Hume’s Dynamic Coordination and International Law

Carmen E. Pavel

Abstract
At the heart of the tension between state autonomy and international law is the question of whether states should willingly restrict their freedom of action for the sake of international security, human rights, trade, communication, and the environment. David Hume offers surprising insights to answer this question. He argues that the same interests in cooperation arise among individuals as well as states and that their interactions should be regulated by the same principles. Drawing on his model of dynamic coordination, I will reconstruct the Humean case for developing international law into a more robust legal system and also highlight the limitation of Hume’s account of justice for such a reconstructive project. Hume’s lessons are enduring; we must strengthen the essential features of international law that allow states and individuals to reap the benefits of its protections, such as nonoptional rules that articulate a moral minimum, courts with compulsory jurisdiction, and stronger mechanisms of enforcement.

Keywords
David Hume, international law, state sovereignty, rule of law, dynamic coordination

1Department of Political Economy, King’s College London, London, UK

Corresponding Author:
Carmen E. Pavel, Associate Professor, Department of Political Economy, King’s College London, Bush House (North East Wing), 30 Aldwych, London, WC2B 4BG, UK.
Email: carmen.pavel@kcl.ac.uk
Do individuals and states have reason to create and submit to the rules of international law? The tension between sovereign independence and international law is at the heart of recent initiatives by states to withdraw from the Paris Agreement or the International Criminal Court. Yet one might think that states cannot have it both ways; they cannot reap the benefits of a system of international law that limits negative externalities from other states, restricts the use of violence, and ultimately guarantees a sphere of autonomous state action and at the same time claim that international law is optional and their autonomy absolute. Just as individuals cannot benefit from domestic law while at the same time rejecting any interference with their freedom, states cannot be both restricted by international law and remain completely free to act according to the whims of their leaders or citizens. David Hume (1711–1776) offers a surprising resource for this argument, because he claims that the same reasons for adopting and developing a legal system at the domestic level also hold at the international level, even if the content and character of those rules will be different.

In this article I will explore and develop this Humean claim. Section XI of the Treatise on Human Nature on the Law of Nations offers exceptional insights into the similarity and complementarity of domestic and international law. Hume believes that the needs of individuals and states for social coordination are analogous: “The advantages, therefore, of peace, commerce, and mutual succour, make us extend to different kingdoms the same notions of justice, which take place among individuals.” At the domestic level, Hume is famous for providing an account of dynamic coordination as the origin of law. I will show that the evolution of international customs and treaties offers an important study in Humean dynamic coordination.

This exploration takes place in the context of a dominant mood marked by skepticism of the authority of existing international law. International law is said to be in turn inconsequential to state behavior, the product of irrational state action that goes against national interest in a world of anarchy, or detrimental to the project of democratic self-determination. Eric Posner’s string of latest books aims to demonstrate the futility of international law when he says that “International law is . . . endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest.” Due to the inherent inward-looking preferences of states, it is incapable of creating order or solving collective action problems. Therefore we should maintain “a crisp analytic distinction between intrastate cooperation, which is capable of solving major nation-level collective action problems, and interstate cooperation, which is itself subject to collective action problems and thus cannot solve them, except in a very rudimentary fashion.” Posner is part of a new wave of legal scholars influenced by international relations
realists who are skeptical that the world can be explained in terms of anything other than raw power. Offering a remarkable combination of explanatory social science and normative analysis, realists such as Stephen Krasner say that “for realism, the central admonition for policy makers is that they must make prudent judgments. They must assess the consequences of their actions. They can never rely on moral precepts. Applying law and judicial proceedings to international relations reduces the likelihood of prudential calculations.” This means in effect that states are better off ignoring the constraints of international law and can be considered to act irrationally when they take them seriously. But skepticism is not just the purview of realists. More recently, Martha Nussbaum claimed that international law is “leaching sovereignty away from the nation and its institutions, which are chosen by the nation’s people, and turning it over to an international realm that is not decently accountable to people through their own political choices.” In Nussbaum’s view, law must be the product of a democratic community creating rules according to standards of accountability and inclusion that can only be obtained within states. To think law beyond the state is possible and desirable is to imperil state-based projects of democratic self-governance. Other political philosophers and legal scholars have offered a more positive take on the authority and legitimacy of international law and its conformity with principles of justice. Still, these contributions take the existence of international law as a given, and many support it in this special sense of law where adherence to it is largely optional and consent revocable.

Drawing partly on David Hume’s model of dynamic coordination, I will provide a moral justification for the necessity of developing international law into a legal system that has stronger lawlike features. A reconstruction of Hume’s account for international law explains how it can facilitate mutually beneficial cooperation internationally by enhancing the pursuit of peace and of goals shared by various nations. Hume offers both an explanatory and a normative basis for this analysis. The explanatory basis traces the evolution of international law from customs responding to political communities’ immediate interests for communicating and engaging with each other peacefully, to the complex treaties that characterize international law today, which speak to states’ long-term self-interest and the interests of individuals through protections of their rights. The normative basis shows that gains made from stable, fair social norms that ensure the satisfaction of needs and interests are made possible by legal institutions that have rudimentary rule of law features. But there are limitations to Hume’s account, stemming from his inattentiveness to the distinctive demands of recognizing individuals as sources of moral claims.
Thus the rest of the essay will provide, in the first section, an account of the tension between international law and state sovereignty, which is institutionalized in the requirement that the former’s rules and institutions must be subject to express state consent. The next section will develop a Humean justification to support strengthening and expanding the authority of international law over states by focusing on the main functions of a legal system as Hume saw it. Section three describes the evolution of international law as broadly consistent with the Humean logic of dynamic coordination. The final section shows why we need to supplement the Humean framework with a focus on the intrinsic and equal moral worth of individual human beings in order to both give a fuller account of the norms of justice instantiated in international law and to explain the significant development of international human rights law. Despite his lacunae in this area, Hume remains helpful in illuminating why this particular area of international law continues to be weak.

In addition to reconstructing the Humean case for supporting the authority of international law, this article aims more generally to highlight the richness of Hume’s understanding of law and political authority. It thus complements the valuable work produced in the last few decades that recovers his neglected insights on the nature of political authority, justice, game theory, and law.10

International Law and State Consent

International law continues to be suspended between the internal logic of law, which requires a system of uniformly binding rules, and the internal logic of sovereignty, which requires that states are recognized and entrenched as political entities that make their own rules free from interference from the outside.11 International law has some distinct, unusual features for a legal system. One of its most important sources, treaty law, is consensual in the sense that its rules only bind states when they have explicitly agreed to them. Even when states consent to a treaty, they can register reservations to some of its provisions, which subsequently become nonbinding.12 Some states consider authoritative the interpretation of their international obligations provided by their own national courts, even when their interpretation conflicts with that provided by international courts.13 The various international courts and dispute resolution mechanisms such as the International Court of Justice and the International Criminal Court lack compulsory jurisdiction, which makes it easy for states to extricate themselves from accountability when they violate international rules.14 Jus cogens norms, obligations erga omnes, customary law, and the decisions of the Security Council bind states without their consent, but states manage to extricate themselves even from these binding norms and institutions.15
State consent is the cornerstone of international law. The Vienna Convention on the Law of Treaties clearly states in Article 34 that “A treaty does not create either obligations or rights for a third State without its consent.” Each country’s foundational legal rules determine when and under what conditions adherence to international law is possible or desirable. In the United States, for instance, recent constitutional practice has cemented the idea that only constitutionally authorized domestic bodies, such as the president, the legislature, and the supreme court, can decide when to adopt an international treaty, and what its consequences are for domestic law. One might think that this is an unusual position, reflective of the fact that the United States has both the power to situate itself outside of major international treaties with fewer costs and to see such treaties as damaging its national interest, but in fact this position of constitutional supremacy is quite common. “Monist” states such as France and Netherlands do grant automatic authority to international law without the need for implementing legislation, but importantly, only to the treaties to which they explicitly consent.

This leaves plenty of room for both weak and powerful countries to withhold consent to treaties solving collective action problems, such as climate change, or to give consent to rules and withhold consent to institutions tasked with interpreting and applying the rules, such as international courts. This latter feature of international law renders it less costly for states to breach international rules. International law is thus in a rather unique position to bind its subjects (mostly states) only when they agree to its authority, and only in the manner in which the subjects deem appropriate. This is a rather weak form of law, if we can call it law at all. Increasingly, customary law and other nonoptional norms such as jus cogens create obligations for states without their consent, but states continue to guard their sovereignty jealously in the face of these developments.

Why should this matter? At the heart of the question about the proper relationship of national and international law is the more general question of the nature and the purpose of law. Can law be such that adherence to rules is optional, the interpretation is left to the law’s subjects, and the subjects can decide unilaterally they are no longer bound by some or all of the rules? How to best understand the authority of independent states to make rules on their own territories—absolute, or subject to some constrains set by international law? Can international law determine the rights individuals have against their own governments or the governments of other states? Can states be restrained by rules that regulate their interactions with each other? These questions about the nature of law and international law more specifically are questions about the extent of domestic state authority and are therefore foundational questions of political philosophy. Taking inspiration from Hume, I will argue
that the reasons to defend the establishment of laws and legal institutions inside political communities are the same as the reasons to establish it across political communities. If one believes there is a general justification for law, that justification applies to international law as well.

**Hume on International Law**

Hume emerges as an unlikely figure to argue for a justification for domestic and international law based on common principles. He believed that law draws its origin from group conflict: “And so far am I from thinking with some philosophers, that men are utterly incapable of society without government, that I assert the first rudiments of government to arise from quarrels, not among men of the same society, but among those of different societies (emphasis mine).” Conflict creates the necessity of establishing rules of mutual forbearance, and only once those are instituted, the possibility of cooperation emerges. Hume explains further that

the three fundamental rules of justice, the stability of possession, its transference by consent, and the performance of promises, are duties of princes, as well as of subjects. The same interest produces the same effect in both cases. Where possession has no stability, there must be perpetual war. Where property is not transferr’d by consent, there can be no commerce. Where promises are not observ’d, there can be no leagues nor alliances. The advantages, therefore, of peace, commerce, and mutual succour, make us extend to different kingdoms the same notions of justice, which take place among individuals.

The three fundamental rules of justice—namely, the stability of possessions or territories in the case of states, their peaceful transfer, and promise-keeping—create the demand for international rules just as they create the demand for domestic rules. In their absence, war is likely to persist, and the possibility of stable cooperation and growth diminishes or disappears.

Hume was not alone in drawing parallels between the dynamic of interaction among individuals and that of states. As Richard Tuck shows, this was a leitmotif of natural law theorists who searched for the principles of right conduct to govern individuals and nations discoverable by reason. Hugo Grotius, for example, claimed there is no remarkable difference between individuals and states, and for him and Thomas Hobbes, “self-preservation was a paramount principle” of both. Peace was the necessary corollary of self-preservation as a right of both individuals and states, and the way to achieve peace was to follow natural law precepts as an account of universal morality.

Grotius made much of the parallel between individuals and states and of the natural law that applies to both. In his seminal works *Mare Liberum* and
De Jure Belli ac Pacis, he argued that the law of nature directs states, just as much as individuals, to reconcile self-preservation with social life.\textsuperscript{22} The rights of states derive from those of individuals, and Grotius was able to derive a number of principles that should govern the relations among states, such as sovereign independence, mutual toleration, peaceful commercial relations, humanitarian intervention, and the principle of the freedom of the seas, all of which have since exercised an indisputable influence on the development of international law.\textsuperscript{23} Grotius relied on natural law principles as the basis of a proto-contractarian system of rules meant to bind states in their interactions with one another.

Hobbes, like Grotius, saw the analogy between the natural condition of men and the international order but drew a different conclusion, namely that international law is not possible; states have a right to self-preservation just as individuals do, but in the absence of a state to preside over all states—that is, a global leviathan—states cannot overcome the dynamics of perpetual conflict of the state of nature in international politics. More importantly, he saw binding rules on states as incompatible with principles of absolute sovereignty.\textsuperscript{24} There is not, and there cannot be, a global social contract to create international law. In the anarchy of international politics, only natural law principles apply, and they do so weakly, just as they do among individuals in the state of nature. Inspired by Grotius and Hobbes, it was Immanuel Kant who provided the most ambitious contractarian proposal for international cooperation in the form of a confederation of free states. However, the rules envisioned as the foundation of this confederation were limited to the preservation of peace and the creation of the conditions of universal hospitality.\textsuperscript{25}

Hume notoriously rejected both the social contract and natural law as explanatory and normative frameworks for law and social cooperation. He claimed that social cooperation can exist without government and that we cannot understand what rules people develop by studying their nature in the abstract.\textsuperscript{26} On Hume’s view, neither rules nor their interpretation rest on a realm of objective, shared principles waiting to be discovered and applied. Instead, rules come about in a contingent and somewhat arbitrary fashion, and they depend on specific patterns of human interaction. Hume proposes a very different picture of human sociability; one that I will argue provides a better empirical and explanatory account of the evolution of international law and of its limitations from the standpoint of justice. Hume’s alternative account of the evolution of social rules, including law, is that they develop gradually, through a process of dynamic coordination, which allows individuals to develop common interests even when they are initially stuck in conflict.\textsuperscript{27}
Hume departed significantly from the idea of morality discoverable by reason alone, a feature common to natural law theories. Reason is limited when solutions to one coordination problem are many; they emerge haphazardly and grow in a path-dependent manner out of previous conventions to provide answers to new problems. But Hume agreed with natural law theorists that conventions will not be completely arbitrary; they will follow a logic internal to the nature of humans as beings with certain needs, interests, and proclivities, such as the inclination to favor one’s own self-preservation and interests, but also to sympathetically engage the interests and needs of other fellow humans. And these features are common to the evolution of international law.

If we take seriously Hume’s claim that the problems of cooperation are similar among individuals and states, we need to ask whether a general justification for law among individuals can transfer to international law. One of the justifications that transfers easily is that law often originates out of conflict, which is a condition between individuals as well as states: “and indeed this assertion is so far just, that different nations, as well as private persons, require mutual assistance; at the same time that their selfishness and ambition are perpetual sources of war and discord.” The pervasiveness of war served as the rationale for a system of international rules for the early scholars of international law just as it did for Hume. The Spanish scholastics Francisco de Vitoria and Francisco Suarez sought to discover general principles for regulating the use of violence. Hugo Grotius and Samuel Pufendorf, both of whom exercised perhaps the most lasting influence on international law, count among their main contributions works on the law of war and peace.

This preoccupation with war reflected the times in which these thinkers lived. War between monarchical powers was a regular means of solving disagreements—the human and economic costs were often catastrophic—and erased the gains made by stable, developed internal legal systems. While these early theorists of international law provided general rules and principles for regulating war, they talk much less about the problem John Locke identified—namely, how to restrict the partiality of legal subjects, in this case states. Having international rules to regulate the conduct of war is not sufficient if states are left to interpret those rules themselves. Indeed, Grotius’s insistence that sovereign states ought to be trusted to interpret the indeterminate clauses of their contracts on their own, because their sense of justice and universal right will lead them to converge on their interpretations, or at least to remain constrained in judging how far their authority extends, should strike us as naive. It is a lacuna in theorizing about the necessity of international law, both in the writings of these earlier thinkers...
and more recently, that there is so little emphasis on common, authoritative institutions for the settlement of legal disputes and the interpretation of the common rules of behavior.

War was not just a problem for European monarchical states. R. P. Anand, a scholar prominent in Third World Approaches to International Law (TWAIL), criticizes the Eurocentrism of the narratives that led to the creation of international law. He argues that law grows slowly to fulfill the needs of people locally and “the needs of men organized in separate communities” internationally.\(^{35}\) International law responds to a universal need for stability and predictability. Rules for governing the interaction of different political communities do not have an exclusive European pedigree. In some form or other, rules for regulating war, the exchange of diplomatic representatives, the treatment of foreigners, and the regulation of trade were present in ancient civilizations around the world, from China, India, Egypt, Islamic states, the Roman Empire, and premodern Europe. These insights are recovered by new histories of international law that aim to move beyond the Eurocentrism of earlier approaches.\(^{36}\)

But if Hume rejected natural law and the social contract, what did he leave in their place to account for the origin and moral authority of law? Hume’s most important contribution to political philosophy is arguably his account of dynamic coordination—namely, the idea that we learn how to live peacefully with other people by adjusting our behavior to theirs.\(^{37}\) His story of the evolution of law offers a unique framework for understanding the evolution of international law as well. Hume thought human beings first develop formal and informal social conventions that prescribe rules for how they should interact in small communities. The recognition of the role of property rules for social peace was fundamental. People come to gradually recognize the importance of reciprocal respect for other people’s property: “the rule concerning the stability of possession [is] deriv’d from human conventions, it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it.”\(^{38}\) Rules such as respect for possessions are shaped by evolving common interests into what Hume calls conventions.

At first, these conventions are sustained by mutual sympathy and reciprocity among kin. Conventions in small communities can create a sense of order but do not take us very far. We still inhabit a state that Michael Frazer describes as “lawless clannishness,” where we can be secure inside our communities but find ourselves constantly under threat from the outside.\(^{39}\) We trade war for peace by extending prevailing conventions or negotiating new ones among an increasing number of people who are now part of an enlarged circle of mutual sympathy and reciprocity. The conventions themselves
deepen and become more stable and lawlike, as both the original participants and the new ones can grasp the long-term benefits of social coordination through rules.40

Importantly, these conventions that engender peace and cooperation precede government. Thus Hume offered a rival account of politics, and ultimately of law, to that of Hobbes, based on human sociability, which precedes government and guarantees the foundation for it.41 Conventions precede government, and as they multiply and change dynamically to include greater numbers of people and answers to new problems of social cooperation, we also enlarge our sympathy toward others. Once social practices are established, we expect other people to comply with them and we develop a sense of approbation and disapprobation for actions that fall outside of those practices and are injurious to those in the enlarged circle.42 Conventions grow independently of our moral approbation or disapprobation but help cultivate it. They instill the habits of mind and virtues that make it possible for us to consider the interest of increasing numbers of individuals.43 Against natural law theorists, Hume argues that our sense of justice is itself developed by conventions and does not come from unsocialized reflection: “that those impressions, which give rise to this sense of justice, are not natural to the mind of man, but arise from artifice and human conventions.”44 Justice is itself a kind of convention: “thus justice establishes itself by a kind of convention or agreement; that is, by a sense of interest, suppos’d to be common to all, and where every single act is perform’d in expectation that others are to perform the like.”45 Justice for Hume consists not only in doing what is right in some abstruse, abstract sense. What is right is determined by other people’s actions and expectations, and mutual reliance on their ability to follow rules makes cooperation possible.

Social conventions evolve from small communities to larger ones, and both individual and social learning takes place. Individuals come to reconsider their self-interest in a way that incorporates to a growing extent the interests of others. Communities sometimes accidentally, sometimes deliberately, stumble upon solutions to a wide range of coordination and cooperation problems, such as language, traffic rules, units of measurements, money, and rules for property and contracts. Self-interest plays a key role in creating and maintaining those rules. Yet according to Hume, self-interest makes rules vulnerable as well, because people will often prefer a trivial advantage they can obtain by breaking them to the observance of justice that they make possible. But social cooperation also teaches us that others who follow the law reap long-term benefits, and they serve as a model for us to refrain from pursuing short-sighted self-interest. Hume says:
This is the reason why men so often act in contradiction to their known interest; and in particular why they prefer any trivial advantage, that is present, to the maintenance of order in society, which so much depends on the observance of justice. The consequences of every breach of equity seem to lie very remote, and are not able to counter-ballance any immediate advantage, that may be reap’d from it. Your example both pushes me forward in this way by imitation, and also affords me a new reason for any breach of equity, by shewing me, that I should be the cully of my integrity, if I alone shou’d impose on myself a severe restraint amidst the licentiousness of others.46

Learning about the benefits of social cooperation enables us to reflectively correct our sense of self-interest as we develop an interest in cooperation itself.47 Thus while Posner may be right that international law springs from the self-interest of states, just as law more generally springs from the self-interest of individuals, it does not follow that it cannot act as a constraint. Legal subjects, when appropriately socialized, develop an interest in maintaining the rules quite irrespective of the latter’s effect on their immediate self-interest.

While law precedes government, legal conventions are made more effective, and their benefits extended to all by institutionalized systems of rules through laws made by governments, aided by their impartial application by magistrates.48 They provide additional reasons for individuals, either via uniform sanctions or simply due to the widespread obedience that political authority inspires, to restrain their natural partiality and to refrain from pursuing short-sighted self-interest at the expense of their long-term interest and the common good. In addition, general conventions also facilitate common projects. Two neighbors can build a dam together, but hundreds or thousands of individuals face severe collective action problems in the absence of general rules.49 Communities contain people of complementary skills who can cooperate and create more and better together. And it is the internal security of the society that makes it all possible.50

Conventions of authority are crucial in Hume’s view for stability and peace. Andrew Sabl explains persuasively the reason for their prominence in Hume’s thinking. Conventions of authority are conventions about how power changes hands—who is entitled to exercise it, based on which rules, and what are the limits of that power. They facilitated peaceful transition from one ruler to the next and orderly, incremental changes in the rules themselves. They protect us from “the risk of civil war on the one hand and the excesses of arbitrary power on the other.”51 To mediate political compromises, conventions of authority must precede them temporarily and thus rest outside the normal space of politics.52 But conventions of authority tend to acquire their legitimacy only after they have proven successful at mediating
political compromise, even if their origins predate the compromises they solve. Conventions of authority must be especially stable since they serve the most basic ends of security and peace.

If conventions of authority are essential, so are the substantive and formal characteristics of the law. Law’s main purpose is to create the regularity that helps us orient ourselves to others, plan for the future, and reap the fruits of our plans. Property and contracts are the result of uniform, binding conventions that maintain stability of possessions, and the performance of promises. Therefore, laws related to property and contracts are fundamental to any legal system, and Hume equates their observance with justice.

In addition to substantive requirements, a legal system must meet some formal requirements as well. The formal requirements take the form of rule of law features. Hume says that the extensive benefits of social cooperation are better achieved by generally applicable laws, which are stable in time and across circumstances, and are independent of social class. They are rigid, in the sense that they do not make too much room for the discretionary judgment of the magistrate. They are applied impartially and uniformly, including to those that make and apply law. They are public. Punishing people for breaking secret laws is revenge, not justice. Only law constrained by the rule of law can perform its function of preventing conflict and protecting the interests of the participants in social cooperation.

It is this account of dynamic coordination, coupled with the insights in Section XI of the Treatise on Human Nature on the Law of Nations, which offers a distinctive Humean account of the similarity and the complementarity of domestic and international law. Hume believes that the needs of individual persons and states for social coordination are analogous:

When men have found by experience, that ‘tis impossible to subsist without society, and that ‘tis impossible to maintain society, while they give free course to their appetites; so urgent an interest quickly restrains their actions, and imposes an obligation to observe those rules, which we call the laws of justice. . . . The same natural obligation of interest takes place among independent kingdoms, and gives rise to the same morality; so that no one of ever so corrupt morals will approve of a prince, who voluntarily, and of his own accord, breaks his word, or violates any treaty.

The interaction of individuals and kingdoms follows the same logic and generates a similar dynamic. Individuals and states share the same interests in peace and justice and the same morality. It is unjust for a person to break her promises just as it is for a prince. And it is unjust of a state to usurp another’s territory just as it is for individuals to violate property rights. Therefore, states and individuals share the same general principles to regulate their conduct.
Yet Hume sees differences too. He believes that those differences mean that individuals and nations will regulate themselves by different rules, although aiming at the same general principles. The difference does not consist only in the different substance of the rules but also in the different force with which they apply: “tho’ the morality of princes has the same extent, yet it has not the same force as that of private persons, and may lawfully be transgress’d from a more trivial motive.” What could possibly be the basis of the assertion that states can break their agreements more easily? The answer is to be found on the different degrees of necessity domestic and international law respond to:

But here we may observe, that tho’ the intercourse of different states be advantageous, and even sometimes necessary, yet it is not so necessary nor advantageous as that among individuals, without which ‘tis utterly impossible for human nature ever to subsist. Since, therefore, the natural obligation to justice, among different states, is not so strong as among individuals, the moral obligation, which arises from it, must partake of its weakness; and we must necessarily give a greater indulgence to a prince or minister, who deceives another; than to a private gentleman, who breaks his word of honour.

In other words, Hume does not believe that states breaking their promises to each other will have the same devastating consequences as individuals doing the same. He is in one sense correct. Once we have a certain level of domestic stability through laws that are widely respected, the consequences of breaking a promise to some distant and little-known prince may be low. But in another way, Hume seriously underestimates the extent to which international peace and stability, and the rules respecting the territorial integrity of states, operate as preconditions for the existence of domestic legal systems. In the case of constant war with neighboring countries, the gains in stability and prosperity made by state-based legal systems are likely to stagnate and even to reverse over time.

Hume insists on the opposite view. In a passage in The Enquiry Concerning the Principles of Morals, he says: “here is the difference between kingdoms and individuals. Human nature cannot, by any means, subsist, without the association of individuals; and that association never could have place, were no regard paid to the laws of equity and justice. . . . But nations can subsist without intercourse.” Yet Hume is overstating his case. He may be right that at different historical times communities could have subsisted without relying on each other much for economic resources, but that time of minimal subsistence and economic autarchy has long passed. A different interpretation of Hume is that he is simply making a conceptual point. Human sociability is inconceivable without law, while states are conceivable without
international law. Although we can grant this conceptual point, we must resist taking it too far. Hume is simply incorrect if we take on board the current reality of intense interaction among separate political communities, in which states need to create rules in order to resolve territorial disputes, solve collective action problems such as climate change, divide air transport routes, etc. The large numbers of countries in existence today routinely cooperate over the division of border resources such as waterways, the management of negative externalities they inflict on each other, and the necessity of regular diplomatic relations, all of which require rule-based interaction.

One might even argue that the failures or inexistence of rules that limit the use of force, resolve conflict over borders and resources, and solve problems such as global warming are just as large threats to human survival, or even greater, than threats to the association of individuals in well-regulated political communities. Some of these threats, like the possibility of destruction brought about by nuclear technology, or climate change, are new, and Hume could not have anticipated them. But he did understand that conventions arise in response to contingent and unpredictable forces that shape how human beings interact, and the importance of international rules is more acute now than it was in Hume’s time. Therefore, Hume is overstating the disanalogy, and acknowledging this shortcoming in Hume’s theory enables us to give a stronger rather than weaker justification for developing a system of international law. Although Hume lacked some clarity in his account of the necessity of developing a system of international law, he provides a sound basis on which to reconstruct a case for international law that is as strong, if not stronger, than the case for domestic law.

Hume’s account of dynamic coordination will help us see, in the next section, why Hobbes’s skepticism about the possibility of a system of international law is not compelling. Hobbes thought law is not possible without a government to coordinate individual action and enforce the rules. But Hume established the possibility of law without government via the evolution of conventions among small-scale communities, and a similar evolution can be observed via customs and treaties in international law in the absence of a global Leviathan.

**A Humean Model of Dynamic Coordination in International Law**

I have made the case that Hume’s account of dynamic coordination gives us a different and much richer perspective on the necessity of developing a robust system of rules at the international level, one that matches more closely the evolution of international law and enables us to observe both the
limitations of this evolution as well as understand its possibilities. Indeed, the point of this section is to show precisely why the Humean account of dynamic coordination can explain the slow evolution of international law from customary law to the complex formal treaties and institutional arrangements we see today, which a contractualist natural law–inspired view cannot. The division of air traffic routes or the creation of nuclear nonproliferation treaties rely on technologies that could hardly be anticipated during the heyday of modern social contract theories and that create challenges for interstate interactions with their own demands for regulation.

International law’s genealogy offers a study in dynamic coordination. Dynamic coordination explains the incremental, unpredictable, and contingent development of international conventions from custom to formal treaties and institutions tasked with their interpretation and application. Customary international norms allowed states to coordinate expectations in areas essential to their interactions, such as the exchanging of ambassadors, the treatment of each other’s citizens, and the regulation of trade. Hume already saw the fruits of that coordination and observed that what we call “the laws of nations” comprise “the sacredness of the persons of ambassadors, the declaration of war, the abstaining from poison’d arms, with other duties of that kind, which are evidently calculated for the commerce, that is peculiar to different societies.” Customary norms have created the predictability and stability countries required in the absence of formal treaties, evolving from bilateral agreements to the rule we see operating in international law today.

International law has moved more decisively past the lawless clannishness of Hume’s basic conventions with the creation of formal multilateral treaties. Today it contains treaties whose role is to balance conflicting interests and assign rights of way among multiple states so that disagreements are anticipated and resolved and large-scale cooperation is made possible. The law of the sea offers a great example of lawlike cooperation. States with commercial fleets have sought wide access to international waters, while coastal states have wanted to restrict such access along their shores. And various states have demanded access to the exploitation of the same ocean resources. First through a series of customary norms, and more recently thought the United Nations Convention on the Law of the Sea (UNCLOS - 1982), the law of the sea now regulates, among others, control over coastal waters, the allocation of fishing rights, pollution, criminal jurisdiction, seabed mining, marine scientific research, and passage through straits for shipping and military vessels.

Hume’s account of dynamic cooperation is based on an evolved sense of self-interest. The coordination function of law is accomplished by treaties that serve the states’ immediate and converging interests. States can coordinate
easily in situations in which they prefer to create a mutually binding rule but may have different views about which rule is the best. A good example of a solution to a coordination problem is the treaty creating the 1865 International Telegraphic Union, by which states agreed on the type of equipment and the language used to transmit telegraphic messages. Once the treaty helps states coordinate on a language and other rules for communicating, they have strong incentives to comply because they have little to gain by defecting. The treaty selects rules as equilibrium points, and the more states join the treaty, the more it becomes the dominant equilibrium. Countless treaties like this have been adopted since mid-nineteenth century, but they fade from view because they run smoothly, compliance rates are extremely high, and there is little incentive to cheat. A modern-day example is international conventions that regulate aircraft travel and airspace routes. The Convention on International Civil Aviation (1944), also known as the Chicago Convention, is a foundational document, amended repeatedly in light of advances in technology and learning about what rules work best.70

However, states find themselves in a variety of situations in which their short-term interest and their enlightened, long-term interest may be at odds. In these contexts, states have incentives to both create rules and to defect from them, and these incentives interact in complex ways. This is why tremendous progress in certain areas of international law, such as environmental law, human rights, war-making, and economic law, coexists with violations of the rules by states. Because it is still a primitive legal system in many respects, one can see the operation of short-sighed self-interest in the often-hypocritical insistence of states like the United States, Russia, and China that other states follow international law but that its rules do not necessarily apply to them. Or in the unwillingness to create strong enforcement mechanisms for binding rules for fear that their sovereign authority will be curtailed. Or in the many states’ unwillingness to join or make effective human rights treaties, or the International Criminal Court, for fear that their own citizens or officials will be targeted for prosecution.

Perhaps the most difficult area for international cooperation is the case of human rights protection. Although treaties in this area have proliferated, states gain little by complying, and treaties often tie the hands of the political elites for whom joining such treaties is costly. Still, strong, authoritative law can transform the incentives of states to cooperate in the process of having states deliberate about the appropriate rules.71 The law-making process itself increases incentives for compliance and cooperation by transforming the identities and interests of states themselves and by creating conventions of authority that facilitate the adoption of prolegal attitudes in the law’s subjects. International legal rules also decrease incentives for defection due to
sanctions that raise the cost of non-compliance, and in no small measure due to mechanisms such as reputation, reciprocity, and retaliation.\textsuperscript{72}

Therefore, despite significant prevarication on the parts of states about the value and necessity of respecting existing rules and creating stronger mechanisms of enforcement, we see states engaging in a process of converging on basic principles of justice through law creation that mimics that of individuals in the domestic context. For Hume, justice develops among individuals as an artificial virtue, aided by processes of socialization and education over long periods of time. But we now have good empirical evidence from international relations scholars, particularly those employing a social constructivist lens, that these processes of socialization and education take place at the international level as well.

Constructivists show that processes of interaction affect how states view themselves and their relationship to other states, and at the same time transform the nature of international anarchy.\textsuperscript{73} Dynamic coordination allows states to build norms of trust and cooperation and redefine their identities in response to each other’s action. Norm entrepreneurs (states, NGOs, organizations) act as prime movers and like-minded states contribute to norm diffusion.\textsuperscript{74} For example, we have good evidence that the norms of individual accountability for large scale human rights abuses have been changing in the past thirty years, from a norm of sovereign immunity which precluded prosecutions of heads of states and other officials, to one in which accountability becomes more common and the norms of sovereign immunity ceases to be absolute.\textsuperscript{75} The creation of various ad-hoc criminal tribunals but also domestic accountability mechanism such as universal jurisdiction rules have culminated in the creation of the International Criminal Court, whose main role is to institute norms of criminal accountability on a larger scale.\textsuperscript{76}

Norms of accountability are emerging even in the case of corruption, with states and international organizations agreeing on measures to capture the misbegotten wealth of political leaders hidden in foreign accounts, redirecting assets to development purposes, and facilitating accountability to victimized populations through reports published by NGOs that investigate in detail financial wrongdoing by elites.\textsuperscript{77} But evidence of processes of socialization go back a lot farther than that. Martha Finnemore has demonstrated that many states have developed specialized bureaucracies in charge of scientific research in the 1950s and 1960s in light of UNESCO’s efforts to get states to consider their positive consequences for economic development and security.\textsuperscript{78} States were persuaded to redefine the role of science with respect to their national interests. Nina Tannenwald has shown that states have developed strong norms around the nonuse of nuclear weapons. According to Tannenwald, the stigmatization of nuclear weapons as unacceptable weapons
of mass destruction and their nonuse even in cases where there was no fear of retaliation is indeed one of the most remarkable phenomena in the nuclear age.79

Those skeptical of the potential of states to develop common interests and act on them to create international law have a difficult time explaining why states join treaties that are costly and tie their hands. The range of environmental conventions created in the 1970s and 1980s, which register a high level of compliance, are not an anomaly but a step in the process toward states converging on principles of environmental justice. Among them, the 1973 Convention on International Trade in Endangered Species, the 1973 Convention for the Prevention of Pollution from Ships, and the 1985 Convention for the Protection of the Ozone Layer are evidence of successful collective action in a world in which collective action was considered impossible by those who see the world in terms of power politics alone.80 States are still far away from solving the most important environmental problem of our times—that of climate change—but in this respect, socialization has not advanced far enough to make states reconsider their interests in this area.

Hume anticipated one of the main challenges of international law today—to persuade states to forgo short-sighted self-interest and adopt a more consistent commitment to international rules for the sake of the long-term benefits of an international legal order for all. States like the United States struggle with the conflicting impulse of short-term flouting of the rules and the insistence that it is in everyone’s interest to follow them in the long term. Its dismissal of the judgment of the International Court of Justice in Sanchez Llama v Oregon (Avena and Other Mexican Nationals, Mexico v. United States of America, ICJ 2004) is a symptom of the former. Its insistence that China follow the decision of the arbitration court in the South China Sea dispute, which found China in violation of the UNCLOS, is an example of the latter.81

Hume helps us both understand and defend the subsequent dramatic development of international law. He defended substantive rules at the international level to ensure the stability of possessions, their transfer by consent, and the keeping of promises. He anticipated states becoming socialized in new conventions of international cooperation. Respecting these conventions is a key mechanism whereby nations have managed to avert constant war, even if war inevitably breaks out at times. While Hume does not explicitly defend international decision-making bodies (they did not exist during his time), his theory gives us reasons to understand their value. This evolutionary account enables us to identify important constitutive moments in the development of international law as we see it today, from customary rules regarding the exchange of diplomatic representatives to formal agreements as
treaties that create dense networks of institutions of adjudication and enforcement, such as the UN Charter or the World Trade Organization.

The lesson we must draw from Hume is not just that rules are needed to address problems of cooperation among states that have a similar structure to problems of cooperation among individuals. It is rather that rules governing relations among states become effective when they are institutionalized, benefit from stable conventions of authority, are applied generally and impartially, and are interpreted by courts insulated from political persuasion. To conclude, for Hume as well as for early scholars of international law the problems of cooperation among individuals and cooperation among states are similar and law is meant to provide solutions for both. This insight is worth recovering in support of the further strengthening of international law toward a system with stronger lawlike features.

The Limits of the Humean Account

It is important to note however that there are important limitations to Hume’s account of justice at the domestic level, and these limitations will be reproduced in a reconstruction of his argument in support of international law. The main problem with Hume’s account of justice is that it is too narrow, consisting mostly of rules regarding property and contracts. A proper account of justice goes beyond the Humean one to include valuing individuals as sources of moral claims. Law performs a unique social function by making sure people are given their due as sources of moral claims. And law must fulfill this function partly (though not wholly) independent of the consequences for peace, property, and social cooperation. Social norms that evolve and spread informally could go some way toward correcting injustice, but it is public laws that ensure the general and impartial standards about the appropriate ways of treating fellow human beings.

The “rights protecting” function of law has a more convoluted relationship to self-interest. Self-interest properly understood plays a key role in creating and maintaining legal rules. Individuals engage in the process of creating legal rules because they can reap long-term benefits from peace, stability, and extended social cooperation. But rights protection is different. Individuals and groups in a privileged position to make the law often benefit from harming and oppressing vulnerable individuals and minorities, and social peace may rest on the oppressed not insisting on their demands for justice. While the conflict-preventing and coordinating functions of law are mostly a result of self-regarding reasons, the rights-promoting function of law requires more than self-interest. It requires other-regarding reasons—namely, to regard other individuals as having moral worth and as being sources of moral claims on us.
Human rights theorists talk about rights as norms that help to protect all people everywhere from severe political, legal, and social abuses. These norms are made effective when they are incorporated in the actual legal systems of national and international law. International human rights law defines states responsibilities to their own citizens and acts as a surrogate when states are unable to protect the rights of their citizens or are themselves the primary violators. Situations of failed states, refugees, and stateless individuals are additional, distinctive concerns of international law.

If Hume is right about the evolution of the law, historically speaking, we would expect this function of law to become entrenched last in developed legal systems. Hume was not directly concerned with the protection of vulnerable individuals and minorities, and this protection cannot be explained solely in terms of a coordination or cooperation. But Hume was right that the coordinative function of law typically gets off the ground first, because it speaks directly to the self-interest of all agents in society. The protection of the weak and vulnerable is adopted after law as a system of social coordination acquires social legitimacy and the rule of law takes shape as a feature of that system. Only subsequently is the rule of law used in the service of protecting rights impartially and to ensure that law-making and law-applying institutions are limited in their exercise of power.

The commitment to the minimal demands of justice for protecting individuals as such has been the slowest and costliest victory in domestic law, and it went hand in hand with strengthening the rule of law—the idea that rules must be applied impartially, to all, including political officials or powerful elites; that they must be publicized and that they must be clear, stable, and just; that the process by which laws are enacted, administered, and enforced is accessible, fair, and efficient.

Massive state failures regarding states’ protection of their citizens’ basic rights leave scope for international law to cover large gaps in governance. International law ensures an additional basis, however minimal, for rights protection for those individuals that fall outside of the scope of government protection, either because their county’s legal system explicitly excludes them or because their county’s legal system fails to function at all, as in the case of failed states. Jus cogens norms are norms that protect individuals against some of the most serious violations of their rights and are a good starting point for inserting minimal standards of justice into the international legal system. The creation of the International Criminal Court is a step in that direction.

As Steven Ratner persuasively shows, international law already conforms to a “thin” notion of justice by having rules that respect, in the sense that they do not interfere, with basic rights. The norms of sovereign equality,
noninterference into the affairs of other states, and the ban on the use of force are important to an understanding of justice as rights protection at the international level. Absent such norms, we would see even more trampling on individual and group rights and the undermining of the peace that makes such rights protection possible. Timidly, international law attempts to incorporate a more substantive notion of justice by adopting more demanding obligations for states to protect, promote, and enforce their citizen’s rights and by creating international institutions with the jurisdiction to adjudicate claims about noncompliance. But it remains the case that many of these obligations are weak and only apply to states that voluntarily undertake obligations associated with human rights treaties.

Conclusion

Drawing on Hume, I have argued that there is a general justification for developing international law into an authoritative, nonoptional system of rules, and this justification shares many features in common with justifications for domestic law. If such justification is available, states should be willing to create rules and institutions in the international sphere with greater force and authority than they are willing to do so now. At the very least, international law should contain rules regulating the use of violence, the protection of states’ territory and resources, minimal benchmarks for individual rights, and compulsory jurisdiction for courts to interpret these rules and adjudicate disagreements arising out of their implementation by states.

Besides giving us a fuller measure of the richness and applicability of Hume’s conception of law, the general lesson of this reconstruction of Hume’s account of the necessity of international law is the following. Making international law more lawlike does not entail reproducing all or even most of the features of effective domestic legal systems. Nonetheless, it does entail reproducing the minimal features that enable its subjects to reap the benefits of peaceful cooperation, such as some obligatory rules that apply to all, regardless of choice—that is, restrictions on the free use of violence, courts with compulsory jurisdiction, and rights protections for individuals and states. These features enable states to adjust their behavior to the actions of others, plan for the future, engage in cooperative activities, and solve collective action and public goods problems.

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ORCID iD
Carmen E. Pavel https://orcid.org/0000-0001-6683-0638

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**Author Biography**

Carmen E. Pavel is an associate professor at King’s College London (KCL). She held postdoctoral positions at the University of Virginia and University of Arizona and served as the first director of the PPE program at KCL. Her research interests include international justice and international law, liberal theory and contemporary challenges to it, and ethics and public policy. Her work has appeared in *Economics and Philosophy, Law and Philosophy*, and *Political Studies*, among others. She published *Divided Sovereignty: International Institutions and the Limits of State Sovereignty* with Oxford University Press in 2015 and has edited the *Oxford Handbook of Freedom* (with David Schmidtz), which was published in 2018.