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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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

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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.

This poses both normative and methodological challenges for international law and international relations scholarship. Individuals and corporate entities are increasingly becoming central agents in international affairs, quite independent of their relationship to the state. The agency of individuals before international legal (and quasi-legal) institutions has become an issue for both IL and IR: they can, for example, trigger internal reviews of World Bank projects or challenge their designations on UN sanctions lists. These developments do not eliminate the importance of the state in international law and international relations. Rather, a state-centered focus, taken alone, is increasingly inadequate for a growing number of important issues in international affairs.

This realization has been reached simultaneously by international law scholars, international relations scholars, and policy practitioners. It has been our hope in the various workshops that are summarized in this volume, that by bringing together IL scholars, IR scholars, and policy practitioners, we might be able to generate some new insights and go beyond the core realization that IL, IR, and policy practitioners have already reached independently. By grounding the conversation in four different empirical contemporary global security issues, we have attempted to go beyond general calls for greater collaboration among the three communities and to explore the connections between them that might emerge out of common concern.

The task, however, is simple. International law scholars share a body of international legal case knowledge that often seems arcane and exclusionary to IR scholars and policy practitioners. IR scholars are often caught up in meta-theoretical debates and epistemological arguments of their own. IR scholars' concern with research design and methods of analysis may seem equally arcane to IL scholars and policy practitioners. At the same time, the advocacy of some practitioners is sometimes off-putting to IL and IR scholars who seek "objectivity."

There are challenges in combining practitioner observations and normative commitments to outcomes with theoretical generality and analytical commitments on the part of both IR and IL, just as there are questions of how practitioner knowledge can be incorporated into social science and legal understanding, and how those bodies of theory can assist practitioners on the ground. We have not addressed all of these issues in the volume, but we have at least begun the conversation.

Organization of the volume

This volume seeks to contribute to the growing literature on the linkages between international law and international relations in two novel ways. First, it brings into the discussion policy practitioners, who regularly operate in the arenas of both law and politics, and whose concerns offer new insights into the relationship between law and politics in the "real" world. Second, it seeks to deepen our understanding of the interplay of law and politics by focusing upon four discrete clusters of policy challenges: the spread of small arms and light

weapons, the threat of and responses to terrorism, the protection of internally displaced persons, and the demand for international criminal accountability.

These four policy challenges were chosen as subjects of inquiry, initially for the policy workshops and then for this volume, for several reasons. First, each represents a pressing contemporary policy problem. Second, the policy approach to each has been more or less legalized, or is in the process of becoming more legalized. Third, each represents an arena in which state interests, and thus international politics, are clearly implicated. Fourth, these four areas represent very different types of challenge: terrorism may pose a direct security threat to states, as may the spread of small arms, and may be viewed as "hard" politics, while international criminal accountability and protection for IDPs represent "softer" responses to humanitarian concerns. In examining each of these challenges and the responses to date, we see clearly the interplay of law and power relations in policymaking.

The volume has been structured into four sections, each devoted to one of these four policy challenges, with an additional section of three chapters drawing out insights and conclusions. Each section analyzes emerging international processes and institutions from the comparative perspectives of both international law and international relations, and introduces the perspectives of policy practitioners. The structure of the sections themselves replicates the structure of the policy workshop at which the essays that would become this book were presented, in that each section includes the contributions of scholars from different disciplines as well as contributions of practitioners, including policymakers working for governmental agencies and international organizations, as well as NGO activists.

Small arms and light weapons

The chapters in Part I of the volume each deal in different ways with the challenge of responding to a transborder and substate problem with traditional methods of arms control, which are often state-centric and focused upon regulating supply rather than demand. Clear divisions emerge among the contributors about the ramifications of this challenge. While Harold Koh seeks to identify potential international regulatory and legal responses, and is relatively optimistic, Will Reno suggests that the current approaches are overly deferential to the state, failing to recognize the many situations in which armed groups may have control, and even a degree of legitimacy, in a given locale. This disagreement has real ramifications for the regulation of small arms, but also for how we think about the place of law in international relations. Certainly, to the degree that we continue to understand international law as something that can only be created by states, found in sources identified by Article 38 of the Statute of the International Court of Justice (ICJ), the result will be attempts to encourage states to regulate arms flows domestically, or attempts to prevent arms flows by placing constraints such as sanctions upon states. Responses are thus

state-driven and state-centric, replicating the "black box" conception of the state promoted by simple versions of structural realism. Certainly, there have been increased international attempts to curb flows of arms to groups – the 1993 sanctions and arms embargoes imposed upon Angolan rebels under UN Security Council Resolution 864 were the first of their kind. Sanctions on groups rather than states have become more common since, and the responses to terrorist financing in Security Council Resolution 1373, taken up in other chapters of this volume, demonstrate the recognition by states that there is a need to respond legally to nonstate actors directly. The problem is potentially more complex than this, however – in failed states or repressive and genocidal or "democidal" states, armed groups might represent more legitimate forces than does the officially recognized state. They may provide some measure of basic services, including security, and be viewed by the population in a territorial control as a necessary evil or even as legitimate. In such contexts, Reno suggests, regulatory responses that preference the state may potentially do harm by stemming the flow of weapons to groups. However, the legal regimes developed to date do not, and perhaps cannot, differentiate among more or less legitimate armed groups or states. Here the insights of constructivism or other IR theories, perhaps in tandem with the insights of Thomas Franck on sources of legitimacy in international law, might potentially help us to think about more nuanced responses.[18] This is perhaps a key insight of a recent volume on the place of law in international politics edited by Christian Reus-Smit.[19] Constructivism may help us analyze the place of law in international politics, suggesting that it is more than simply a result of political contestation, but also has a feedback effect, shaping politics. As such, law is part of a complex interplay of factors, and helps to shape understandings about norms of appropriate behavior, and legitimacy.[20] This appears to be the case in two of the contributions on small arms, with Reno mounting a serious challenge to the constraints placed upon legitimate actors and possessors of small arms, and the apparent exclusion of certain armed groups. This is a more radical claim than that of Robert Muggah, who nevertheless also challenges the state-centric model, and is antithetical to some of the strong arguments that Koh makes for the role of law in constraining the flow of small arms.

Muggah argues that legal and regulatory responses to the flow of small arms and light weapons currently focus only upon the supply of small arms, not the sources of demand, or the effects of small arms. This appears to be partly an artifact of the epistemic community addressing these arms flows, many of whom were previously active in more conventional arms control.[21] Conventional arms controllers emphasize supply-focused and state-centered regulatory mechanisms. Their focus is thus excessively state-centric, and is unable to appreciate why communities, groups, and individuals seek to acquire weapons to combat radical insecurity in "failed" or "failing" states. This problem is compounded by the fact that states continue to be the primary actors negotiating international agreements, further hampering regulatory efforts that might take account of the

role of nonstate groups, both NGO and armed, and individuals, in developing new norms and law surrounding small arms and light weapons.[22]

Koh, writing as both an academic and a practitioner, places great emphasis upon the importance of regulatory responses. Indeed, he emphasizes the need for academics to recognize the practical challenges faced by practitioners in addressing the flow of small arms, and the need for practitioners to be better informed by some of the theoretical work of academics. He argues not for a blind optimism or faith in regulations, but for a constructive and informed use of transnational legal processes. It is through the spread of norms and transnational regulation that problems that seem insuperable at first glance, he argues, might actually be tackled successfully. He argues, following constructivist work demonstrating the spread of human rights norms, that the spread of norms, practice, and regulation, vertically and horizontally, may help limit the spread and use of small arms.[23] The spread of such norms may also support regulatory regimes that are ultimately more flexible than the state-centric ones depicted and critiqued by Reno and Muggah.

Terrorism

The chapters in Part II of this volume examine law and politics in the wake of the terrorist attacks of September 11, 2001. Mary Ellen O'Connell and coauthors Gerry Simpson and Nicholas J. Wheeler consider the twinned dynamics of the US invasion of Iraq and the global war on terrorism. Simpson and Wheeler propose alternative conceptions of the invasion itself within and outside international legal frameworks. O'Connell highlights the George W. Bush administration's attempted use of international law as a weapon against perceived adversaries. In each analysis, the contributors argue that US actions have been lawless within an international legal model, although both analyses also conclude that any attempt by the Bush administration to legalize or legitimize its actions has failed. By contrast, both Fiona Adamson and Curtis Ward highlight the importance of nonstate actors and international organizations in any effort to systematize developments relating to terrorism. Ward challenges statist IR conceptions of global security issues in describing major innovations in UN efforts against terrorism, while Adamson challenges traditional assumptions of both IR and IL by offering a transnational political conception of terrorism. All four chapters in this section point to the growing role of international law and institutions in international relations, even in an area implicating core security concerns.

Simpson and Wheeler seek to explain the 2003 US invasion of Iraq in ways that take account of the action in international law terms. Treating the invasion as inconsistent with current international legal doctrine, the authors suggest three possible explanations for it. First, the Bush administration may have been seeking to challenge norms about self-defense, seeking to broaden the possibilities for anticipatory, or "preemptive," self-defense. This attempt clearly

failed, as few international actors showed any inclination to accept the implicit and occasionally explicit proposal to transform the law defining acceptable use of force. Alternatively, the US invasion may have been an assertion of sovereign exceptionalism in which the United States perceives itself as above the law. Finally, and most provocatively, Simpson and Wheeler suggest that the United States may have been claiming a legalized hegemony, a right of self-defense available *only* to the United States, which would directly challenge entrenched legal conceptions of sovereign equality, but might also resolve the contradiction between empire and law. Simpson and Wheeler's analysis allows for the integration of realist IR conceptions of power with the presence of a meaningful international legal framework.

O'Connell also examines the apparent use by the Bush administration of international law as a weapon of international politics. Here the subject is *jus in bello* rather than *jus ad bellum*, that is, the laws of conduct in war as opposed to the laws relating to the initiation of war. O'Connell casts the administration's "war" discourse as a tool for claiming the considerable discretion afforded to belligerents in their treatment of enemy actors. This discretion is largely unavailable in peacetime, even in response to criminal behavior, which terrorism was most commonly designated as prior to the events of September 11, 2001. As O'Connell explains, war has its privileges. But the United States has denied duties attendant to belligerency as well (most notably with respect to the treatment of detainees), thus attempting to establish a legal asymmetry. Here her analysis resonates with Simpson and Wheeler's discussion of legalized hegemony. O'Connell further suggests that the United States will face material consequences for its violations of the laws of war.

Where O'Connell and Simpson and Wheeler see the legal justifications offered as perversions of the law, Adamson and Ward address the challenge terrorism poses to our conceptions of international relations. Adamson highlights the inability of dominant IR paradigms to account for nonstate actors such as terrorist networks. Realists view nonstate actors as irrelevant or as state proxies, which when translated into policy requires identifying a state sponsor of such groups. While more open to accounting for nonstate influence, liberal IR theory likewise largely frames such influence in a state-ordered system. Where nonstate actors are destabilizing, the liberal response is a regulatory one. Adamson instead offers a "political mobilization" view of violent nonstate actors. Terrorism is thus an element in transnational constituency building. Thus the appropriate response to terrorist activities is at least in part proactively political, delegitimizing violent activity and addressing underlying political movements represented by terrorist groups. This response is both institutional and legal.

Ward, a former ambassador of Jamaica to the United Nations, offers in his commentary a distinct practitioner perspective on terrorism and the IR–IL divide. His analysis is informed in significant part by his time on the Security Council, on which Jamaica was a nonpermanent member following the terrorist attacks on the United States in 2001. Ward is highly skeptical of the realist

approach he sees reflected in much of US unilateralism since these attacks. US actions, such as the invasion of Iraq, he argues, are not merely illegal, but are also, in part as a consequence of that illegality, ineffective or counterproductive. He argues rather that multilateral responses, such as those taken by the Security Council, have a greater chance of success.

Taken together, these chapters offer fresh insights into the challenges posed by contemporary terrorism and responses to it for academics and policymakers alike. A clear message is that an analysis of the problem from a purely state-centric perspective is insufficient: nonstate actors, be they substate actors or international organizations, play a central role. Simultaneously, the putative contradiction between law and power in the international system, and indeed the general realist rejection of the place of law in IR, is open to challenge. It thus is important to understand in a more nuanced fashion the ways in which the powerful seek to legitimize or legalize their activities, as well as the ways in which they may seek to recast law in pursuit of their own interests.

Internally displaced persons

The chapters in Part III of this volume address the problem of internally displaced persons – that is, persons forced to flee their homes for such reasons as armed conflict, situations of generalized violence, violations of human rights, or natural or human-made disasters, but who remain within the borders of their own countries. In this section, Francis Deng, Special Representative of the UN Secretary-General (SRSG) for internally displaced persons, explains norm development through the lens of the Guiding Principles on Internal Displacement, enriching the analysis from a combined practitioner and academic perspective. Deng describes the process by which the Guiding Principles were developed, the reasoning behind the recourse to "soft law," and the reception the principles received at the international, regional, and national levels, and reflects on their current and potential impact as a nascent international normative framework. While arguing that it seems highly unlikely that the process started in 1998 with the formulation of the Guiding Principles could be reversed, Deng acknowledges that their long-term success as a normative instrument – in terms of both acceptance by states as well as visible effects on the ground – is not yet ensured. Looking back on his ten-year experience as SRSG, Deng concludes that it is possible to invigorate or create new norms at the international level, and to do so relatively quickly.

Kenneth Abbott's response to Deng examines privately (as opposed to state) generated soft law in international governance. Abbott compares the development of the Guiding Principles to other cases of privately generated soft law, in the broader framework of "legalization."[24] Abbott points out that the Guiding Principles resemble other soft law instruments, but argues that what makes the Guiding Principles a particularly interesting instance of international norm creation is the fact that, unlike other soft law instruments adopted by

representatives of states, they were drafted and finalized primarily by private experts. Abbott suggests that, by affording particular types of actors (such as NGOs and other nonstate activists, international organization officials, and weaker states) greater access and influence on outcomes, private soft law processes may have unique political advantages. Abbott also demonstrates how Deng's account of the legal drafting by norm entrepreneurs fits into the process of "strategic social construction"[25] whereby apparently technical and neutral work arises from a political agenda.[26] Abbott also engages with the questions of legitimacy and authority raised by other contributors in this volume from a different perspective, by discussing the strategies used by norm entrepreneurs involved in the dynamics of private soft law creation. Abbott concludes by emphasizing that, since the Guiding Principles are a "work in progress" (still in the stage of norm dissemination and adoption, following the "life cycle" stages proposed by Finnemore and Sikkink),[27] their future poses a test for normative theories of international relations.

The dialogue between Deng and Abbott also demonstrates the value of interactions between academics and practitioners, and in particular the rich opportunities for collaboration. In responding to Deng's hypotheses and statements, Abbott not only brings Deng's observations into the framework of his well-developed theory, but also gives feedback to Deng regarding the strengths and weaknesses of the strategies that Deng designed. The dialogue crystallizes key concerns of the project: the need to combine practitioner experience and commitment with theoretical and analytical insights from both IR and IL; the possibility of incorporating practitioner knowledge into social science and legal understanding; and the potential for these bodies of theory to inform practitioners on the ground.

International criminal accountability

The chapters in Part IV of this volume take divergent positions on both the theory and practice of international criminal accountability. Leila Nadya Sadat, Madeline Morris, and Diane Orentlicher each offer academic/practitioner perspectives on the complexities of jurisdiction in the imposition of international criminal accountability, as does Ellen Lutz in her commentary. Jurisdiction is contentious in this arena because it is of necessity extraterritorial: international courts or domestic courts prosecute crimes occurring in faraway locales, where domestic courts are usually unwilling or unable to pursue such cases.[28] Extraterritorial exercise of jurisdiction clearly challenges certain state-centric aspects of both realism in IR theory, and traditional international law. For each, the state sovereignty dictates other states largely cannot or should not judge the internal behavior of state actors. To do so would interfere in "matters which are essentially within the domestic jurisdiction of any state."[29]

There is thus great controversy over the appropriate reach of jurisdiction, in particular the jurisdiction of the International Criminal Court. There has in

particular been dispute over the potential for extension of the court's reach to some citizens of nonstate parties. While the court largely cannot judge acts by citizens of nonstate parties, it can do so if they act upon the territory of state parties. It is this facet that has raised US concerns about the vulnerability of its military and civilian workers abroad, triggering controversial responses.[30]

As Sadat explains, however, it was not inevitable that ICC jurisdiction would depend upon the offender's nationality. Early discussions suggested that jurisdiction could rest solely upon a state having delegated territorial jurisdiction, or even that nationality ought not be a bar if the UN General Assembly believed a person had committed "international crimes." Sadat argues that the traditional limits upon extraterritorial jurisdiction placed upon states do not extend to international courts, because while states are in a horizontal legal relationship to each other, international courts are positioned vertically above states. Thus tribunals do not merely receive their legal powers through delegation by states; rather, states are a creation of international law, and domestic and international legal systems thus exist in a "symbiotic" relationship to one another. This interpretation clearly cuts at the core of realist objections – that international law is at most a convenient fiction created by states, or is a construct of their own rational interests – and at traditional international law emphasizing consent.[31]

Morris emphatically rejects this interpretation, arguing that the underlying dilemma is between the need to pursue crimes that perpetrator regimes will refuse to, and an international system "premised on the sovereign equality of states." It is the respect for sovereign equality, clearest in the continued respect for state and official immunity, that led the International Court of Justice to condemn Belgium's exercise of universal jurisdiction over the Democratic Republic of Congo's foreign minister, who was protected by state immunity. Thus domestic courts, at least, cannot challenge such immunity. But the ICJ suggested that while domestic courts could not do so, international courts might be allowed to, and here Morris suggests that the dicta might have gone too far, implying that the ICC might be allowed to reject immunity claims even by officials of nonstate parties. She argues that the ICC has jurisdiction precisely because a territorial state has delegated its jurisdiction to the Court, and thus if the state must recognize immunity, then so too does the ICC. These concerns are consistent with Morris's suggestions elsewhere that ICC jurisdiction over citizens of nonstate parties is undemocratic.[32]

Orentlicher challenges Morris's interpretation, although she recognizes the same conundrum: true accountability for serious crimes requires piercing the veil of sovereignty, yet international law respects sovereignty. She recognizes that the evolution of what she refers to as "transnational legal development and processes" is a challenge to traditional consent-based conceptions of lawmaking. She rejects the suggestion that judges in general are any less accountable than political branches of government, and further that decisions abroad may undermine domestic pacts in postconflict societies. She argues that transnational proceedings are part of a broader process of norm development, shaping and

constituting the values of domestic and international law. This interpretation, which draws heavily upon the constructivist perspective in IR theory, thus rejects a state-centric or consent-based understanding of the development and enforcement of international criminal law.

The chapter by Chandra Lekha Sriram and Youssef Mahmoud is distinct in that it uses the prism of one case, the Special Court for Sierra Leone (SCSL), as a window on IR theory debates about international accountability. It is framed as both a response to and an elaboration upon realist challenges to the utility of prosecutions. Realists such as Jack Snyder and Leslie Vinjamuri reject constructivist arguments like the one elaborated by Orentlicher above.[33] These realists argue that the primary concern after armed conflict or domestic repression ought not be accountability, but rather stability and the restoration of security and the rule of law. Sriram and Mahmoud consider several IR theory approaches to the problem of postconflict justice, constructivism, liberalism, and realism. While they concur in part with the realist perspective, they argue that it is not sufficiently fine-grained. It worries only in the most general terms about the potential of postconflict justice to provoke further conflict, but does not take seriously the needs of postconflict security, including the restructuring of institutions and disarmament, demobilization, and reintegration processes. Through a close examination of these needs in the context of the SCSL, they demonstrate how such countries may require more detailed policy responses than IR theory can inform.

Lutz offers a vigorous commentary from an academically grounded, and advocacy-oriented, perspective. She reminds us that disagreement continues among academics and policymakers alike regarding the appropriate extent of extraterritorial jurisdiction, and debates about the legitimacy and efficacy of international criminal accountability, we have simultaneously seen the inexorable expansion of both. This has been made possible in part through the norm-changing efforts of leading practitioners who, she notes, sought to work creatively with the law and helped to shape a reality that might have been unthinkable just a decade ago, in reality in which former rights abusers may no longer find safe haven from accountability.

Key conclusions

The three chapters in Part V offer distinct insights regarding the intersections of the disciplines of international law and international relations, but also about the place of law in contemporary international politics. The chapter by Peter Spiro addresses a central issue that emerged repeatedly throughout the project, although it was not an original focus of inquiry: the attitude of the US towards international law. He sketches out a possible alternative to the current US unilateralism and skepticism about international law, drawing upon international relations theory. He offers a theory of liberal transnationalism, arguing that international law will be incorporated progressively by the US not because it is good to do so, but rather because rational institutional action compels it. This

fusion of liberal and constructivist insights offers a challenge to contemporary realist explanations for US behavior, and insights for international lawyers interested in greater US incorporation of international law domestically. The chapter by Martha Finnemore offers a constructivist interpretation of the chapters in the volume, emphasizing the dynamics of change in international law and politics, the importance of social context, and the role of nonstate actors. The final concluding chapter, by Clarence Dias, offers a legal practitioner and activist perspective on the international law and international relations divide. He, like Finnemore, emphasizes the importance of norms in international politics and law, and illustrates the role of norms in shaping both through the examples of small arms and terrorism addressed in the volume. The concluding contributions, taken together, offer not only robust arguments for the importance of international law, but also offer further guidance to increase its role in contemporary international politics.

Insights from the volume: new perspectives on old divides

A close examination of our four key policy challenges – small arms and light weapons, terrorism, internally displaced people, and international criminal accountability – reveals a number of crosscutting themes, emerging not only within the individual sections of the volume, but also across them. These include the primacy of the state, and specific challenges to it, the sources of legitimacy and authority in the international system, the evolution of norms in theory and practice, and the relationship between practitioners and academics, whether expert in international law or international relations.

The state

The state is the central player in international law and international relations. It has traditionally been the author and sole subject of international law, with individuals unable to represent themselves on the international stage, but only to be represented by their own states. The state has also often been treated as the principal object of study of international relations: traditional realist theory viewed states as the only unit of analysis. Substate actors, whether individuals, NGOs, or domestic policy processes, have not therefore been central in either academic discipline. Policymaking has both shaped and reflected this divide, with states of central concern in multilateral negotiations, or in international organizations such as the United Nations.

Yet as the contributions to the volume clearly demonstrate, this vision of the world is flawed. It fails first and foremost to take account of a host of nonstate actors, whether terrorist groups, individuals responsible for, or victims of, violations of international criminal law, or persons such as IDPs who have no state to speak for them. It fails also to take account of transnational processes such as the transborder flow of small arms and light weapons. Each of these sets of