International Law and International Relations

Bridging theory and practice

Edited by

Thomas J. Biersteker, Peter J. Spiro, Chandra Lekha Sriram, and Veronica Raffo

Contemporary Security Studies

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

This volume examines the opportunities for, and initiates work in, interdisciplinary research between the fields of international law (IL) and international relations (IR), two disciplines that have, for much of the post WWII era, engaged relatively little with one another. With contributions from IL and IR scholars as well as policy practitioners, the book's unique approach is that it is organized not only around practical case studies, but around four discrete policy challenges: responses to terrorism after September 11, 2001, controlling the flow of small arms and light weapons, addressing the demands of internally displaced persons, and responding to the call for international criminal accountability.

The contributions thus demonstrate a number of contemporary trends that are often ill-addressed by scholars of either field including the increased importance of non-state actors and the ramifications of state weakness and state illegitimacy. They also shed light upon the ways in which policymakers operate at the intersections of law and politics in the international sphere, notwithstanding the gap between the two domains highlighted by scholars. Ultimately the book analyses how policymakers can draw upon scholars to address concrete policy issues, but also how, in return, scholars can learn from the approaches of policymakers. Such interdisciplinary and policy-relevant work is meant to help develop a more concrete research agenda for the growing work linking international law and international relations.

This book will be of great interest to all students of international law, international relations and governance.

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2007
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Ave, New York, NY 10016

This edition published in the Taylor & Francis e-Library, 2006.

"To purchase your own copy of this or any of Taylor & Francis or Routledge's collection of thousands of eBooks please go to www.eBookstore.tandf.co.uk."

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book has been requested

ISBN10: 0-415-40076-7 (hbk)
ISBN10: 0-203-96676-7 (ebk)

ISBN13: 978-0-415-40076-3 (hbk)
ISBN13: 978-0-203-96676-1 (ebk)

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FOREWORD

When one regards the real world of global, national, and local efforts to achieve peace, equality, and prosperity, it is apparent that the way people conduct politics relies very significantly on values and norms that they believe and act upon. Such a palpable human context is often lost in academic renderings of politics, which increasingly rely on sterile formulas of behavior or quanta of manipulatable data. This sterility seems also to render much social science alien to the choices of policymakers, civil society actors, and others in the day-to-day arena of political action. It has substituted a narrow band of explanatory power for relevancy.

At the same time, international law and theory also seem disconnected from daily experience, irrelevant in a world still dominated by state actors and transnational forces, an antiquated trope of diplomats. This perception is reinforced by leaders of hegemonic powers who regard the supposed restraints imposed by international law as an annoyance to be blocked at every inconvenient turn, rather than as an opportunity to solve global problems through collective action.

This volume and a series of four workshops were convened by the Social Science Research Council to try something a little different that would address the sterility or remoteness of the disciplines and applicability of international relations (IR) and international law (IL). Begun in the summer of 2001 by Ben Rawlence of the Program on Global Security and Cooperation, the project convened leading academics from both fields, men and women with real-world experience and a demonstrated capacity for inter-disciplinarity, a hallmark of the SSRC. In its simplest formulation, the project mission was to explore how norms were manifested through law. As Rawlence recalled to me recently, "Bringing legal perspectives to bear on conventional IR ways of understanding international problems would, it was hoped, promote a better understanding of how law worked to influence outcomes and thus to reinvigorate arguments within IR that law mattered. And flowing from that is that [empirical] scholarship mattered in helping to shape laws and the perspectives of law makers."

We adopted a case-study approach, and sought out complexity and relevance in these cases. The four that were adopted, and guided by the exceptional skill of Veronica Raffo, were the attempt to enact international legal restrictions on the

flow of small arms and light weapons; the ways the international community would deal with terrorism; the treatment of tens of millions of internally displaced persons worldwide; and international criminal accountability. To some extent, these choices were driven by opportunity and headlines, but those are not necessarily poor criteria. We wanted to demonstrate relevance by engaging issues of terrorism and the culpability of criminal regimes. In examining the legal status of internally displaced persons (IDPs), we had the unusual advantage of Ambassador Frances Deng's participation. He, more than anyone, had been responsible for creating and trying to implement norms as the UN Secretary-General's Representative on IDPs. We took on the small arms issue first, in part because it was receiving little attention from American policymakers (who oversee the world's largest export system), had a sizable and sophisticated community of researchers and activists, but was highly problematic with respect to solutions through international law.

The SSRC program always stressed the significance of social science research as a problem-solving enterprise, problems that afflict people the world over. Bringing these publicly spirited scholars together with practitioners – among them activists, judges, and government officials – was intentional, both to enrich the data scholars require and to provide a space and context for practitioners to reflect and learn. This project, perhaps more than any other, seemed to succeed in this way remarkably well.

As usual, there are many to thank for this at SSRC and elsewhere. These include the dozens of workshop participants, some of whose work is presented here. We are grateful as well to the foresight and generosity of our donor, the William and Flora Hewlett Foundation, and its program head, Melanie Greenberg. Intellectual work such as this is among the most satisfying one can pursue – it is both exciting as a complex puzzle and worthwhile because it can lead to enlightened action. We certainly know it met the first expectation, and hope it will fulfill the second one as well.

John Tirman
Cambridge, Massachusetts
August 2006

ACKNOWLEDGMENTS

This volume developed out of a research project sponsored by the Program on Global Security and Cooperation at the Social Science Research Council (SSRC), New York. We are thankful to John Tirman and Ben Rawlence, Program Director and Program Coordinator respectively at the SSRC, who designed the original structure of the project in July 2001. The project was further developed with the intellectual input of a "core group" of scholars that was convened by the SSRC to provide advice and guidance for the project. The members of this group were: Kenneth Abbott, Arizona State University; Thomas Biersteker, Brown University; Clarence Dias, United Nations; Martha Finnemore, George Washington University; Harold Koh, Yale University Law School; Sally Falk Moore, Harvard University; Anne-Marie Slaughter, Princeton University; Peter Spiro, University of Georgia Law School; Chandra Lekha Sriram, University of East London; and Nicholas Wheeler, University of Wales, Aberystwyth. Our thanks go to them as well, for their insightful advice and active engagement throughout the life of this project. The project received financial support from a grant from The William and Flora Hewlett Foundation, for which we are grateful.

The project took the form of a workshop series on different policy areas: Small Arms and Light Weapons Proliferation (workshop held in February 2002); Terrorism (workshop held in November 2002); Internally Displaced Persons (workshop held in June 2003); and International Criminal Accountability (workshop held in November 2003). Many of the chapters in this book are expanded versions of the papers presented at these meetings. We would like to thank all the speakers and participants at these workshops for their thought-provoking presentations, engaged discussions, and insightful analysis.

We take this opportunity to recognize the intellectual, editorial, and administrative support of the staff at the Program on Global Security and Cooperation at the SSRC, whose prodding, skills, and efficiency were absolutely essential to this project: John Tirman, Itty Abraham, Petra Ticha, Maggie Schuppert, Karim Youssef, Thodleen Dessources, and Sion Dayson. A special thank you to all of them.

Finally, we thank our editor Andrew Humphrys at Routledge, for his interest in and support for this volume.

1

INTRODUCTION

International law and international politics – old divides, new developments

Veronica Raffo, Chandra Lekha Sriram, Peter Spiro, and Thomas Biersteker

Introduction: law and politics after the Cold War

Since the end of the Cold War, the international political terrain has altered significantly. We no longer live in a world of discrete national communities, but rather in a world of increasing economic, political, and cultural interdependence, where the trajectories of countries are heavily enmeshed with each other, and where the very nature of everyday processes links people together across borders in multiple ways. Globalization, understood as a multidimensional phenomenon, has put pressure on polities everywhere, gradually circumscribing and delimiting political power.[1] The operation of these transnational social forces has had a profound effect on both the functioning and the conceptualization of international law and international politics.

The end of the Cold War heralded the end of a bipolar world in which law was subjugated to the imperatives of superpower spheres of influence. Pressures from below, such as from nongovernmental organizations (NGOs), and "global civil society," have brought the rights agenda to the fore, calling into question the absolute and unfettered sovereignty of the nation-state over its citizens. [2] With the perceived transformation of state sovereignty as the basis for power politics, the structure of international relations has changed: issues that transcend or disrupt traditional state interests, such as arms flows, human rights, terrorism, migration and displacement of populations, international finance, and the increasingly legalized nature of relations at the multilateral level, have risen to prominence. In this process, international law has increasingly embraced a broader variety of actors, overturning the exclusive position of the state and buttressing the role of suprastate, substate, and nonstate actors.

To study these emerging governance phenomena and questions of codification and enforceability of international law, new approaches to research are needed that can link macrosystemic-level analysis with detailed fieldwork.

Locating the nexus of different types of authority and power, and then further analyzing the drivers of social and legal processes within a web of overlapping political and legal jurisdictions, is a task that requires a multidisciplinary approach.

We intend this volume as an initial effort toward building such a knowledge base, and seek to contribute to a deeper understanding of how international law can be adapted to today's security challenges. The contributors not only examine the opportunities for interdisciplinary collaboration between the fields of international law (IL) and international relations (IR), but also initiate a research agenda, build an empirical base, and offer a multidisciplinary approach designed to provide concrete answers to real-world problems of governance, engaging both the theory and the practice of global security.

Genesis of the project

In July 2001 the Global Security and Cooperation program of the Social Science Research Council (SSRC) convened highly recognized scholars in IR and IL for a planning meeting for a new research project.[3] This SSRC initiative was aimed at forging collaboration between the fields of international law and international relations, both in theory and in practice, in order to address contemporary global security challenges. The project concentrated upon three central questions: (1) To what extent are international norms manifested through law? (2) In what ways can methodological and theoretical collaboration between the fields of IR and IL be fostered? (3) In what ways can social science research be mobilized effectively to enhance our knowledge about the utility of international norms through law?

The project drew on the expertise of a core group of scholars,[4] who chose a case-study approach to go beyond abstract meta-theoretical discussion of the relationship between IL and IR and concentrate on fresh approaches to urgent problems of international security and governance. The goal was the production of new knowledge as well as bridging the gap between relevant scholars and on-the-ground practitioners in a systematic and innovative way. The core group also identified several policy challenges crucial to the achievement of a sustainable global peace, challenges that require new research and new ways of applying research and scholarship. The four policy areas selected by the group were small arms and light weapons (workshop held in February 2002), terrorism (workshop held in November 2002), internally displaced persons (IDPs) (workshop held in June 2003), and international criminal accountability (workshop held in November 2003). This volume is organized into distinct sections that engage these specific policy challenges, in the order in which the workshops devoted to them occurred.

The purpose of the workshops was to examine these policy problems through the lenses of different legal and social science methods in order to illuminate how law and political processes intersect to influence the possibilities for inter-

national cooperation. By examining specific challenges in international politics through crosscutting theoretical frames, this project sought first to generalize about the cases and contribute to theory-building on the structure and efficacy of international mechanisms for regulating transnational governance issues; and second, to apply these theoretical insights in the service of case-specific policy problems and provide practitioners with empirical research on which to base negotiations or advocacy efforts. The workshops thus were aimed at clarifying the variables at play in each case in order to assist those practitioners who are committed to enhancing global security by the application of norms through law. The evidence of the politico-legal process at work in international affairs contributed, simultaneously, to an ongoing examination of the theoretical and methodological habits of the scholarly disciplines of law and international relations.

In order to foster greater interaction between practitioner experience and more theoretical approaches, the workshops were structured in such a way that each panel would feature practitioners (including policymakers working for governmental agencies as well as international organizations, and also NGO activists) and scholars from different disciplines.

In discussions at the workshops, the advantage of approaching these policy problems from the intersection of IL and IR became evident. On the one hand, IL as a discipline has suffered from overreliance on legal cases involving states without paying due attention to case studies (a new method for IL) rather than cases seeking adjudication, or without paying due attention to nonstate actors, who are increasingly the greatest perpetrators and victims of violence and conflict. On the other hand, IR has focused mainly on power and state-to-state relations, leaving out considerations of justice, nonstate actors, sustainable peace, international crime, and violence and its means. When these considerations cross international borders, as they increasingly do, neither traditional IR nor IL – taken alone – is sufficient.

This volume is intended to bridge the analytic and methodological shortcomings of both fields while also drawing on their respective strengths. Through case studies concerning some of the most pressing problems facing the world today, the distinguished contributors to this volume seek to ground discussions of norms, justice, peace, violence, and conflict in relation to the real world and thereby move beyond the existing limits of both disciplines.

International law and international relations: defining the gap, bridging the gap

The fields of international law and international relations have become increasingly intertwined in recent years, beginning to reverse a long tradition of viewing them as separate arenas. For several decades, this tradition was reinforced by the development of the academic disciplines of both international relations and international law.[5]

The dominance of the realist, and later, neorealist school of thought in international relations in the post-World War II era was perhaps the most significant reason for the divide between international law and international relations, as the realist school tended to promote the argument that law was largely derivative of international power politics. Political realists argued that law was epiphenomenal in the international sphere, and that it was generally ignored when contrary to state interests; it was a tool of the strong used to impose constraints on the weak, or something that states agreed to abide by only as long as it supported their own interests – and happily violated when it ceased to do so. This built upon the realists' traditional claims that the international system is one of anarchy, that the primary units are states, and that states pursue self-interest and survival.

Surely, the realists argued, it was clear that law could not constrain the external behavior of nations in any serious way; only the use of force was respected. If realists were correct that states were rational, unitary actors concerned with their own survival, then they would be loath to enter into agreements that in any way constrained their ability to act. Even if they were to make such agreements, they would do so only when it was in their own interest, and would feel quite free to abrogate them should their interests change. Law, and by extension international institutions, were therefore ineffectual and "epiphenomenal."[6] Major international law texts were dropped from the required reading lists for international relations students in leading research-oriented departments.

The skepticism of realism was compounded by skepticism from within legal or jurisprudential study, specifically by positivists who, following a tradition deriving from John Austin, argued that international law could not properly be law because it lacked the requisites. The positivists argued that as sovereign states were the highest authority in global society, it was by definition impossible to place limitations or authorities above them. As a result, international law could not function like domestic law: there might be some elements of international law that resembled domestic law, such as primary and secondary rules, and even adjudicatory bodies, but there was no apparatus for enforcement, no global police force.[7]

Of course, these challenges did not go unanswered, and there are a host of arguments that have been put forward for the role and relevance of law in contemporary international politics. Arguments for bridging the gap between international law and international relations have grown since the late 1980s and early 1990s. Further, the divide was less pronounced in the United Kingdom, where the importance of law in international relations was emphasized by adherents of the "English School."[8] At the same time, some groups of IR scholars – liberal institutionalists, social constructivists, and those who discuss legalization in international life – have begun to move past debates about the relevance or status of international law, to queries or arguments about *how* it functions in international life.

While the IR–IL divide was not just a peculiarly American phenomenon, it

was most visible in the United States. Scholars of the English School embraced the role of law, rules, and norms in international society, often proudly proclaiming themselves to be working in a "Grotian tradition," referring to Hugo Grotius, a seventeenth-century scholar who is often referred to as the "father of international law."[9] These scholars argued that even though international politics was anarchic, lacking a unitary hierarchical structure, this did not mean that rules and indeed law could not govern state behavior. They argued rather that international society was an anarchical society, but a *society* nonetheless, a carefully regulated one.[10]

Liberal institutionalists' arguments vary, but they combine key elements of liberalism with elements of institutionalism. They argue for the importance of institutions and cooperation in the international system – far from being anarchic, they argue, international order is maintained and rule-governed. This may be the case, in large part, for self-interested reasons: states create institutions that facilitate activities in which they wish to engage, such as trade, or ease the risks of risky negotiations, such as those over arms control. These theorists argue that because institutions or regimes facilitate transparency, reduce transactions costs, and reduce the risks of cheating, states will create rules and abide by them. Many also argue that, once created, institutions develop an identity and power of their own, constraining state behavior even where states may wish to deviate from agreed rules. Path dependency ensures that institutions are easier to maintain than they are to create. Liberal institutionalists may further argue that liberal states that adhere to the rule of law at home will be more likely to promote rule-governed behavior internationally, and to create and abide by international legal regimes.[11]

Constructivists, too, have embraced the role of law and norms in international politics. They reject the realist claim that anarchy in the sense of the absence of a unitary ruler in international relations means that behavior cannot be ordered. As Alexander Wendt put it, anarchy is what states make of it, and they can construct social interactions and institutions that are orderly. Norms have an impact upon state actors, shaping their identity and interests, and thus shaping their behavior. The account of normative development that they offer often reads very much like that of the emergence and shaping of international law, particularly customary law. By this account, norms may emerge initially through the efforts of a few norm entrepreneurs. Over time, these entrepreneurs are able to convince actors to adhere to their norms, and at some point, when a sufficient number have adopted a norm, a tipping point is reached and it becomes embedded. Central to this account is the nature of actors' belief systems: actors change behavior because they believe it to be in their interest, or consistent with their identity, to do so. Norms, and indeed law, are then not cynical fictions as realists might suggest, but rather create real limits on state behavior.[12]

Finally, emergent work devoted to the so-called legalization of international politics focuses less on debates about whether or not international law is important in international politics and more on explaining how legalized institutional

arrangements come to be. They use state interests and preferences to help explain why states choose to develop regimes that appear to constrain them. Such legalization can be harder or softer, and its creation is driven by state interests. States will strategically choose harder or softer law according to their needs. Harder law has the advantage of reducing transaction costs, strengthening credible commitments, and resolving problems of incomplete contracting and later interpretive disputes. Softer law has lower contracting costs and lower sovereignty costs, facilitating compromise and allowing the possibility of coping with uncertainty.[13]

International lawyers have been saying for years that "law matters" in international affairs; now, current events are proving them right and IR scholars are taking note. Myriad books and articles have been devoted to the subject, seeking to identify the gap between international law and international relations, and arguing that it must be bridged, since roughly the end of the Cold War.[14] Some work has devoted attention to the insights that can be derived from the engagement between IR and IL for specific challenges, such as that of responding to mass atrocities.[15] But more remains to be done.

For analysts taking law seriously, the question now becomes: How do we take the theoretical engagement between the two fields and use it to interpret and explain aspects of contemporary international politics? Further, how can these analyses be made relevant to policymakers seeking to craft solutions to policy challenges at the intersection of international law and politics? And how can both IL and IR gain from the insights of practitioners? Many practitioners are already simultaneously engaged in integrating concepts from both international law and international relations into their daily work and have little time for meta-theoretical musings about how the two can be better integrated in the abstract.

International law, international relations, policy practitioners, and the state

Each of the three different communities (international law scholars, international relations scholars, and policy practitioners) engaged in conversations in the four sections that compose this volume (small arms and light weapons, terrorism, internally displaced people, and international criminal accountability) has a distinct relationship to the state. As already discussed, most mainstream international relations scholars are explicitly or implicitly state-centric in their orientation and analysis. The same is true of many scholars of international law, which has long privileged the law of states. Practitioners, including those represented in this volume, are often either former state officials or representatives of nongovernmental organizations who define their mission in opposition to state policies. For all three, whether they respect or abhor the state, securing a change in state policy is often their primary goal or best indicator of success.

Yet the state construct itself has become increasingly problematic in recent years. The state faces challenges both from above and from below. The Westphalian state ideal – that neat convergence of an unchallenged (sovereign) location of final authority over a people with an unproblematic identity residing within a clearly demarcated territorial boundary – is a rare achievement, if it ever even existed.[16]

A key challenge from above is the emergence of institutions within which states voluntarily bind themselves, such as the International Criminal Court (ICC) (discussed in this volume) and the United Nations (UN). The UN Security Council has increasingly invoked Chapter VII of the UN Charter in resolutions passed since the end of the Cold War, making its resolutions binding on *all* member states. In particular, the UN's frequent invocation of Chapter VII in its counterterrorism resolutions since September 11, 2001, has led to complaints from some member states of a growing "democratic deficit" in the UN system.

The codification of new norms, such as the "responsibility to protect," poses a different kind of challenge to the Westphalian state ideal from above. The idea that all states have a responsibility to protect populations located within their territorial space (and if they do not or are unable to do so, that others implicitly have a right to intervene) constitutes a significant redefinition of the operational meaning of state sovereignty. It is a direct descendent of the Nuremburg trials, the Universal Declaration of Human Rights, the Genocide Convention, and the Helsinki accords. There will inevitably be violations of this emergent norm, but the codification of the idea in the 2005 UN summit declaration is a significant normative challenge to the Westphalian state ideal.

Challenges to the state from below include the emergence of both relatively benign institutions, such as the growth of institutions of global civil society, and less benign elements, such as groups engaged in transnational terrorism. Further, in some places the institutions of the state have virtually ceased to exist (in the so-called failed or collapsed states of sub-Saharan Africa, such as Somalia, Sierra Leone, or Liberia).

As a result of these challenges from below, nonstate (often private) actors increasingly play authoritative roles in international affairs, roles ranging from market-based standard-setting organizations to transnational networks engaged in acts of terrorism.[17] Whether they invoke market authority, the authority of expertise, or the authority that comes from the provision of subnational security (sometimes by warlords), substate actors variously operate below the radar of the state, challenge centralized state legitimacy, and increasingly provide alternatives to the unachieved Westphalian state ideal.

The four sections that compose the bulk of this volume address these different challenges from above and below the state and are indicative of the new kinds of problems facing the world in the twenty-first century. However normatively appealing the unrealized Westphalian state ideal, a growing number of actors and analysts are beginning to see the state as a problem, not as the sole source of effective solutions.