International Law and International Relations

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Preface

This volume is intended to help readers understand the relationship between international law and international relations (IL/IR). The excerpted articles, all of which were first published in *International Organization*, represent some of the most important research since serious social science scholarship began in this area more than twenty years ago. The contributions have been selected to provide readers with a range of theoretical perspectives, concepts, and heuristics that can be used to analyze the relationship between international law and international relations. These articles also cover some of the main topics of international affairs. In this brief preface, we note the rise of law in interstate relations and flag some of the most important theoretical approaches to understanding this development. We also introduce the topics chosen and discuss the volume's organization.

THE RISE OF LAW IN INTERNATIONAL RELATIONS

The study of international law has enjoyed something of a renaissance in the last two decades. Of course, international affairs have long been assumed to include international legal issues. Yet, in the first third of the twentieth century, analysts did not sharply distinguish "international law" from "international relations." International relations courses were often about international law and frequently confounded the prescripts of international law with the way states were said to behave in fact. By the time the United States entered the Second World War, that illusory mistake was exposed: it was clear that international legal rules and processes had not operated the way many had hoped. The failure to

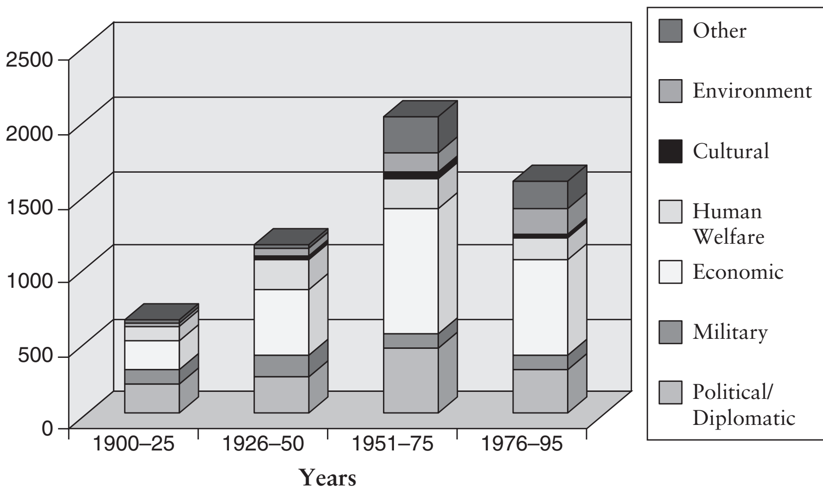
contain German and Japanese aggression, the weakness of agreements to keep the international economy functioning, and the humanitarian disasters of the Second World War made most observers acutely aware of the limits of law in international affairs. For more than thirty years after the end of the war, American political science turned its back on international law, focusing its study of international relations on the material interests and observed behavior of states.

Yet by the early 1980s, many international relations scholars had rediscovered a role for law in interstate relations. Reflecting on the post-war order, many recognized that it was built not only upon power relationships but also on explicitly negotiated agreements. These agreements in themselves increasingly piqued scholarly interest. One reason may have been the sheer proliferation of such agreements. A century ago, most international law was said to arise from custom – evidenced by continuous, recurrent state practice and *opinion juris* (i.e., the practice was compelled by legal obligation). For a number of reasons – including the growth of independent states, the lack of consent implied by many approaches to customary law, the increasingly detailed nature of international agreements, and the rise of multilateral treaty-making capacity, e.g. by various working groups of the United Nations – today, many (if not most) international legal obligations are expressed in treaty form. Some treaties codify customary law, but in a way that respects the express consent of the states that are parties to them.

Figure 1 shows the number of new multilateral treaties concluded in each quarter of the last century. While the number of new multilateral treaties grew from 1900 to 1975 and then began to decline in the 1976–95 period, Figure 1 strongly suggests that the aggregate number of multilateral treaties in force has grown rapidly in the last hundred years.

Not only has the number of treaties grown, so has the scope of topics and subjects addressed by treaty law. As Figure 1 suggests, treaty growth has been especially marked in economic affairs, as well as in areas of human welfare and the environment. Moreover, in the late nineteenth century, most international law defined the rights and responsibilities of *states* toward each other – purely "public" international law. Over the course of the twentieth century, international law increasingly began to address the responsibilities of states toward individuals and nonstate actors (characteristic of human rights treaties), and set forth rules governing the relationships of private individuals and nonstate actors toward each other – an expansion of private international law. This latter development is reflected in such important treaties as the United Nations

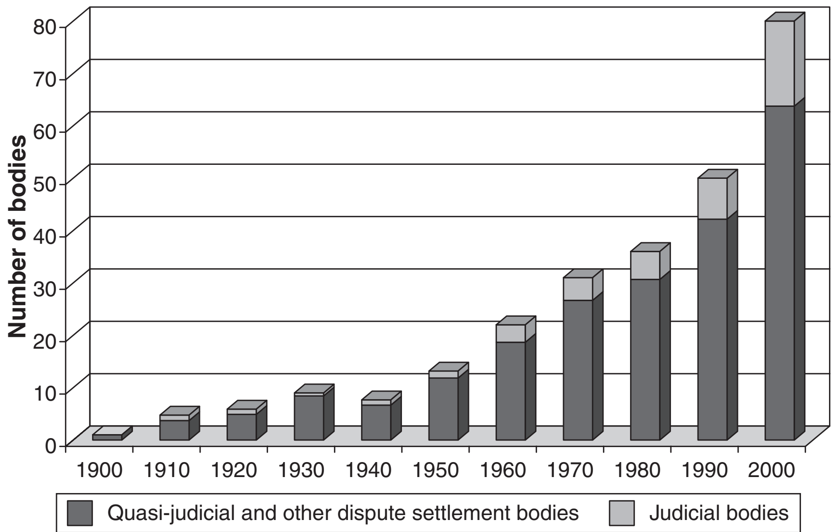
Figure 1. Number of New Multilateral Treaties Concluded



Convention on the International Sale of Goods, which is essentially a global commercial code, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has enhanced the effectiveness of private international dispute settlement.

In this context, it is perhaps not surprising that the authority to adjudicate international disputes has been delegated increasingly to international courts. Figure 2 shows that the number of international judicial, quasi-judicial, and dispute settlement bodies has grown from just a handful in 1900 to nearly a hundred today. Moreover, the rate at which dispute settlement bodies are growing has accelerated in the last 25 years. Interstate disputes over territory, trade, human rights, environmental protection, intellectual property, labor protection, and criminal matters may now be resolved in international institutions that more or less resemble well-developed domestic legal systems in the way they apply legal standards, procedures, and norms to dispute resolution. Some of these institutions, such as the European Court of Justice (ECJ) and the World Trade Organization's (WTO) dispute settlement system, have compulsory jurisdiction over member states or territories and enjoy impressive rates of compliance with their decisions.

What explains the explosive growth of treaty law, the broader scope of international law topics and subjects, and expansion of international venues for law-based dispute resolution? Does international law affect the behavior of individuals, states, and nonstate actors? How



does international law – and how do particular international rules and procedures – affect interstate relations? These are some of the questions addressed by social science and legal scholarship, of which the articles in this volume are examples.

THEORIES OF LAW IN INTERNATIONAL AFFAIRS

One way to understand the proliferation of legal arrangements is to view them as an epiphenomenon of more basic relationships between states. This is the position of scholars informed by structural realist theories: The interests of powerful states determine the content of international law, which in and of itself has little independent impact on behavior or outcomes. In conceptualizing "international regimes," Stephen Krasner's contribution in Part I of this volume sets forth this position in its pure form (Krasner 1982). Another selection in this volume, by Downs, Rocke, and Barsoom (1996), reflects similar skepticism about the extent to which international law has autonomous explanatory power. Other realist work, however, such as Steinberg (2002) and Garrett, Kelemen, and Schulz (1998) in this volume, affords some important functions to international law, while maintaining that law nonetheless reflects underlying power.

If law does simply reflect underlying power relationships, this raises the question of why states bother to create rules to order their interactions at all. A rationalist institutionalist theory was offered in early form by Robert Keohane (1982), an excerpt from which appears in Part I of this volume. Using a rationalist logic that was built on the same assumptions employed by structural realism, Keohane showed that international institutions could facilitate cooperative, positive sum outcomes that would not otherwise occur. Keohane's paradigmatic example was the prisoners dilemma, which he (and others following him) argued was a metaphor for much of international life. Rationalist argumentation that infuses legal institutions with autonomous explanatory power has since been a mainstay of much IL/IR literature. Increasingly, rationalist institutionalist scholarship has shifted from questions about how international law matters to questions about why legal forms vary (see, e.g., Lipson 1991, in this volume) and why treaty design varies (see, e.g., Smith 2000 and Koremenos 2001, both in this volume).

Much of the early rationalist work, whether realist or institutionalist, has treated states as unitary actors with interests that are exogenous to the argument. This evades a crucial question: where do interests come from? Liberal theories offer an answer: "State interests" are best understood as an aggregation and intermediation of individual and group interests. International law in this view is driven from the bottom up. For example, a selection from Andrew Moravcsik in this volume argues that the European human rights regime expanded rapidly in the wake of the Cold War, as nascent democracies that supported human rights protection emerged in Eastern Europe (Moravcsik 2000).

Liberalism may explain much of the content of international law, but it affords little autonomous role to law; however, when liberal processes are viewed as operating in the context of particular institutional arrangements, law may be afforded a crucial explanatory role. For example, Slaughter and Mattli's contribution to this volume shows how the ECJ offered a path for European interests that differed from the European Community's legislative path, reconfiguring European interests in ways that reshaped outcomes (Slaughter and Mattli 1993). Similarly, Keohane, Moravcsik, and Slaughter show how variance in the legal structure of international dispute resolution may explain the extent to which the various processes expand international law (Keohane, Moravcsik, and Slaughter 2000). Other selections in this volume, such as Goldstein and Martin (2000) and Gaubatz (1996), also combine liberal and institutional elements to generate interesting explanations.

Influenced by postmodern social theory, constructivists delved even more deeply into the question: Where do interests come from? Constructivists launched an ontological attack on the rationalist work that preceded it, claiming that neither interests nor power exists independent of the social context in which actors are enmeshed. Interests and identity are constructed socially; they are plastic and may be redefined. International law may be understood as both a reflection of identities and as a social artifact that reinforces identities, interests, and power. Variations on this view are articulated by several selections in this volume, including critiques of nonconstructivist approaches in Wendt (2001) and Finnemore and Toope (2001) and arguments about the importance of norms in shaping and understanding the operation of international law by Jackson (1987), Legro (1997), and Zacher (2001).

CONTEMPORARY RESEARCH AND THE ORGANIZATION OF THIS VOLUME

Increasingly, contemporary IL/IR research organizes less around abstract theoretical debates and more around particular methods and concepts that may be seen as hybrids of the main approaches. Increasingly, there is conscious engagement across meta-theories, with a focus on mid-level analysis of international legal and political developments using hybrid theories and powerful methods to test those theories.

Part II of this volume is largely organized around these developments, and newer heuristics and debates associated with them. This part highlights the distinction between making a commitment to an international rule and compliance with it. Gaubatz (1996) introduces the "credible commitment" concept (which suggests that a costly commitment by one state may induce other states to behave differently from the way they would otherwise behave) to the debate about treaty effects and suggests that at least some treaty commitments by democracies may be more credible than commitments by nondemocracies. Chayes and Chayes (1993) present what has become known as the "managerial" theory of treaty compliance, offering reasons that explain why states generally comply with treaties. Downs, Rocke, and Barsoom (1996) offer a skeptical counterpoint to Chayes and Chayes (1993) and others, arguing that apparent state "compliance" frequently results from treaty provisions that require little more than states would do in the absence of treaties, and that in other cases compliance is usually explained by self-interest or enforcement pressures from powerful states.

Part III explores the "legalization" of international relations, which was the topic of a widely read *IO* special issue in 2000. The first contribution (Abbott et al. 2000) defines the concept of legalization. Keohane, Moravcsik, and Slaughter (2000) argue that transnational adjudication causes more expansive international law-making than interstate dispute resolution. Goldstein and Martin (2000) offer reasons to be cautious about concluding that legalization is normatively desirable. Finnemore and Toope (2001) suggest that most of the work on "legalization" is limited by its narrow definition and the associated ontological orientation, which prevents the concept from adequately accounting for the reciprocal relationship between international law and social practice.

Part IV explores the relationship between international law and international norms. The first piece, by Robert Jackson (1987), argues that competing definitions of sovereignty and statehood suggest that international theory must accommodate morality and legality as autonomous variables. Legro (1997) shows that some norms affect state behavior more than others, and he identifies factors that influenced which norms concerning the use of force mattered most in World War II. Zacher (2001) suggests ideational and instrumental factors that influence the strength of norms, examining the norm against coercive territorial revisionism.

Part V considers the growing literature on treaty design and dynamics. Three of the selections (Lipson 1991, Smith 2000, and Koremenos 2001) offer a rationalist explanation for a particular attribute of international agreement design – why some international agreements are informal; why the extent of legalism in dispute settlement mechanisms varies across agreements; and why some agreements contain escape clauses or provide for a short duration. Wendt (2001) offers a constructivist critique of the rationalist approach to understanding treaty design, suggesting limits of the approach. Diehl, Ku, and Zamora (2003) present a perspective suggesting that international law can only be understood systemically and dynamically, by considering how international law changes (or does not change) as norms or other political factors change.

Part VI presents two competing views of the European Court of Justice (ECJ), which is considered by many to be the world's most legalized and sophisticated international court. Slaughter [Burley] and Mattli (1993) is a classic article, using neofunctionalist theory to argue how the authority and independence of the ECJ have grown and how the court has played an autonomous role in European integration. Garrett, Keleman, and Schulz (1998) challenge this view, arguing that the ECJ is so constrained by European politics that it should not be seen as a truly autonomous actor.

Part VII presents some classic articles that use IL/IR theory to understand particular substantive areas of international law. This includes articles that explore the extent to which international agreements maintain peace after conflict (Fortna 2003), how powerful countries use "invisible weighting" to influence outcomes under "consensus-based" decision-making rules at the World Trade Organization (Steinberg 2002), and why governments commit themselves to particular International Monetary Fund rules and the conditions under which they comply with those rules (Simmons 2000). Other selections consider the politics of war crimes tribunals (Rudolph 2001), explain the surge of commitment to human rights regimes in postwar Europe (Moravcsik 2000), identify treaty features that favor compliance with the international oil pollution control regime (Mitchell 1994), and explore state behavior in the "regime complex" of overlapping treaties governing plant genetic resources (Raustiala and Victor 2004).

CONCLUSION

The scholarship linking international law and international relations has developed significantly over the past three decades. *International Organization* has published some of the most important research in this area, and the articles reprinted here represent major theoretical and empirical contributions. As a testament to this dynamic area of inquiry, new research on IL/IR is now being published in a growing range of traditional law reviews and disciplinary journals. The articles reprinted here were important milestones toward making IL/IR a central concern of scholarly research in international affairs.

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Editors' Note

In order to offer broad coverage of theories, approaches, and topics in this volume, each contribution has been edited down to approximately two-thirds of its originally published length. The authors of each contribution actively supported this endeavor.

While citations within articles have been maintained, complete references have been omitted from the book. However, a complete set of references for each of the chapters in the book may be found at http//:www.cambridge.org/9780521861861.

The deletion of originally published text is signified in this book by the insertion of asterisks. Where three asterisks appear within or at the end of a paragraph, part of the originally published paragraph has been deleted. Where three asterisks appear between paragraphs, one or more paragraphs have been removed. A single asterisk marks where a footnote was deleted. Text appearing within brackets signifies that those words have been changed from the originally published article or added during the editing process. Neither asterisks nor brackets appear in Chapter 4, which was substantially revised from the original by one of its co-authors.