
Experts, Networks and International Law

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In the early years of the current millennium, questions about the architecture of global governance occupied the attention of scholars of both international law and international relations. To many, it seemed as though the traditional approaches to international governance and the traditional institutions of international law would be ill-equipped to deal with the problems of a globalised world, including climate change, pandemics, migration, financial market instability and international crime. The problems are complex and transnational in nature. Identifying problems, interpreting data and charting paths of action require the expertise of specialists and technicians, while the implementation of solutions requires flexible and speedy responses from state and non-state actors working in concert across multiple borders.

I The Roles for Experts and Expertise

The difficulty in identifying issues and interpreting their significance points to an increasingly significant role for experts. At the domestic level, over the past century, the increasing bureaucratisation of the state has shifted the locus of governance from politics to expertise.¹ At the international level, in more recent times, a similar phenomenon has taken place. The conditions of uncertainty that characterise globalisation, where complex and interrelated variables heighten the unpredictability of policy choices, increase the authority and importance of experts as professionals with special knowledge and skills in given issue areas. Policy-makers and leaders increasingly rely upon experts to help them understand the nature of problems, identify relevant state interests,

¹ Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46:1 *International Organization* 1–35, 8.

produce specialised information efficiently, frame issues for collective debate, chart the range of appropriate actions, propose specific policies and maintain the institutions necessary to implement policies. Experts become powerful, their power lying in their control over knowledge and information and their consequent capacity to determine policy. It is a power that David Kennedy has described as lying in ‘the capillaries of social and economic life’: the ‘background’ of world affairs.²

The net result is that patterns of global decision-making are not – or not solely – the result of interstate diplomacy reflecting the interests of sovereigns or legislators. They are also shaped by the work of specialists and technicians. These specialists and technicians are located inside international organisations and civil society groups, and within state bureaucracies where domestic experts engage with their foreign counterparts to implement policies of transnational reach. Experts are recognised as such by their membership in a group with shared professional beliefs, values and techniques. Networks of knowledge-based experts, also known as ‘epistemic communities’, have multiplied.³ As Peter Haas has explained, these communities share: (1) a set of common practices associated with their professional competence; (2) a set of principled beliefs that provide a basis for the action of community members; (3) an understanding of the range of possible policy actions to achieve the desired outcomes; and (4) internally defined criteria for validating knowledge.⁴ The language of international experts and epistemic communities is one of rationality: scientific objectivity, best practices, expert consensus and empirical necessity. The considerable influence of these actors in defining agendas, setting standards and affecting the way that states perceive their interests is facilitated by the structure of the international environment, where international institutions provide important forums through which information can be solicited and disseminated.

By the end of the 1990s, it was no longer questioned that experts and epistemic communities mattered as actors in international affairs.⁵ Scholars had by then turned to the question of when, and under what conditions, they mattered, and to normative questions about whether their power undermined state autonomy or served the ends of global

² David W. Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 *Sydney Law Review* 5–28, 7. See further, David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shaped Political Economy* (Princeton: Princeton University Press, 2016).

³ Haas, above note 1, 2. ⁴ *Ibid.*, 3. ⁵ *Ibid.*

justice.⁶ The most obvious criticism was that experts and epistemic communities lacked democratic accountability. Experts were responsible for decisions that affected people in multiple ways, but they were not answerable to the people at the ballot box. They provided advice and implemented decisions according to a worldview that was not articulated (nor contested) within political discourse because experts did not use the language of interest and ideology.⁷ By nature they were elitist; they excluded the opinions and perspectives of those outside the club. When experts operated within networks that reached across borders to address issues of transnational concern, questions arose about their motivations and their allegiances.

Scholarly interest in the role of experts in international law includes an examination of international lawyers themselves as experts.⁸ Analyses of the role for international lawyers, particularly government legal advisers, have been published periodically in the past 50 years,⁹ but recently a more critical, and self-critical, scholarship on how international lawyers use their expertise has emerged. Martti Koskenniemi has analysed the different ways in which international lawyers deploy their expertise in terms of a tension between commitment and cynicism.¹⁰ He suggests that the mere choice of international law as a career path demonstrates commitment beyond that held, for example, by a commercial lawyer.¹¹ Indeed, practitioners of international law have asserted that the role is not only to advise their clients, but also to advance the cause of international law.¹² On the other hand, practitioners' comments about their role also support the charge of cynicism, where one accepts that advice is fed into an essentially political context, and legal advice is often not 'the end of the matter'.¹³ For Koskenniemi, the commitment is continually under stress

⁶ See, for example, Kennedy, above note 2. ⁷ Ibid., 27.

⁸ Stephen Bouwhuis, 'The Role of an International Legal Adviser to Government' (2012) 61 *International and Comparative Law Quarterly* 939–960, 950 and 954.

⁹ See, for example, Herbert C.L. Merillat, ed., *Legal Advisers and Foreign Affairs* (Dobbs Ferry: Oceana Publications, 1964).

¹⁰ Martti Koskenniemi, 'Between Commitment and Cynicism: Outline of a Theory of International Law as Practice' in Martti Koskenniemi, ed., *The Politics of International Law* (Oxford: Hart Publishing, 2011), 271–293.

¹¹ Ibid., 274.

¹² James Crawford, 'International Law as Discipline and Profession' (2012) 106 *American Society of International Law Annual Meeting Proceedings* 471–486, 474; Bouwhuis, above note 8, 940–941.

¹³ Daniel Bethlehem, 'The Secret Life of International Law' (2012) 1 *Cambridge Journal of International and Comparative Law* 23–26, 29.

as the hopes for international law are dashed.¹⁴ Furthermore, the ways that the tensions between commitment and cynicism manifest themselves differ between the roles that international lawyers fill, and may place them in opposition to each other, such as the criticism of government lawyers by activists advocating particular causes.¹⁵

On the more pragmatic side, there appears to be an increase in the extent of legal expertise used by foreign affairs ministries. More government lawyers have advanced qualifications in international law, and government departments use outside experts to a greater extent than in the past.¹⁶ Often the expertise of the government legal adviser operates behind the scenes, in what Daniel Bethlehem has described as ‘the secret life of international law’.¹⁷ International lawyers, and indeed international courts, also rely on non-legal expertise.¹⁸ As James Crawford has said, ‘a degree of interdisciplinarity to grasp complex non-legal ideas may be necessary ... there is no expectation on the practical level that we go beyond that’.¹⁹ Instead, the international lawyer relies on experts in a variety of fields governed by international law.

II The Roles for Networks and Networked Governance

As for the question of how to coordinate responses to complex issues involving multiple actors across many borders, the current reality points away from traditional institutions of international law (which were perceived as slow-moving, cumbersome and unwieldy) towards new forms of organisation.²⁰ Some have argued for the creation of a more legalised and powerful world order – such as a ‘world government’ for global problems²¹ – but it remains difficult to see how this could be

¹⁴ Koskeniemi, above note 10, 276–281. ¹⁵ Ibid., 289.

¹⁶ Richard Rowe, ‘International Law and Diplomacy: The Art of the Possible’ (2014) 15 *Melbourne Journal of International Law* 318–329, 318 and 323; Bouwhuis, above note 8, 951–952.

¹⁷ Bethlehem, above note 13, 23.

¹⁸ Crawford, above note 12, 478–479. See also the discussion of the *Whaling in the Antarctic* case in the chapter by Cameron S.G. Jefferies.

¹⁹ Crawford, above note 12, 479.

²⁰ Kal Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002) 43:1 *Virginia Journal of International Law* 1–92, 25.

²¹ See, for example, Campbell Craig, ‘The Resurgent Idea of World Government’ (2008) 22:2 *Ethics & International Affairs* 133–142.

achieved in the absence of a global *demos*.²² Moreover, many view a more powerful centralised global institution as a deeply undesirable prospect, denying the diversity of the world's peoples and threatening both democracy and individual liberty.²³ In a nutshell, this is the 'governance dilemma' so aptly described by political scientists: more international governance was necessary, but 'world government' was feared.²⁴

A novel answer to this dilemma was presented by international law and relations scholar Anne-Marie Slaughter in her 2004 book *A New World Order*. In Slaughter's view, the future of global governance lay within existing and new 'transgovernmental networks', a term she used to refer to the 'patterns of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the "domestic" from the "international" sphere'.²⁵ Slaughter argued that these networks could carry out various aspects of global governance in new and informal ways, and indeed were already doing so.²⁶ Networked relations between regulatory and subject-matter experts occurred at the sub-state level and were not necessarily controlled or closely guided by the policies of cabinets or chief executives of governments.²⁷

Slaughter's premise was that the state is not a unitary monolithic actor, but the sum of its aggregate parts (legislative, bureaucratic and judicial) and that these parts have the capacity (and the imperative) to interact with their foreign counterparts in order to address issues of transnational or common concern. Engagement results in horizontal networks of experts and policy-makers that are decentralised and dispersed, and incapable of exercising centralised coercive authority.²⁸ Slaughter²⁹ has

²² Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 8.

²³ Ibid.

²⁴ See Robert O. Keohane, 'Governance in a Partially Globalized World: Presidential Address' (2001) 95:1 *American Political Science Review* 1–13.

²⁵ Slaughter, above note 22, 14.

²⁶ See further, Anne-Marie Slaughter and David Zaring, 'Networking Goes International: An Update' (2006) 2 *Annual Review of Law and Social Science* 211–229. In recent years, government legal advisers have been more open about the degree of ongoing cooperation between the foreign ministries of allied states: see, for example, Rowe, above note 16, 326–327; Harold Hongju Koh, 'The State Department Legal Adviser's Office: Eight Decades in Peace and War' (2011–2012) 100 *Georgetown Law Journal* 1747–1781, 1756 and 1764.

²⁷ Robert O. Keohane and Joseph Nye, 'Transgovernmental Relations and International Organisations' (1974) 1 *World Politics* 39–42.

²⁸ Slaughter and Zaring, above note 26, 211.

²⁹ See, for example, Emilie M. Hafner-Burton, Miles Kahler and Alexander H. Montgomery, 'Network Analysis for International Relations' (2009) 63 *International Organizations* 559–592.

argued, as have other network theorists, that domestic political decisions to implement global objectives (from resisting deforestation to conforming to global standards for securities trading) are the result of activities amongst regulators (coordinating information, policy and action) at the same hierarchical level within their own national structure. Direct engagement – including the dissemination and sharing of information and strategies, the discussion of joint approaches to common problems and the shared implementation processes for achieving solutions – was orchestrated below the state level by networks driven by the imperative to resolve a common issue. Slaughter argued that as a form of international governance, transgovernmental networks are more efficient and adaptable than the bureaucracies of international organisations.³⁰

Slaughter identified three different types of network, whose functions sometimes overlap: (1) information networks, which provide a forum for the exchange of ideas, techniques, experiences, problems; (2) enforcement and capacity-building networks, which aim (through training and technical assistance) to enhance capacity so that states can enforce their own domestic regulation; and (3) harmonisation networks, which aim to bring different national systems into conformity with one another.³¹ In each of these networks, the principal characteristic is the absence of vertical ties, which permits flexibility, informality and consensus-based decision-making processes.³² In contrast, international organisations are characterised by a formal vertical structure, with centralised decision-making that is implemented at lower levels, and official mechanisms for dispute resolution.

Slaughter's theory of governance by networks drew on globalisation's central features to answer the governance dilemma, notably the accessibility of information and the speed of communication, which enables different actors to link across the world, as well as the complexity of national governance. For Slaughter, the emergence of a world of government networks was not just an underappreciated fact of international life, but it also offered 'a more effective and potentially more just world order; than either what we have today' or 'a world government in which a set of global institutions perched above nation-states enforced global rules'.³³ She also suggested that '[g]lobal governance through government networks is good public policy for the world' and that a 'world order

³⁰ Miles Kahler, ed., *Networked Politics: Agency, Power and Governance* (Ithaca, NY: Cornell University Press, 2009), 2.

³¹ Slaughter, above note 22, 52–61. ³² See also Raustiala, above note 20, 22.

³³ Slaughter, above note 22, 6–7.

self-consciously created out of horizontal and vertical government networks could ... create a genuine global rule of law without centralised global institutions'.³⁴ This approach to networks has been refined in some writings to include actors outside of government. In his reflections on the eightieth anniversary of the Legal Adviser's Office of the US State Department, Harold Koh recognised that after the end of the Cold War, '[t]he defining players ... may be networks of actors connected in countless tangible and intangible ways that challenge our traditional understandings of international relations and international law'.³⁵

Some were, and continue to be, sceptical about Slaughter's claims. Transgovernmental networks aim to achieve domestic change that conforms to a global objective through the cooperation of government officials. Such networks thus bypass political processes normally triggered by government attempts to achieve change in traditional ways, such as through the negotiation of treaties complete with processes of national consultation and ratification. For these reasons, for some, transgovernmental networks represent an unacceptable surrender of the democratic accountability of states, which alone possess the legitimacy to act in the public interest.³⁶ Philip Alston, for example, has worried that power would congeal in '[t]he back rooms of the real new world order, where those with power consolidate it and make the decisions which will continue to determine the fate of the excluded'.³⁷ Others worry that enforcement networks will serve as a mask for preferences shaped by hegemonic interests,³⁸ while others are concerned about the ethics of a process which appears to enmesh illiberal states 'in a system of

³⁴ Ibid., 261.

³⁵ Koh, above note 26, 1772. Examples of complex networks of state and non-state actors are examined in the chapters by Suzanne Akila, Philipp Kastner and Josephine Toop.

³⁶ Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks' (2005) 118:4 *Harvard Law Review* 1255–1312. For an alternative perspective, see the chapter by Cecily Rose in this collection.

³⁷ Philip Alston has written that if Slaughter's analysis is correct, 'it implies the marginalisation of governments as such and their replacement by special interest groups. It suggests a move away from arenas of relative transparency into the backrooms and the bypassing of the national political arenas to which the United States and other proponents of the importance of healthy democratic institutions attach so much importance.' Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435–448, 441.

³⁸ Martti Koskeniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations' in Michael Byers, ed., *The Role of Law in International Politics. Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 17–34.

transnational networks designed to ease them into the liberal-democratic legal order'.³⁹

While some are concerned about the power *of* networks, others are concerned about the distribution and uses of power *within* networks. Some scholars suggest that networked governance is too often represented as inherently consensual and that the assumption that power within networks is always exercised in a benign way must be questioned. These critics point to the ability of some network nodes to exert disproportionate influence as a result of their position in the network; with 'power's second face, setting the network's agenda through (the) structural control of information'.⁴⁰ Slaughter had a threefold rejoinder to these concerns. First, she argued that government networks are primarily 'talking shops' and (traditional, political) accountability is not relevant to the 'soft power' of (only) giving and receiving ideas. Second, she argued that the (independent) nature of some domestic institutions (such as courts) is that they 'act legitimately without direct accountability'. Finally, she noted that accountability must be assessed comparatively; international organisations such as the UN, and civil society actors who sometimes wield considerable influence, are not very accountable themselves, yet both aim to effect domestic change and bypass domestic political processes.⁴¹

III About This Book

In this book, we reflect upon the role for both experts and networks in international law. We are interested in whether and how experts and epistemic communities have answered challenges about their democratic accountability, inclusiveness and transparency in the face of a new and demanding set of urgent contemporary problems, whether environmental or economic. We are also interested in how the vision of a new world order based upon networked, disaggregated state institutions has held up over the past ten years, and how experts and epistemic communities have addressed ongoing issues of governance such as human rights and individual criminal accountability. Does international law today in fact

³⁹ Gerry Simpson, 'The Ethics of the New Liberalism' in Christian Reus-Smit and Duncan Snidal, eds., *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2009), 255–266.

⁴⁰ Kahler, above note 30, 3.

⁴¹ Anne-Marie Slaughter, 'The Accountability of Government Networks' (2000) 8:2 *Indiana Journal of Global Legal Studies* 341–367, 347.

operate through diffused networks, and through the experts within those networks that one may consider influencers? How does power operate within and between transnational networks? Have the fears of sceptics of a 'new world order' proven justified? Do networks complement or compete with traditional institutions of global governance, and how do these dynamics vary in different institutional and substantive settings? What is the power of networks in setting global policy agendas, and how much control do global policy-makers really have over the implementation of those agendas?

Both experts and networks belong to the backstage world of international law. Our attention to what goes on behind the scenes is not new in international law and international relations scholarship.⁴² But tracking the nature of the power exercised by actors that lies in the shadows remains an important task. In recent years, the reach and influence of both experts and networks have increased, as the complexity and interdependent nature of economic and environmental problems, as well as problems of individual and collective security, make coordinated international decision-making more important and more uncertain. Both experts and networks share the same fundamental vulnerability on the count of democratic legitimacy: neither is elected or answerable to a political constituency. Both experts and networks also share, potentially, the same remedy for this democratic deficit: greater inclusiveness and transparency. A little over a decade has elapsed since Anne-Marie Slaughter published *A New World Order*, and David Kennedy challenged experts to resist denying 'the political' in their work and thus abrogating both freedom and responsibility. It is a propitious time to assess whether and how experts and networks have changed their practices and patterns of influence.

This book brings to the fore the important role of experts both individually and as members of networks, as key facilitators of the exchange of material and immaterial resources (principally information), to network members. The contributors were given great latitude in terms of defining both experts and networks, and in determining their methodological approach, leading to differences in emphasis as well as varying conclusions, some more positive, others more critical. We view this intellectual diversity within the collection as a strength, and a benefit for future research. In relation to the power and influence of experts, this

⁴² See further, Haas, above note 1; Kennedy, above note 2; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007).

book is interested in the following questions. In whose interest are experts acting? To whom are they accountable? To what extent do experts 'govern' and is governance by experts across diverse fields such as environmental protection, human rights promotion, international criminal prosecution and financial sector reform desirable and effective? Recent conflicts within the International Labour Organization, for example, demonstrate the resistance that established actors, both state and non-state, may present to an increased role for experts in international governance.⁴³ With respect to networks, we are interested in the diversity of networks and the different contexts in which they operate. The informality of many networks allows for the participation of a wide range of actors, with international relations scholars having long identified the work of non-governmental organisations in the human rights field, for example, as a form of network.⁴⁴ The case studies on diplomatic protection, human rights litigation and peace negotiation included within this collection also demonstrate the contributions of networks of diverse participants in developing and implementing international legal norms.

IV Within the Book

This collection is organised into three parts. Part I examines the role for experts and networks in relation to advocacy, fact-finding, dispute resolution and mediation, particularly for matters of human rights. The three chapters within this part demonstrate the ways in which experts and networks enhance (rather than compete with) the effectiveness of international legal regimes, in particular by providing a structure in which both state and non-state actors can participate in international law-making, as well as its execution.

The chapter by Suzanne Akila demonstrates the complexity of interactions between networks of both state and non-state actors for the protection of citizens abroad. Using the *LaGrand* case before the International Court of Justice as an illustrative case study,⁴⁵ Akila examines how and why Germany sought to protect two of its nationals from the application of the death penalty in the United States and the role for both

⁴³ Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42:4 *Industrial Law Journal* 338–368.

⁴⁴ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

⁴⁵ *LaGrand (Germany v. United States of America)*, Judgment, [2001] ICJ Rep 466.