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# Temporary International Legal Regimes as Frames for Permanent Ones

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# Chapter 3

## Temporary International Legal Regimes as Frames for Permanent Ones

Jean Galbraith

**Abstract** This chapter explores the footprint that temporary international legal regimes can leave on international law. Drawing on four different theories of state behaviour, it considers how temporary regimes can shape future permanent regimes. Under a rational design approach, temporary legal regimes influence future permanent regimes largely because they provide valuable experiences from which state actors learn. Under other theories of behaviour—historical institutionalism, constructivism, and behavioural international law—temporary legal regimes can have even more influence on permanent ones. Although these other three theories have important differences, all suggest that temporary regimes strongly shape the real and perceived possibilities for future permanent design choices. This chapter then looks at how these different theoretical approaches play out in case studies in refugee law, international criminal law, and international environmental law. While these case studies do not solely support any one theoretical account, collectively they demonstrate that temporary regimes can have outsized influence on permanent ones. This in turn has important implications for negotiators involved in regime design.

**Keywords** Temporary international legal regimes • Rational design • Historical institutionalism • Constructivism • Behavioural international law

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### 3.1 Introduction

In a sense, all international legal regimes are temporary—or can be. The failure of the League of Nations and the ‘Permanent’ Court of International Justice drove home the reality that all international organizations can end, even those intended to last forever. Nonetheless, states approach the creation of different international regimes with different intentions as to their permanence. Sometimes states build regimes that are clearly temporary, either because they have an explicitly limited duration or because they deal with a discrete, temporally bounded problem. In these instances, the decisions to make regimes that are temporary are deliberate, and often bargained-for consequences of the negotiating processes.

But interestingly, these temporary regimes often have great influence on the permanent shape of international law. They frequently serve as the blueprints for permanent international legal regimes. Sometimes this is because states choose to make temporary regimes permanent, as when the 1951 Refugee Convention, which was originally applicable only to previously displaced refugees, was broadened by the 1967 Protocol to cover all refugee crises. And sometimes this is because states choose to use temporary regimes as models for permanent regimes, as the ad hoc international criminal tribunals served as models for the International Criminal Court (ICC).

This chapter considers how temporary regimes can shape later, permanent ones. It engages with the puzzle of why, after initially insisting on temporary regimes, states later become willing to develop permanent ones along the same lines. To do so, it draws on four theories of behaviour found in the international law and

international relations literature: rational design theory, historical institutionalism, constructivism, and behavioural international law.<sup>1</sup>

Under each of these theories, there are conditions under which states would choose to design permanent regimes based on temporary ones. But these conditions differ importantly across the different theories. From a rational design perspective, temporary regimes influence states' later design choices largely because states learn from their experiences with temporary regimes and this learning shapes their decision whether to build a permanent regime. As a leading scholar of this approach puts it, states 'may choose to make their initial agreement of finite duration, and then ... use the information they have gained through their experience under the agreement to realign the division of gains in the renegotiated agreement.'<sup>2</sup>

The other three theories mentioned—historical institutionalism, constructivism, and behavioural international law—suggest an even greater effect of temporary regimes on permanent ones. Under each of these approaches, temporary regimes shape the real and perceived possibilities for future design choices in ways that go well beyond the merits of their content. Put broadly, a temporary regime serves to frame the debate around the creation of a permanent regime. The permanent regime can differ from the temporary one, but such departures require vision and effort to obtain.

While all three of these approaches would predict some degree of framing, they differ among themselves as to why framing occurs and how strong its effects are. From a historical institutionalist approach, framing occurs primarily because of path dependency: the existence of a temporary regime considerably heightens the costs of making different design choices for a later, permanent regime. From a constructivist approach, by contrast, framing operates mainly because the temporary regime has changed norms and preferences. Finally, from a behavioural international law approach, framing operates largely because actors involved in the negotiations for the permanent regime have a bias in favour of preserving the *status quo*, as represented by the temporary regime.

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<sup>1</sup> My discussion of these theories is necessarily brief and omits many nuances. For one thing, scholars within each approach have different views of the contours of the approach, but I only identify what I view as the most conventional accounts of each approach. Additionally, some mechanisms can be common to multiple theories, but here I describe these mechanisms only under the theory which I view as most emphasizing them. To give a few examples, rational design scholars might acknowledge the importance of transaction costs (which I describe under historical institutionalism); historical institutionalists and constructivists have close connections and may further consider their approaches supported by behavioural mechanisms; and accounts drawn from behavioral economics often use rational design approaches as a starting point. Ryan Goodman and Derek Jinks, for example, posit a theory of state behaviour that draws on both constructivist and behavioural principles. Goodman and Jinks 2004, at 626–630. Finally, these theories are not the only accounts of state behaviour. But they cover a considerable swathe of the field and thus are helpful in conceptualizing the influence of temporary regimes.

<sup>2</sup> Koremenos 2001, at 293.

After discussing what these four different theories of state behaviour would suggest about the relationship between temporary regimes and permanent ones, this chapter considers some case studies of initially temporary regimes and their relationship to later permanent regimes. Specifically, it looks at developments in refugee law, international criminal law, and climate change negotiations and discusses them in light of the four theories. Although the conclusions that can be drawn from a few case studies are necessarily limited, the case studies suggest that temporary international legal regimes serve as frames for later permanent ones in ways that go beyond what a rational design theory would predict, and that each of the other approaches may have something to contribute as to why. The chapter concludes by considering the implications of these findings for those involved in international regime design. Most importantly, these findings suggest that deliberately short-term solutions may sometimes be the best way to develop strong, long-term global governance mechanisms.

The themes explored here are broad ones, and the chapter necessarily leaves many issues unaddressed. At the level of theory, it treats the four theories of state behaviour discussed here with a very broad brush and provides little in the way of background. At the level of application, it is similarly brief in its consideration of the three case studies offered. Finally, with regard to content, it focuses only on instances where legally binding temporary regimes give rise to legally binding permanent regimes. It does not discuss soft law regimes or regional regimes, and it barely touches on the important question of how regimes evolve informally. The central argument of this chapter—that temporary regimes may have outsized effects on the permanent shape of international law—is one that may also have implications for these other contexts.

## **3.2 Why Use Temporary International Legal Regimes?**

This section considers why states sometimes choose to create international legal regimes that are temporary rather than permanent. It suggests that the temporary nature of these regimes can encourage states to make stronger commitments than they would make to permanent regimes.

### ***3.2.1 Factors Favouring the Use of Temporary Regimes***

Broadly speaking, there are two main reasons states might create a temporary regime rather than a permanent one. First, states might prefer a temporary regime due to the particular context at issue. These state preferences might stem from rational interests, as a rational design approach would suggest, or might reflect a mixture of rational calculations and biases on the part of relevant actors, as a

behavioural international law approach would suggest.<sup>3</sup> Second, the process for creating a temporary regime may be less cumbersome than the process for creating a permanent one.

A rational design approach to state behaviour provides a useful starting point for thinking about when and why states might prefer temporary regimes. As Barbara Koremenos and co-authors explain, the basic premise underlying this approach is that ‘states construct and shape institutions to advance their goals’ and that the use of different institutional designs for different regimes is ‘the result of rational, purposive interactions among states and other international actors to solve specific problems.’<sup>4</sup> Temporality is one such design feature, and so states will sometimes have good reason to build temporary regimes rather than permanent ones.<sup>5</sup>

One reason states might prefer a temporary regime is if they are addressing what they perceive as a discrete and short-term need. Crises arising from humanitarian emergencies are good examples. At a high level of generality, one can define the problems of war, mass atrocities, and natural disasters as recurrent ones. But the manifestations of these problems are rare and unpredictable enough that temporary institutions can reasonably deal with specific instances. The field of international criminal law provides many examples, including the International Military Tribunals following World War II, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). All these were temporary tribunals designed to deal with specific crises and with corresponding jurisdictional limits.<sup>6</sup>

States may also sometimes prefer temporary regimes for issues that are ongoing and continuous. They are not always willing to develop permanent solutions to permanent problems, even when they are fully aware that these problems will endure. Koremenos explains this largely by reference to uncertainty.<sup>7</sup> Given lack of clarity about a problem’s scope, distributional effects, or best solution, states may prefer to address these problems through temporary commitments. The negotiators of the Nuclear Non-Proliferation Treaty, for example, initially wrote a twenty-five year duration period into the treaty because, as one of them put it, they were afraid of an ‘iron corset, which could not be adjusted to the changing

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<sup>3</sup> The theories of historical institutionalism and constructivism discussed in Sect. 3.3 speak less strongly to initial design choices than they do to subsequent design choices, and so I omit discussion of them in this section.

<sup>4</sup> Koremenos et al. 2001, at 762.

<sup>5</sup> Of course, not all states share the same preferences. Sometimes certain states might prefer permanent regimes and other states prefer temporary ones. My discussion here focuses on what might motivate those states that prefer temporary regimes; the next sub-section considers how states that prevail on their preferred temporality might therefore be induced to make concessions on other issues, such as the depth of their commitments.

<sup>6</sup> Crises can also trigger the establishment of permanent regimes. See, e.g., Katzenstein 2014 (discussing how crises can further the formation of international courts).

<sup>7</sup> Koremenos 2001, at 291. See also Meyer 2010, at 382–84; Bilder 1981, at 49–51.

conditions of history.’<sup>8</sup> Other examples of temporary regimes aimed at persistent issues include the Kyoto Protocol, which committed the developed countries that ratified it to emissions reductions for a fixed period of years, and commodities treaties like the International Cocoa Agreement, which regulates the international cocoa market and currently applies for a default period of ten years. As Jacob Gersen has observed regarding temporary domestic legislation, this approach ‘allocat[es] enactment costs to the sunset period, [unlike] permanent legislation [which] concentrates them in the initial time period.’<sup>9</sup>

The discussion so far assumes that states are making rationally instrumental choices in preferring temporary regimes. But these preferences could also have origins that are not explained by a rational design approach. Some additional explanations could be drawn from the developing field of behavioural international law, which considers whether states and other international actors might be subject to heuristic biases similar to those demonstrated in behavioural economics research.<sup>10</sup> Among other things, this research shows that individuals tend to overvalue goods already in their possession relative to potential future gains, a finding known as the endowment effect, and to be overoptimistic about their ability to control the future.<sup>11</sup> For example, one interesting study finds that ‘individuals value options in a way that is different from the expected value of these options, and, in particular, that decision makers overvalue their options and are willing to overinvest to keep these options from disappearing.’<sup>12</sup> If applicable to states and their agents, such biases could be another reason for states to prefer temporary regimes to permanent ones, since temporary regimes appear to foreclose fewer options in the future.

A further reason that states may use temporary regimes is that these regimes can face fewer procedural barriers to establishment. Permanent international legal regimes grounded on legally binding commitments tend to be done as treaties that require domestic ratification by every state party. Temporary regimes may also require the treaty form and domestic ratification but sometimes, particularly at moments of crisis, they can be formed through less cumbersome ways. Thus, the President of the United States committed the United States to the General

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<sup>8</sup> Koremenos 2001, at 289 (quoting Italian negotiator Roberto Caracciola).

<sup>9</sup> Gersen 2007, at 264. For an interesting discussion of how temporary regimes can disrupt existing equilibria, see Ginsburg et al. 2014.

<sup>10</sup> Existing work in behavioural international law at the theoretical level includes Aaken 2014 and Braude 2015. Empirical work suggests that state decision-makers are indeed subject to behavioural biases in at least some international legal contexts. Galbraith 2013 (showing that states tend to embrace optional ICJ jurisdictional clauses in treaties only where these clauses are presented as the default option); Poulsen 2014 (describing the power of reference points in negotiations over bilateral investment treaties); cf. Weyland 2005, at 281–294 (showing how peer effects influence states’ legislative decision-making).

<sup>11</sup> See Aaken 2014, at 426–435 (reviewing the literature on these and other biases).

<sup>12</sup> Shin and Ariely 2004, at 584.

Agreement on Tariffs and Trade (GATT) without obtaining the advice and consent of the U.S. Senate in part on the grounds that the GATT was a stopgap measure.<sup>13</sup> The ICTR and the ICTY were created by the UN Security Council under Chapter VII, thus requiring neither the explicit consent of the states to whom they most directly applied—Rwanda and the states of the former Yugoslavia—nor domestic ratification by any other state. (Indeed, Rwanda cast a vote in the Security Council against the establishment of the ICTR.<sup>14</sup>) Because such abbreviated processes create fewer veto points, they can be employed more easily and more swiftly.

### 3.2.2 Sources of Strength for Temporary Regimes

The discussion above theorises conditions under which states might choose temporary regimes over permanent ones. Such choices can also be understood as one aspect of the well-recognised trade-off between form and substance in international institutional design.<sup>15</sup> Specifically, the use of temporary regimes can lead to states embracing deeper commitments than they would accept in permanent regimes.

As noted earlier, temporary legal regimes require states to surrender less control than do comparable permanent regimes. With a temporary regime, a state can feel confident that in due course it will be legally absolved of whatever obligations it has entered into. Therefore, it may be willing to accept greater obligations with temporary regimes than with permanent ones. (To be sure, states have ways out of permanent regimes as well, some lawful and some unlawful,<sup>16</sup> but the costs are usually greater and the possibility for continued influence are reduced.) With temporary regimes, a state may also be willing to delegate more power to central decision-makers. To use Albert Hirschman's formulation, a temporary regime offers greater ease of 'exit' and therefore states may accept having less 'voice'.<sup>17</sup>

States may be particularly willing to accept robust temporary regimes where these regimes are aimed at specific, short-term crises. As discussed earlier, such crises lend themselves well to the use of temporary regimes. The need for swift and vigorous action in these settings is apparent. States may therefore be willing to take on deep though temporary commitments and also to delegate

<sup>13</sup> Hobin 1964, at 337–340.

<sup>14</sup> UNSC Res. 955, 8 April 1994. Voting record available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=P397X40999794.25610&profile=voting&uri=full=3100023~!482018~!48&ri=6&aspect=power&menu=search&source=~!horizon>. Accessed 18 July 2014.

<sup>15</sup> E.g., Raustiala 2005, at 593–594; Coglianese 2000.

<sup>16</sup> See Helfer 2005, at 1591 (describing denunciation clauses as providing 'a hedge against uncertainty that ... enables states to negotiate more expansive or deeper substantive treaty commitments *ex ante*'); Gersen 2007; Meyer 2010; Coglianese and Nicolaidis 2001.

<sup>17</sup> Hirschman 1970.



decision-making authority to actors within international organizations. In order to deal with the refugee crisis set off by World War II and its aftermath, for example, states both accepted significant substantive obligations to refugees and entrusted powerful decision-making authority to the UN High Commissioner for Refugees.

Strong substantive obligations and powerful delegations will be even more likely where the temporary regimes have comparatively low procedural hurdles to establishment and where the states that design the temporary regimes are not the states most affected by them. The ad hoc international criminal tribunals are a good example. Their establishment by the Security Council as opposed to through a treaty process not only meant that it was easier for them to be established, but also that they could be imbued with powers they might never otherwise have obtained. These powers doubtless also owed something to the fact that they were set up to focus on prosecuting persons from the former Yugoslavia and Rwanda, not on persons from Security Council states that voted for their establishment.<sup>18</sup>

Although temporary regimes can inspire deeper commitments by states, it is important to recognise that other trade-offs are also available. For example, deeper substantive commitments might also be obtainable by choosing soft law commitments over hard law commitments, by prioritising the depth of the commitments over the number of states likely to join the regime, and by allowing grace periods before commitments take effect.

### 3.3 Temporary Regimes as Foundations for Permanent Regimes

Temporary regimes often give rise to permanent ones. This is interesting in and of itself. It suggests a change in position on the part of states: having once deliberately chosen temporary regimes, they later come to embrace lasting ones. High-profile examples include the 1967 Protocol removing the temporal limits on the Refugee Convention of 1951 and the decision of the parties to the Nuclear Non-Proliferation Treaty to extend it indefinitely. Temporary regimes can also serve as models for permanent regimes, as the ICTY and ICTR did for the ICC.

This section draws on several distinct theories of state behaviour to consider the causes and implications of such shifts. It considers the two perspectives mentioned in the prior section—rational design and behavioural international law. In addition, it considers two other perspectives—historical institutionalism and constructivism—that offer insights into how institutions, once they have been created, can shape future design choices. This section shows that under the last three of these perspectives, the initial design choices for the temporary regime have an outsized

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<sup>18</sup> Although NATO countries did become involved in the conflict in Kosovo (which developed after the establishment of the ICTY), the ICTY Prosecutor chose not to investigate allegations regarding the actions of NATO.

effect on the shape of the future regime. These choices serve as frames for the real or perceived possibilities of the permanent regime. This stickiness has a double-edged character from the prospective of robust regime-building.

### 3.3.1 Causes

When and why do temporary regimes become blueprints for permanent regimes? Different theories of state behaviour offer different explanations, which are often complementary but also can be in tension with each other.

*Rational Design.* From a rational design perspective, a central reason why temporary regimes might develop into permanent ones is learning on the part of states. Looking at how initially temporary regimes like the Nuclear Non-Proliferation Treaty are ultimately made permanent by their state parties, Koremenos argues that learning explains much of the answer.<sup>19</sup> Uncertainty about the future and a desire to avoid risks make states unwilling to make permanent commitments at first. But then states see that the temporary regimes seemed to work reasonably well and become willing to embrace them permanently. With regard to the Nuclear Non-Proliferation treaty, by the time its initial duration was drawing to a close, interview evidence suggests that ‘essentially all of the parties ... favor[ed] extension, a fact that itself provides powerful evidence of learning.’<sup>20</sup>

*Historical Institutionalism.* Broadly speaking, historical institutionalists consider ‘the way in which institutional configurations ... often shape political outcomes by facilitating the organization of certain groups while actively disarticulating others.’<sup>21</sup> A major feature of this analysis is a focus on the sequencing of events and how this sequencing can give rise to path-dependent results.<sup>22</sup> From a historical institutionalist perspective, temporary regimes are likely to influence permanent regimes in ways that go beyond the functional value of the temporary regime. This influence partly stems from predictable aspects of renegotiation processes. Once a temporary regime is established, there are reduced costs to building a permanent regime off of the temporary regime instead of starting from scratch. In addition, proposals to take a different approach may make other countries suspicious that these proposals are simply attempts to advance the interests of the proposers at the expense of others. Besides these factors, other case-specific aspects of the temporary regime may also lead it to leave a strong mark on the

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<sup>19</sup> Koremenos 2001, at 310–312, 314–15 (also discussing the Arctic Treaty).

<sup>20</sup> Ibid., at 312.

<sup>21</sup> Thelen 2002, at 92.

<sup>22</sup> Fioretos 2011, at 371 and 376. See also Pierson 2000, at 251 (emphasising the need to understand path dependency in terms of marked increases in the cost of change at later times); Sverdrup 2002, at 123–127 (exploring the role played by sequencing in the context of the conferences leading to the Amsterdam and Nice Treaties).

permanent one. For example, the very existence of the temporary regime may mobilize constituencies focused on making it permanent. Such constituencies could include both domestic political actors and the international civil servants involved in the temporary regime.

*Constructivism.* Central to constructivist accounts is the view ‘that the meanings in terms of which action is organized arise out of interaction.’<sup>23</sup> Where for scholars of rational design preferences are for the most part exogenously determined, constructivists consider that preferences are heavily shaped by interactions. Martha Finnemore and Kathryn Sikkink suggest that new international norms develop through the efforts of particular, persuasive individual and group actors, and then typically ‘become institutionalized in specific sets of international rules and organizations.’<sup>24</sup> The norms then ‘cascade’ more broadly around the globe until they are widely internalised.<sup>25</sup> A constructivist approach would suggest that temporary international legal regimes can themselves institutionalise and strengthen norms, thus shifting the preferences of relevant domestic and international actors to further favour the objects of the temporary regimes. By helping shift preferences, the temporary regimes therefore make it more likely that states will support permanent regimes.

*Behavioural International Law.* A behavioural approach would also suggest that temporary regimes have an outsized effect on shaping later permanent ones. A key finding of behavioural research is that actors tend to favour default options (due to factors like the endowment effect and loss aversion) and to make use of reference points more powerfully than pure instrumental rationality would predict.<sup>26</sup> This has implications for the renegotiation of agreements. In a working paper studying the renegotiation of contracts, for example, Fabian Herweg and Klaus Schmidt propose that the ‘initial contract sets the reference point that causes feelings of loss if the contract is renegotiated.’<sup>27</sup> Rather than achieving rationally optimal outcomes in renegotiation, parties are likely either simply to continue the original contract or to renegotiate in a way that hues closer to the original contract than is optimal.<sup>28</sup> Applied to international regime design, this approach suggests that the design choices for temporary regimes will prove sticky for reasons that go beyond the increased transaction costs that come with making changes. Because these temporary regimes embody the *status quo* and/or serve as reference points, state representatives will have biases in favour of continuing them as is. This creates a bar to renegotiation that, while not surmountable, is higher than it would be for purely rational states.

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<sup>23</sup> Wendt 1992, at 403. For a recent overview of the field, see Brunnée 2013.

<sup>24</sup> Finnemore and Sikkink 1998, at 900. For considering how international organisations can serve as a fora for competing norms, see Hurd 2005, at 502–503.

<sup>25</sup> Finnemore and Sikkink 1998, at 902–905.

<sup>26</sup> For reviewing the literature on these biases, see Aaken 2014. For showing that states favour default options in ICJ jurisdictional clauses in treaties, see Galbraith 2013, at 329–336.

<sup>27</sup> Herweg and Schmidt 2013, at 2; see also Bartling and Schmidt 2012.

<sup>28</sup> Herweg and Schmidt 2013, at 2.

### 3.3.2 Implications

The theories of state behaviour described above can all explain why temporary regimes will sometimes be made permanent. But these theories emphasise different mechanisms and thus have different (though often complementary) implications for the question of how to approach the initial design of temporary international legal regimes. Table 3.1 sets forth these differences in emphasis at a high level of generality.

**Table 3.1** The influences of temporary regimes on permanent ones

Theory	How temporary regimes influence future ones	Implications for negotiators of initial regimes
Rational design	States learn from their experiences with temporary regimes	Be aware that temporary regimes' successes or failures will be factors for consideration in future negotiations
Historical institutionalism	Temporary regimes trigger path dependency and build constituencies in favor of their permanence	Note that the very existence of temporary regimes furthers the likelihood of future permanent ones  Make design choices with the awareness that they are likely to be fairly sticky for the long term, especially if permanent regimes can be established by the same processes used for temporary ones
Constructivism	Temporary regimes further the spread of the norms that they reflect and therefore increase support for permanent regimes	Expect that by helping the norms they stand for to spread, temporary regimes may make it easier in the future to create permanent and robust regimes  Anticipate that models can play an important role in spreading norms
Behavioural international law	States and other relevant actors use temporary regimes as reference points and can have status quo biases in favor of their features and continuation	Consider that initial temporariness may enable unusually deep commitments and delegations, as states may overvalue apparent exit  Make design choices with the awareness that they are likely to be quite sticky for the long term, even if these initial regimes are only models

If a rational design approach accurately predicts state behaviour, then the focus for negotiating an initial temporary regime should simply be on getting a good temporary regime. This is because temporary regimes may not be as sticky under a rational design approach as they are under the other theories of state behaviour considered here. Just as states can find reasons to make temporary regimes permanent under a rational design approach (such as learning that they work and deciding to make them lasting) so they could also find reasons to alter or abandon these temporary regimes (such as from learning that these temporary regimes do not work too well). If there are permanent solutions that are better for all the state parties, then these will be implemented. Even permanent solutions that are better for only some of the parties can be obtained, if the restructuring process does not require the consent of all state parties or if side-deals are an option. And if permanent solutions are not obtainable under these conditions, then the temporary regime will simply expire without replacement. In other words, a rational design approach suggests that states can iron out mistakes or adjust to new conditions in ways that are not overly influenced by the structure of the temporary regime.

If any of the other three approaches more accurately predicts state behaviour, however, then temporary regimes will have a greater effect on the existence and shape of permanent ones. The choices made in temporary regimes are especially likely to be entrenched, and negotiators can sometimes use the very fact of initial temporariness to promote choices they perceive as desirable. Although this general point holds across all three approaches, they give rise to different conclusions as to (1) how strongly the temporary regime influences the existence and scope of the permanent one; (2) how this effect manifests itself; and (3) the extent of the effect in situations where the temporary regime is a model or is established without the full panoply of procedures that the permanent regime would require.

Under a historical institutionalist perspective, one would expect the design choices made for temporary regimes to have outsized influence in some but not all contexts. The effect will be strongest where the temporary regimes have the same reach as the proposed permanent regimes and were created through the same procedural mechanisms. Under these conditions, the constituencies developed by the temporary regime increase the likelihood that a permanent regime will be established, and the increased costs that come with making changes raise the likelihood that the permanent regime will closely track the temporary one. Negotiators should thus expect that their initial design choices will be sticky, whether these choices are good or bad. The effect is likely to be much weaker, however, where the temporary regime is simply a model rather than broadly applicable, or where it is set up through easier procedures. In these instances, some renegotiation is inevitable—particularly if a new international regime will be set up—and different actors and constituencies will be involved. These factors invite reconsideration of initial design choices and thus reduce the likelihood of path dependent actions.

Under a constructivist approach, the power of the temporary regime is largely in strengthening the norms of governmental and other actors in favour of the objective of the regime. If this approach is accurate, negotiators might place greater emphasis on simply creating the temporary regime, with the expectation

that the regime will cause actors' commitments to deepen and perhaps to cascade. Once commitment has deepened, negotiators could seek both to create a permanent regime and to strengthen this regime in comparison to the temporary one. A constructivist approach thus might worry less than a historical institutional approach about specific design features of the temporary regime, due to the expectation that the regime could be improved following broader acceptance of the norm. Also in contrast to a historical institutionalist approach, a constructivist approach would suggest that temporary regimes could have a strong effect on shaping permanent ones even if these temporary regimes are simply models or were established through easier procedures. This is because norms can be shaped by models and from regimes established through stopgap procedures.

Finally, a behavioural international law approach would suggest that temporary regimes are always sticky, with the magnitude varying based on the extent to which these regimes serve as defaults or reference points. As with a historical institutionalist approach, a behavioural approach suggests that temporary regimes will prove influential in shaping permanent regimes when they have the same reach and are created through the same procedural mechanisms. Indeed, a behavioural approach would predict an even stronger influence than a historical institutional approach, because of potential cognitive biases in favour of the *status quo* and the use of the temporary regime as a reference point. Similar to a constructivist approach, a behavioural approach would predict that temporary regimes will influence the creation of permanent ones even where these temporary regimes are only models or were subject to lessened procedural barriers. Models do not represent the *status quo* with regard to states not subject to the models, but they can still serve as reference points. Finally, a behavioural approach would predict that the specific design features of the temporary regime would serve as important templates for the permanent regime. In sum, a behaviouralist approach predicts a particularly powerful influence of the temporary regime on the permanent one. Based on this approach, negotiators of initial regimes should be constantly aware that their choices are likely to have effects that outlast the temporary regime, whether for good or for ill. Negotiators could also try to strategically harness behavioural biases. For example, those interested in strong, permanent institutions—especially ones where significant power is delegated to civil servants—could seek to establish models or other temporary regimes subject to lessened procedural hurdles in order to establish reference points for future regime-building.

The different theories of state behaviour thus hold different implications for the negotiators of temporary regimes. These theories may also have significance for negotiators deciding whether and how to make a permanent regime given the existence of a temporary one. From rational design and historical institutionalist approaches, the effects of the temporary regime are primarily just existing factors to work with, but constructivist and behavioural international law approaches suggest that the rhetorical use of these temporary regimes may matter. Negotiators who value the temporary regime and wish to make it permanent should emphasise the norm created by the regime and strive to describe the regime as embodying the *status quo* and setting the reference point. By contrast, negotiators who think that

the temporary regime has problems should strive to minimise the framing effects caused by it. One way would be to emphasise different frames, such as competing models or templates.<sup>29</sup>

### 3.4 Case Studies

Which of the four approaches given above most accurately describes why and how temporary regimes can become permanent regimes? As just discussed, the answer could hold important implications for how negotiators should approach the design of temporary regimes. Unfortunately, this is a hard question to answer. Under all four theories temporary regimes can be made into permanent ones; and, comparably, under all four theories temporary regimes can be abandoned or, if made permanent, substantially modified. The difference between these theories is primarily one of the locus and degree of stickiness. Moreover, it is possible and in fact likely that aspects of several or even all of these theories are at work, perhaps to different extents in different contexts.

This section does not pretend to offer a final answer, but, through the exploration of case studies, it seeks to tease out some initial insights. I look here at three initially temporary regimes and their permanent implications in three areas of law: refugee law, international criminal law, and climate change. Collectively, they suggest that temporary regimes do indeed leave a strong footprint on future permanent ones, for reasons that go well beyond learning.

#### 3.4.1 *Refugee Law*

In the wake of World War II, a refugee crisis swept Europe and other parts of the world. In December 1950, the General Assembly (GA) passed a resolution and an accompanying statute creating the Office of the UN High Commissioner for Refugees (UNHCR).<sup>30</sup> These contained both temporary and permanent elements: on the one hand, the High Commissioner was given competence over all refugees regardless of when they became refugees, but on the other hand the Statute contained a presumption that the Office of the High Commissioner would have only a

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<sup>29</sup> Larrick 2009, at 466. See also Soll et al. 2013, at 7. Compromise drafts drawn up by a single state, for example, can sometimes have striking influence in negotiations. E.g., Letts et al. 1993 (describing the role of the Australian draft in the Chemical Weapons Convention negotiations).

<sup>30</sup> UNGA Res 428 and Annex, 14 December 1950. Prior to this, there were protections for some refugees embodied in certain international agreements and there were also some predecessor organizations, including the International Refugee Organization (IRO), which was involved in the drafting of the Refugee Convention. Discussion of these predecessors is beyond the scope of this chapter. For background, see Loescher 2001, at 21–49; Holborn 1956.

three-year lifespan.<sup>31</sup> The High Commissioner was entrusted with responsibility for ‘providing international protection, under the auspices of the United Nations, to refugees who fall within the scope’ of the Statute, and states were called upon to cooperate with the High Commissioner.<sup>32</sup> Then, in the summer of 1951, delegates from 26 mostly western countries gathered in Geneva to finalise a new Refugee Convention. This Convention contained substantial state obligations towards refugees, including the principle of *non-refoulement*, and also committed them to ‘undertake to cooperate’ with the UNHCR.<sup>33</sup>

The UNHCR Statute and the Refugee Convention quite consciously created a temporary, crisis-specific regime. The Statute established the position of the High Commissioner on a temporary basis and did so using a less rigorous process (a vote of state parties in the UN) than a formal treaty would require. The Refugee Convention then cemented the powers of the High Commissioner and states’ obligations towards refugees, but it did so only as a temporary regime. For the Refugee Convention applied not to all refugees, but only to persons who became refugees prior to January 1, 1951—and states had the further option of limiting their obligations to encompass only refugees within Europe.<sup>34</sup> This temporal limit was critical to the negotiations, as some states were willing to accept the substantial commitments of the Convention only with respect to the refugee crisis at hand. While certain negotiators were hopeful that this would shine the way to a broader approach to refugee issues,<sup>35</sup> delegates from some states were deeply wary of any permanent regime.<sup>36</sup>

Yet, this once-temporary regime became the foundation for something permanent. The GA kept extending and re-extending the mandate of the UN High Commissioner,<sup>37</sup> and, in 1965, a group of legal scholars assembled with the encouragement of UNHCR to consider how to resolve the tension between the temporal reach of the Convention and the realities of post-1951 refugees.<sup>38</sup> This

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<sup>31</sup> UNGA Res. 428, Annex at 5, 6B, 14 December 1950. Throughout, I use the term ‘refugees’ as shorthand for those persons covered by the subject-matter provisions of the respective instruments, i.e., those with a well-grounded fear of prosecution on certain specified grounds.

<sup>32</sup> UNGA Res. 428, 14 December 1950, at 2; UNGA Res. 428, Annex, 14 December 1950, at 1.

<sup>33</sup> Articles 33 and 35 of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 150.

<sup>34</sup> Article 1(A) and (B) 1951 Convention Relating to the Status of Refugees, 189 UNTS 150.

<sup>35</sup> The Final Act of the Conference did express the aspiration that the Convention would ‘have value as an example exceeding its contractual scope.’ Final Act of UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 37, para E.

<sup>36</sup> Fitzpatrick 1996, at 232. He indicates that ‘this limitation reflected the negotiators’ reluctance to accept an open-ended obligation and their preference for an ad hoc solution to problems posed by persons displaced in Europe by the Second World War and the onset of the Cold War.’ See also Loescher 2001, at 44–46.

<sup>37</sup> This continued until the early twenty-first century, when the General Assembly decided to make the post of High Commissioner permanent ‘until the refugee problem is solved.’ UNGA Res. 58/153, 24 February 2004.

<sup>38</sup> This conference was organized by the Carnegie Endowment with the collaboration of Switzerland and UNHCR. Weis 1967, at 40.



group decided not to seek ‘the preparation and adoption of a new Convention ... [as] such a procedure would, in the opinion of the participants, be too lengthy and cumbersome to meet the need for urgency.’<sup>39</sup> Instead, the group proposed a Protocol that simply removed the temporal and geographic limitations of the Refugee Convention, leaving its substantive and structural provisions virtually untouched.<sup>40</sup> In promoting this approach to states, the High Commissioner

pointed out in [a] paper that such a Protocol, dealing with a most pressing need, i.e., that of removing the dateline, would not, from a long-term point of view, in any way prevent States from proceeding to a revision of the Convention.<sup>41</sup>

In 1967, the GA took note of the Protocol and made it available for accession, despite the concerns of some states that the GA and its relevant committees had engaged in very little discussion and review of the Protocol. The representative from the Philippines, for example, said that despite his vote favouring moving the Protocol forward within the GA process, ‘he would in future insist that the articles of important international instruments should be considered in detail.’<sup>42</sup> Although states thus had little input into the content of the Protocol, they proved willing over time to accede to it. Today the Protocol has 146 parties.<sup>43</sup>

Given the initial reluctance of states to accept a permanent refugee regime, it is striking that they came to embrace a Protocol that made the Convention permanent—and did so without weakening either the Convention’s strong substantive provisions or the power it gave to the High Commissioner. It is possible to understand this shift by drawing on each of the four approaches to state behaviour discussed above, but these approaches differ in how well they can explain it.

The negotiation of the Protocol and its referral by the General Assembly for state accession seem least related to a rational design approach. Of course, there is a plausible reason why the Protocol would be desirable from a rational design perspective: states could have rationally found the Refugee Convention to work sufficiently well that they wanted to have the opportunity to make it applicable to all future refugees with no additional changes. But if the Protocol were the product of rational and purposeful state design, one would expect states to have played more of a role in its formation—especially given how important the removal of the temporal and geographic limits of the Convention was. Yet, states seemed largely

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<sup>39</sup> *Ibid.*, at 43.

<sup>40</sup> *Ibid.*, at 43. In its final form, the Protocol provided that state parties would ‘undertake to apply articles 2 to 34 inclusive of the Convention’ with the removal of its temporal limit and the removal (subject to prior reservations) of the geographic limit. The remaining Final Clauses of the Protocol closely tracked those of the Convention, but unlike the Convention it did permit states to reserve out of International Court of Justice jurisdiction. See generally Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

<sup>41</sup> Weis 1967, at 44.

<sup>42</sup> *Ibid.*, at 47.

<sup>43</sup> UN Treaty Collection, Depository Status for the Protocol Relating to the Status of Refugees, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en). Accessed 17 October 2014.

passive participants, as they did not play a direct role in its drafting, and they discussed it only lightly in the GA.

The creation of the Protocol can broadly fit under a constructivist account. The Convention had strengthened the norm of protection for refugees, and now non-state actors sought to cement that norm by developing a permanent Protocol. Nonetheless, this approach does little to help understand why the creators of the Protocol did not seek further advances. By 1965, it was apparent that many displaced persons in critical need of help failed to meet the technical definition of refugee and could only receive help from UNHCR through the High Commissioner's good offices.<sup>44</sup> The drafters of the Protocol, however, deliberately chose simple extension over more elaborate revisions.

The development of the Protocol fits fairly well with both a historical institutionalist and a behavioural international law perspective. The impetus behind the Protocol came less from states than from the UNHCR and its supporters—and, as historical institutionalists would observe, this community's very existence depended on the existing temporary regime. Moreover, as a behavioralist would note, what this community chose to propose was in essence an extension of the *status quo*. This choice seems to have stemmed from the concern that further reforms would have been 'cumbersome' to develop,<sup>45</sup> perhaps because states would then have demanded a more active role in the Protocol's creation and content. By contrast, states proved passive in a process aimed at continuing the legal standards and procedures that were already in place. Despite the importance of the issue of temporal and geographic limits, states proved comfortable with letting the Protocol go through the GA without much debate.

Whatever the precise mechanism, it seems clear that the current permanent refugee regime is due in large part to the temporary regime that preceded it. This has brought benefits to refugee law, not only substantively but also in terms of the power of UNHCR. Once states had delegated sizeable power to the High Commissioner in a temporary context, they became willing to make this approach permanent. In contrast, in instances where states have begun with permanent regimes, they have often proved more reluctant to cede enforcement power to independent actors. The permanent treaties in human rights law, for example, have not created any independent figure with comparable power—unlike the High Commissioner for Refugees, the authority of the High Commissioner for Human Rights comes only out of the General Assembly.<sup>46</sup> On the other side of the coin,

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<sup>44</sup> Loescher 2001, at 109–114 (describing how the High Commissioner increasingly used his good offices in the 1960s); Barnett and Finnemore 2004, at 91–93. The 1969 regional convention drawn up by the Organisation of African Unity did come to include a broader definition of refugee. See Loescher 2001, at 126.

<sup>45</sup> Weis 1967, at 43.

<sup>46</sup> See UNGA Res. 48/141, 20 December 1993.

however, the permanent regime remains formally limited by the constraints set down in the original, temporary regime, most notably the fact that the definition of refugee does not apply to large numbers of displaced persons.<sup>47</sup> In short, for all its temporary origins, the Refugee Convention has proved astonishingly durable in both its strengths and its limits.

### 3.4.2 *International Criminal Law*

International criminal law also originated through crisis-specific regimes. The ICTY and the ICTR, like the IMTs before them, dealt with particular events and were established through relatively swift procedures. Their scopes were designed in such a way that they would mainly impact countries with very little international clout—the states of the former Yugoslavia and Rwanda for the ad hoc tribunals, and the defeated countries of World War II for the IMTs. Their implementation did not require the domestic ratification or even the consent of many countries (including the countries whose citizens they were likely to try).<sup>48</sup> These factors encouraged and enabled the states involved in their creation to entrust these institutions with a great deal of power, including providing the prosecutors with the authority to decide whom to investigate and prosecute.

The crisis-specific nature of the ICTY and ICTR, then, seemed essential to the robust powers with which they were vested. Yet, in 1998, states gathered at the Rome Conference and negotiated a full-fledged treaty for a permanent international court whose strength would be roughly comparable to the ad hoc tribunals. The Rome Statute is much longer than the ICTY and ICTR Statutes and differs from them in many particulars.<sup>49</sup> But its existence and shape nonetheless owes much to the *ad hoc* tribunals. As the second ICTY Prosecutor, Richard Goldstone, put it bluntly: ‘Absolutely, without the ICTR and ICTY there would not have been an ICC. Had the tribunals not been established, or worse, had they

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<sup>47</sup> The administrative flexibility of UNHCR goes some way – but far from all the way – in relaxing these constraints. E.g., Goldenziel 2014.

<sup>48</sup> The ICTY and ICTR were established by the Security Council. UNSC Res. 827, 25 May 1993; UNSC Res. 955, 8 April 1994. The IMTs were also established through streamlined processes; for example, the London Charter setting up the Nuremberg IMT did not receive advice and consent from the U.S. Senate.

<sup>49</sup> Compare the Statute of the ICTY with the Rome Statute of the International Criminal Court. UNSC S/25704, Report of the UN Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993), 3 May 1993; 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (hereinafter Rome Statute). To give only one of the many differences, pursuant to the principle of complementarity as enshrined in Article 17 Rome Statute, the ICC can only exercise jurisdiction in cases where the relevant states are unwilling or unable to prosecute. See Burke-White 2008.

been established and failed substantially, [the Rome Conference] would not have even been held.<sup>50</sup>

Perhaps the most contested issue at the Rome Conference was the Prosecutor's power to initiate investigations. The International Law Commission's (ILC) draft statute had limited the Prosecutor to bringing cases following state party complaints or a Security Council Resolution, on the grounds that the international legal system was not ready to support an independent Prosecutor.<sup>51</sup> As the preparatory work for the Rome Conference went on, however, actors began to urge giving the Prosecutor an independent power to open investigations and '[i]n particular it was argued that the Prosecutor of the two existing ad hoc Tribunals was granted *ex officio* powers and there was therefore no reason to deny the same power to the Prosecutor of the Court.'<sup>52</sup> This approach ultimately prevailed at the Rome Conference. And while the most powerful and populous countries still remain outside the ICC, to date 122 nations have become parties to the Rome Statute.<sup>53</sup>

While the influence of the ad hoc tribunals is apparent, the reason or reasons for this influence is less obvious. Once again, each of the approaches to state behaviour discussed above would emphasise a different reason. A rational design perspective would focus on the learning that states gained from the experience of the ad hoc tribunals; a historical institutional perspective would note how the *ad hoc* tribunals created a community of supporters for the permanent court; a constructivist perspective would draw upon how the *ad hoc* tribunals increased the normative preferences of states in favour of international criminal justice; and a behavioural international law perspective would consider how the *ad hoc* tribunals may have served as a reference point, both for the principle of international criminal justice and for the specific structural choices made for the ICC, in a way whose influence reached well beyond an account based on rational instrumentality.

Once again, each of these explanations has some plausibility. Yet, again, the rational design perspective does not seem to have as much explanatory power as the other three perspectives. The trouble with a rational design approach here is that the ad hoc tribunals had not been in operation long enough for states to learn

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<sup>50</sup> R Goldstone, Interview on obstacles in international justice, 2009, <http://hir.harvard.edu/rethinking-finance/obstacles-in-international-justice>. Accessed 5 July 2014. See also Katzenstein 2014, at 192 (drawing on additional sources in explaining '[w]ithout the example of these tribunals, governments would have been unwilling to create an independent criminal court').

<sup>51</sup> De Gurmendi 1999, at 175–176.

<sup>52</sup> *Ibid.*, at 178. The NGO Coalition for the ICC, an influential umbrella group for NGOs, was one of the entities emphasizing this parallel. Pejic argues that 'there is no compelling justification for the difference in the "trigger mechanism"' between the ICTY and ICTR Prosecutor and the future ICC Prosecutor. (Pejic 1996.) Those attempting to counter this argument suggested that the ICTY and ICTR Prosecutors should be viewed not as having true *proprio moto* powers, but rather as having received a Security Council referral to investigate the situation in the former Yugoslavia and Rwanda. See de Gurmendi 1999, at 180.

<sup>53</sup> UN Treaty Status, Depository information for the Rome Statute of the International Criminal Court, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en). Accessed 17 October 2014.

much or to have confidence that what immediate lessons there were would hold true for the long term. By 1998, the *ad hoc* tribunals were still quite young, had only a modest number of suspects in custody, and between them had completed one trial and no appeals.<sup>54</sup> There were certainly some insights to gather from the tribunals' experience to date, such as the fact that, in practice, even an independent prosecutor is substantially dependent on state cooperation. Yet, if learning was the main mechanism of the tribunals' influence, it is surprising that states seemed to rely so heavily on the tribunals' limited experience.

A historical institutionalist account helps explain why the *ad hoc* tribunals might have mattered in ways apart from their merits. These tribunals strengthened the community of advocates for an international criminal court, and there were lower transaction costs to drawing on the ICTY and ICTR Statutes in constructing the Rome Statute. But it is still surprising how much influence these models had, given that the Rome Conference itself offered a chance to step away from a path-dependent course. There was great opportunity for alternative input at the Rome Conference (and no shortage of input offered), and there was a need for the resulting treaty to clear domestic state ratification processes in a way that had not been required for *ad hoc* tribunals established by the Security Council. Yet, states were willing to draw substantially—though far from completely—on the ICTY and ICTR template, including on the deeply contentious issue of the Prosecutor's independent powers.

A constructivist approach goes further in suggesting why many states would become so much more willing to embrace a permanent international criminal court after the establishment of the ICTY and ICTR. For constructivists, the establishment of the *ad hoc* tribunals helped shift the normative preferences of states and their agents (and the networks that work with their agents) in favour of greater international criminal justice.<sup>55</sup> The concept of such a norms shift helps explain why so many states that had little if any direct involvement with the creation or operation of the *ad hoc* tribunals would come to back the broader, permanent project. But shifts in norms at a broad level do not fully demonstrate why the specific features of the ICTY and ICTR cast such a strong shadow on the negotiations at Rome.

Finally, a behavioural international law approach would anticipate that the *ad hoc* tribunals both would make states more willing to embrace a permanent international criminal court and would significantly influence its ultimate shape. The fact that the *ad hoc* tribunals were out there—that international criminal justice was being pursued through international courts somewhere in the world—changed the reference points of states and other relevant actors in a way that caused them to become more comfortable with the broader project. Similarly, the particulars of the *ad hoc* tribunals were important frames for the negotiations at the Rome Conference, not so much because these particulars worked well as because they

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<sup>54</sup> See Galbraith 2009, at 145–153 (providing charts with custody, trial, and appeals dates).

<sup>55</sup> See Ralph 2009, at 141–143.

were a reference point. Of course, the tribunals were not the only reference points—others included the ILC’s draft statute and, for each state, its own set of expectations about how courts should function, including views about civil law and common law approaches.

In sum, the ICTY and ICTR proved crucial to the development of the ICC in its present form. Although it is difficult to pin down exactly why this influence was so substantial, the answer seems to go well beyond rational learning on the part of states. Indeed, the power of this influence may have caught some actors by surprise. Had the United States foreseen how strongly the ICTY and ICTR Prosecutors would be viewed as models for the ICC Prosecutor, for example, it might well have tried to have the Security Council draft somewhat different prosecutorial powers into the Statutes of the *ad hoc* tribunals. As in the refugee context, initial temporariness played a crucial role in furthering the emergence of a permanent executive figure with considerable independent authority.

### 3.4.3 Climate Change

Coordinated state action on climate change began not with models or temporary regimes, but rather with a permanent framework treaty. The 1992 UN Framework Convention on Climate Change established commitments with regard to the process of further negotiations, but did not clearly set up specific legally binding emissions limits.<sup>56</sup> Five years later, the Kyoto Protocol committed the developed countries that ratified it to certain specified emissions reductions for the temporary commitment period of 2008-2012.<sup>57</sup> ‘The expectation was that this first commitment period would be followed by a second commitment period, a third, and so on, indefinitely into the future.’<sup>58</sup>

The Kyoto Protocol was developed as a full-fledged treaty, subject to domestic ratification, and thus could not build in the greater depth that can come with more abbreviated processes. In addition, unlike the crisis-born rise of refugee law, negotiators at the time of the Kyoto Protocol understood that climate change would be an ongoing and continuous problem. In their design choices, negotiators imported some structural features from the Montreal Protocol on Substances that Deplete the Ozone Layer—the strongest reference point for many negotiators—without fully considering whether design choices aimed at protecting the ozone

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<sup>56</sup> Article 4(2) of the 1992 UN Framework Convention on Climate Change, 1771 UNTS 107 (hereinafter UNFCCC). For discussing the ambiguities, see Bodansky 1993, at 516–517. As noted in its preamble, the UNFCCC came after some GA resolutions and other soft law actions on climate change. For further details, see Bodansky 1993, at 461–474.

<sup>57</sup> Article 3(1) of the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148. While the Protocol itself is not temporary, this commitment period is.

<sup>58</sup> Bodansky 2011, at 697.

layer would prove appropriate for the greater and more diffuse challenge of climate change.<sup>59</sup>

The regime set up under the Kyoto Protocol has been far from adequate. The commitment period does not apply to the majority of emitters—including the United States, which never ratified the Protocol, and developing countries like China and India, which are not subject to the Protocol's emissions reductions provisions. Climate change and its resulting problems continue at an alarming pace, and there is widespread recognition that a better solution is needed. Yet, so far a legally binding replacement has proved elusive. The story of the continuing negotiations is far too extensive to recount, but so far one piece of these negotiations has been an agreement to create a second commitment period under the Kyoto Protocol.<sup>60</sup> This agreement, which would run to 2020, has yet to enter into force, and some important developed countries have made clear that they will not take on this second commitment period.<sup>61</sup> The Kyoto Protocol thus serves as an example of a temporary regime that has been extended but that (so far) has yet to give rise to a permanent, or more permanent replacement.

Looking ahead, the different theories of behaviour discussed here would give rise to varying predictions as to the effect that the Kyoto Protocol will have on the future climate change regime. Both a rational design approach and a constructivist approach offer some bases for optimism going forward. From a rational design perspective, one would expect that states will learn from the inadequacies of the Protocol and improve on it. If there are solutions that are better for all states, these will be embraced, and even solutions that are better overall but not better for all states can be reached with side-payments. From a constructivist perspective, one might anticipate that the Protocol will build norms in favour of addressing climate change—norms that would lead to stronger and better efforts going forward.<sup>62</sup> In the United States, for example, some local governmental actors have used the Kyoto Protocol as a rallying point even though the national government has failed to adopt it.<sup>63</sup>

For historical institutionalists and behavioral international law scholars, the example of the Kyoto Protocol highlights how temporary regimes can potentially have downsides as well as benefits for permanent international law. Historical institutionalists might emphasise how the process of climate change negotiations, from the framework convention on, has generated a focus on universal state participation and emission-cap commitments and has crowded out other, potentially more effective solutions.<sup>64</sup> From a behavioural international law perspective, these

<sup>59</sup> Victor 2011, at 215–224. He observed critically that '[m]ore than any other model, the herd looked to Montreal'. *Ibid.*, at 220.

<sup>60</sup> Doha Amendment to the Kyoto Protocol, 8 December 2012 (not yet in force).

<sup>61</sup> See [http://unfccc.int/files/kyoto\\_protocol/application/pdf/kp\\_doha\\_amendment\\_english.pdf](http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf) (noting the decisions of Canada, Japan, Russia, and New Zealand). Accessed 14 October 2014.

<sup>62</sup> Brunnée suggests that the design of the Kyoto Protocol's compliance mechanisms may foster a norm of compliance. Brunnée 2003, at 261–262, 278–280.

<sup>63</sup> Osofsky and Levit 2008, at 410.

<sup>64</sup> See Victor 2011, at 203–240.

design features are also likely to prove far more resilient than is rationally optimal, as international actors are accustomed to them. In addition, because of the endowment effect, parties to the Kyoto Protocol may be more reluctant than is rational to make further concessions in future agreements. Improvements can occur where a temporary regime is a poor fit as a long-term solution or model, but these improvements require extra effort to achieve.

### 3.5 Conclusion

Paradoxically, the best way to get to robust, long-term global governance may be to begin with short-term, situation-specific fixes. Once short-term regimes are developed, they can have outsized influence on the development of later, permanent regimes, even when these short-term regimes were established through less rigorous processes than required for the permanent regimes. The nature and degree of this influence depends on how international actors behave, and much work needs to be done to improve predictive models. In the meantime, negotiators of initial regimes should be aware that their choices may prove exceptionally sticky.

### References

- Barnett M, Finnemore M (2004) *Rules for the world: international organizations in global politics*. Cornell University Press, Ithaca
- Bartling B, Schmidt K (2012) Reference points in (re)negotiation: the role of contracts and competition. Working Paper. <http://ssrn.com/abstract=2123387>. Accessed 5 July 2014
- Bilder R (1981) *Managing the risks of international agreement*. University of Wisconsin Press, Madison
- Bodansky D (1993) United Nations Framework Convention on Climate Change: a commentary. *Yale J Int Law* 18:451–558
- Bodansky D (2011) A tale of two architectures: the once and future U.N. climate change regime. *Ariz State Law J* 43:697–712
- Braude T (2015) Behavioral international law. *University of Pennsylvania Law Review* 163:(forthcoming)
- Brunnée J (2003) The Kyoto Protocol: a testing ground for compliance theories? *Heidelb J Int Law* 63:255–280
- Brunnée J (2013) Constructivism and international law. In: Dunoff J, Pollack M (eds) *Interdisciplinary perspectives on international law and international relations: the state of the art*. Cambridge University Press, New York, pp 119–145
- Burke-White B (2008) Proactive complementarity: the International Criminal Court and national courts in the Rome system of justice. *Harv Int Law J* 49:53–108
- Coglianesi C (2000) Globalization and the design of international institutions. In: Nye J, Donahue J (eds) *Governance in a globalizing world*. Brookings Institution Press, Washington, pp 297–318
- Coglianesi C, Nicolaidis K (2001) Securing subsidiarity: the institutional design of federalism in the US and Europe. In: Nicolaidis K, Howse R (eds) *The federal vision: legitimacy and levels of governance in the US and the EU*. Oxford University Press, Oxford, pp 277–299



- de Gurmendi SAF (1999) The role of the international prosecutor. In: Lee R (ed) *The International Criminal Court: the making of the Rome Statute*. Kluwer Law International, The Hague, pp 175–216
- Finnemore M, Sikkink K (1998) International norm dynamics and political change. *Int Org* 52:887–917
- Fioretos O (2011) Historical institutionalism in international relations. *Int Org* 65:367–399
- Fitzpatrick J (1996) Revitalizing the 1951 Refugee Convention. *Harv Hum Rights J* 9:229–254
- Galbraith J (2009) The pace of international criminal justice. *Mich J Int Law* 31:79–156
- Galbraith J (2013) Treaty options: towards a behavioral understanding of treaty design. *Va J Int Law* 53:309–363
- Gersen J (2007) Temporary legislation. *Univ Chic Law Rev* 74:247–298
- Ginsburg T, Masur J, McAdams R (2014) Libertarian paternalism, path dependence, and temporary law. *Univ Chic Law Rev* 81:291–359
- Goldenziel J (2014) Regulating human rights: international organizations, flexible standards, and international refugee law. *Chic J Int Law* 14:453–492
- Goodman R, Jinks D (2004) How to influence states: socialization and international human rights law. *Duke Law J* 54:621–703
- Helfer L (2005) Exiting treaties. *Va Law Rev* 91:1578–1648
- Herweg F, Schmidt K (2013) Loss aversion and inefficient renegotiation. <http://www.nottingham.ac.uk/economics/documents/seminars/senior/sass-19-02-14-schmidt.pdf>. Accessed 15 Aug 2014
- Hirschman A (1970) *Exit, voice, and loyalty*. Harvard University Press, Cambridge, MA
- Hobin P (1964) GATT, the California Buy American Act, and the continuing struggle between free trade and protectionism. *Calif Law Rev* 52:335–349
- Holborn L (1956) *The International Refugee Organization*. Oxford University Press, Oxford
- Hurd I (2005) The strategic use of liberal internationalism: Libya and the UN sanctions. *Int Org* 59:495–526
- Katzenstein S (2014) In the shadow of crisis: the creation of international courts in the twentieth century. *Harv Int Law J* 55:151–209
- Koremenos B (2001) Loosening the ties that bind: a learning model of agreement flexibility. *Int Org* 55:289–325
- Koremenos B, Lipson C, Snidal D (2001) The rational design of international institutions. *Int Org* 55:761–799
- Larrick R (2009) Broaden the decision frame to make effective decisions. In: Locke EA (ed) *Handbook of principles of organizational behavior*. Wiley and Sons, Chichester, pp 461–480
- Letts M, Mathews R, McCormack T, Mortaitis C (1993) The conclusion of the Chemical Weapons Convention: an Australian perspective. *Contemp Sec Policy* 14:311–332
- Loescher G (2001) *The UNHCR and world politics: a perilous path*. Oxford University Press, New York
- Meyer T (2010) Power, exit costs, and renegotiation in international law. *Harv Int Law J* 51:379–426
- Osofsky H, Levit J (2008) The scale of networks?: local climate change coalitions. *Chic J Int Law* 8:409–436
- Pejic J (1996) The need for an independent prosecutor. *Int Crim Court Monitor* 1996:8
- Pierson P (2000) Increasing returns, path dependence, and the study of politics. *Am Polit Sci Rev* 94:251–267
- Poulsen L (2014) Bounded rationality and the diffusion of modern investment treaties. *Int Stud Quart* 58:1–14
- Ralph J (2009) Anarchy is what criminal lawyers and other actors make of it: international criminal justice as an institution of international and world society. In: Roach S (ed) *Governance, order, and the International Criminal Court*. Oxford University Press, Oxford, pp 133–153
- Raustiala K (2005) Form and substance in international agreements. *Am J Int Law* 99:581–614

- Shin J, Ariely D (2004) Keeping doors open: the effect of unavailability on incentives to keep options viable. *Manage Sci* 50:575–586
- Soll J, Milkman K, Payne J (2013) A user's guide to debiasing. [http://opim.wharton.upenn.edu/~kmilkman/Soll\\_et\\_al\\_2013.pdf](http://opim.wharton.upenn.edu/~kmilkman/Soll_et_al_2013.pdf). Accessed 15 Aug 2014
- Sverdrup U (2002) An institutional perspective on treaty reform: contextualizing the Amsterdam and Nice Treaties. *J Eur Publ Policy* 9:120–140
- Thelen K (2002) The explanatory power of historical institutionalism. In Mayntz R (ed), *Akteure-Mechanismen-Modelle*, Max Planck Institute, pp 91–107
- van Aaken A (2014) Behavioral international law and economics. *Harv J Int Law* 55:421–481
- Victor D (2011) *Global warming gridlock*. Cambridge University Press, New York
- Weis P (1967) The 1967 Protocol relating to the status of refugees and some questions of the law of treaties. *Br Yearb Int Law* 42:39–70
- Wendt A (2002) Anarchy is what states make of it: the social construction of power politics. *Int Org* 46:391–425
- Weyland K (2005) Theories of policy diffusion: lessons from Latin American pension reform. *World Polit* 57:262–295