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RESEARCH ARTICLE

The case against international cooperation

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Abstract

The idea that international law and institutions represent cooperative means for resolving inter-state disputes is so common as to be almost taken for granted in International Relations scholarship. Global-governance scholars often use the terms international law and cooperation interchangeably and treat legalization as a subset of the broader category of inter-governmental cooperation. This paper highlights the methodological and substantive problems that follow from equating 'global governance' with 'international cooperation' and suggests an alternative. The traditional model applies liberal political theory to the study of international institutions and interprets global governance as the realization of shared interests. It deflects research away from questions about trade-offs and winners or losers. In place of cooperation theory, I outline an overtly political methodology that assumes that governance – global or otherwise – necessarily favors some interests over others. In scholarship, the difference is evident in research methods, normative interpretation, and policy recommendations, as research is reoriented toward understanding how international institutions redistribute inequalities of wealth and power.

Keywords: international cooperation; international theory; liberalism; international institutions; liberal world order

It is conventional among scholars of International Relations (IR) to treat international institutions and international cooperation as part of a single conceptual category. This manifests in many ways: international law and organizations are routinely classified as instances of 'cooperative' behavior and, conversely, rejection of an international organization by a state is understood as the 'end of cooperation'[1]; many colleges offer courses on 'International Law and Cooperation' and textbook-writers affirm that the two belong together[2]; the flagship journal in the field of global governance describes its goal as understanding 'multilateral institutions forging

[1]Magnuson 2017.

[2]A leading textbook on International Relations says 'International law is established by states… as a way to facilitate international cooperation', Frieden *et al.* 2019, 465. Another introduces students to IOs with these lines: 'Why have states chosen to organize themselves collectively? Liberalism provides the answer: within the framework of institutions and rules, cooperation is possible', Mingst and Arreguín-Toft 2017, 210.

collective responses to global problems'[3]; in policy settings, commentators on the recent American turn against international organizations worry about 'a descent into the chaos of a world without effective institutions that encourage and organize cooperation'.[4] More grandly, John Ikenberry and others maintain that the fate of the consensual, rules-based order that produced peace and prosperity since 1945 is now in danger.[5]

This paper challenges the view that international law, institutions, and organizations can be classified unproblematically as examples of international cooperation. The 'cooperation assumption' rests on a distinctly liberal model of the separation of 'law' from 'politics' that may seem self-evident to liberal theorists but is alien in other traditions. By beginning with an assumption about cooperation, liberal IR theorists narrow their research questions, substantive interpretations, and policy recommendations in ways that produce empirically unrealistic and politically naïve conclusions. This paper illustrates these and shows an alternative that shifts the focus from cooperation to politics and competing interests. I build on recent work in IR and Comparative Politics that aims to 'demolish the seemingly unbreakable elective affinity between institutionalism and a cooperative reading of world politics'.[6]

Global governance scholars who adopt the cooperation premise should be alert to its biases and costs. By assuming that global governance follows from mutual interests pursed through cooperation, they naturally interpret international institutions as devices aimed at the common good. This leads to three problems: as a research method, it avoids questions about who gains and who loses from international institutions; as a normative theory, it offers a moral justification for international institutions that precedes empirical evidence on their actual effects; and as policy advice, its deference to international institutions helps enact the interests of those who write and interpret the rules. Each of these impoverishes scholarship and pushes IR as a field away from attention to the mechanisms and consequences of global governance. Together, they encourage a simplistic view of IOs as progressive devices that naturally advance toward the common good.

The alternative to the liberal view is a political perspective on global governance that begins with the recognition that divergent interests means that law and institutions advance some interests at the expense of others. International law codifies political choices and tradeoffs into legal forms. It smooths the path toward those interests and places obstacles on the paths to competing distributional outcomes. This necessarily produces both winners and losers, and it is a familiar position on law and politics widely held by scholars from a range of non-liberal persuasions. It is not a novel observation, but it needs to be restated for contemporary scholars of global governance.

I do not claim that international cooperation isn't possible or that it doesn't sometimes occur. There are plenty of examples of governments changing their

[3]Coate and Murphy 1995, 1.

[4]This is from a collective statement by several American IR scholars defending 'international institutions and order' and printed as an advertisement in the *New York Times* on 23 July 2018. It was organized by David A. Lake and Peter Gourevitch and is explained by them in Lake and Gourevitch 2018.

[5]Ikenberry 2020; Owen 2018.

[6]Zürn 2018, 3.

policies together or otherwise accommodating themselves to the desires of others, sometimes through institutions: for instance, airplane overflight rights are negotiated among governments and landing rights re-allocated; the USA organized other governments to help run its 'black sites' after 9/11; and the coronavirus response included a measure of international coordination. My point is not to deny that inter-state coordination happens. It is instead to remind that this coordination takes place in a social field constructed by power politics and serves partial rather than universal interests and that 'cooperation' is a misleading descriptor for this activity.

I highlight a 'political' understanding of global governance in contrast to the 'cooperative' understanding, and show how these differ as analytic starting points, as empirical research programs, and in policy implications. 'Consent' is not an alternative governing mechanism to 'power'. A political approach to global governance returns our attention to the central questions of power and divergent interests and enriches IR scholarship. When law is understood as empowering specific interests rather than an imaginary universal welfare, then research on international governance can open more easily to inquiries into winners and losers and the result is a more realistic appraisal of the political power of law. It also offers a different interpretation of the state of the 'liberal world order' today.

This does not represent a return to 'realism' in IR theory. Although it is true that realism emphasizes power, interests, and redistribution, it is equally true that the realist framing of these concerns is far too narrow to accommodate the discursive politics around law that are central to my argument. Other approaches to power politics, including Marxism, critical theory, constructivism, and feminism, supply better tools that realism for understanding the place of legalized politics in IR. What makes realism distinct is its insistence on either brute materialism that disavows attention to legal or social institutions[7] or an essentialized version of 'national interests' as foundational, self-explanatory, and prior to social interaction.[8] Neither of these is a useful starting-point for studying the interplay of law and politics in the politics of global governance. By contrast, the political approach that I outline here is centrally concerned with the discursive power of legal ideas and practices – that is, the capacity of social institutions such as 'law' and 'governance' to produce the possibilities of political action and to redefine them. These are features of the world that are expressly set aside by IR realists. Theirs is an exceptionally shallow conceptualization of 'power politics'. A deeper view is possible by following scholars who see international institutions as places of contestation and power rather than place of cooperation and mutual gains.[9]

[7]See Stephen Krasner's 'realist' dismissal of international law: 'If there were rules at all, they would be set by powerful states, and these rules would change if the distribution of power changed'. Cited in Hakimi 2017, 13.

[8]See John J. Mearsheimer's argument that states pursue 'survival' all the time and follow norms, rules or institutions only when they are consistent with that goal: 'In the realist story, states worry about their survival above all else, and this motivates them to pursue power at each other's expense…. In the absence of institutions… states follow the dictates of realpolitik', Mearsheimer 2018, 191, 192.

[9]This includes scholars associated with realism in IR including Krasner 1991 and Gruber 2000, with Marxism (Strange 1996), with international legal history (Koskenniemi 2009) and legal theory (Hakimi 2017), with critical theory (Peevers 2013). It is interesting that many of the IR scholars on this list are

This paper begins by describing the cooperative model of international law and institutions that pervades liberal scholarship on global governance, premised on the assumption of shared interests and mutual benefits. It then sets out the political alternative that sees conflicting interests as the empirical and analytic core of global governance. Finally, it outlines their differences in relation to three areas: research design, historical interpretation, and policy prescription.

The liberal approach: cooperation, constraint, and mutual payoffs

In her recent book on international courts, Leslie Johns provides a clear summary of the cooperative view of international law and politics. She says:

> As the modern world grows more interconnected through globalization and social movements, there is a greater need for states to cooperate in areas like foreign investment, international trade, financial regulation, environmental protection, human rights, and other issue-areas. International organizations can help states to capture the benefits of cooperation. For states to cooperate, they must first have common expectations about appropriate behavior and the consequences for inappropriate behavior. International law and organizations help states to articulate and uphold those expectations.[10]

Johns identifies a real-world need for inter-governmental cooperation and suggests that better outcomes are possible when governments stay within cooperative and legalized parameters. The bounds of appropriate behavior are defined by the international laws, rules, and courts that governments agree upon. The reward for complying is a share of the 'benefits of cooperation'.

The idea of cooperation is at the heart of the liberal perspective in IR. It is traceable through the long history of state-of-nature thinking in liberal political theory that interprets political institutions as a consequence of free-will, but also can be seen to originate for IR scholarship in the rise of rationalist IR analysis in the 1970s and 1980s. The turn to liberal rationalism as framework for describing international politics and institutions brought with it the idea that 'international institutions constituted mutually beneficial arrangements' for governments.[11] Under the influence of the 'classically liberal argument of economists about individuals and firms engaging in mutually beneficial exchanges',[12] IR liberals constructed a school of research centered on the twin goals of identifying why governments sometimes choose cooperation over unilateralism and encouraging them to do so more often.[13]

somewhat difficult to classify among the IR-isms, precisely because they do not subscribe to the familiar duality that pairs realism with conflict and liberalism with cooperation.

[10]Johns 2015, 13.

[11]Stein 2008, 204–05.

[12]Stein 2008, 205.

[13]Classics in this tradition include Chayes and Chayes 1993, Downs *et al.* 1996, Hathaway 2002, and McLaughlin and Hensel 2007. A new wave of IR/IL scholarship contests the assumption that the power of law is measured by 'compliance' and looks at its broader effects in a world where compliance and violation are not so clearly distinguished – for instance, Peevers 2013, Dill 2015, and Sanders 2018.

There are two ways in which liberal theory sees international law as essentially cooperative: in its founding and in its operation. Both follow from the rationalist assumption that states are self-regarding units that have the free will to advance their goals using the tools available to them, and together they end up morphing into the substantive claim that law is in fact consensual and mutually beneficial.

Cooperation appears first in the process by which governments negotiate, agree on, and ratify treaties, rules, and agreements. Global governance institutions are produced when negotiations result in agreements. The failure to agree leaves an empty place in the web of international governance, a space in which governments retain the full autonomy that is understood as their default condition.[14] Barbara Koremenos, for instance, analyzes international agreements as devices that help states overcome certain obstacles to cooperation such as cheating, monitoring problems, uncertainty, and asymmetry.[15] For her, 'legalization' is terminologically interchangeable with 'cooperation' – her goal is to understand how agreements are 'affected by the particular characteristics of the actors cooperating', and her data on legal agreements is a subset of broader 'international cooperation data sets'.[16]

Second, governments are said to be cooperating with each other when they choose to comply with a rule rather than to violate it. This opportunity to choose comes up frequently because there are many international obligations impose upon government decisions. The potential dataset of compliance decisions is therefore very large and behavioralist scholars routinely code compliance as cooperation and violation as non-cooperation.[17] Leslie Johns says 'legal regimes are designed with an eye to both enhancing cooperation today among members of the regime and ensuring that these states cooperate in the future by remaining members of the regime'.[18] For Andrew Guzman, international law can be said to 'matter' – that is, to have an effect – when states choose to follow it.[19] This implies of course that they could also choose not to, and so Guzman's 'theory' of how international law works aims to understand how and when governments make the choice to comply. For Guzman, deference to the law is the same as cooperation.

In IR debates between realists and liberals in the 1980s and 1990s, the cooperation assumption served as a dividing line. Arthur Stein summarized the scholarly split in 2008 in the following way: 'Realists after all focus on conflict and minimize the prospect for, and the nature of, international cooperation…. [while liberals] focused on the cooperation that underlay the new post-Second World War international arrangements'.[20] This common way of describing the difference between realism and liberalism highlights their disagreement over the likelihood that 'power' can indeed be replaced by 'cooperation' in inter-governmental relations.

[14]Subject of course to *erga omnes* norms including *pacta sunt servanda*. The problem of legal voids in the network of global agreements is explored in Hurd 2017, ch. 5.

[15]Koremenos 2016, ch. 1.

[16]Koremenos 2016, 14–15.

[17]Koremenos 2016, Appendix 2, on compliance coding. Hathaway and Shapiro code compliance with the ban on war in Hathaway and Shapiro 2018. Other work is reviewed in Shaffer and Ginsburg 2012.

[18]Johns 2015, 177.

[19]Guzman 2008, 22.

[20]Stein 2008, 204.

To see world politics in terms of cooperation among governments made one a 'liberal'; to see it in terms of power politics made one a 'realist'. This disciplinary self-definition put cooperation and law together under the heading of Liberalism, and power and conflict together on the opposite side as Realism. With that, the dichotomy between cooperation and power was further entrenched.

The payoff to international cooperation, according to IR liberals, is that it promises better outcomes than those that follow from non-cooperation. This begins as an assumption, deduced from the premises of liberal theory, but it quickly becomes a substantive claim about international politics that leads to a policy preference in favor of rule-following. The logic follows like this: when states are modeled as *choosing* to cooperate through law, liberal theory infers that they are doing so because they see some benefit from it; without the promise of a benefit they would presumably choose some other option – this is the core of the assumption of rationality in liberal IR theory. Thus, the existence of private benefits can be deduced from the behavioral observation that governments are engaging in the practices of 'cooperative' international law. Trade treaties, for instance, are assumed to be good for both sides because no party would agree if it thought the deal harmed its interests. Issues of distribution and inequality arise in this framework as questions about how the gains that come from cooperation are shared. The debate about absolute-vs.-relative gains focuses on the division of gains between the 'cooperation' partners whereas debates about the domestic effects of global 'cooperation' focus on how gains are distributed within a state or society.[21] The existence of an international agreement is taken as sufficient evidence proving that its parties expected it to benefit from it.

The presumed cooperative nature of international law is evident when liberals suggest that the payoff is independent of the substantive content of the rules. A rules-based system is thought to be desirable in itself regardless of the content of the rules. A functioning legal system is assumed to produce generalized benefits for society and so is a good in itself. It is not necessary to ask about the details of the actual rules that make up the system, since the normative value of the system is provided by the 'rules-based system' itself. Michael Mastanduno illustrates this view by drawing on John Ikenberry's work:

> By exercising self-restraint and especially by binding themselves within international institutions, dominant states can lock others into a durable order. Subordinate states, in this bargain, gain reassurance that they will not be dominated, and that hegemonic power will be exercised predictably and responsibly. The greater the power asymmetries, the greater the incentives for each side to strike a bargain resting on hegemonic restraint. Strategic restraint, Ikenberry argues, is the 'passport' away from imperial domination or balancing and towards more consensual or 'constitutional' forms of order.[22]

[21]The absolute/relative gains debate can be quickly summarized with Snidal 1991, Powell 1994, and Gowa 1986. On the distribution of 'cooperative' gains within societies see Milner 1992 and Moravcsik 1997. On the shared liberal assumptions across all of these strands, see Jahn's incisive account of international liberalism (2018).

[22]Mastanduno 2018, 48, identifying Ikenberry as the source of this analysis.

Once international institutions are assumed to be founded on consensual membership, their existence is enough to confirm that they must be producing benefits for their members, otherwise their 'rational' members would not have consented to them. By logical deduction, liberal theory establishes that international institutions serve the common good. This conclusion is reached without looking at the specific content of the rules and institutions in question – it is 'content-independent' in the sense used by Samantha Besson.[23]

The joint assumption of rationality and mutual benefits is not merely an analytic device to simplify a complex reality. It flows through liberal analysis to become its normative and policy output; it acts as both assumption and conclusion. It feeds the liberal internationalist interpretation of American power and its claim to progress and development in world order after World War II.[24] It underpins the belief that the answer to global problems, from pollution to corruption to genocide, is a 'stronger endorsement of the institutions of international law'.[25] The UN, NATO, and the WTO, are said to be examples of global cooperation in practice: the United Nations constitutes the 'guardians of the common good'[26]; NATO is a 'pool of partners who… by and large share fundamental values' of cooperative security[27]; and the WTO is the 'embodiment of an integrated, peaceful world' whose success 'will serve us *all* well'.[28] Together, these and other institutions are said form a social system among the nations that are 'capable of rising above self-interested passions and entering into accord with other similarly constituted peoples for the sake of the general good – a common peace'.[29] Max Boot accuses critics of global governance of 'implacable hostility to international cooperation'.[30] The existence of international institutions is interpreted as evidence of that cooperation is taking place.

Moreover, liberal internationalists have interpreted the post-WWII period of American hegemony as 'cooperative' on the grounds that the subordinate states have consented to the institutions of the post-WWII order. They participated in the negotiation of these institutions and they make an informed choice when they comply with them. This, according to John Ikenberry, is 'a hierarchical order built around political bargains, diffuse reciprocity, provision of public goods, and mutually agreeable institutions and working relationships'.[31] It has 'several features' that 'give it a more consensual and agreed-upon character than imperial systems'. Subordinate states consent to 'supporting and abiding by agreed-upon rules and institutions' he says because these generate benefits that are shared among the players.[32]

[23]Besson 2011.

[24]Tony Smith says 'liberal internationalism – "Wilsonianism" – has been a basic element of American foreign policy over the last seventy-five years, contributing decisively to the greatest achievements in the Republic's history in world affairs', Smith 2017, xii.

[25]de Waal 2019.

[26]Guterres 2018.

[27]Stavridis 2019.

[28]Medhora 2017, ital. in original.

[29]Smith 2017, 20.

[30]Boot 2019.

[31]Ikenberry 2011, 26.

[32]Ikenberry 2011, 27.

Josh Rogin merges a defense of legal institutions with his defense of human decency and good governance, assuming that the three are of a piece: 'For too long', he says, 'Western democracies have taken a laissez-faire approach to defending the rules of rules-based institutions, while authoritarian regimes work to shape them to do their bidding. Solving that problem is crucial to winning the grand strategic competition and preserving our security, prosperity and freedom'.[33] In a similar vein, Ikenberry makes grand historical claims about the benefits for human welfare of this 'cooperative' legal frame for global affairs. He says 'International order is manifest in the settled rules and arrangements between states that define and guide their interaction. War and upheaval among states – that is, disorder – is turned into order when stable rules and arrangements are established by agreement, imposition, or otherwise'.[34] In such a world, there are no losers from international legal agreements (except those who would deny international rules their appropriate power). Everybody wins.

The cooperative model of law implies a view of law as a constraint on state freedom rather than as a resource that empowers actors. International law is said to limit governments' scope of action and foreclose some options which otherwise would open to them. Koremenos says legalization is 'a particular kind of institutional design – one that imposes international legal constraints on states'.[35] The constraint of law, familiar from liberal political theory, is compatible with state sovereignty because both are assumed to begin with state consent.[36] As John Ikenberry says, 'a state bargains away some of its policy autonomy in order to get other states to operate in more predictable and desirable ways – all of it made credible through institutionalized agreements'.[37] Legal obligations are said to be normatively preferable to political constraints. Adam Bower says 'law is typically held to be more technocratic and impartial in contrast to an unregulated political realm in which material power is expected to dominate'.[38] If law constrains everyone equally in the service of the common good it is hard to see why governments compete for influence to define the rules. Strong governments have long known that control over international rules is a source of power; it is part of the appeal of being a hegemon.[39] This suggests that law is not a neutral, technocratic, constraint upon all; it is a useful device and entangled with the politics of those who use it.

Liberal internationalists see the distinction between the legal and political realms as crucial for modern global governance. Shannon Fyfe notes 'the great promise of international institutions is that they could bring all peoples under the rule of law

[33]Rogin 2019.

[34]Ikenberry 2011, 12–13.

[35]Koremenos 2016, 9, paraphrasing Judith Goldstein *et al.* in a special issue of *International Organization*, 2000.

[36]This resolves what critical legal theorists see as the 'fundamental contradiction' in liberalism between 'individual autonomy and the common welfare', Bianchi 2016, 137.

[37]Ikenberry 2011, 28.

[38]Bower 2015, 346.

[39]The fact that the Trump administration in the USA does not follow this premise is part of what annoys so many observers of American foreign policy about the current US government. See Lake and Gourevitch 2018.

where rights are protected regardless of where one comes from'.[40] Karen Alter suggests the split began around the end of the 19th century and was institutionalized through the 20th century: 'the Hague Peace Conferences were moments for legal idealists to crystalize their bold vision of subordinating power politics to an international rule of law'.[41] Anne-Marie Burley used the separation of law from politics as a feature by which liberal states are identified: 'Courts within this [liberal] zone evaluate and apply the domestic law of foreign states in accordance with general pluralist principles of mutual respect and interest-balancing. Nonliberal states, by contrast, operate in a "zone of politics", in which domestic courts either play no role in the resolution of transnational disputes or allow themselves to be guided by the political branches'.[42] Where the principle of legal supremacy is respected, legal institutions are insulated from political influence and are thus empowered to issue rulings that reflect legal rather than political considerations.

This vision of the rule of law imagines a social order in which the legal system constrains the political. Liberal legal theory identifies the legal realm as a domain of consensual cooperation in pursuit of personal and mutual gains. This is distinct from the domain of politics, which is understood as a realm in which power is used to gain advantage. The liberal idea of the rule of law imagines a social system built upon legal control over politics. Leslie Vinjamuri and Jack Snyder define the two in ideal-type form: 'politics' relates to 'bargaining behavior based on power' whereas 'law' is characterized by 'binding and authoritative rule-making, rule-following, and rule-enforcing behavior'.[43] Politics operates from 'power, interest, prudence, and strategic interaction in light of expected outcomes' and law 'proceeds within the logic of a system of rules'.[44] They set out these two as distinct institutions or logics in a conceptual sense but their empirical analysis aims to show how they interlace. Andrea Bianchi says that 'legal control over politics is a highly powerful notion in the collective imaginary'[45] and it is widely proposed as a progressive accomplishment of modern times, replacing power with rules.

Thus, liberal theory generates the conclusion that compliance with international law is good for everyone: It produces both private and collective benefits. Private benefits are inferred from the behavioral observation that states are choosing to cooperate in legal institutions – if there were no private benefits they would presumably choose to do something else; and collective benefits come out of the existence of a stable, rules-based environment that is apparently good for all. The dominance of law over politics in liberal theory is thus understood to be good for everyone, and everyone is thought to benefit from increasing compliance with international law.

This leads liberals to the conclusion that enhancing compliance is a normatively worthy goal. Leslie Johns is explicit about this, as she says that 'a key premise' of her book 'is that policy-makers can and should design institutions to facilitate

[40]Fyfe 2018, 996.
[41]Alter 2014, 114.
[42]Burley 1992, 1910.
[43]Vinjamuri and Snyder 2015, 305.
[44]Vinjamuri and Snyder 2015, 305.
[45]Bianchi 2016, 51.

cooperation'.[46] The head of the Rule of Law unit in the United Nations said recently 'the rule of law builds peace, contributes to sustainable development, and protects human rights'.[47] Cooperation is understood as beneficial – politically and normatively – and international law comes to look like a generalized good, all winners and no losers.[48]

To recap: liberal political theory posits that international law represents a consensual set of constraints on state behavior. It produces a stable decision environment that is beneficial for all actors in the system. The legal system knits together the mutual interests of states into a structure that channels political choices within legitimate limits. Sustained by the ideological commitment to a 'harmony of interests', the liberal approach sees the rules and institutions of international law as a turn away from the power and coercion of politics. Liberalism 'taps into the promise of the end of politics' that 'promises to free us from the contingencies and uncertainties of political debates and policy choices'.[49] Governments that follow international law are understood to be acting as good international citizens, 'cooperating' with others, and enabling the achievement of collective goals, whereas those that violate international law are cast as 'rogue' states, self-interested, and anti-social.

The political approach: winners, losers, power, and tradeoffs

An alternative to the liberal worldview is available and it starts by assuming that people's preferences are in conflict with each other rather than in harmony. This alternative premise leads to a different line of research questions, a different interpretation of history, and a different set of policy prescriptions than the cooperation model. It sees law and governance as political engagements upon conflicting interests rather than as consensual arrangements founded in mutual benefit. It disputes the liberal effort to separate legal from political domains as a conceptual, empirical, and political matter. It identifies law as empowering as well as constraining, and so directs scholars to ask about who is being empowered or constrained and in relation to whom.

The work of expressing an alternative to the liberal approach is complicated by the implausible straw targets often used by liberal internationalists to contrast with their arguments. These invoke chaos, anarchy, or constant war, a world without any rules at all. Anne-Marie Slaughter suggests the alternative to liberal internationalism is the 'return to anarchy' in international affairs.[50] Terry Halliday and Greg Shaffer see 'transnational legal order' as making 'some order out of chaos, anarchy, unpredictability, or irregularity'.[51] John Ikenberry contrasts the legalized order that

[46]Johns 2015, 14.

[47]Alvarez 2019.

[48]Michelle Burgis-Kasthala observes that for scholars of international criminal law (ICL) 'often there is no distinction between scholarship on ICL and ICL scholarship in support of the field itself', cited in Powderly 2019, 6, emphasis in original.

[49]Bianchi 2016, 51. 'Taps into the promise' is Bianchi quoting from Jan Klabbers, 'Constitutionalism Lite', *International Organization Law Review* 2004.

[50]Slaughter 2017.

[51]Halliday and Shaffer 2015, 7.

emerges from 'stable rules and arrangements… established by agreement' with 'war and upheaval – that is, disorder'.[52] Reaching further back, Lassa Oppenheim aspired to the 'ultimate victory of international law over international anarchy'.[53] These are not well thought-out alternatives to legalization.

If the alternative to international law is anarchy, chaos, war, and upheaval, then it is easy to make an emotive case that law should be defended at all costs. But these antinomies lack a connection to reality. Social contract theory in the liberal tradition – Hobbes and Locke for instance – has always relied on the imagined pathologies of the pre-contract world to make its case. It is a bit fantastical to defend the existing body international law and institutions on the grounds that a hypothetical world without any law or institutions would be worse. It is akin defending Hayekian monetary policy on the grounds that it's better than a world where money had never been invented – that may be true but it is hardly the most relevant comparison. In addition, the assumption that today's international law resolves problems better than 'politics' would, or better than Russia or China would, presumes the thing that we need to know: what are the actual effects of following international law today, and how does this differ from following other interests?

A political approach toward international law begins by recognizing that law is written to advance certain interests at the expense of others. And global governance involves imposing outcomes on people, to the benefit of some and at the expense of others. It takes sides among competing claims and requires that some interests win whereas others lose. For instance, a schedule of trade tariffs favors some industries at the expense of others and allocates costs and benefits among produces, consumers, governments, and others; rules on taxation, capital mobility, and secrecy combine into a system of penalties and incentives that affect different people differently; various schemes to prevent COVID-19 spread or global warming impose costs and offer gains in unequal ways across classes, sectors, regions, and people. Global governance is no different than domestic governance in this way. Governance through law is one technology by which tradeoffs are imposed; others include markets, agenda-setting, and violence. Scholarship on international law and politics seeks in part to understand global governance through law and so needs to start with an intellectual framing of law and politics that makes this possible.

In some sense this is uncontroversial. Things could hardly be otherwise: by making some things legal and others illegal, law distributes responsibilities and rights among members of a community depending on their relationship to legality. This starting premise directs attention immediately to the question of whose interests are being advanced at whose expense. It points scholars to research questions that recognize competition among interests: which interests are encoded in the law and who is empowered by it? Whose interests are not in the law and what happens to those people? How does the application of the law affect the welfare of both the 'winners' and the 'losers'? Daniel Nexon offers a hint in this direction when he observes that 'for many who live outside its core, the liberal international order

[52]Ikenberry 2011, 12–13.
[53]Oppenheim 1908, 303.

was never terribly liberal nor much of an order'[54] – global governance looks different to different people according to whether it is advancing their interests or someone else's. This insight can be the start of a broad shift in how we assess the effects of international institutions and rules.

The difference is evident in Monica Hakimi's recent analysis of the politics of international law. She sees two versions of the 'cooperation thesis' in legal scholarship. There is a weak variant, which exists in the claim that international legalization is a step toward shared goals of peaceful dispute resolution, and a strong variant, which holds that 'that defusing conflict is both a standalone goal and a means for achieving many other shared goals – on the economy, the environment, and so on'.[55] The first sees dispute resolution through law as a form of cooperation and the second sees cooperative law as the path to a rules-based global social order with generalized benefits. Hakimi's complaint is that both marginalize political disagreement, with results that are counter-empirical and politically undesirable. They 'assume that conflict impedes cooperation and is a problem for international law to overcome'[56] and that international law provides a solution for political disagreements.

Hakimi argues that a better path, as both an empirical claim and a research premise, is to assume that conflict and cooperation are symbiotic in international law and in institutions more generally. 'Even as international law enables global actors to work past their differences and toward shared ends, it also enables them to hone in on these differences and disagree – at times fiercely and without resolution…. Rather than foster cooperation at the expense of conflict, international law fosters both simultaneously'.[57]

Hakimi suggests that we see international law as a device to 'facilitate real-world conflicts' as much as it 'facilitates real-world collaborations'.[58] Down this road we find research that attends to the differences in opinion or interests that make up the political conflicts carried on through legalization and legal forms. As illustration, she uses the Libya 2011 intervention to see how international laws on war 'served initially to curb and then to inflame a conflict'.[59] The legal framework of *jus ad bellum* dissuaded France and the UK from intervening in Libya on their own, but once the Arab League asked the Security Council to authorize military action the valence of these laws reversed and they become a powerful force in support of military an intervention. She also documents that once the Council authorized force, the USA decided there was a need for 'a broader mandate and more aggressive military strategy than others had been contemplating'.[60] The Council's capacity to enable war is 'hiding in plain sight'[61] and deep disagreements over how it should be used and against whom will not be erased by closer reading of legal texts or by further legalization.

[54]Nexon 2018.
[55]Hakimi 2017, 3.
[56]Hakimi 2017, 5.
[57]Hakimi 2017, 5.
[58]Hakimi 2017, 5.
[59]Hakimi 2017, 44.
[60]Hakimi 2017, 58.
[61]Hakimi 2017, 45.

Abe Newman and Elliot Posner make a similar point in their analysis of soft law and international governance. They aim to remind scholars that soft law is contentious precisely because it has the potential to govern and regularize social behavior.[62] As new rules are advanced, legitimized, interpreted, and applied, they are used as resources to 'disrupt domestic political contests in' favor of some interest group and at the expense of others. This cannot be captured by models of shared goals and coordination around focal points that imagine norms and rules as 'quick means to promote cooperation based on mutual interests' and to tame power.[63] It misses what the actors already know: 'the politics of institutions is an ongoing struggle' among incommensurate interests.[64]

Arjun Chowdhury's contribution to the literature on weak states and state-formation begins from a similar premise. He reminds readers that the typical model of the modern state is that it 'must monopolize organized violence and provide a basic level of services. If the state is to have the good effects said to justify it, the central authority must choose to protect the population and provide it services, and the population must choose to disarm and pay taxes'.[65] This frames a state as a matter of choice, an exchange between population and government and imagines that a stable government arises when each side gets something that it values in exchange for willingly giving up something slightly less important. It's a good deal for all sides: the public gets protection and services and the state gets taxes and loyalty, whether in a democratic or authoritarian setting. Chowdhury makes a subtle change in this framework by recognizing the implicit role of 'outside options'. Of authoritarian systems, he says 'the population does not *choose* to live under tyranny; to say they "cooperate" is absurd'. It is more accurate to say 'that they are unwilling or unable to defect – for example, because they are unable to coordinate a rebellion'.[66] The cooperation thesis in state-formation interprets stability as an equilibrium of interests between population and government, but Chowdhury reminds us that this only makes sense if the public has an exit option that would allow them to express their interests when they diverge from those of the state. In practice, that option is foreclosed by the government – indeed, 'exit' is ruled out by the very definition of 'government' with its monopoly on violence and control over rule-making authority. Scholars who overlook the gatekeepers of exit will tricked into the illusion of consensus. Lloyd Gruber made a similar point regarding the implicit role of 'go-it-alone' power in the original NAFTA negotiations: liberal accounts of consent in trade negotiation risks overlooking the influence of unequally distributed exit options.[67] Chowdhury argues that state-formation theory has made a similar mistake: the cooperative model is inadequate for explaining the proliferation of weak states.

These scholars represent a disparate strand in an emerging movement in the study of international politics that sees international law and regimes as places of contestation rather than as cooperative solutions to shared problems. This applies

[62]Newman and Posner 2018, 4.
[63]Newman and Posner 2018, 19.
[64]Newman and Posner 2018, 169.
[65]Chowdhury 2018, 14.
[66]Chowdhury 2018, 15.
[67]Gruber 2000.

to formal institutions such as the UN Security Council and also informal social institutions including international law and international norms. It also reminds scholars of the importance of disaggregating the state and mapping winners and losers in both substate and transnational groups. This is an empirical movement that looks first at the real-world effects of international governance institutions and at their 'lived experience'.

Contrary to Lassa Oppenheim, whose ambition mentioned above was to see the triumph of law over politics, the political approach does not aim to separate the 'legal' from the 'political'. Instead, it begins from the premise that the two are mutually implicated. Rather than compare existing law to 'no law' or anarchy, it aims to compare one set of rules or institutions against other plausible sets according to their effects in the world.

This is the starting point for a wide range of scholarship on law and politics that includes variants of Marxism, critical legal studies, legal pragmatism, legal realism, and practice theory.[68] Each of these is involved in debates that are beyond the goals of this paper – my more modest interest is in showing the broad differences between a liberal approach to international law and a political one, as they are manifested in scholarship on global governance. Rather than strive to isolate legal from political forces, the alternative intellectual tradition aligned with legal realism and pragmatism provides tools for understanding the politicization of international law and the legalization of international politics. This is both a conceptual and an empirical contribution, and by following it scholars of global governance end up with a different set of research questions and methods as well as different policy conclusions. The political approach is not new – it puts to work familiar ideas about law, power, and politics in service of better understanding the controversies around international legal institutions and the international rule of law more broadly.

Implications for methods, interpretation, and policy

The recognition that law encodes tradeoffs among political goals leads to three implications for research on international law and politics.

First, the rule of law ideal, consisting of the neutral application of rules across cases, is not politically neutral. International law is necessarily partial to some goals and opposed to others and it will therefore have unequal effects on its constituents. The rose-colored glasses that are often used to interpret the world of international law lead scholars to assume that global governance enacts the best ideals of humanity, universally shared and therefore uncontroversial. Darryl Robinson adopts this view in his analysis of international criminal law (ICL): 'I believe that cosmopolitanism resonates with the aspirations of ICL: a concern for human beings that extends beyond borders; a willingness to embrace alternative governance structures to supplement state structures; and inclusiveness of the concerns of the "international community as a whole"'.[69] Shashi Tharoor has called the

[68]For works that situate and unpack these and other approaches to law and politics with an international emphasis, see Bianchi 2016 and the essays in Dunoff and Pollack 2021, especially Shaffer 2021.

[69]Robinson 2013, 138.

United Nations 'the best hope the world currently has' for its problems because it 'brings all the countries of the world together to pursue collectively the security and welfare so essential to our common humanity'.[70] This is an 'enchanted view' of international law and governance.[71] Fernando Nuñez-Mietz assumes that international law is naturally morally good: 'the content of much of international law is a reflection of shared understandings of what is morally right'.[72] To liberals, international law can seem like a magical machine that takes in hot controversies and feeds out cool, impartial solutions.

The limits of this view are easy to see. If one were to take the same assumption into the study of tax law, the results would be equally weak. As tax law creates categories for different kinds of income and wealth and it sets rules to govern how each is taxed, it draws lines around types of person or institution and taxes them differently. These are understood as political because they affect different interests differently, and they are fought over in legislatures and in the streets by the partisans of these interests. The law is politically productive in the sense that it creates inequalities which then present to individuals as incentives to get on one side or other of the law and gives rise to new terrains of political contestation.[73] In the USA for instance, where religious institutions are not taxed, courts are required to monitor the distinction between religious and non-religious institutions so that the rule can be 'correctly' applied as various entities seek to be declared 'religious' for tax purposes.[74] The social distinction between religious and non-religious is made into a legal distinction, governed by the state, with tax consequences. Tax law might be applied in a neutral manner in the sense that everyone is expected to follow the same rules equally but the effect of application is not neutral because the law works to the advantage of some over others. It cannot be apolitical.

International law can be seen in the same light. Depending on how it is used it could prioritize the interests of states over people, or powerful states over less powerful, or corporations over nature, or the opposite of these. It specifies which laws govern the Nepalese peacekeeper sent to Haiti by the United Nations and it regulates how a Haitian who suffers harm by that peacekeeper can seek compensation and from whom.[75] It constrains some kinds of killing and while empowering others.[76] And it could be written differently so that it would encompass different sets of winners and losers,[77] just as tax law could. But it can't be written so that it benefits *everyone*.

Because international law reflects partial rather than universal interests, it is important to investigate which interests are served and which are denied. The empirical, pragmatist research agenda that I advocate in place of cooperation theory traces the actual distribution of welfare and power created by these rules or

[70]Tharoor 2003.
[71]Hurd 2016.
[72]Nuñez-Mietz 2019, 221.
[73]Hussin 2014.
[74]Sullivan 2018.
[75]Pillinger *et al.* 2016.
[76]Sanders 2018, Dill 2015, Peevers 2013, Kinsella 2011.
[77]Recent work that attempts this include McKeown 2017 and Linarelli *et al.* 2018.

institutions.[78] David Kennedy has pursued this work in connection with humanitarian action, motivated by the idea that 'once we see international humanitarians as participants in global governance – as rulers – it seems impossible not to be attentive to the possible costs, as well as the benefits, of our work'.[79] The simple assumptions of liberalism, of consent and mutual gains are bypassed. As David Lake says, 'as a set of rules, international orders affect individuals and groups in different ways, and these actors pursue their interests to the extent of their abilities, including legitimating the rule of some foreign country or resisting that rule. International order is not simply Pareto-improving cooperation, as often theorized in international relations, but involves hard bargaining and winners and losers'.[80]

Second, because it has these political effects, international law is a powerful tool for governments and others and it has come to occupy an important place in their strategic behavior. States and activists invoke international law strategically with an eye on its potential to help them achieve their goals. It empowers governments, as well as constraining them. The instrumental use of law to advance interests is seen by some liberal theorists as the direct contradiction of the idea of the rule of law, but as a practice it is ubiquitous in IR. Brian Tamanaha argues against instrumentalism in his book *Law as a Means to an End: Threat to the Rule of Law*.[81] A similar complaint comes up around international courts. Shannon Fyfe, noted above, seeks to root out 'impermissible political influence' from the work of the ICC while allowing it the admittedly political goal of deterring or punishing perpetrators.[82] These complaints presume the separation of law from politics and they strive to keep each in its box.

A political approach to law recognizes that instrumentalism is an inescapable part of legalization. This is true of international law just as it is of domestic tax law. Countries bring cases to international tribunals when they believe that a legal judgment will help their political goals, as Australia did over Japanese whaling and the USA did at Nuremberg and governments do with self-referrals to the ICC.[83] Contesting political disputes in legal form is the norm not an aberration. The turn to law, in the form of legal institutions, legal resources, and legal logics, is a political one, with characteristic effects on the shape of arguments, the roster of authorized actors, and the distribution of power and payoffs.[84] 'Law', said Judith Shklar, 'is a political instrument'[85] and Martti Koskenniemi went on to say that every legal choice is a 'politics of law'.[86]

The instrumentalization of legal resources for political purposes follows naturally from the idea of the rule of law, which elevates legal institutions to the authoritative position of deciding how things should go. A regime of legal supremacy directs actors to fight their fights in the language of law. This is not particularly

[78]Shaffer and Ginsburg 2012.
[79]Kennedy 2014, xviii.
[80]Lake 2018, 9. This builds from Krasner 1991.
[81]Tamanaha 2006.
[82]Fyfe 2018, 989.
[83]Hassanein 2017.
[84]Walker 2015.
[85]Shklar, cited in Moyn 2013, 492.
[86]Koskenniemi *Politics of Law*, p. 23, cited in McKeown 2017, 437.

controversial as a conceptual point – indeed, it sits inside much liberal analysis of law – but the methodological commitment to separating legal from political makes it harder to recognize and study.[87] Bower says that the goal of legal discourse is to 'shift the strategic terrain [between contending parties] such that the other arguments are no longer sustainable'.[88] Even in a setting where courts are not available, legal argumentation is strategically powerful. David Luban identifies the expressive power of international prosecution as the main payoff to the ICC itself: 'the most promising justification for international tribunals is their role in *norm projection*'.[89] The court's function is in a sense ceremonial, showing the values of the international community in vivid color. This is political theater, deployed instrumentally in pursuit of what he sees as universal goals.

The widespread commitments to rule-of-law ideology in world affairs means that being seen as acting lawfully is politically powerful – it gives legitimacy to the state and its policy.[90] These are valuable resources and we should expect actors to reach for them. The substance of international law will tilt in the direction of those with the capacity to invoke it, shape it, and apply it, that is to say: toward strong states rather than weak states or non-state actors.

The hope that law might be a weapon of the weak is widely shared among liberal scholars but it runs into empirical difficulty. Lee Seymour notes that the ICC prosecutor once declared 'I believe in law as power for all; it is the ultimate weapon that the weak have against the strong'.[91] Adam Bower also sees the ICC as empowering weaker players relative to the USA.[92] Harold Koh recently outlined his vision of 'law as resistance' in his book on legal efforts to counter the Trump administration at home and abroad.[93] To be sure, there are many instances where less powerful actors use the law to defend themselves against powerful states. Harold Koh's account of legalized resistance offers some success stories as does David Cole's similar book on domestic US constitutional issues, *Engines of Liberty*.[94] But the capacity of law to serve the interests of the weak is minor compared to its more common function of serving the goals of those who control it. Since international law is authored by states and mainly developed, interpreted, and changed by strong states, its development over time tracks the changing interests of those governments. This is evident around the rules of self-defense in the law on the use of force, which evolved from its mid-20th century origins as a ban on war into a more permissive regime that the USA and others now use to legitimize military operations under the headings of counterinsurgency, intervention, and targeted killing.[95] Strong states have the capacity to shift the operative interpretation of international legal rules – this

[87]On the construction of authority – legal and political – in international courts, see the essays in Alter *et al.* 2018.

[88]Bower 2015, 341.

[89]Luban 2010, 576, ital. in original.

[90]Scott 1994.

[91]Seymour 2016, 117. The prosecutor went on to muddle things by adding 'the law sets one standard for everyone; it empowers all peoples and provides justice for all'.

[92]Bower 2015, 359.

[93]Koh 2018.

[94]Cole 2017.

[95]Ruys 2011; Hurd 2019.

is baked into international legal theory and practice, as Tom Ruys notes that treaty interpretation must take into account 'evolutions in the international security environment' as it decides what is lawful and what isn't.[96] Thomas Franck and W. Michael Reisman embedded this point in their grand theories of international law, offering great-power interests a prominent role as a formal source of legal change.[97] With this in mind, we can comfortably predict that international legal development will follow the interests of the most powerful actors. This is not a weapon of the weak.

Finally, to declare that a government must 'comply with international law' is not politically neutral. It favors the political goals that are encoded in the rules, which may or may not be goals one actually wants to advance. This is important for foreign-policy scholars because compliance is widely endorsed by liberal internationalists as the most sensible policy choice – it is presented as self-evidently better for the individual, for its partners in legal arrangements, and for the whole idea of a rule of law system. It produces an image of non-compliance as anti-social, self-interested, and a signal of bad character on the part of a state. For instance, Mary Ellen O'Connell has said 'given the nature of the problems we face in the world, …. any effort to weaken international law only serves to undermine the prospects for achieving an orderly world and progress toward fulfillment of humanity's shared goals, including prosperity'.[98] Judith Shklar described this normative attitude under the label 'legalism'.[99] A government that wishes to be seen as a member of international society in good standing is encouraged to comply with the legal regime regardless of the content of the rule in question.

The utility of international law and institutions for powerful governments may help explain why the liberal approach to cooperation has remained so popular despite the problems identified in this paper. The history of liberal internationalism, and its place in the imaginative world of IR theory, is told well by Beate Jahn.[100]

The pro-compliance policy recommendation helps advance the interests that are encoded in international law. Once we understand these interests as partial rather than universal, the normative question regarding whether compliance is desirable or not is revealed to hinge on how we feel about the values of those partial interests. The normative issue is reopened for discussion, centered not on myths about the universal benefits of rules-based governance but instead on real-world assessments of the effects of specific rules on people with diverging interests.

Conclusion

This paper shows that the flourishing scholarly discussion about international law and politics today contains competing schools of thought on how law and politics relate to each other as concepts and in practice. On one hand is the liberal approach

[96]Ruys 2011, 511.

[97]Franck says 'a strictly literal interpretation of the Charter' is unworkable, and it must be read through the lens of great-power needs. Reisman says 'one should not seek point-for-point conformity to a rule' that might transgress deeply held values or policies. Franck 2009, 21; Reisman 1984, 644.

[98]O'Connell 2008, 14.

[99]Shklar 1986.

[100]Jahn 2013.

that imagines law as a cooperative framework within which politics takes place. On the other is a political approach that pays attention to the political choices that are embedded in the legal system itself, encoded by specific rules and then spread around the world through the regime of legal supremacy. The liberal and the political approaches rest on different intuitions about the nature of the world they are studying and highlight different kinds of scholarly research questions. They lead to different programs of research, asking different kinds of questions. When the two look at the same phenomenon there is notable opportunity for misunderstandings, unproductive controversy, and cross-talk until these underlying differences are recognized.

The separation of law and politics is common in liberal approaches but it leaves scholars without the tools they need to study the politics of law and legalization. This is a fatal deficiency for the study of global governance. It directs scholars away from questions regarding the substantive goals, values, and interests that are advanced by following international rules and from considering the people whose interests are harmed. For IR, it has the unfortunate effect of representing international institutions as if they were outside of politics, either neutral among political disputes or defending goals that are so universally held that they are not subject to political contestation. As the organizations are made to seem self-evident and beyond controversy, their opponents appear as system-wrecking spoilers who prefer 'anarchy' or 'chaos' over rules.

This paper encourages scholarship that enquires into the tradeoffs across interests that are embedded in the rules and institutions that make up global governance – that is, into questions of who gains and who loses from legalization as it is actually enacted. I am neither celebrating nor indicting international law; instead, I aim to better understand its political effects by recognizing the politics of law-following itself. Because legalization distributes gains and loses across society, it follows that different legal specifics will empower different winners and losers and also that the value of legalization depends on whose interests one has in mind. It can't serve all interests at once.

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