, 39 UNSW L.J. 1191, 1203 (2016).

[7] Klara Polackova Van der Ploeg, *International Law Through Time: On Change and Facticity of International Law*, *in* International Law and Time: Narratives and Techniques (Klara Polackova Van der Ploeg et al. eds., 2023).

were caught off-guard when the pandemic arrived, finding themselves ill-prepared for what had befallen.[8] The revised regulations—perhaps an effective tool to deal with past conventional outbreaks like SARS—proved inefficient against new outbreaks like COVID-19 from which experts had warned.[9] Thus, the reactive approach left international law and institutions poorly positioned to cope with the anticipated threat when it eventually materialized. In these circumstances, the costs ultimately imposed on the international community were exceedingly high; these costs, furthermore, were not evenly distributed, hitting those less well-off the hardest.

Given the irreversible and wide impacts of such a multifaceted global crisis, so the pandemic has shown, preparation and prevention well in advance are the only viable options for avoiding the worst possible consequences. Real-time reactive cures are simply impossible, insufficient, or too expensive. On this view, the UN Secretary-General critically observed in his address to the UN Security Council on "Global Governance Post-COVID-19," that "we cannot continue to respond with such ad hoc solutions to systemic, foreseeable global risks."[10] We urgently need innovative thinking on international law and governance so that they are fit for the twenty-first century, ready to address the full range of challenges we face.[11]

II. Proactiveness and International Legal Change

It is against this background that we call for a conceptual shift, arguing that the time has come to couple the centuries-old reactive, backward-looking paradigm so dominant in international law and governance with a more proactive, long-term, and forward-looking approach. The need for such a shift, we contend, is particularly acute given that, looking beyond pandemics, many other evolving global challenges—such as environmental degradation, artificial intelligence, synthetic biology, population growth, urbanization, and outer-space exploration—are more complex and diffuse than the ones encountered in the past. Moreover, these challenges transpire in an accelerated environment in which the rapid pace of social and technological change leaves little time for maneuver when action is due. Such challenges thus require international legal thinking and regulation that point to the future (rather than the past), with an eye to preventing the risks and realizing the opportunities embedded in global developments as they evolve in an ever more fast-paced world. This latter point is critical, for when the rate of change accelerates, the time available for comprehension, deliberation, and legal intervention is reduced, and the relevance of accumulated wisdom and experience from the past is called into doubt.[12]

From this standpoint we advance in our work a new complementary approach to the development and operation of international law, called Proactive International Law. At its core, this approach advocates a more active and far-sighted international regulative and operative perspective that expands beyond those events that happened in the past or are happening in the present, to those that might happen in the future. To gain analytical leverage in this endeavor, we draw—with

[8] Sands, *supra* note 3; Anne Applebaum, *When the World Stumbled: COVID-19 and the Failure of the International System*, *in* COVID-19 AND WORLD ORDER: THE FUTURE OF CONFLICT, COMPETITION, AND COOPERATION 224 (Hal Brands & Francis J. Gavin eds., 2020).

[9] Jaemin Lee, *IHR 2005 in the Coronavirus Pandemic: A Need for a New Instrument to Overcome Fragmentation*, ASIL INSIGHTS (June 12, 2020).

[10] UN Secretary-General, Secretary-General's Briefing to the Security Council on Global Governance Post-COVID-19 (Sept. 24, 2020).

[11] *Id*.

[12] Jaye Ellis, *Change and Adaptation in International Environmental Law: The Challenge of Resilience*, *in* INTERNATIONAL LAW AND TIME: NARRATIVES AND TECHNIQUES, *supra* note 7, at 361.

relevant adjustments and refinements—on the burgeoning literature on Proactive Law, a concept originally developed in Scandinavia in the domestic legal context in the late 1990s.[13] Proactive law challenges the traditional approach to law and legal practice, which rests on backward-looking and failure-oriented modalities. Rather than reacting to deficiencies and shortcomings, as traditional law usually does, the proactive law approach stresses foresightedness and self-initiation, calling upon all actors involved in legislation, contract drafting, or other law-related processes to act in anticipation of future challenges and take control of potential problems or opportunities.[14]

The proactive law approach is still predominantly discussed within the context of domestic legal systems, while efforts to extend it beyond the national realm could be observed in the European Union legal framework.[15] To date, however, neither international law scholars nor practicing international lawyers have fully acknowledged the potential of proactive law for the international legal system. Elevating this approach to the international level requires, of course, necessary adaptations given the different circumstances of the international order. Nevertheless, its key concepts and insights, we assert, provide useful trajectories along which to advance a new, proactive approach to international law.

Under this approach, as we envision it, international law, its creators, and its operators should no longer predominantly focus on correcting problems *ex post* while narrowly prioritizing near-term over long-term concerns. Rather, they should invest more effort in spotting potential risks when preventive action is still possible and in identifying opportunities early enough to realize their value. No less importantly, they should take initiative in view of prospective (even if uncertain) problems and advancements, thus making long-term developments—often with critical implications for the international community—a real regulatory priority on the international agenda.

To give some more concrete content to this general idea and explain what states, international organizations, and other international actors should do in order to steer international law toward a more proactive trajectory, in our research we lay down eight core elements of the proactive approach, which should be pursued at all levels of international regulation, and which cover normative, procedural, and institutional dimensions. Due to space limitations, only a few of those elements are briefly mentioned below.

And so, proactive international law denotes, first and foremost, future-orientation and far-sightedness in the creation and operation of international rules and institutions. Starting from the premise that the past no longer serves as a good enough indicator of the future and, thus, cannot function as the primary benchmark for international legal arrangements, proactive international law urges international law and policy makers to expand their outlook far into the future—decades and even centuries ahead. In other words, this future-oriented approach calls for the incorporation of far-sighted vision and planning into international regulatory schemes, placing an emphasis on

[13] For the first publication relating to the approach, see Helena Haapio, *Quality Improvement Through Proactive Contracting: Contracts Are Too Important to Be Left to Lawyers!*, *in* ASQ ANNUAL QUALITY CONGRESS PROCEEDINGS (1998). For a general discussion of the proactive law approach, its background, and its application, see Peter Wahlgren (ed.), *A Proactive Approach*, 49 SCANDINAVIAN STUD. L. (2006); A PROACTIVE APPROACH TO CONTRACTING AND LAW (Helena Haapio ed., 2008); Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, *in* PROACTIVE LAW MOVEMENT IN A BUSINESS ENVIRONMENT (Gerlinde Berger-Walliser & Kim Østergaard eds., 2012).

[14] Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO J. INT'L L. 417, 434 (2015).

[15] *See* Opinion of the European Economic and Social Committee, The Proactive Law Approach: A Further Step Towards Better Regulation at EU Level, 175 OFF. J. EUR. UNION 26 (2009).

the development of mechanisms, procedures, and rules that may help avoid possible global risks and realize potential opportunities in a timely manner.

In line with that, proactive international law, as a framework geared toward the remote and often uncertain future, further entails profound awareness and learning of evolving global challenges as a necessary element of any attempt by international regulators and operators to tackle the uncertainties associated with those challenges. This is particularly vital given that many prospective global challenges are seriously underestimated and poorly understood, as is the case, for instance, with the rapidly changing demographics around the world or with outer space exploitation and commercialization. Also not fully explored is the condition whereby certain global challenges carry both new risks and new opportunities, as is evident, for example, with the revolutions in artificial intelligence and synthetic biology, which are clearly double-edged swords that may yield both positive and negative consequences for the international community. Proactive international law therefore requires international regulators to constantly seek to identify and analyze and, when necessary, redefine prospective global challenges, with a view to assessing their causes, probabilities, and potential consequences, and reducing the chances of being surprised once they materialize. Such assessments must be based on scientific knowledge and professional input, which may be fed into regulatory processes through various expert bodies.

Still, proactive international law implies not merely envisioning and understanding change and reducing the uncertainty associated with future global challenges and developments. To be proactive is also about creating change and taking initiative in the face of still uncertain future international events. Hence, rather than postponing action until "enough" is known, proactive international law acknowledges that time and resources are too short to defer some action, particularly actions to address immense problems of the type often presented in the international arena.[16] As such, proactive international law calls international regulators to make *ex-ante*, forward-looking interventions. In so doing, moreover, it requires those involved in the making and operation of international law to take both preventive and promotive actions.[17] That is, to take measures that encourage the regulated (state and non-state) entities toward the prevention of problems and undesirable behaviors, as well as toward good practices, value creation, and exploitation of opportunities.

Finally, our conception of proactive international law is also featured by a commitment to collaboration and an integrative outlook across regulatory institutions and policy domains. As is well known, many global challenges, such as artificial intelligence and job loss or population growth and food security, are closely interconnected. Also, many global problems such as pandemics and global warming are multisectoral in nature, coming within the purview of multiple international legal regimes and institutions whose membership and jurisdictions are (partially) overlapping.[18] Consequently, substantive progress in issues such as AI technologies, public health, and climate change effectively hinges on constructive relations and dialogue among diverse institutions governing different-but-interrelated aspects of international affairs. Proactive international law, in turn, acknowledges the increasingly interconnected and multisectoral nature of pending global challenges, the fragmented international order in which they transpire and, consequently, the need for active collaboration across international legal regimes and institutions in order to ensure high-quality governance in many areas of global policy. It thus assumes cross-professional

[16] For a similar point made in the context of adaptive governance, see Rosie Cooney & Andrew T.F. Lang, *Taking Uncertainty Seriously: Adaptive Governance and International Trade*, 18 EUR. J. INT'L L. 523, 535 (2007).

[17] *Cf.* Berger-Walliser, *supra* note 13; George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641 659 (2010).

[18] Sivan Shlomo Agon, *Farwell to the F-word? Fragmentation of International Law in Times of the COVID-19 Pandemic*, 72 U. TORONTO L.J. 1 (2022).

collaboration and underscores the need for dialogue between different understandings and areas of expertise in the processes of making and implementing international law.

Notably, while certain manifestations of these and other core elements outlined in our work can already be traced in some international legal arrangements, most notably in the area of climate change and environmental protection, these manifestations are very limited in their content and reach. Moreover, they represent the exception rather than the rule in the existing international legal system, which is still largely dominated by a reactive mode of development and operation. By contrast, under the proactive approach that we advocate, the goal is to truly break the reactive mold of international law and to streamline the proactive elements into the daily operation of the international legal system.

III. Time to Proact

Stepping outside the comfort zone of reactiveness and pursuing a more proactive approach to the development and implementation of international law, we admit, is by no means a simple task. Above all, such an approach entails a paradigmatic shift in the thinking, resourcing, and conduct of all actors concerned, especially states and international organizations. In a similar vein, this approach requires a profound thinking about the adequate mechanisms and strategies for using international legal infrastructures, instruments, and processes proactively, as well as a critical examination of the fields and domains in the international legal system to which the application of the proactive approach may be found more pressing, suitable, and desirable.

Pursuing a proactive approach on the international plane, as implied earlier, further requires the makers and operators of international law to overcome a range of rational constraints and irrational cognitive biases—such as the status quo bias or overoptimism—which often impair the ability to plan for an uncertain future. In addition, there are also notable political factors and interests that play out in the international and the national level and that may stand in the way of pushing international law toward greater proactiveness.

Finally, alongside the above, a move toward greater proactiveness in the international legal system might also give rise to certain risks and perils that need to be carefully assessed and considered. Thus, making early interventions in view of uncertain and not-yet-fully comprehensible future challenges may increase the risks of relying on wrong predictions, using inadequate regulatory tools, and spending limited resources in vain. Beyond inefficient resource allocation, the proactive approach is prone to invoking some intricate questions regarding the propriety of curbing the discretion of future generations and creating irreversible path dependencies through the adoption of early preventive and promotive measures.

However, notwithstanding these evident difficulties and concerns, we believe that precisely because international law strives to remain legitimate, effective, and fit-for-purpose, it must be guided by a more proactive and future-oriented vision. In an ever more complex, interdependent, and accelerated world, where the future is increasingly less like the past, shaping the desired legal future mainly through reaction to past occurrences is no longer sufficient. International law, in other words, no longer has the luxury to develop and effectuate legal change mainly in a reactive fashion. For international law to remain a valuable and viable system of governance in the world we are living, and more so in the world to which we are heading, it must proact, not merely react.