

Editors' Note: International Law, International Relations and the 'War on Terror'

One of the recurrent charges levelled against International Law is that, when questions of high politics get into the picture, its relevance in world affairs inexorably wanes. This condition is even more apparent when issues of national security are at stake. As the argument goes, when states are trying to protect their very existence in an anarchical world, formal legal preoccupations should give way to the pragmatism of *realpolitik*.

The events of 9/11 in the United States and the ensuing 'War on Terror' have bolstered this sceptical view of International Law. Security has become a top priority in contemporary national and international political agendas, and governments have felt legitimized in adopting 'exceptional' measures to deal with real and perceived threats. The grounds to use force against rogue regimes have thus expanded, and the 'right' to security is now frequently used to trump other long established legal guarantees such as the right to a fair trial.

Seen in this light, the War on Terror has represented a serious challenge to International Law. At the same time, however, its controversial nature has rekindled the debate over the importance of the legal and normative dimensions of world affairs. In the post 9/11 geopolitical landscape, do the old rules of the game still apply, or is a more 'realistic' approach to International Relations and International Law required? If that is the case, is this move justified? And what are the consequences, both in the short and long term, of moving beyond existing normative and legal commitments encapsulated in International Law?

The four articles included in this special issue of the JILIR contribute to this ongoing debate about the War on Terror. They do so by critically exploring current responses to terrorism around the world and the new meanings security has acquired in this context. Craig Barker, in the article "The Politics of International Law-Making: Constructing Security in Response to Global Terrorism" argues that the international response to global terrorism has been characterized by an apparent 'rush to law', which is evidenced by the adoption of a growing number of global and regional counter-terrorism treaties and the legislative activism of international institutions such as the United Nations. Relying on an eclectic analytical framework that draws from both International Law and International Relations theory, the author contends that the success of this legalization process is not based on pure self-interest on the part of the main actors involved (i.e. states), as most rationalist theorists would suggest, but on social influence and coercion (e.g. the shaming effect of the provision requiring states to report to the UN's Counter-Terrorism Committee). In turn, the legitimacy of this process does not depend on 'internal morality' of the law enacted, as Fuller's legal positivism would suggest, but on compliance with the set of shared understandings about what is an appropriate response to terrorism that have emerged through an ongoing open dialogue among both state and non-state law-makers in the international arena. It is through this type of exchange, which

Barker equates to the Habermasian idea of communicative action, that a 'balanced' construction of security in response to global terrorism can take place.

The legality of current efforts to fight terrorism is also a central theme in Barbara Falk's article. In "The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III," the author examines the debate over the long-term detention and legal status of 'enemy combatants' in the context of the War on Terror. At the core of this debate is the issue of the applicability of international humanitarian law to these individuals. Falk shows how in the aftermath of the conflict in Afghanistan the US administration has emphasized the gaps in the existing legislation regarding the distinction between civilians and combatants. This attitude has been in sharp contrast to that of the International Committee of the Red Cross, which has refused to engage in a debate about the Geneva Conventions, claiming that their provisions applied to both civilian and combatants. According to Falk, these stubborn and uncompromising positions have limited a healthy discussion about the issue of 'enemy combatants'. Using as term of reference the recent *Hamdan v Rumsfeld* decision of the US Supreme Court, the author then looks at ways in which this conversation over international humanitarian law can be fruitfully (re)opened.

In the third article of this special issue, the focus shifts from Afghanistan to Iraq, the other key front in the War on Terror. In "Why Did the U.N. Security Council Support the Anglo-American Project to Transform Postwar Iraq?: The Evolution of International Law in the Shadow of the American Hegemon," Carlos Yordán analyzes the power dynamics underlying the application of International Law in Iraq after the 2003 US-led invasion. Building on Detlev Vagts's notion of 'hegemonic international law', the author contends that in the post-Cold War era, American power and influence have come to define the dominant 'neo-liberal' worldview about intrastate order. This worldview in turn has shaped the workings of international institutions, including the UN Security Council. In the case of Iraq, the Council not only legitimized the post war American occupation, but also accepted most of the US administration's requests aimed at transforming the local social order according to neo-liberal values. This was not the first time the Council acquiesced to the American hegemon in a postwar mission. Yordán shows that this hegemon-subject relation characterized other recent UN-led missions, such as the one in Kosovo.

In the special issue's concluding article, "Manufacturing Threats: Asylum Seekers as Threats or Refugees?" Scott Watson takes into consideration the other battleground in the ongoing War on Terror, namely the 'home front'. Using as a term of reference Buzan and Waever's notion of 'securitization', the author shows how in the Canadian context the discursive practices of political and media elites have constructed the identity of asylum seekers arriving to North America. These constructions have clear practical implications, since they have shaped immigration and refugee policy in the host country. In recent years, the portrayal of immigrants and refugees as a potential threat to national security around the world has favoured the adoption of restrictive border control measures. Watson, however, warns us that while border security has become a hot political issue after the events of 9/11, the securitization of immigrants and refugees is not a new phenomenon. To

support this claim, the author looks at the case of the Sikh asylum seekers arriving in Canada in the mid 1980s and the 'securitized' debate that this event sparked in the local media and among policy-makers. At the same time, Watson shows that this is not the only type of discourse surrounding asylum seekers. In certain circumstances, these individuals might be framed as individuals in need of the protection of the state, not as a threat. This was the case, for example, of the group of Sri Lankan asylum seekers that arrived in Canada few months before the Sikhs. The existence of alternative 'humanitarian' discourses about immigrants and asylum seekers implies that the now prevalent 'securitarian' arguments are not as natural as they seem today, and thus they might be replaced by more progressive ones in the future.

These articles, taken together, demonstrate that the debate over the role of International Law in the current 'securitized' political environment has not faded away. On the contrary, it has become more relevant than ever.

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