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International Law and International Relations: Together, Apart, Together?

Stephen D. Krasner *

In 1982, I edited a volume on international regimes, a term that was just coming into wider usage in the field of international relations and which had some currency in international law.¹ Most of the contributions to the volume, which dealt with a number of specific areas such as trade and finance, as well some more general theoretical explorations of the concept of regimes, were written by political scientists. The conference that preceded the publication of the volume, however, was attended by international lawyers and economists, as well as political scientists.

For me, the conference illuminated a distinction that I had not fully appreciated between social scientists, the economists, and political scientists, on the one hand, and international lawyers on the other. The lawyers actually knew something, knew a great deal, about the specific character of international regimes, such as the rules of the General Agreement on Trade and Tariffs ("GATT"). The economists knew hardly anything at all. The discussions at the meeting, however, were dominated by the economists and political scientists. Now, perhaps this was simply because the lawyers were wise enough to realize that Palm Springs in the winter was better appreciated without spending an excessive amount of time ruminating about a concept as abstract as international regimes. It was evident enough that the political scientists did not have any real understanding about how the term should actually be understood.² My own conclusion, however, was that the lawyers approached the issue of regimes in a fundamentally different way. The political scientists and economists were interested in formulating propositions that could be empirically tested. To some extent, they also shared a common explanatory, as well as methodological, frame. Whatever the international lawyers were doing, and I for one was not sure, was different.

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1. Stephen D. Krasner, ed, *International Regimes* (Cornell 1983). The volume had earlier appeared as a special issue of the journal *International Organization*. See 36 Intl Org 185 (1982).
2. In the volume, regimes were defined as sets of implicit or explicit "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area" of international relations. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables* in Stephen D. Krasner, ed, *International Regimes* at 1 (cited in note 1). In fact this definition reflected what would now be termed a constructivist perspective which emphasizes the importance of intersubjective shared ideas or identities. Most of the writers in the volume would not have accepted this definition had they fully appreciated its implications. Realists, for instance, would have defined regimes as principles, norms, rules and decision making procedures that reflect the preferences of the most powerful states in the international system, and liberals would have been happier with a definition that read something like principles, norms, rules and decision making procedures that contribute to the solution of market failure problems. But, these distinctions were not as clear in 1981 as they are now.

The study of international law and international relations has not always been so sharply distinguished. Until the 1970s and even later, international law would have been part of the curriculum of almost all international relations programs. In 1947, some of the founding members of the editorial board of the journal *International Organization*, the venue where issues that are of concern to public international lawyers would most frequently be addressed in the international relations literature, were international lawyers who also taught in political science departments or international relations programs. The break came because of changes in the study of international relations, rather than in the study of international law. Following political science more generally, international relations scholars became more self-consciously social scientific. Since the 1970s, the study of international relations has been driven by a set of theoretical frameworks that have generated more specific research programs or theories.³

Realism, which existed as a general frame of reference and even a set of normative prescriptions long before the 1970s, has been the most prominent of these approaches. Its most acclaimed post-war exponent, Hans Morgenthau, was a refugee from Nazi Germany appalled by what he saw as the consequences of ignoring the distribution of power as the basic determinant of outcomes in the international environment. Morgenthau, like his contemporaries, was more of an essayist than someone who tried to systematically associate explicit propositions with empirical evidence. While Morgenthau emphasized the importance of the distribution of power among states, he also pointed to human nature as a basic cause of conflict, and distinguished between states following status quo and imperialist policies.⁴ It was not evident what weight Morgenthau gave to the nature of human beings, the domestic characteristics of states, or the international distribution of power. In 1979, Kenneth Waltz published *Theory of International Politics*,⁵ in which he made a clear distinction between systemic and domestic, or what he called reductionist, arguments. Waltz was not so explicit about the specific causal arguments that followed from his approach, the most obvious was the stability of bipolarity, but he did provide a framework that guided other scholars.

For Waltz's approach, which came to be labeled neo-realism, international law played essentially no role. The international system was anarchical. There were no authoritative decision-making structures, no mechanism for resolving conflict about how the law should be decided. If there were rules at all, they would be set by powerful states, and these rules would change if the distribution of power changed. Realism was the most prominent approach to the study of international relations into the 1980s. It was so not only in the area of international security, but also in the study of international political economy as well, where some analysts argued that the

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3. For an overview of these developments see Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner, *International Organization and the Study of World Politics*, 52 *Intl Org* 645 (1998).
 4. Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, ch 4-5 (Knopf 4th ed 1967).
 5. Kenneth N. Waltz, *Theory of International Politics* (Addison-Wesley 1979).

international rules related, for instance, to international trade or finance, would be determined by the most powerful states in the system, and that states, always alert to the dangers of losing relative ground, would be instinctively suspicious of international cooperation. International law virtually disappeared from the study of international relations.⁶

This situation has changed because new theoretical approaches, liberalism and constructivism, have challenged, and in some arenas displaced, realism. Liberalism as a general approach has spawned a number of specific research programs or specific theories. The defining core of realism is that power determines outcomes. In the international system which is anarchical, coercion, war, and violent death are always possibilities. In contrast, the defining core of liberalism is "let's make a deal"—coercion is not part of the equation although actors may have unequal bargaining power. In the 1970s, liberal thinking was associated with arguments about interdependence and transnational relations.⁷ While realism focused on states, interdependence and transnational approaches maintained that there were many different actors in the international system including multinational corporations, nongovernmental organizations, foundations, and the Catholic Church. As a result of technological change, reductions in the cost of communications and transportation, the number of interactions among these actors was increasing. Outcomes were the result of bargaining among actors. Interdependence and transnational arguments failed, not so much because they provided a poor description of developments in the international system, but because they could not generate a set of specific propositions that could be validated by empirical evidence. If the bargaining power and interests of actors could not be specified *ex ante*, and they could not, it was possible to explain any outcome *ex post*. There were too many actors and too many interests to make a clear causal argument in most situations. But, if any result was consistent with the theory, then it had no real explanatory power. After the fact, it was always possible to explain an outcome by positing interests and bargaining power for the relevant set of actors, but it was difficult to do this before the fact.

Liberalism was resurrected by a new research program, which was initially termed neo-liberal institutionalism and is now often simply labeled institutionalism. The most prominent exposition of this perspective is Robert Keohane's *After Hegemony*.⁸ Keohane radically simplified the ontological base of liberal theory by

6. The term "international law" still hardly ever occurs in the titles of articles published in the three leading international relations journals, *International Organization*, *International Studies Quarterly*, and *World Politics*. In the period 1973-1979 there were three articles in these journals with international law in the title, from 1980 through 1989 there were none, and in the period 1990 through the middle of 1999 there were two. Figures derived from information in Social SciSearch* at LANL, available on line at <<http://scisearch2.lanl.gov:8082/stanford/ssci.html>> (visited Mar 4, 2000).

7. See, for instance, Robert O. Keohane and Joseph S. Nye, Jr., *Transnational Relations and World Politics* (Harvard 1972). There were, of course, earlier liberal arguments, perhaps the best known being the Manchester School of the 19th century. Its leading exponents, such as Cobden and Bright, argued that open international economic relations would lead to world peace.

8. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton

accepting the realist premise that the critical actors in the international system were states that could be understood as rational, unified, autonomous actors. Keohane and others using this approach have understood, obviously, that this is a radically simplifying assumption, but it is one that makes the study of international politics much more tractable. For neo-liberal institutionalism, the exemplary problem in international politics is market failure and not, as it is for realists, a coercive struggle involving distributional and sometimes even zero-sum relative gains. In an increasingly interdependent or globalized world, the opportunities for mutual gain will not necessarily be realized by Adam Smith's invisible hand, the tacit assumption of earlier liberal formulations. Individual actors seeking to maximize their own well-being will not necessarily generate pareto optimal outcomes. Pareto optimality will not occur, for instance, in prisoner's dilemma payoff situations with a specified number of plays, where there are information asymmetries, and where it is necessary to provide collective goods.

For neo-liberals, states deal with these market failure problems by creating international institutions, and indeed, the number of international organizations has proliferated. These institutions can, among other things, provide information, monitor, offer opportunities for issue linkage, establish salient solutions or focal points, and increase iterations. Cooperation is possible even in the international environment lacking a centralized system of authority. Neo-liberal institutionalism has spawned a huge body of research, not only because it is so heuristically powerful, but also because it has been able to draw on non-cooperative game theory, perhaps the most powerful analytic framework in the social sciences, and a framework that has become increasingly prominent in economics which stands at the top of the social science academic pecking order at least in the United States. Game theoretic studies have also provided a unifying methodological framework across political science and have been applied by scholars working on problems as diverse as the American Congress, ethnic conflict, medieval guilds, and central bank regulation.

Neo-liberal institutionalism has brought international legal and international relations scholarship closer together. The ontological framework of neo-liberal institutionalism is identical with that of much international legal scholarship. The classic model of international law is a replication of the liberal theory of the state. The state is treated at the international level as analogous to the individual at the national level. Sovereignty, independence, and consent are comparable to the position that the individual has in the liberal theory of the state.⁹ States are equal in the same way that individuals are equal. Outcomes in the international environment are, or should be, the result of contracting among sovereign states, voluntary agreements, which they

1984).

9. Joseph H. H. Weiler, *The Transformation of Europe*, 100 Yale L J 2479, 2479-80 (1991). See also the description of positive international law in Steven R. Ratner and Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 Am J Intl L 293 (1999).

would not enter into were they not pareto improving.

If neo-liberal institutionalism is one perspective that promises to bring international law and international relations back together, constructivism, which emphasizes the importance of inter-subjective shared understandings and mutually recognized identities, is another. Constructivism is a research orientation that has only been explicitly recognized in the last decade. Earlier studies that looked at the importance of international norms were not seen as part of a more general research approach. Realism and liberalism have not problematized the preferences or identities of actors; they have assumed them. For realism states must always protect their relative power, even when they are seeking absolute gains, such as higher economic benefits, because these benefits could be seized, used as a source of leverage, or reduced in the future by some newly powerful player. Although liberal arguments, including neo-liberal institutionalism, can be applied to any kind of objective that an actor might pursue, in practice these approaches have focused primarily on material gains. Constructivists have argued that this is far too simple, that the behavior of actors, even in an anarchic environment, depends upon their identities and their underlying values. Not all states act in the same way. National culture can be consequential. The values that informed German foreign policy in 1999 are very different than those that informed German policy in 1939. At the international level the identity of states can also change. Alexander Wendt has argued, for instance, that the way in which states behave is determined not by the condition of anarchy but rather by inter-subjective shared beliefs. An anarchical environment can be Hobbesian, in which states see each other as enemies or potential enemies; Lockean, in which states accept each others' right to exist but see other states as rivals; or Kantian, in which states see each other as friends who settle issues among themselves without violence and collectively resist threats from third parties.¹⁰

Constructivism in international relations scholarship resonates with an orientation that has sometimes been represented in the work of international legal scholars, the notion that there is an international society and that the norms of this society influence or determine the behavior and identity of states. Thomas Farer, for instance, avers that for the Yale School the international system can be described in terms of a set of shared values or rules that constrain the behavior of actors. Evidence for the existence of such values is found in treaties, the decisions of international tribunals, resolutions of international organizations, the writings of authorities, and the statements and actions of national policy makers. The core values in the contemporary system include avoiding behavior that would risk general war, self-determination and decolonization, minimum human rights, and economic modernization.¹¹ In a similar vein, Louis Henkin writes "Although there is no international "government," there is an international "society"; law includes the structure of that society, its institutions, forms, and procedures for daily activity, the

10. Alexander Wendt, *Social Theory of International Politics* ch 6 (Cambridge 1999).

11. Tom J. Farer, *Problems of an International Law of Intervention*, 3 Stan J Intl L 22 (1968).

assumption on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them and the effects of those relations."¹²

Constructivism is much less well-established in the international relations literature than realism or neo-liberal institutionalism. Arguments that the behavior of actors is based on deeply embedded, sometimes taken for granted, shared norms are difficult to demonstrate empirically. The beliefs of actors cannot be directly observed, but rather must be inductively derived from their behavior and justifications. It is often difficult to distinguish among economic, security, and normative motivations. The most compelling constructivist arguments have been associated with the national political cultures or values of individual states rather than inter-subjective shared understandings that operate across the whole international environment. Systematic accounts of how such norms are generated and reconstituted are more easily contrived for specific polities as opposed to the international system as a whole. Whether constructivist arguments will effectively challenge more established approaches in international relations—realism and liberalism—remains an open question. But constructivism is an orientation that complements the prescriptive focus of some international legal scholarship.¹³

In sum, from the 1960s to the 1990s, a chasm opened between the study of international relations and the study of international law. Scholars in these two fields were separated both by their methodology and their substantive views. Political scientists were committed to a social science research program involving empirical claims about actual behavior. In many cases, public international lawyers were involved in a normative project to establish or demonstrate the existence of a set of rules that would facilitate or encourage appropriate behavior in the international environment. Substantively, realism was the most prominent approach to the study of international politics. For realism, international law is an oxymoron. More recently, liberal institutionalist and constructivist arguments have created a substantive space that can be shared by political scientists and international lawyers. Institutional analyses comprehend law as one mechanism that can be used to solve problems of market failure. Constructivist arguments see law as part of the basic cognitive structure of the international system which defines the identities of actors; in the contemporary world sovereign states as opposed to, for instance, the tributary states of the traditional Sino-centric world or the Holy Roman Empire of medieval Europe.¹⁴ Nevertheless, the methodological divide that separates political science and

12. Louis Henkin, *How Nations Behave: Law and Foreign Policy* 15 (Praeger 1968).

13. See Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *Am J Intl L* 367 (1998), which emphasizes the significance of institutional and constructivist theories in bringing international legal and international relations scholarship closer together.

14. I am skeptical of constructivist arguments which understand fundamental concepts, such as sovereignty, as taken for granted constitutive norms that enable some kinds of action and preclude others. See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton 1999), especially Chapter 8.

international law is not likely to be bridged, and that, perhaps, is not such a bad thing. The task of political scientists is primarily to explain what is and thereby to hint at what might be. The task of lawyers is more often to elucidate not what is, but what might be. If the normative project that is central to international public law were more closely linked with the empirical project of international relations scholars, both enterprises might be enriched.



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