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The Social Science Study of International Law: Review of W. Gould & M. Barkun, International Law and the Social Sciences

Stuart S. Malawer*

This study, sponsored by the American Society of International Law and published by Princeton University Press, describes the promises and problems of applying social science techniques to the field of international law. The authors maintain that a systems analysis using communications theory is the most advantageous approach towards fostering an understanding of international law. Techniques of simulation analysis and case studies involving both historical-sociological and cultural anthropological concepts and methods are meaningful approaches. They are capable of generating medium range theories concerning the international law system. The goal of the authors is to convince both the international legal scholar and practitioner of the benefits of a non-legalistic approach to the study and practice of international law.

Review and Evaluation

Gould and Barkun essentially review the contending concepts and methodologies of the social sciences as they relate to international relations and as they may be applied to international law. This includes factor analysis, structural-functional analysis, theory-building, decision-making and content analysis.

The authors correctly emphasize that there is no adequate application of systems theory or techniques of simulation in the study of international law.[1]

> Systems theory should find a ready welcome among international lawyers . . . . It does not seem unreasonable that the study of international law might extend its venture into simulation, beyond the teaching device of the moot court . . . .[2] We know of no simulation structured to permit focus upon the role of legal norms in the conduct of relations between states

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1 W. Gould & M. Barkun, International Law and the Social Sciences 27 (1970) [hereinafter cited as Gould].

2 *Id.*

> . . . or for national legal advisors . . . .[3] There have as yet been no simulations directly focused upon the role of norms in international behavior. But pilot studies involving simulated situations in domestic law indicate that simulation studies may ultimately become a major tool for the examinaticn of the international arena.[4]

In the development of laboratory exercises to investigate the process of generating legal norms, the authors contend it is necessary to concentrate on:

> What happened before international agreement took form, and before revised interpertations were articulated . . . . [I]t may be said that the laboratory even permits investigation of what precedes the negotiation stages. And it is to antecedent stages . . . that one must turn if the process of norm generation is to receive scientific exposition.[5]

The point is made that researchers ought to analyze the verbatim records involved in multilateral treaty formation.[6] Not only would such an analysis lend insight to the process of norm formulation, but it would also show how international law enters into the complex calculus of decision-making as information concerning the substance of decisions.[7] "Besides the contribution made by lawyers in the form of briefs and oral presentations to courts . . . their contribution to development of law itself and to their nations' acceptance of international law are essentially unknown."[8] The authors argue that an "international law subculture transcending political boundaries allows states to make useful and verifiable predictions of the behavior of others."[9]

Unfortunately, the authors do not develop guidelines for the structuring of an international law simulation. They do suggest two areas that they believe exercises ought to simulate: treaty negotiations, and legal advice to foreign offices. These areas are cited as "bridge topics" that could use the skills of individuals trained in international relations and law.[10] A re-

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[3] *Id.* at 36.

[4] *Id.* at 98. *See* W. COPLIN, SIMULATION IN THE STUDY OF POLITCS 2 (1968). "Simulation as an approach is also characterized by a concern with the operation of systems. It is directly related to system analysis not only in its use of terminology but also in its striving to present an integrated view of a set of processes. . . . [A] 11 simulation efforts are interested in the investigation of a set of processes pictured in a systems framework."

[5] *Id.* at 178, 179.

[6] *Id.* at 236.

[7] *Id.* at 230.

[8] *Id.* at 205.

[9] *Id.* at 230.

[10] *Id.* at 22. The authors suggest that there was no work on the topic of legal advice to foreign offices, but see the recent dissertation completed at Syracuse University discussing the role of lawyers and international

finement of the topic of treaty negotiations could well be the development of a simulation exercise based on the "commission-conference codification process of international law". Such a simulation exercise could use as its empirical referant the Vienna Conference on the Law of Treaties of 1968-69 and the prior work of the International Law Commission. An example of such structuring will be developed later in this essay.

The authors' application of systems analysis to the study of international law is based explicitly on biologist James G. Miller's concept of "living systems" to the exclusion of other systems. For example, they accept this organismic view of systems analysis in contrast to the biologist, Anatol Rapoport's mathematical approach.[11] The authors adopt an organismic definition of systems despite their argument that there is no good reason why properly equipped scholars could not mathematize models of the international legal system.[12] They emphasized that mathematics may be more revealing than verbalization, but that jurimetrics ought not to accept poorly conceived concepts as a substitute for well developed verbal symbols.[13] The authors would have presented a stronger argument for systems analysis if they had demonstrated the relevance of other definitions of systems to the study of international law, instead of promulgating a definition that is not well known, not well accepted, and not well developed.

It is disappointing that the authors did not posit a set of hypotheses that could be subject to testing by simulation studies or otherwise. Charles F. Hermann has suggested a set of possible hypotheses of related variables in his recent work.[14] Hypotheses discussing international law and politics are: if a one party state exists, then it adheres to a positivist view of international obligations; if a parliamentary form of government with a weak executive exists, it adheres to a dualist view of international law; and if a totalitarian state exists, then it relies on treaty law as the source of its obligation and in the conduct of its foreign relations. It is also disappointing that the authors did not want system analysis to generate medium range theories in the nature of policy recommendations in addition to theories concerning

law in the functioning of the State Department. J. Outland, Law and the Lawyer in the State Department's Administration of Foreign Policy, (unpublished Ph.D. thesis in Syracuse University Library) 1969.

[11] A. RAPOPORT, OPERATIONAL PHILOSOPHY (1969) and 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 452 at 457 (1968).

[12] GOULD 30.

[13] *Id.* at 29.

[14] C. HERMANN, CRISIS-DECISION MAKING: A SIMULATION ANALYSIS (1969).

international law.[15] However, they subsequently violate this stricture several times. For example, when discussing state responsibility they contend that it is a topic ". . . in which systems analysis can be put to the service of policy".[16]

One of the most promising aspects of applying systems analysis is the possibility of identifying fundamental international law rules in the context of historical international political systems (intertemporal) and to identify legal rules that have remained as a system changed over a period of time.[17] The authors' attempts to approximate this aspect is more closely related to legal strategy than to basic and unchanging rules of international law. For example, they suggest that there was a change from a balance-of-power system in the interwar period to a loose bipolar system exemplified by the post-World War II era. This is a development from a reliance on a "minorities treaties approach", to a reliance on a "human rights approach" — a change of group protection to individual protection.[18] The authors also avoid an analytical inquiry into comparative international legal systems and theories (not intertemporal) which would be equally rewarding, *e.g.* Classical Greek, Ancient Roman, Ancient Indian, and Ancient Chinese.[19]

The role of the lawyer is viewed as one who merely defines the content of rules. The authors' low opinion of traditional legal scholarship becomes all too apparent when they state:

> [W]e doubt that legal skills, even though necessary, are sufficient to adapt international law to technological change as to the complex social change represented by the advent of new African and Asian states.[20]

This attitude is especially startling in light of the successfully concluded treaties on the Law of the Sea,[21] the Law of Outer Space[22] and the Law of Treaties.[23]

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15 GOULD 41.

16 *Id.* at 115.

17 This approach is to identify legal rules and correlate them with various historical systems, perhaps, such as those in A. ROSECRANSE, ACTION AND REACTION IN WORLD POLITICS (1963).

18 GOULD 213.

19 *Id.* at 75.

20 *Id.* at 190. "It is data that can hardly be tapped . . . either by legalistically formal treatment or by social service approaches that do not incorporate the rich insights of legal scholarships." *Id.* at 93.

21 Convention on the Territorial Sea and the Contiguous Zone (1958), 15 U.S.T. 1606, T.I.A.S. No. 5639, 519 U.N.T.S. 205.

22 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 18 U.S.T. 2410, T.I.A.S. No. 6347.

23 Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969). *See* Malawer, *Vienna Convention of the Law of Treaties*, 4 VANDERBILT INT'L 1 (1971).

While lamenting the quality of legal scholarship, the authors emphasize the potential role of legal analysis.

> [L]aw enters the policy process not simply as a set of norms useful in dealing with choice situations but as a way of conceiving problems and determining the range of alternatives available. Snyder, Bruck and Sapin see the policy-maker as 'carving out' of the total range of phenomena before him something he conceives to be the problem at hand.[24]

It is the authors' contention that international law provides ways of interpreting events; it provides a structure for processing information. The international law specialist weds law to policy; he couches policy proposals in the language of his profession. This interaction of law and government provides a mass of raw material for legal analysis.[25] The authors quite adequately identify the subject of the lawyer in the foreign policy decision-making process as a subject for future research.

> The subject of legal advice has many intriguing facets to be examined. In this endeavor to determine the parts played by law and lawyers in the foreign policy decision process, the techniques used by the student of decision-making . . . as well as those used by the international law specialist, are forces that could profitably be combined . . . . [26]

This discussion of the lawyer's role leads to a general analysis of a communications system. International law as a communications system is a more fully developed topic than the argument for a systems approach to international law. They state that:

> [F]rom the point of view of the scholar, if not from that of the practitioner of law . . . methods of communication research may reveal a great deal about legal processes and functions in domestic and international societies that presently lies hidden under the traditional legal language and concepts. A communications approach seems particularly relevant to the study of international law in view of the paucity of authoritative third parties . . . .[27]

The communication function of international law, specifically its relationship to the area of foreign policy analysis, is emphasized. "In any case the interaction of international law and the formation of foreign policy involves the intersection of various kinds of expertise. It is a matter not only of content — the

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[24] GOULD 120. *See* FOREIGN POLICY DECISION-MAKING: AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS (Snyder, Bruck & Sapin eds. 1962).

[25] *Id.* at 122. For a discussion of "international law and foreign policy" as a viable field of inquiry, *see* Malawer, *A Juridical Paradigm for Classifying International Law in the Foreign Policy Process: The Middle East War*, 1967, 10 VA. J. INT'L L. 348 (1970) and Malawer, *The Relevance of International Law*, 8 COLUM. J. TRANSNAT'L L. 343 (1969).

[26] *Id.* at 125.

[27] *Id.* at 35.

norms themselves — but of the cast of thought, the way of approaching a problem, that is important."[28]

The discussion of communication theory is broad in the sense of describing the communication function of international law and the impact of communications on the related topics of integration and socialization. The impact of traditional international legal scholarship on contemporary international relations theorizing is identified as providing "symbolic representation" and concepts to diversified phenomena.

> The concepts taken for granted in international law . . . are in fact symbolic representations of certain events and facts in the world of international relations. Law is a system of symbolic representation, a shorthand for taking in the panoply of events and making some sense of it.[29]

The authors identify the communication and socialization aspects of international law in the context of investigating the nature and foundations of the international legal system. They emphasize that international law is "sometimes sanctioned rules, but they are always something more".[30] "As instruments for socialization, communication and ordering of events, the rules perform functions irrespective of the existence of a sanction apparatus."[31]

This analysis was informative, especially the description of international law as "symbolic representation".[32] What really needs to be commented upon is what was largely omitted: the restraint function of international law in conflict situations. Gould and Barkun contend that international law, by functioning as a communication system, implicitly functions as a restraining factor in state behavior.

The general omission of international law as an overt restraint system renders this book less relevant for those concerned with the crux of the international system, namely, conflict between states. While international law as an "overt" restraint system is not discussed, it is identified as an "implicit" restraint system, derived from the communication function of international law. "[I]n terms of a communication model of law, stored legal messages announce consequences intended to follow certain precedent actions."[33]

Louis Henkin contends that conflict management is the

[28] *Id.* at 119.
[29] *Id.* at 127.
[30] *Id.* at 130.
[31] *Id.*
[32] *Id.* at 127.
[33] *Id.* at 171.

foundation of the international legal system, rather than a mere derivative of the communication function.[34] One is startled by the failure of the authors to discuss international law in terms of war and peace as does Henkin. All parties interested in the future of the international legal system must be taken aback by this deliberate omission. Even Falk, cited by the authors as a law trained scholar who applies social science techniques and concepts, has written extensively on the problems of war and peace.[35]

The Treaty Law Development Simulation: Towards a Framework of an International Law Simulation Exercise

Gould and Barkun suggest that a simulation exercise depicting the multilateral treaty-making process needs to be developed.[36] However, they do not suggest a set of parameters for such a simulation exercise. The need for such a simulation exercise is paramount. The international community in the 1960's concluded many multilateral treaties codifying or creating new laws. They covered such areas as diplomatic and consular relations, law of the sea, rules of treaty law, air piracy and the arbitration of international investment disputes. The forthcoming U.N. Conference on the Environment to be held in Stockholm this year further evidences the international community's realization that the multilateral treaty process is the primary means of generating new law which allows a diversified world to manage common global problems. The following suggests a framework for constructing such an international simulation.

Ahmed Sheikh posits parameters for a model codification process.[37] The model developed is one of

> the intricate process of international negotiations and bargaining leading up to consensus formation prior to development of new international laws. It assumes that most international laws of the future will be consensual norms developed as a result of international treaties agreed through the process of negotiation and bargaining.[38]

Sheikh argues that the development of a model of treaty formation needs to be the "first step" in a social science approach to the study of international legal development. This could lead to the development of a "single global perspective" of the process that culminates in treaty formation.[39]

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[34] L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1968).

[35] I, II VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968-69).

[36] GOULD 37.

[37] A. Sheikh, *Analysis of Contemporary International Law Development —A Social Psychological Perspective*, 4 INT'L L. 785 (1970).

[38] *Id.* at 794.

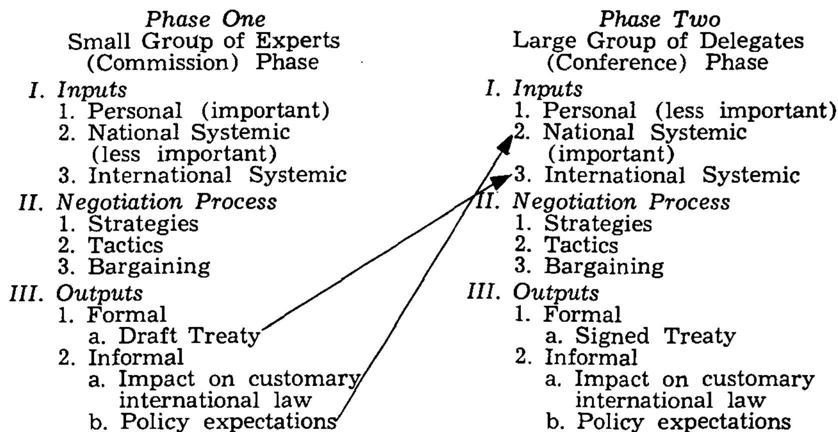
[39] *Id.* at 786.

Sheikh studies state behavior as it is related to "the process of international law-making".[40] He wants to develop "new conceptualizations, approaches and models . . . which play a significant part in the process of law-making".[41] A social-psychological approach is used to determine the parameters of his model. He emphasizes such variables as ideological preferences, value hierarchies, and cultural and social factors. A model of international negotiations or of decision-making in an international conference needs to encompass these variables, he argues.

Unfortunately, Sheikh limits his model to the international negotiation process conducted only by government representatives. It is necessary to develop the parameters of a model and a simulation exercise with validating historical case studies that uses both government delegates and non-government representatives (private experts) engaged in developing treaty law. It is very meaningful in constructing a model of the treaty law formation process to use the International Law Commission and its role in the treaty law formation process as an empirical referent. This commission-conference process has been, in reality, the method used by the international community to foster many significant multilateral law-making treaties.[42]

A two-phase model of the treaty law formation process needs to be developed emphasizing the role of private experts in a small group situation and the subsequent role of state delegates in a large multilateral conference situation.

INTERNATIONAL LAW CODIFICATION PROCESS



[40] *Id.* at 787.

[41] *Id.*

[42] *Id. See also* Malawer, *supra* note 25.

The first phase is the small group of experts that produce certain outputs. The second phase is the large international conference which utilizes the output of the prior phase as international systemic inputs. The grouping of variables as to both phases needs to be categorized as inputs, negotiation process and outputs. The input variables need to be classified as: (1) personal (values and perception); (2) national systemic (problems facing the expert's nation); and (3) international systemic (problems facing the international community). The negotiation process variables are those of strategies, tactics and bargaining techniques.

Examples of variables to be considered in the first phase of the model are ideology and value preferences of the private expert. The influence of the national government on the expert needs to be considered as a national systemic input. The security problems confronting the system and the expert's own country need to be considered as international systemic inputs.

It is also important to note that inputs are subject to intervening variables of the negotiation process, *e.g.*, bargaining techniques, strategies and tactics. This requires a determination of the factors in the negotiation process (strategies and tactics) and the utility of the desired outcomes. Outcomes are of high or low utility relative to either the international system or the particular national system.

At both stages of the codification process the outputs are either formal or informal. A draft treaty is the formal output of the experts. The impact of the draft treaty on existing customary international law is the informal output of this small group situation. Additional informal outputs are policy expectations generated on part of a particular state due to the formal outputs of the commission process. A signed treaty, an unratified treaty, or a treaty not yet in force, is the formal output of the multilateral conference. The impact on customary international law of a signed treaty not yet in force is the informal output of the large group situation.

Variables in addition to those considered in the commission phase need to be included when considering the conference phase. Policy objectives and state directives to delegates should be national systemic inputs of the conference phase. The individual actor is no longer the private expert but an official delegate of a state. This is true even though the state delegate may be, and often is, the same individual who serves as the private expert in the commission phase. Policy expectations

generated as informal output of the commission phase are variables under the category of national systemic inputs.

National systemic input is of more importance in the conference phase than in the commission phase. This is because the negotiator is officially acting as an agent of his own government. The delegate puts less emphasis on the problems confronting other states than does the private expert in the commission process. For the state delegate, the problems confronting other states are international systemic inputs.

Unlike the draft treaty produced in the commission phase, the output of the conference process is not of an interim nature. The signed treaty produced by the conference, as well as related resolutions, are generally intended to become effective as treaty obligations upon ratification by the necessary amount of signatory states. Informal outputs of the conference phase are the impact of the yet unratified treaty on existing international law and policy expectations generated by the conference on the part of the participating states.

The preceding is a tentative framework to establish a model of the multilateral treaty-making process. By indicating how legal, political, and psychological factors ought to be conceived, the model furthers the study of international law and foreign policy. It allows for a more systematic and systemic investigation of the development process of treaty law and is capable of attempting to partially answer the often debated question of the nature of obligation in treaty law. The framework is intended to be used by both scholars and policy-makers using either traditional techniques of legal research or methods favored by the social scientist.

Conclusion

This study presents in summary form the contending methods and concepts of the social sciences that have probable applicability to the study of international law. Despite the introductory comments by Harold Lasswell,[43] for the practicing lawyer and the traditionally trained legal scholar the concepts and the general presentation appear to be needlessly obscure and too abstruse.

While the book is addressed both to legal scholars and practitioners of international law, its ultimate value concerns the international law student in a social science program. It can provoke further research and hopefully lay the foundation for revitalizing an essential and very old discipline of learning

43 GOULD at xx.

that is vital for the study and regulation of the behavior of international actors.

This reviewer's proposed framework for a treaty law development simulation is intended to be relevant for both the academician and the policy-maker. The emphasis on policy relevance is intentional. For it is in the area of international law and foreign policy analysis that the application of social science methods and concepts for the researcher and the practitioner is both necessary and promising. It is with the aim of furthering the study of international law and increasing the relevance of international law in the current crisis-ridden international system that this essay is devoted.