1 **Introduction**

Christian Reus-Smit

Politics and law have long been seen as separate domains of international relations, as realms of action with their own distinctive rationalities and consequences. So pervasive is this view that the disciplines of International Relations and International Law have evolved as parallel yet carefully quarantined fields of inquiry, each with its own account of distinctiveness and autonomy. Hans Morgenthau famously asserted that *the political realist 'thinks in terms of interest defined as power*, as the economist thinks in terms of interest defined as wealth; *the lawyer, of conformity of action with legal rules*; the moralist, of conformity of action with moral principles'.[1] Curiously, many scholars of international law have acquiesced in this separation. With notable exceptions, international law has been presented as a regulatory regime, external to the cut and thrust of international politics, a framework of rules and institutional practices intended to constrain and moderate political action. Legal philosophers have frequently sought to quarantine law from politics for fear that the intrusion of politics would undermine the distinctive character of law as an impartial system of rules. From both sides of the divide, therefore, international politics and law have been treated as categorically distinct, and while international law was given little space in the international relations curriculum, students of international law have learnt doctrine and process but not politics.

To many observers of contemporary international relations, this neat separation of politics and law seems increasingly anachronistic. Whether one considers the NATO intervention in Kosovo, East Timor's tortuous path to sovereign independence, the extradition proceedings

[1] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th edn (New York: McGraw-Hill, 1985), p. 13 (emphasis added).

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against Augusto Pinochet, the creation of the new International Criminal Court, the debate over nuclear missile defence, the conduct of the 'war against terrorism', or the standoff in the Security Council over war with Iraq, it is the complex entanglement of politics and law that stands out. In each case one struggles to locate the boundary between the political and the legal, to the point where the established concepts of politics and law no longer seem especially helpful in illuminating pressing issues, crises, events, and developments. The discourse of politics is now replete with the language of law and legitimacy as much as realpolitik, lawyers are as central to military campaigns as strategists, legal right is as much a power resource as guns and money, and juridical sovereignty, grounded in the legal norms of international society, is becoming a key determinant of state power.

It is this growing disjuncture between our established understandings of politics and law and the complexities of contemporary international relations that motivates this book. There has been much talk in recent years about the need to bridge the divide between the disciplines of International Relations and International Law.[2] Yet there has been a curious reluctance on the part of both international relations scholars and lawyers to rethink long-held assumptions about the nature of politics and law and their interrelation. There have been calls for common research agendas, for bringing together the analytical strengths of both disciplines, and for forging links between complementary theoretical paradigms, but few of these bridge-building exercises start by critically reconsidering the foundational concepts on which these bridges will be constructed. Beginning such a reconsideration is one of the primary purposes of this book. It is concerned with three interconnected questions: how should we conceptualise international politics and international law? How should we understand the relationship between the two? And, finally, how does a reconsideration of the nature of, and

[2] See, for example, Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', *Yale Journal of International Law* 14: 2 (1989); Robert O. Keohane, 'International Relations and International Law: Two Optics', *Harvard International Law Journal* 38: 2 (1997); Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law* 87: 2 (1993); Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', *American Journal of International Law* 92: 3 (1998); Robert J. Beck, 'International Law and International Relations: The Prospects for Interdisciplinary Collaboration', *Journal of International Legal Studies* 1: Summer (1995); and Anthony Clark Arend, 'Do Legal Rules Matter? International Law and International Politics', *Virginia Journal of International Law* 38: 2 (1998).

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relationship between, politics and law help us to understand impor-
tant issues, events, and developments in contemporary international
relations?

The answers we advance to these questions build on the insights of re-
cent constructivist scholarship in international relations. Constructivists
argue that international politics, like all politics, is an inherently social
activity. Through politics states and other actors constitute their social
and material lives, determining not only 'who gets what when and how',
but also who will be accepted as a legitimate actor and what will pass as
rightful conduct. International politics takes place within a framework
of rules and norms, and states and other actors define and redefine these
understandings through their discursive practices. International law is
central to this framework, and like politics, constructivists see it as 'a
broad social phenomenon deeply embedded in the practices, beliefs,
and traditions of societies, and shaped by interaction among societies'.[3]
Constructivists frequently distinguish between the roles that social and
legal norms play in international life, with many suggesting that since
the latter are more codified than the former they more powerfully con-
stitute actors' identities, interests, and actions.

To date, constructivists have devoted most of their attention to the
way in which rules and norms condition actors' self-understandings,
preferences, and behaviour, and have, as a consequence, been accused
of excessive structuralism.[4] While these criticisms are often overdrawn,
constructivists have neglected two aspects of their schema vital to this
book's project. First, their conception of politics is implied not elabo-
rated. Alexander Wendt's *Social Theory of International Politics*[5] – which
is rightly considered a definitive constructivist work – never addresses
the question of politics directly. Nowhere do we find the equivalent of
E. H. Carr's claim that 'Political action must be based on a co-ordination
of morality and power',[6] or Morgenthau's assertion that 'International
politics, like all politics, is a struggle for power'.[7] Second, the distinction
constructivists draw between social and legal norms is inconsistent and

[3] Martha Finnemore and Stephen J. Toope, 'Alternatives to "Legalization": Richer Views
of Law and Politics', *International Organization* 55: 3 (2001), 743.
[4] Jeff Checkel, 'The Constructivist Turn in International Relations Theory', *World Politics*
50: 2 (1998).
[5] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge Univer-
sity Press, 1999).
[6] E. H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International
Relations*, 2nd edn (London: Macmillan, 1946), p. 97.
[7] Morgenthau, *Politics Among Nations*, p. 31.

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underdeveloped. Some scholars strongly emphasise the difference,[8] others ponder whether any valid distinctions exist,[9] and still others deny categorical differences but stress the particular styles of reasoning that attend each type of norm.[10] Because of these shortcomings, constructivists have developed a substantial literature on the role of norms in international life, but have had comparatively little to say about the politics of international law.[11]

My goals in this book are thus twofold. As editor, I have sought to develop a framework for thinking about the nature of international politics, its constitutive impact on the institution of international law, and the way in which law, in turn, structures and disciplines the expression of politics. This framework is necessarily broad; it advances a set of concepts, and posits a set of relationships between aspects of international life, that help order the empirical analyses that follow, but it falls short of a 'theory'. Not only are edited volumes poorly suited to the task of theory building, I am concerned that my framework of ideas allow the empirical analyses presented by other contributors to 'breathe'. This brings us to my second goal. A relationship of fascinating complexity has evolved between international politics and law, and this relationship finds expression in diverse issue-areas. I am keen that the following chapters capture this richness. My conceptual and analytical framework is sufficiently broad to allow the other contributors to develop their own distinctive arguments about the subjects they examine. And I have included case-studies on everything from the use of force and arms control to environmental protection and migrant rights.

In developing my analytical framework, I join other international relations scholars who have sought to recover the classical conception of politics advanced by early writers in the field, such as Carr.[12] As

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[8] Peter J. Katzenstein, *The Culture of National Security* (Ithaca: Cornell University Press, 1996).

[9] Martha Finnemore, 'Are Legal Norms Distinctive?', *New York University Journal of International Law and Politics* 32: Spring (2000).

[10] Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

[11] Notable exceptions to this are the writings of Nicholas Onuf and Friedrich Kratochwil. See Onuf's 'Do Rules Say What They Do? From Ordinary Language to International Law', *Harvard International Law Journal* 26: 2 (1985); and Kratochwil's 'How Do Norms Matter?', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000).

[12] See, in particular, Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000).

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explained in chapter 2, I see politics as a variegated, multi-dimensional form of human deliberation and action, one that encompasses not just instrumental reason and strategic action, but also forms of reason and action that ordain certain actors with legitimacy, define certain preferences as socially acceptable, and license certain strategies over others. When politics is understood in this way, I come to see international society as more than a 'practical association', as a 'constitutive association' in which debates over who counts as a legitimate actor, over the kinds of purposes that are socially acceptable, and over appropriate strategies, prefigure and frame the rational pursuit of interests. In such a world states create institutions not only as functional solutions to co-operation problems, but also as expressions of prevailing conceptions of legitimate agency and action that serve, in turn, as structuring frameworks for the communicative politics of legitimation. In the modern era politics has given the institution of international law a distinctive form, practice, and content. But international law has also 'fed back' to condition politics. As the other contributors demonstrate, the international legal order shapes politics through its discourse of institutional autonomy, language and practice of justification, multilateral form of legislation, and structure of obligation. Extra-legal politics is thus structurally and substantively different from intra-legal politics.

The 'feedback' effect of law on politics is illustrated by Dino Kritsiotis in his analysis, in chapter 3, of the politico-legal conditions governing the use of force among states. Highlighting the discourse of institutional autonomy that surrounds the contemporary politics of international law, Kritsiotis examines the way in which 'states themselves have come to accept the essential autonomies of "law" and "politics" in their practices'.[13] States have created a legal realm, in which the politics of power and interests is subordinated to the politics of norm-referential argument. Within this realm, law structures politics in a variety of ways, depending both on the nature of the relevant rules and on the 'facts' of the situation. When international law is determinate and commands a high degree of acceptance, it acts, or should act, as a constraint on state action. At the other end of the spectrum, when international law is indeterminate, or when situations arise that were not anticipated when the rules were formulated, international law serves as a discursive medium in which states are able to make, address, and assess claims. To illustrate the 'determinate' end of this spectrum, Kritsiotis examines the

[13] Dino Kritsiotis, chapter 3, this volume, p. 49.

gradual shift from the ambiguous prohibition on war found in the 1928 Kellogg–Briand Pact to the unambiguous prohibition on force enshrined in the UN Charter. The structuring effect of international law at the 'indeterminate' end is illustrated by the 'exceptions' to this prohibition. It is here, Kritsiotis argues, that international law's language and practice of justification becomes crucial, so much so that debates over legal interpretation have come to structure the politics surrounding situations involving the use of force.

Turning from the 'high' politics of the use of force to a pre-eminent 'new issue area', Robyn Eckersley examines in chapter 4 the complex relationship between politics and law in the area of global environmental protection. Focusing on the 1997 negotiations over the Kyoto Protocol of the Framework Convention on Climate Change, as well as subsequent developments in the regime, she enlists a 'critical-constructivist' perspective to shed light on the relationship between international politics and law in the realm of treaty-making. She argues that although politics and law cannot be reduced to one another, they remain mutually enmeshed through the requirement of communicative or procedural fairness and the norms of recognition, reciprocity, and argument that such procedures enable and presuppose. Eckersley holds that such an approach offers both a sociological understanding of the legitimacy of international legal norms and a critical framework that highlights the degree of legitimacy of particular treaty negotiations and helps explain the outcomes for both state and non-state actors. Applied to the climate change case, it illuminates the social 'ambiguity' of international law, the way in which it can discipline powerful actors from a moral point of view while also serving as a tool to legitimate more narrowly conceived national interests. The framework also highlights the tensions facing powerful states, such as the United States, in deciding whether to assert naked power or to uphold the discursive processes of treaty-making as well as the ways in which law can be used by weak and non-state actors to shape expectations and identities.

In chapter 5 Richard Price examines the emergence during the 1990s of a new international legal norm prohibiting the use, transfer, production, and stockpiling of anti-personnel landmines. Marked as it is by broad participation and extremely rapid entry into force, this norm has attained an impressive status compared to the lengthy process taken by many international legal norms to spread and consolidate. This having been said, participation in the legal regime is not yet universal, raising the important question of whether or not the norm has broad enough

adherence to qualify as a customary rule of international law, one that would generate obligations even for those states that have not explicitly consented to the treaty. Price carefully illustrates the shortcomings of reigning consent-based approaches to politics of international law, arguing that the insights from constructivist theories of norms are needed to comprehend the movement toward customary legal status. After examining the 'politics of *opinio juris*' in the field of landmines, he examines a number of empirical indicators of compliance, claiming that, contrary to standard approaches, *opinio juris* or empirical compliance should serve as demonstrations that the norm has achieved customary status. It 'may be reasonable to claim customary status for norms when the proscribed practice is sufficiently politicised to significantly raise the threshold for violations, so much so that the burden of proof clearly is reversed in favour of a general rule of non-use'.[14] Price concludes that although the norm has made important strides toward customary status, it probably still falls short of the threshold of an unambiguous customary legal rule. Nevertheless, he shows how the practices of states and non-state actors to enlist and resist the pulls of customary obligation have significantly shaped political practice, particularly the identities, interests, and behaviour of states. Furthermore, he shows that the deployment of distinctive rhetorical and behavioural practices regarding landmines has played a crucial role in constituting political and legal practice.

A distinctive feature of the contemporary international legal order is the progressive 'cosmopolitanisation' of international law, the movement away from a legal system in which states are the sole legal subjects, and in which the domestic is tightly quarantined from the international, toward a transnational legal order that grants legal rights and agency to individuals and erodes the traditional boundary between inside and outside. In chapter 6 Amy Gurowitz goes to the heart of this process by examining the relationship between international human rights law and the politics of migration in Japan. Migrant rights, especially in non-immigrant states such as Japan, provide an important case-study for the impact of international law. Migrants are seeking rights not as citizens but as human beings, and they are often doing so in states without domestic precedent for dealing with non-citizens. The well-established body of international human rights law would thus seem a logical place for migrants and their advocates to look in establishing and reinforcing

[14] Richard Price, chapter 5, this volume, pp. 122–3.

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arguments for non-citizen rights. Gurowitz shows how the rights en-
shrined in such law have become increasingly important for migrant
rights in Japan, with migrant activists and lawyers using international
law in domestic courts to effect change. She argues that although judges
rarely find that a policy is illegal under international law, in a num-
ber of important cases they have used human rights treaties that Japan
is a party to, as well as those to which it is not, to interpret domes-
tic law and the constitution in favour of immigrants. A more compre-
hensive approach to the relationship between international politics and
law than those offered by neorealists and neoliberals, Gurowitz con-
tends, can demonstrate the importance of the legal realm for weak ac-
tors fighting 'uphill' battles, and also explain why states highly resis-
tant to integrating migrants find arguments based on international law
compelling.

If the relationship between international human rights law and do-
mestic political change is one dimension of the cosmopolitanisation of
international law, another is the creation of international judicial insti-
tutions for the prosecution of crimes against humanity, genocide, and
acts of aggression, the most important of which is the new International
Criminal Court (other examples being the ad hoc tribunals for the for-
mer Yugoslavia and Rwanda). In chapter 7 David Wippman addresses
the relationship between politics and law through an examination of the
major issues that divided the United States from the large majority of
other states that voted to adopt the Rome Statute of the Court, in partic-
ular the role of the Security Council, the powers of the prosecutor, the
questions of jurisdiction and state consent, the issue of complementar-
ity, and harmonising of diverse legal systems. While acknowledging the
central role that the politics of power and interests played in the Rome
negotiations, Wippman explains the influence of international law on
particular issues, particularly its distinctive language of justification.
On some issues, he contends, the parties' shared understanding of what
international law requires foreclosed argument. On many other issues,
however, international law was not sufficiently determinate to compel
any particular outcome. Even on these issues, though, the parties' argu-
ments, and to some extent their preferences, appear to have been shaped
by competing general conceptions of what 'legal' institutions, rules, and
arguments should look like, and what role international law and insti-
tutions should play in international relations. Importantly, when sup-
porters and critics of the new Court evinced fundamentally divergent

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conceptions and views on these issues, these were often rooted in the
self-identities of the principal actors.

The movement toward the systematic prosecution of individuals for
massive violations of international humanitarian law and the laws of
war has been matched by a 'new humanitarian interventionism', the
equivocatory nature of which has been starkly apparent in the inter-
national community's haphazard responses to the wars in the former
Yugoslavia. In chapter 8 Nicholas Wheeler confronts the complex in-
terplay between politics and law in this area by examining NATO's
targeting policy against the Federal Republic of Yugoslavia during Op-
eration Allied Force. Using the conceptual and theoretical framework
advanced in this volume to elaborate Rosalyn Higgins' view of 'law
as process',[15] Wheeler shows the limits of the 'law as rules' approach
and the value of the proposition that communicative dynamics shape
the possibilities of politics. Although the use of force in humanitarian
interventions constitutes a hard case for the power of legal norms, he
uses NATO's targeting decisions to demonstrate that legal norms in-
hibit state actions that cannot be legitimated. International legal norms,
he contends, are clearly constitutive as well as constraining, with spe-
cific legal rules empowering certain actors and disempowering others.
Shared logics of argumentation – the fact that when actors resort to legal
reasons they employ a distinctive language and practice of justification
which both licenses and constrains their actions – shapes politics in sig-
nificant ways. 'As this examination of NATO's targeting policy shows,
even the world's most powerful military alliance recognised the need to
justify its actions before the court of domestic and world public opinion.
And the fact that Alliance leaders knew that they would be called upon
to defend their choice of targets was an inhibiting factor on what could
be attacked.'[16]

In chapter 9 the discussion turns to the realm of international politi-
cal economy, with Antony Anghie exploring the politico-legal practices
of the two major international financial institutions, the World Bank
and the International Monetary Fund. These organisations, Anghie con-
tends, were created by states through mechanisms of international law,
yet they nevertheless represent themselves as autonomous entities that

[15] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford:
Clarendon Press, 1994).
[16] Nicholas Wheeler, chapter 8, this volume, p. 213.

adopt technocratic and objective approaches to the problems they address. Although both the Bank and the Fund are exclusively creations of international law, and unlike states cannot make any claim to preceding international law, they have used their status under international law to isolate themselves from evolving international legal norms. Despite these efforts, Anghie contends, the relative isolation of these organisations from the general concerns of international law has led to questions about their legitimacy. Both organisations have responded to this crisis of legitimacy by deploying concepts such as 'good governance', and a central focus of Anghie's analysis is the politico-legal manoeuvres surrounding such strategies. The good governance strategy has, at one level, enabled the Bank and the Fund to deny that their policies are at odds with international human rights law, and to claim that they are actually busy promoting such law. At another level, though, the crisis of legitimacy and the nature of the two organisations' responses are testimony to the way in which weak actors can appeal to international legal norms to force a redefinition of the social identities and interests of powerful political and economic actors. It is also testimony to the way in which international law works as a site for contests over legitimate agency and action in international relations.

At the intersection of politics and law in international relations lies the vexed question of global governance, and it is on this topic that Wayne Sandholtz and Alec Stone Sweet in chapter 10 conclude the case-study section of the book. Concerned first and foremost with how social and legal norms emerge and evolve, Sandholtz and Stone Sweet advance an ambitious theory of governance, which they define as the process by which systems of rules are produced and modified over time. To explore this process they focus on two different modes of governance: dyadic and triadic. The former refers to 'decentralised' and 'formally anarchic' systems in which the parties to social exchange generate rules among themselves to govern their interactions and resolve disputes. Where the primary mechanisms of rule creation and dispute resolution in such systems are power and persuasion, in triadic systems actors turn to third parties to resolve disputes about rules. Triadic systems are thus more institutionalised, rules become more formalised and organised into hierarchies, dispute resolution becomes more compulsory and binding, and rules emerge to define the procedures for creating new rules. By demonstrating these arguments about modes of governance through case-studies of the dyadic evolution of norms of humanitarian intervention and the development of triadic forms of dispute resolution

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