Life Cycles of International Law as a Noetic Unity: The Various Times of Law-thinking

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Abstract: This essay discusses different possible temporalities, or life cycles, that structure international law-making if international law is taken to be a noetic unity - a complex whole that is created by an exercise of reason and that does not exist outside of that exercise of reason. Put differently, it deals with the following question: if international law is something we create and develop through a shared understanding of what it is, what are the different salient moments in time that give a pace to the evolution of such an understanding? In answer to the question, the essay first explains that understanding law as a noetic unity allows us to make sense of the idea of law-making by law-thinking, and then identifies the following temporalities: the time of paradigm shifts; the time of struggles between competing schools of thought; the time of the formation of distinct epistemic fields; the time of the evolution of interests; and the time of the change of beliefs.

We may distinguish two types of struggles in international law-making. The first, more obvious type is about content: what will the new norms say? Who and what will they protect? What substantive values will they promote? In a struggle of this kind, the fighting forces may expectantly ask when new treaties will be signed, when behaviour will become custom, when decisions on disputes will be rendered, but also when our understanding of reality will finally come up to speed, when society’s values will progress, when the relevant political forces will align so that we can finally have all these new norms. And the fighting forces create lobbies, advocacy groups, and NGOs, think tanks, research centres, and academic journals, all of it to influence the usual suspects.

The second type of struggles seems more academic. But it is equally real and it may well be just as important eventually. It is about presuppositions and representations and containers. It is about epistemologies and concepts to give effect to these epistemologies. It is about the sort of things that

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struggles of the first type take for granted, what they posit as postulates and axioms. It is about what structures the boundaries of the knowledge within which struggles of the first type unfold. It does to the first type of struggles something similar to what phenomenology did to ‘objective research’, showing that ‘objectivity’ is merely a set of assumptions that change over time because what research makes explicit must always already have been in our selfhood. Struggles of the second type are over matters such as: What is international law in the first place? Who gets to say what it is? If someone wants to make international law, what sort of things do they have to ‘make’? Who can make these things? Who gets to say who can make these things? Why do those who get to say who can make these things get to say it? What does it take to change all of this? With much simplification, we might say that these are struggles over the legitimate understanding of what deserves the label of international law.

The distinction easily echoes in traditional international law scholarship. Sir Gerald Fitzmaurice put it casually: “although on the domestic plane there may still remain uncertainty as to what the law is (for statutes, judicial decisions, etc., have to be interpreted and applied) there is never any uncertainty as to what is law. On the international plane there may be uncertainty under both heads.”\(^1\) Yet the uncertainty is not of the nonchalant and inactive sort, like a cool fisherman shrugging off a bizarre weather forecast. It rather is of the tense and vigorous sort, such as an unsure outcome of a long-standing feud. In the second type of struggles too there are fighting forces and usual suspects and lobbies and advocacy groups. Many of them are in the academy, but not all.

The focus on conflicts brings Bourdieu to mind, for whom oppositions and battles explain so much of social life. The distinction between the two types of struggles can indeed also be thought of, if it helps, as classic Bourdieu: the distinction is the opposition between the contents of the field and the boundaries of the field; what is in the field as opposed to what is the field; what is the outcome of the game as opposed to what is part of the game; who wins the game as opposed to who can play.\(^2\)

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In a book concerned with international law and time, the point of the distinction is to suggest that each type of struggles has its own ‘time’. Each has its own temporality, salient moments, pace, time horizons, time patterns, life cycles, or any other name by which you might want to refer to the typical intervals of time that mark how the struggles play out. The current essay focuses on the ‘time’ of the second type of struggles, although incidental references will occasionally be made to struggles of the first kind. Put in words Bourdieu might use, the essay deals with the moments at which the rights of admission are redistributed for norms to enter the field of international law. (If this is perplexingly abstract, think metaphorically of norms standing in a queue waiting with bated breath to be let into the club of international law; bouncers let some in, some not, based on criteria they call ‘rules of recognition’ or just ‘sources’; every now and then, the bouncers are given new instructions; every now and then, the shift of bouncers is relieved. Like a con planning a heist, the question for this essay is to determine the likely ‘nows and thens’.)

To be clear, the essay has no historiographic ambition. It does not aim to identify factors, recurring with a certain regularity, that actually have marked the ways in which we have understood international law through history. Nor does it aim to examine the temporality of the recurrence of such factors – that is, at what intervals our understanding and definition of what counts as international law have changed in history or in more recent times. The chapter is rather philosophical in method, submitting possibilities and consequences to critical reasoning in the abstract. It seeks to map what could credibly mark the timeline of the evolution of what we consider international law to be.

The essay moves in seven parts of unequal length. I begin with a long part which explains what I fancifully call law-making by law-thinking: if law is a noetic unity, a mental world of sorts, we make it and change it by thinking about it, collectively. In Part 2, I sketch the idea that law-making has different temporalities, that time flows in different ways and that these different ways offer different coexisting accounts of the life cycles of international law-making. Parts 3 to 7 apply this general approach and identify different life cycles in the making of international law considered as a noetic unity, namely the life cycles or times of: paradigm shifts; struggles between competing schools of thought; the formation of distinct epistemic fields; the evolution of interests; and the change of beliefs.
1. Law-making by law-thinking

The epistemological background to my discussion of the temporalities of our understanding of international law as international law is that law is a ‘noetic unity’, as Paul Bohannan put it. And it should be noted that international law is, here, simply considered a species of law. The following discussion thus applies equally to both.

To say that law is a noetic unity means that law is a complex whole (a ‘unity’) that is created by the exercise of reason (noesis). Law does not exist outside of an exercise of reason. Compare law to a rock for instance. The rock exists both as an object in the natural world and as an object in our perception of it – as a ‘phenomenon’ in the phenomenological sense in our noetic experience of it. Law, by contrast, exists only in our noetic experience of it. Put more simply, the rock both exists in the world of objects and in our noetic experience of it, while law only exists in our noetic experience of it.

More precisely, law is most usefully understood as not existing outside of a collective exercise of reason, or a collective noetic experience. To clarify the point, consider the following parallel with the rules of grammar, which are also a noetic unity: ‘an individual as such is unable to change the rules of grammar; an individual, by systematically breaking the grammatical rules, only leaves the respective language community but does not change its rules. Likewise, an individual by himself or herself cannot change the world structure that is inherent in scientific or everyday language’. Another, quite classic, example of a collectively created and collectively changed noetic unity would be money: in the world of objects a banknote is a piece of paper; in our collective noetic experience it is money. Yet another classic example would be the state.

In the terminology of the sociology of knowledge, we might also say that law and the state and money are constructed social realities. Yes, realities. Andrea Bianchi explains it with elegance: understandings of international law, he says, ‘do not offer subjective explanations of a reality that has a discrete and objective existence. They constitute the reality they intend to describe by representing it and constructing it on the basis of their own presuppositions and theoretical tenets.’\(^5\) Or in philosophy of science idiom: ‘the subjects of knowledge contribute to the constitution of the objects of knowledge (by means of "paradigms") insofar as they structure the world of these objects.’\(^6\) Now, it is emphatically not the case that the noetic quality of a state and of the law (and of money) implies that they do not have tangible consequences in the world of objects. They do have quite tangible effects in the real-world, from borders to police officers, from signing international conventions to taking actions led by a sense that one has to follow legal rules in the name of the authority of law.

Brutally simplified, it is because we think about law that law exists. It is because we think about law that there are norms we recognise as law and integrate (or fail or refuse to integrate) in our decision-making qua legal norms, as opposed to other, non-legal norms. If we were to collectively come to believe that law has ceased to exist, generally or in a given society, which would mean for instance that we believe that no rule deserves the label of law, generally or in a given society, then law would indeed cease to exist, generally or in a given society. It is not, of course, that the rules and institutions enforcing them would be spirited away. But we would no longer behave vis-à-vis them as legal norms. We would no longer believe them to be law and treat them as such.

To further clarify the point, it is helpful to quickly consider the closely related but distinct idea that law is nothing more and nothing less than what we believe is law and treat as law. The idea was expressed about law in general by Georg Jellinek a hundred years ago.\(^7\) It was reformulated more recently by Brian Tamanaha\(^8\) and applied more specifically to international law by Andrea Bianchi.\(^9\) (One might then wonder, of course, why we still think about law in the abstract, from an analytical

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5 Andrea Bianchi, International Law Theories (OUP 2016) 16 (emphasis added).
7 Georg Jellinek, Allgemeine Rechtslehre (2nd edn, O Haring 1905) 324ff.
legal philosophy perspective for instance, instead of merely engaging in social empirical studies, asking people what they think is law. I have tried to make the point elsewhere that the purpose of our analytic thinking about law in this context is to eventually shape the way ‘we’ think about what law is, what we believe it to be and what we treat as such – ‘we’ collectively, ‘we’ as a society, ‘we’ as the makers and addressees of law.10)

We may also express the same essential idea in language more habitual to international law: if we change our discourse about international law, if we change our understanding of what law is, we change what international law effectively is. The choices we have in thinking about international law are choices about what international law is and becomes. Thinking about international law effectively creates international law – not in the sense of wishful thinking, but in the sense of labelling, recognising, characterising. What makes international law international law depends on what criteria we use to understand and to recognise international law. Simple enough. So a norm can be a norm of international law for some but not for others. More precisely, our ideas about international law, the ways we understand and define it, what we believe it to be, effectively create international law and make international law. The distinction between ‘create’ and ‘make’ is simply a convenient way to say this: Our ideas about international law create the label of ‘international law’ and attach certain consequences to the fact of being placed under that label, such as the understanding that we should obey it, that it is to a certain extent legitimate, and so on, which is what marks international law as international law. And our ideas about international law affix the label to specific types of norms and institutions and to individual norms and institutions, which is what makes these norms and institutions norms and institutions of international law. If we expand our idea of international law, so as to understand and define it more broadly, encompassing a greater number of things, we effectively make international law. If we narrow down our idea of international law, so that we regard fewer things as international law, we effectively unmake international law. If we shift our idea of international law, so that the new idea simultaneously includes things that were up to then not regarded as international law

10 Thomas Schultz, Transnational Legality (OUP 2014) 66ff.
and excludes things that were up to then regarded as international law, we simultaneously both make and unmake international law.

Any number of examples would make the point, but two quick ones should largely suffice. If the idea comes to prevail that informal international law counts as international law, international law is thereby made.\textsuperscript{11} If the idea comes to prevail that non-state actors can make customary international law, international law is made, simply because the label of international law is affixed to a new set of norms, without new norms per se being made. Finally, if a parallel helps, think of existing pieces of paper which become recognised as money: this is in truth a way to make money (one that is unusually pleasing aesthetically at that).

Now that the general point has been clarified, we may get back to one of its specifics. Bohannan appears to be pushing the idea of law as a noetic unity quite far. He writes this: ‘The most sophisticated scholars … have been driven to realize that … a definition [of law] can mean no more than a set of mnemonics to remind the reader what has been talked about.’\textsuperscript{12} This seems to suggests that for Bohannan, or rather for those he considers the most sophisticated scholars, \textit{nothing} is inherently law or not law. This is probably too simple. Paul Hoyningen-Huen (one of the important interpreters of Thomas Kuhn, who will enter the discussion turn later on) points the way: Yes, he says, ‘we impose a structure on the world by means of … concepts, and … we do not read off these concepts from the world itself, as a more familiar story wants us to believe.’ But, he continues, ‘it is not possible to impose any and every structure on the world, [although] more than just one is possible.’\textsuperscript{13} Then what, in the case of law, would be the ‘world itself’ which limits the structures we can impose on it? One answer might be the ‘world itself’ of our experience of law, oxymoronic as this may sound. Let me explain.

If we focus on noetic experience, the focus may lead us to study our experience of law. If we are then open to bringing back in the methods of natural sciences for this – not for the study of law as a reality in direct access, which is what these methods were developed for initially, which in turn is

\textsuperscript{11} Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), \textit{Informal International Lawmaking} (OUP 2012).
\textsuperscript{12} Bohannan, Differing Realms, 33.
\textsuperscript{13} Hoyningen-Huen, ‘Idealist Elements’, 394.
why phenomenologists tend to reject them, but for the study of our experience of law – we might for instance consider neurophysiological studies on the way the brain encodes the idea of law. This would be one way to understand how we experience law. (For Kant buffs: think of it as if the neurophysiological experience of law were the Kantian ‘thing-in-itself’ of law.) And indeed some studies in neurophysiology tentatively suggest, for instance, that the brain encodes the experience of law differently than it does neighbouring experiences, in particular justice and fairness. The idea of law would seem to correspond to a measurable, reasonably distinct brain activity. If this is so, the remaining matter at hand is merely to decide what to call that thing which the brain activity responds to. ‘Law’ is then the mnemonic, the label, to characterise that thing we found in the brain.

This would seem to suggest – much hedging is needed because the brain’s response might be culturally determined – that there could be a core, almost inherent, noetic experience of law. This might further suggest the existence of a core understanding of what law is as a noetic experience, as a noetic unity. It would follow that not nothing (that is, something) is inherently law. The ‘world in itself’ of law would be its neurophysiological reality. This reality, this core inherent part of our understanding of law, would then offer resistance to some of the ways in which we might want to understand it. One reason why this matters, as Hoyningen-Huen explains in a different context, is that ‘If there were no relevant resistance of the world in itself, all that would count in a [Kuhnian scientific] revolutionary situation would be the social success of the winning theory, independently of its scientific quality. A consensus in science would then essentially be the same as an accidental consensus in a madhouse.’ (And no, it is not appropriate in an academic paper to venture an explanation as to why academia is not a madhouse.)

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14 See for instance Johannes Schultz, Oliver Goodenough, Richard Frackowiak, and Chris Frith, “Cortical regions associated with the sense of justice and with legal rules” (2001) 13 NeuroImage 473. For the jurisprudential implications of this study, see Oliver Goodenough, “Mapping Cortical Areas Associated with Legal Reasoning and with Moral Intuition” (2001) 41 Jurimetrics 429, with further references at 439–41. See also the critical discussion of the jurisprudential implications drawn by Goodenough (which are quite different from mine) in Michael Pardo and Dennis Patterson, “The Promise of Neuroscience for Law: ‘Overclaiming’ in Jurisprudence, Morality, and Economics” in Dennis Patterson and Michael Pardo (eds), Philosophical Foundations of Law and Neuroscience (Oxford University Press 2016).

What could this core part of our understanding of law be? Again very tentatively, one might try to infer, admittedly quite loosely, the following idea from the neurophysiological studies: law’s core function is to make a certain social game possible. We come together as communities, overlapping communities of different sizes, to play a certain common social game, a game we create by a collective exercise of reason. Law constitutes the rules of that game, and thereby defines the game, in itself and in opposition to other social games we play, which are governed by other rules. If that indeed is the core function of law, it would follow that law must exhibit certain characteristics to fulfil the function. The basic purpose of the rules of a game is to allow the players to predict and plan within the game; this effectively means to play the game. In order to allow the players to predict and plan, law must at least exhibit a reasonable level of predictability (so that the law’s subjects can predict and plan vis-à-vis the rules) and some form of authority or effectiveness (so that the law’s subjects can predict and plan vis-à-vis other individuals subject to the same rules; if too few people obey rules which are per se predictable the rules effectively disappear).\(^\text{16}\)

This, arguably, is what we normally understand law to be. The question then is to identify these rules of the game, which first requires to determine how we want to identify the rules, which in turn requires that we decide what sort of things we are willing to consider rules of the game, which means to agree on what things we are content to affix the label of law to. This is where we have quite some wiggle room to determine what, beyond the core ‘neurophysiological’ understanding, we do understand and have understood to be law, what we should understand to be law, and how these understandings change over time and under the influence of what factors.

From the perspective that views law as a noetic unity, the contours of the understanding beyond the core are very much contingent. To put this in sociological language, using Bourdieu’s words, these contours are ‘the social product of a historical work of construction’;\(^\text{17}\) which is both based on and creates ‘social structures and mental structures’.\(^\text{18}\) Expressed without the sociology

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\(^\text{16}\) See for instance Schultz, *Transnational Legality*.

\(^\text{17}\) Bourdieu and Wacquant, *An Invitation to Reflexive Sociology*, 242-3. Bourdieu deals more specifically with professions, including the legal profession, and fields, including the field of law, rather that the meaning of the concept of law.

\(^\text{18}\) ibid. 247.
jargon: communities of people and the dominant ideas that prevail within them create the contours of different understandings of law; vice versa, the different ways to understand what exactly law is creates communities of people around these ways of thinking and reinforces these ways of thinking within the communities. Quite straightforwardly then, one aspect of international law-making is the work of construction of the historical social product that is the idea of international law.

Importantly, these ideas about the contours of law, at least to some extent, are precisely constructions, deliberate epistemic constructions. They do not simply occur by happenstance; they are not merely coincidental doxae. They are constructions of, among others, ‘scholars’ broadly speaking. Scholars in the sense of members of epistemic communities, individuals who actively engage with the ideas, individuals who tend to have intentions about these ideas and interests determined by these ideas.

I indeed said ‘interests’. Simply put, one’s interests determines one’s epistemology. Or in the language of analytic legal philosophy: one’s epistemological views are credibly determined not only by one’s epistemic reasons but also by one’s prudential reasons-for-action. That is, we may understand and define international law in a certain way because we actually believe this to be true (epistemic reasons). And, at the same time, we may understand and define international law in a certain way because it helps advance our interests (reasons-for-action). In the rough version offered by plain language, we would say that we see truth, or say we see truth, in what is convenient for us.

Andrea Bianchi expresses the idea more eloquently, in nearly Marxist terms of class struggles much like Bourdieu would: ‘It would be naive to believe that the different theories and approaches are simply submitted in the arena of theoretical debates by their proponents as if they were to compete fairly, with a view to persuading the social agents that their own theory is the one that better accounts for the reality of international law. In fact, the discipline of international law is currently engaged in a power battle, in which conflicting claims to academic authority and discursive control are being put forward.’

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It is on the constructions of the idea of international law within these epistemic communities that I want to focus, and more precisely on the life cycles marking such constructions. The point is, as I have already explained, to contribute to the comprehension of the temporality of international law-making, the intervals of time that discernibly mark the making of international law, by advancing our comprehension of the temporality of how we understand and define it. Put differently, the object of inquiry from here on is the temporality, or rather the temporalities in the plural, of the noetics of international law. Or expressed in more traditional terminology: when a community starts to think differently about international law, by that very fact it starts to make (and/or unmake) international law. So when is this likely to happen?

2. The clocks of law

In traditional legal thinking and in Western common sense, time is usually represented in the singular, not the plural, as a homogeneous and continuous line. A one-way street. Irreversible. This is a view that is as popular as it is rough. It might just possibly be true in physics, but it certainly does not quite capture the diversity of the ways in which social actors and social interactions build collective time-bound imaginaries and relate to reference points in time.

In that social way at least, time flows in different ways. Put particularly un-poetically, if time is a measure, it uses different standard units. Time, in that sense, is a social construct that we make flow in a variety of ways depending on what we want to use it for. We measure time in different ways and we measure it according to different yardsticks, depending on what we want to account for and make sense of. My writing time right now is measured by the time represented on the calendars and watches of this book’s editors and publisher, not (unfortunately) by the time it takes me to make an intelligible point. The timing, the temporality for want of a better word, of my writing is professional time. It is not the temporality of the formation and transmission of ideas. It is a business temporality, not an ideational temporality. (Ah well.)
To make a first general point about law-making: the time of law-making is not only the time it takes to complete the more technical aspects of its creation – the time it takes to enact legislation in parliament as a standard unit of time, the intervals of time at which significant judicial precedents can reasonably be created and departed from, the average duration of the negotiation of treaties. The time of law-making is also the time it takes for its norms to take hold in society. To the question ‘How much time does it take to make law?’ or ‘What is the appropriate temporality to think about law-making’, Aristotle responded this: ‘For a law derives all its strength from custom, and this requires a long time to establish; so that, to make it an easy matter to pass from the established laws to other new ones, is to weaken the power of laws.’\(^{20}\) In other words, the time of law-making is also the time of belief-making and habit-making in society.

In that sense, the time of law is *instituted by society*.

Contrariwise and at the same level of generality, law also institutes time for society, it establishes different forms of time for the good operations of society, different legal rhythms to give society certain rhythms, to slow it down or spur it on. Consider for instance the slow pace of collective remembering we find in national constitutions and in peace treaties. Or the time given to allow people to forgive which we find in transitional justice efforts.\(^ {21}\) Or the time horizons of promises which stir up so much commotion in today’s volatile economy. Or the pace at which international legal actors can engage in self-questioning, which for instance translates into survival clauses in treaties, cool-off periods in international dispute settlement, and stabilisation clauses in investment treaties. In François Ost’s view, each of these temporalities – the times of forgiveness, promise, collective memory, and self-questioning – gives a specific role to the present and how it relates to the past and the future; each of them allows different analytic and emotional arguments as valid arguments; and each of them translates into specific vocabularies.\(^ {22}\) Each of these temporalities tries to make the clocks of different aspects of society tick at different, and differently appropriate, speeds.


\(^{22}\) François Ost, *Le temps du droit* (Odile Jacob 1999).
These are different temporalities that influence the development of international law within the first type of struggles mentioned at the outset of this essay: they are some of the temporalities of the evolution of international law within the boundaries of the usual understandings of what international law is. Different temporalities, different forms of time, also structure or otherwise influence the ways in which we think about what international law is in the first place: they are the temporalities of the settings of the boundaries within which the game of international law is being played.

So what are these temporalities? What are the different forms of time, the rhythms, the standard units of time we can use to account for, to make sense of the ways in which we define what it means to play the game of international law-making? What temporalities shape the practice of how we think about international law? The following sections discuss five such temporalities. They are, then, to echo the title of this essay, five life cycles in the creation of international law as a collective act of thought in recognising a norm as a norm of international law.

3. Paradigm shifts: the time of the evolution of central ideas within a community

The first temporality to mark the change and evolution of the ways in which we think about international law relates to Kuhnian paradigm shifts. According to Thomas Kuhn, every scientific discipline, including disciplines of the social sciences and the humanities, alternate between periods of normal science and periods of scientific revolution. During periods of normal science, a scientific discipline, an academic field, a field of thought more generally – international law for instance – is organised around a central paradigm, a central idea, a central set of beliefs and values, which amount to rules of ‘valid truth’, widely shared by the members of the field. Consider for instance the idea that law is necessarily created by states, that international law must be made by states in order to validly

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count as international law. How norms of international law can be made depend on what the paradigm says.

And then, Kuhn continues, trouble comes to town. Anomalies appear: situations in which things happen that should not happen according to the theory, that are not explained by the paradigm. Typically, these situations are progressively encountered ever more frequently. The validity of the paradigm is questioned and new candidate theories (think ‘candidates for paradigm’) line up in the competition to become the next paradigm. When the competition starts, the scientific discipline in question has in fact entered a period of scientific revolution. The paradigm resists for a time by stretching its explanatory power in ever less credible manners (think ‘conceptual repair patches’) and eventually resigns, allowing a new paradigm to come to the throne and rule the field. The new paradigm then determines what is true and what is false in the field, what is international law and what cannot be. The new paradigm is likely to make international law, not by making new norms per se, but by recognising new norms as norms of international law. It can also go the other way, as I mentioned above: the new paradigm can unmake international by no longer recognising certain norms as norms of international law, norms that the previous paradigm did consider to validly amount to international law.

The temporality, the pace, the standard unit of time allowing us to make sense of the creation of norms of international law is, here, the temporality of paradigm shifts: they are slow yet abrupt. Quite simply, then, to the questions ‘How long does it take to make international law?’, ‘When will a given field of international law change?’, one answer among others is when there will be a paradigm shift. For instance, to use once again the example from above, if there is a paradigm shift so that informal international law counts as international law under the new paradigm, international law is thereby made. What was not international law now is. Conversely, of course, this is also a way to unmake international law: if there is a shift ‘back’ to strict formalism, all those norms we have started to regard as international law despite the informalism in their creation will cease to be regarded as international law. The realm of international law will thereby effectively shrink. This temporality may be thought of as the temporality of the evolution of central ideas within a community.
4. The time of struggles between competing schools of thought

Think for a second about Kuhn’s theory as described in the previous section. It is a particular widespread account of how paradigms change. But it is as simplistic and idealistic as it is widespread. Not idealistic in the sense of epistemological idealism, which suggests that ‘everything there is, is mental’, but in the sense that it shows an unrealistic belief in the purity of the pursuit of scientific knowledge. In a word, it is cute.

Consider that Kuhn was used, much in spite of himself, as an icon of some of the radical student movements of the 1960s in the USA and in Germany. The idea that there are revolutions in scientific knowledge was used as an argument to drive revolutions against the institutions producing scientific knowledge – the universities. Protests, arsons, and other demonstrations of force were used to bring about change in the production of scientific knowledge and thus in scientific knowledge itself. Bourdieu himself ‘attributed to Kuhn the essential part of [his] own representation of the logic of the [scientific] field and its dynamic’ – a logic characterised by his insistence on clashes of social forces. Essentially, Kuhn’s emphasis on the idea that scientific knowledge is not an immutable objective truth but rather a matter of changing perspectives facilitated the understanding of scientific knowledge as also being the contingent result of social forces.

In that sense, the account provided in the previous section is simplistic and idealistic in that it suggests that paradigm shifts occur simply because the new paradigm offers a better explanation than the previous one. The new theory would simply be scientifically better than the one it replaces. Science would inexorably progress. But given human nature and the diversity of things that people really try to achieve when they put forward theories, this may not necessarily be the case. Recall the discussion from above on how one’s interests determines one’s epistemology, and the ensuing power battle Bianchi pointed out. Indeed paradigms can also be imposed by brute force. My paradigm is

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26 ibid 15.
‘better’ than yours in the sense that I am stronger and can impose it and thus it trumps yours. I impose it by inundating the field with publications by my gang mates, by organising conferences around my central idea, by launching journals that take my approach, by telling my students that mine is the only correct way of thinking. And so my school of thought eventually prevails over yours. The field becomes dominated by the central ideas of, for instance, the Chicago school and no longer the Boston school, or the New York school and no longer the New Haven school, the Beijing school and no longer the Stanford school, the New Delhi school and no longer the Cambridge school.

One might then suggest that it is more illuminating to liken the evolution of law, and more specifically the evolution of central ideas within law, to battles of religions. Different religions provide different competing accounts of the world. Yet historically the triumph of a particular religion over another would appear to be due more to power relations and indoctrination than to the accuracy of the respective accounts of the world. And so in order to understand the timing, the temporality of the evolution of international law through our understanding of it as a noetic unity, we might find inspiration in the study of the factors that structure the evolution of religions over time.

Be that as it may, the temporality of international law-making I am referring to here is the temporality of struggles between schools of thought. This is for instance the temporality of appointments to key idea-shaping positions around the world. It is also the temporality of economic cycles, or rather of cycles of economic policies regarding academia: to inject money in academic institutions may well amount to – if the institutions are in fact intellectually active and hold somewhat homogeneous ideas within – injecting money in certain schools of thought, thus in given rivals in the struggle between schools of thought. When universities engage in fundraising, they may effectively, with or without knowing it, engage in efforts to finance their intellectual troops so that their ideas can conquer their respective fields of thought. When the field of thought is international law, financing may amount to the empowerment of certain understandings of what international law is, which may well translate into making or unmaking international law, into the creation, or the demise, of certain norms as norms of international law.

In sum, to the question of what understanding of time helps us understand the creation of norms of international law, one answer, among many, is the pace of struggles between competing
schools of thought. I repeat, and offer no apology for the repetition because the point is central: if we change the way we think about something noetic, like international law, that something effectively changes and becomes something else. If international law becomes something else, it may be the case that norms that did not count as international law now start to count, and vice versa that what was international law may no longer be. So, when is there a salient moment in the creation and destruction of norms of international law? One answer is when a new school of thought relating to our understanding of international law comes to prevail, and imposes its paradigm and thus its epistemological perspective.

5. The time of the formation of distinct epistemic fields

In truth, the account provided in the previous section was again somewhat rough. It assumed that there is only one community of international lawyers, within which different schools of thought battle for epistemological supremacy. It is a rough account because, as Jean d’Aspremont points out, there is a ‘growing cacophony in contemporary scholarly debates in the field of international law. Indeed, nowadays, international legal scholars often talk past each other. It is as if the international legal scholarship had turned into a cluster of different scholarly communities, each of them using different criteria for the ascertainment of international legal rules’.

Perhaps at some stage in the history of international law there was only one worldwide community of people who think about international law. One worldwide community which shared one paradigm, one epistemology of what international law is. While this seems only moderately plausible, it offers a useful conceptual contrast to today’s reality. Today, we know that international law is not the same thing for legal formalists, for the different offsprings of legal realism, for marxists and for critical legal scholars, for pragmatists and law & economics devotees, and so on and so forth. These

are parallel, juxtaposed accounts of what international law is. Parallel communities of individuals who think about international law. Juxtaposed drawings of the contours of international law. They recognise, and by recognising create, different norms as norms of international law. To think of international law as a global epistemic field dominated by one common epistemology, one common paradigm, is simply not accurate today. Of course, this does not prevent these approaches from having hegemonic pretences: they often indeed portray their views as the only correct view. The point is that international law, as an epistemic field, as a field producing knowledge about international law, is in fact fragmented into several coexistent epistemic fields.

From this a further point follows: a norm is a norm of international law in some of these fields, but not in others. The emergence of a new field, a new distinct community of individuals who think about international law in a distinct way and according to a different paradigm with a different epistemology, may well mean the emergence of a new set of norms deemed to amount to norms of international law.

The temporality we have here is the temporality of the formation of distinct epistemic fields which are as many distinct communities: a norm becomes a norm of international law depending on the pace of the formation of distinct epistemic communities, which recognise the norm in question as a norm of international law. There will be new norms of international when, among many other things, a new epistemic field develops that recognises such norms as norms of international law.

To distinguish this clearly from paradigm shifts, consider that a paradigm shift classically assumes that the relevant epistemic community stays the same and people start to think differently within that community. By contrast, what I am discussing here is the idea that a new community emerges, within, beside or across the preexisting community, a new community that thinks differently than the preexisting community. The new community thinks according to a new paradigm, but this is not a paradigm shift because the paradigm prevalent in the preexisting community may well not have changed, or shifted.

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28 See generally the discussion in Bianchi, *International Law Theories*.  

6. The time of the evolution of interests

Hark back once more to the idea that one’s interests influence one’s epistemology. We have seen above that this leads to struggles to protect or advance one’s interests, which translate into struggles to protect or advance one’s epistemology and thus one’s understanding of international law. How these the struggles pan out creates one temporality. That much I have already discussed. But here is the simple point: these interests are not immutable. They also change over time, creating another temporality of international law-making.

To make the point, it may simply be best to give an example of what it means that one’s interests influences one’s epistemology. Consider, for instance, a current or former government lawyer who has interests, psychological or more tangible ones, in promoting or sustaining the power of governments. Because of her interests, such a person may well hold an epistemology that prevents her from recognising, possibly even in her most candid moments, that non-state actors can create norms of customary international law. If one’s interest is that governments stay strong, one’s epistemology is plausibly such that only governments can create law, that only states can create norms of international law. To put the same idea from a different perspective, it would be unwise for states and their representatives to nominate and elect to the International Law Commission, for instance for work on the identification of customary international law, someone who does not have the interests of states at heart – and a good proxy to determine whose interests an individual has at heart often is to consider the individual’s own contingent utility function.

The temporality of international law-making in question here is the temporality of the evolution of interests shaping epistemologies. When the personal interests of those who shape the thinking about international law change, their epistemology is likely to change, and the creation of norms of international law is likely to change too. Look out for such changes, and you will have one predictor for the occurrence of international law-making.
7. The time of the change of beliefs

My discussion so far has assumed rational behaviour when we shape our understanding of international law through our collective noetic experience. But of course assuming constant or even just dominant rationality in behaviour is barely realistic. Our understanding of international law is inevitably also influenced by other factors than logical reasoning, empirical observation, and conscious or unconscious calculation of whose psychological and material interests one may advance by one’s actions. A candidate of choice for such non-rational factors in the determination of how we think about international law would seem to be beliefs – beliefs almost in the religious sense.

For instance, we may well believe, more or less consciously, that law is something inherently good, an inherent moral-political positive. We are easily led to believe that law is the end and opposite of tyranny\footnote{John Locke, Second Treatise of Civil Government (first published 1690, Prometheus 1986), ch XVII, section 202: ‘Wherever law ends, tyranny begins’. Jerold S. Auerbach, Justice Without Law? (Oxford University Press 1983) 14: law is a ‘glorious triumph … over inferior forms of communitarian extra-legal tyranny’} – as if no tyrant had ever used a legal system to strengthen his grip on power. That law is something good: this is such a comfortable thought for us lawyers. It gives moral meaning to our jobs. (Hence the parallel with religious beliefs.) It would tend to follow that we believe that law has to be obeyed, has to be granted authority and be enforced if its authority is insufficient. To preserve and if possible increase the authority of international law: this would appear to be one of the cardinal points on the moral compass of many an international lawyer. To the point that even just questioning it would conjure up the risk of excommunication, where one is manhandled out of the community of international lawyers and cast into the crowd of legal philosophers. And so we hold on to our beliefs. And they continue to influence how we think about international law.

We may also believe that states and what they do, individually or collectively, are something inherently good, or at least inherently better than what other producers of norms can be expected to do. Unless one works in and with law without the state, which remains marginal or cutting-edge depending on how you look at it, it is a comforting thought for international lawyers to believe that states are good. One works for the good when one works within the boundaries of state law, even if
one takes a legal position in opposition to that of one or several states, because it implies that the game is played by the states’ rules, on the states’ terms, and this contributes to sustaining the states’ centrality. Such a belief that states are a nearly unconditional moral-political positive in law-making naturally leads to believe that international law must be created by states and by states only, regardless of the evidence, regardless whether it makes sense epistemologically or not. Léon Duguit and Hans Kelsen candidly expressed just that belief at some stage.30

I have discussed elsewhere these ‘justice beliefs’ which have an implication on our understanding of law and law-making.31 I do not believe I need to entertain them further here. The point simply is that when such a belief changes, what one is ready to recognise as international law may well change too, and thereby international law effectively also changes. A simple change in belief may create new norms of international law. The relevant temporality of international law-making, then, is the temporal horizon of the change of beliefs. Change certain beliefs and you may be making international law.

Conclusion

To someone interested in the question of what life cycles mark the creation of norms of international law, what pace structures international law-making, I would respond that part of the answer lies in the times of law-thinking: the various paces at which we change the way we think about international law. To be sure, the common time references of treaty negotiation and signature and ratification, the rhythm of the ebbing and flowing of customs, even the tension and alternation between the aesthetically satisfying vision of disputes and dispute settlement as an engaging, dramatic on-going process and the

30 Léon Duguit and Hans Kelsen, “Avant-propos” (1926–1927) 1 Revue internationale de la théorie du droit 1, 3: ‘we believe to have serious reasons to be convinced that the only means to satisfy our aspiration to justice and equity is the resigned confidence that there is no other justice than the justice to be found in the positive law of states.’ (Translated by the author. Emphasis added.)

brutally cathartic vision of dispute and dispute settlement as an axe-falling moment\textsuperscript{32} – they are all pregnant answers. But they may not be the only ones. The temporalities of how we think of international law as international law in the first place: they offer an alternative set of ways to measure the passing of time in our efforts to understand the creation of norms of international law.

\textsuperscript{32} Julen Etxabe, \textit{The Experience of Tragic Judgment} (Routledge 2013).