

The Perils of Global Legalism

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PREFACE

Is international law anything more than the sum of states' interests, a useful instrument for cooperation but nothing more? In earlier work, I argued that international law reflects norms of cooperation that emerge when states act in their self-interest.¹ It followed from that conception that when a state considers whether to obey international law that conflicts with what it perceives to be good policy, it should weigh the costs and benefits and act accordingly. The usual cost of violation of international law is that another state will object or retaliate, and valuable cooperative opportunities could be lost. This cost can be high, so states do not violate international law lightly. But when circumstances change, so can the pay-offs from complying with a particular norm of international law, in which case it may make sense for the state in question to violate the law. It may do so on the sly or it may do so explicitly. States refuse to admit that they violate international law and instead simply advance an "interpretation" of the law that more closely aligns that law with that state's interest, in some cases hollowing it out completely. Sometimes, they insist on renegotiating international agreements that stand in their way.

Consider, for example, the decision of the United States and its NATO allies to launch a military intervention in Serbia in 1999. Serbian forces had begun to put pressure on the mainly ethnic Albanian population of Kosovo, which supported an insurgency that sought to achieve autonomy for that region. Atrocities multiplied, and the foreign governments feared a recurrence of the violence and instability of the Yugoslavian civil war that had occurred earlier in that decade, which had killed many thousands, sent refugees spilling over borders, and destabilized the region. The problem was that under the UN charter, Serbia's conflict with its insurgency

was an internal matter, and foreign countries could not intervene without the approval of the Security Council. Neither Russia nor China would withhold their veto, which meant that such approval would not be forthcoming. If NATO invaded, it would break international law. But if it did not, then it would have to stand by and watch a genocide unfold.

NATO broke international law and intervened. NATO countries did not admit to breaking the law, but they also did not try very hard to drum up a legal rationale. Some commentators bruited about the idea that international law really ought to, or maybe already does, have an implicit exception to the UN charter, one that allows uses of force for humanitarian purposes. However, this idea never gained traction.² The only way to explain this episode is to admit that the relevant nations believed that they had a stronger interest in violating international law than in complying with it. Russia and China were too weak at the time for their opposition to matter.

The benefits of the intervention were clear; what of the costs? Was there a cost to “international law” or to the “rule of international law” that can be distinguished from the apparently tolerable cost of Chinese and Russian opposition? It may be that the force of the UN rule eroded as a consequence of the intervention; whether in fact it did or not is hard to say. It is possible, but unlikely, that the weakening of the UN rule contributed to the intervention in Iraq in 2003, which also lacked Security Council authorization, at least under the most plausible reading of earlier resolutions, or to Russia’s incursion in Georgia in 2008, which was clearly unauthorized. After all, the Kosovo intervention was hardly the first use of military force that violated the UN charter.³ So it is hard to say whether the Kosovo intervention weakened the charter. Even if it did, it is unclear whether this weakening was beneficial or not. Suppose, for example, that the effect of the intervention was to carve out an exception for humanitarian interventions. Such a rule could very well be desirable; or it might not—everything depends on how that exception was subsequently interpreted.

Violating international law has identifiable short-term costs and benefits relating to the particular course of action, and it has much more speculative long-term costs and benefits touching on the legitimacy or robustness of international law in general. In public discussion in the United States, popular and elite opinion think of international law in a straightforward cost-benefit sense. The main divide between liberals and conservatives is

over the long-term costs and benefits. Liberals believe that the long-term costs for the United States from breaking international law are high, while conservatives think they are low. But, although the two groups have different ideas about what the national interest requires, they agree that the national interest may justify violating or working against international law—for liberals, when international trade threatens environmental standards and working conditions; for conservatives, when human rights treaties and international criminal law interfere with security.⁴ The result is a pattern of American international lawbreaking that long predates the years of the Bush administration.⁵

This type of instrumental thinking about international law offends Europeans, especially European intellectuals, who argue that international law—and especially certain core norms of international law—cannot be put into a cost-benefit analysis but simply must be obeyed. Whether this view actually influences European governments is another question, as the Kosovo case illustrates. The European Union has also authorized illegal trade practices when pressures from European industry or public sentiment were great enough, and many commentators see European attitudes about international law as an instrumental effort to promote European values and interests.⁶ As for the rest of the world, no serious observer contends that countries like China, Russia, India, Brazil, and Japan think of international law in other than instrumental terms.

In the United States, conventional legal-academic thinking about international law hovers somewhere between the European view and the liberal popular-press view in the United States. American legal scholars typically argue that preserving and enhancing international law is in the long-term interest of the United States even if particular short-term costs are high. However, it is increasingly rare for an American legal scholar to acknowledge that any particular illegal act on the part of the United States could be justified on national interest grounds, and there seems to be movement toward the view that the real justification for international law is cosmopolitan, the implication being that the United States should incur costs for the sake of international law in some abstract sense—perhaps for the sake of the international community, but this is always left a little obscure.

The conflation of America’s interests and the world’s interests is a typically American stance, and so it is no surprise that American legal scholars

have fallen into this trap. In American legal scholarship, it has led to a view of international law that I will call “global legalism.” Most European scholars are global legalists as well. Global legalism is an excessive faith in the efficacy of international law. For some (mainly American) global legalists, the very high value of international law creates a presumption against violating it that is so strong that, for all practical purposes, it may never be violated. For others (mainly Europeans), international law has value for its own sake—it does not have merely instrumental value for the states that it governs—and therefore it is wrong for states to evaluate potentially illegal conduct with a cost-benefit analysis that uses national interest as the metric. Indeed, global legalists have long since dropped the conventional view that international law is based on the consent of states; international law transcends the interests of states and holds them in its grasp. I will argue that global legalism is not just a scholarly fashion; in fact, it has deep roots in American thinking, which explains why it exerts so much power in scholarly and, sometimes but to a lesser extent, in popular discussion.

The premise of this book is that law and legal institutions can obtain prestige among the public when they function in a highly effective manner, especially when they function more effectively than political institutions do. The prestige of the law often leads to *legalism*, which is a view that loses sight of the social function of law and sees it as an end in itself, one that thinks of moral and political problems in legal categories and asks lawyers and judges rather than politicians to solve them. In the United States, legalism has been a powerful way of thinking for almost two hundred years. Legalistic thinking has favorably disposed Americans to international law where, however, legal institutions have always been extremely weak and unreliable, despite the many efforts (since World War I, led by the United States) to construct and strengthen them.

The weakness of international law, by contrast to domestic law in the United States and many other advanced democracies, can be traced to the absence of robust international political and legal institutions—legislatures, executives, courts—which can in turn be traced to the extreme heterogeneity of the global population and the vastness of the globe. Although there are some recognized global values and interests, virtually everyone around the world owes his or her primary loyalty to a state, which delivers goods such as security that promote local values and interests. Even in poorly run and authoritarian states, people trust and defer to conationals

in their governments in ways that would never happen for an international government, which would have to draw its staff from all around the world and could not be monitored or even understood by ordinary people. It can hardly be exaggerated how important the supporting institutions of law are for making the law work in a way that advances people’s interests; without those institutions, law is more like social norms or customary norms or norms of etiquette—free-floating rules that emerge somehow from the maelstrom of human behavior that people only vaguely understand, that are rarely clear, that can’t be easily changed, and that have an obscure relationship with human well-being.

So international law is a peculiar type of law that exists but lacks effective legal institutions to manage it. Legalism has its global counterpart, *global legalism*, which is a contradictory faith that both acknowledges this problem—in a phrase, the problem of “law without government”—but also believes that international law can nonetheless carry out its functions and deserves loyalty beyond national interest-based cost-benefit calculations. The reasoning is as follows. True, world government does not exist, and the reason is that nations refuse to yield authority to supranational institutions that they cannot trust. But nations can yield that authority to international law that, after all, they have agreed to. If the authority of international law merely rests on nations’ consent, then why shouldn’t a nation withdraw its consent if it believes that it can do better by violating the law? The answer is that if states do that, international law will lose its authority, and thus its ability to constrain nations to act in the general interest. International law is effective because states defer to it; they defer to it because it is effective.

This book is about this circularity, its implications for international institutions, and attempts to break out of it. Chapter 1 defines global legalism by comparing it to other utopian approaches to solving global problems like war and environmental degradation—problems that states cannot solve unilaterally because the behavior responsible for them extends across multiple borders. These other approaches—setting up a world government, for example—no longer seem plausible and few people take them seriously anymore. But the problems remain, and global legalism presents itself as a more realistic method for approaching them. It does not require as dramatic a change in human nature or the organization of the world, and it presents itself as a simple extension of the domestic version of legal-

ism that prevails in the most successful states, preeminently, the United States and the quasi-state European Union. The prestige of domestic legalism underlies the faith in global legalism. But I argue that the two kinds of legalism are fundamentally different: domestic legalism flourishes because governments support it; global legalism has no government to turn to. Chapter 2 spells out this problem in detail. Law cannot control behavior unless legal institutions support it; without legal institutions—legislatures, enforcers, courts—international law is unavoidably weak.

In chapter 3, I consider various defenses of global legalism in the academic literature. Scholars have argued that only a “state-centered” view of international law would insist that it is weak. If one disaggregates the state and looks at its component parts, one discovers reasons for believing that international law transcends the interests of states. I argue that none of the intrastate components that advocates identify—interest groups and civil society, the consciences of citizens or government officials, democratic processes or judicial review—provide a theoretical basis for global legalism or evidence that global legalism provides an accurate description of the world, nor do trends such as the fragmentation of states (chapter 4) or the increasing incorporation of international law in domestic law (chapter 5), as is sometimes argued. The efforts of advocates to persuade national courts around the world to take international law more seriously than they have in the past are likely to be futile.

In part II, I focus on international courts. One might think that the proliferation of international tribunals provides evidence for global legalism, and it is true that international courts have fared much better than international legislative and executive institutions, which are virtually nonexistent. The courts do provide evidence of legalistic thinking—the prestige of the judge has always been a central element of legalism—but not of the accuracy of that worldview. Chapter 6 explains the limited power of international tribunals to resolve disputes, and chapter 7 explains what happens when those tribunals’ ambitions exceed their limited grasp—states work around them, constructing new tribunals that they can more tightly control. Chapter 8 examines international tribunals that have jurisdiction over individuals and argues that the legalistic ambitions for international criminal adjudication do not reflect their roots in security policy, and its continued vitality depends on a return to those roots. Chapter 9 examines domestic courts and their relationship with global legalism and shows that

domestic adjudication that seeks to advance international law can do little to address the global problems that one should care about.

The proliferation of courts does need to be explained, however; and part II argues that international courts have fared better than international legislatures and executives because courts have real but limited instrumental value for states and can be controlled and worked around. In this way, they have little in common with domestic courts, which have mandatory jurisdiction. Legalists seek more than that from the international judge—a person who stands outside international politics and turns away the lances of state interest with the shield of justice. On such a mirage do they try to construct the international order.

This book follows a long line of warnings about excessive reliance on international law and international institutions for solving problems of global conflict. Its predecessors include E. H. Carr’s *The Twenty Years’ Crisis* and Hans Morgenthau’s *Politics Among Nations*, whose diagnoses I update with the help of the intervening literature on legalism and judicialization. These authors are sometimes misunderstood as pessimists about all forms of international cooperation. In fact, they did believe that ideals matter and that international law can solve certain problems, but because they did not provide a constructive account of international law—that is, a theory that explains its existence—their skepticism is their defining legacy. The challenge for today is explaining when international law works and what its limits are.

Some political scientists have accepted this challenge and their most convincing work uses rational choice theory to explain the conditions under which states can cooperate.⁷ Law professors, by contrast, have largely ignored the challenge, having instead succumbed to the lure of global legalism. Building on an earlier book that I wrote with Jack Goldsmith,⁸ in this book I have two aims: to refute global legalism and to further develop the rational choice account of international law. As in the earlier book, it is most definitely not my claim that international law does not exist or does not matter. The argument is instead that international law exists and matters when it serves nation-states’ interests in international cooperation. Understanding when those conditions exist and do not exist should be on every international law professor’s academic agenda.

If this book has a single theme, it is that politics, idealism, and careless thinking conspire to produce a picture of international law that bears little

resemblance to reality. This picture emphasizes universalism (the rules apply to all states), sovereign equality, and human rights; the reality is one of bilateralism (states typically cooperate in pairs), heterogeneity (states frequently have opposing interests), and power. While refuting the picture, I try to suggest ways in which appreciation of reality allows for more effective forms of cooperation than those that prevail when states yield to idealistic agendas. For states do, from time to time, construct idealistic institutions—they can agree to anything they want, after all, and under the influence of popular enthusiasm, they sometimes do. But under the pressure of events, these institutions always either crumble or are put to other uses more consistent with international realities.

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International Adjudication: Its Promise and Problems

CHAPTER SIX

International adjudication is the most distinctive and lasting contribution of global legalism, as well as a phenomenon to which global legalists point with pride. Understanding international adjudication is thus an important part of this study. Any discussion of international adjudication must start with the International Court of Justice, often called the World Court, which was established in 1945, at the same time as the United Nations as an organ of that institution. The founders of the UN hoped that an international court would be able to resolve disputes between states, thus heading off war by applying law.

Why did the founders believe that an international court was needed? International law, like domestic law, is often ambiguous; and governments, like ordinary people, can exploit legal ambiguities in order to attain their ends. Indeed, government officials rarely admit that state policy violates international law; instead, they argue that state policy is consistent with international law, rightly interpreted. When the United States invaded Iraq in 2003, critics charged that the invasion violated the UN charter, because it was not in self-defense and was not authorized by the Security Council. The U.S. government replied that earlier Security Council resolutions that had ended the first Gulf War implicitly gave the United States the authority to resume hostilities if Iraq refused to cooperate with UN weapons monitors. These resolutions suspended hostilities but also obligated Iraq to cooperate in the disposal of its weapons of mass destruction, which Iraq did not do. (Iraq did eventually dispose of its weapons, but not openly, so that inspectors could not confirm that it had done so.) Both arguments have surface plausibility, and what might have resolved the conflict between the United States and its critics was an authoritative interpretation

of those resolutions by an impartial court. For reasons that we will shortly discuss, that could not happen, but in principle, such a court could have resolved a conflict that damaged numerous diplomatic relationships.

Many other long-running conflicts would also benefit from impartial adjudication. The dispute between Britain and Argentina over the Falklands/Malvinas Islands, which exploded into war in 1982, seems impervious to diplomatic resolution. China-India border disputes led to war in 1962, and many still have not been resolved. China and Japan have a serious disagreement about their maritime boundaries, and thus, rights to underwater resources. India and Pakistan dispute the status of Kashmir. Turkey and Greece have fought over Cyprus, Britain and Spain cannot agree about the status of Gibraltar. Russia, Denmark, and Canada have overlapping claims to mineral resources in the Arctic seabed. Israel and several of its Arab neighbors have disputed Israel's right to exist for decades. Countless other such conflicts exist. Many are minor, and many others have been resolved. But some are serious and disrupt the lives of people who live in the affected area, and occasionally lead to war.

That adjudication of some sort can resolve disputes between states, at least in some cases, is not open to serious question. In the nineteenth century, the United States and Britain used arbitration panels to resolve numerous disputes, including disputes over the location of the U.S.-Canada border and over Britain's assistance to the Confederacy during the Civil War. The U.S.-Britain example influenced other states, and by the end of the nineteenth century, ad hoc international arbitration had become a thriving institution. But arbitration was only as good as the intentions of the states with a dispute; if they did not trust each other, they would not set up an arbitration panel or comply with its judgment. Many people therefore argued that what was needed was a permanent international court with compulsory jurisdiction. Only such a court could compel states to bring their disputes to it, and in this way ensure that wars did not break out between states otherwise unwilling to resolve their disputes with voluntary arbitration.

For the global legalist, the move from arbitration to adjudication was natural, perhaps inevitable. No domestic legal system lacks a judiciary; therefore, the international legal system needs a judiciary as well. Indeed, legalists have long envisioned an international court system that would have a hierarchical structure similar to that of domestic court systems:

judges would be independent; jurisdiction would be compulsory and general. And judges would not only interpret treaties; they would develop customary international law.

Yet the history of international adjudication during the twentieth century has not gone according to plan. The Permanent Court of International Justice, set up after World War I, performed poorly, and the ICJ, which replaced it after World War II, has also failed to live up to the ambitions of its founders. Adjudication today remains marginal to world affairs. Splintered into many specialized systems with no clear relationship to one another, international adjudication has worked well only in narrow conditions. This chapter will argue that the move from episodic arbitration to a full-fledged international court could seem natural only to global legalists. The failure of the ICJ has much to say about the pitfalls of global legalism.

HISTORY

States in conflict can choose from a range of methods to resolve disputes short of the use of force or coercive sanctions, including diplomacy, mediation or conciliation, arbitration, and adjudication.¹ While the distinctions between these categories are not sharp, international legal scholars traditionally distinguish arbitration and adjudication from negotiation or mediation because in the former a formally binding decision is reached according to a legal rule.² Before any permanent courts were established, states often relied on ad hoc arbitration. In the typical arbitration case, two states involved in a dispute would each appoint a single arbitrator, the two arbitrators would then jointly appoint a third, and the three arbitrators would together hear arguments and deliver a judgment. International lawyers date the modern era of arbitration to the Jay Treaty of 1795.³ Since then, hundreds of arbitrations have occurred, and they continue to the present day. For example, the currently operating Iran-U.S. claims tribunal, which was created to hear and adjust claims arising from the Iranian Revolution in 1979, falls within this tradition.⁴ Interstate arbitrations have concerned a wide range of disputes, including controversies over borders, damage to property during wars and civil disturbances, and collisions between ships at sea.

While different in many respects, international arbitration shares a key characteristic with international judicial processes: reliance on third

parties to resolve a dispute between them. Arbitration has many attractions: it involves the third party in the dispute—one whose views are not those of either party; the arbitration panel is set up to resolve only one dispute; it follows an ad hoc set of procedural rules; it is under the control of the parties. Arbitrating states, whose interests and policies are at stake, control the panel's jurisdiction, nor need they accept its decisions frequently do. A fully fledged institution would include: (1) compulsory jurisdiction over a certain class of disputes whose members do not depend on the panel for payment or salary; and (3) regular procedure from dispute to dispute.⁶

The first steps toward this institution were taken in the nineteenth century. The delegates to the Congress of Vienna agreed to establish a permanent court of Arbitration (PCA).⁷ The PCA had no jurisdiction to use arbitration; it did this by appointing arbitrators from a group of candidates. However, parties did not always accept its decisions, and it went into desuetude. It recently enjoyed a rebirth.⁸

The next step was the establishment of the Permanent Court of International Justice (PCIJ), which was supposed to maintain international law. Its creation was an authentic innovation and so in theory would be at least as effective as the PCA. In addition, states could sue each other using unilateral declarations, and the PCIJ lacked independence, and was not the stage for the International Court of Justice. The United Nations, which continues to exist, has not. The compulsory jurisdiction of the PCIJ and the compulsory jurisdiction of the ICJ have been more than

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Reading seminars