

Enchanted and Disenchanted International Law

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Abstract

Scholars and activists commonly see international law in a privileged normative and political position in world politics, where international legal institutions are assumed to advance important goals such as international stability, human justice and even global order as a whole. I explore this attitude toward international law, which I call an 'enchanted' view, and contrast it to the 'disenchanted' alternative. Where the enchanted attitude presumes the normative valence and political wisdom of following international law, the disenchanted approach treats these as open questions for inquiry and discussion. The disenchanted approach is more empirically minded, and more politically open, than the enchanted, and leads to a distinct research program on legalization in international affairs – one that is attentive to the politics of law, the connections between law and power, the ambiguity that exists between legality and policy wisdom.

Among IR scholars, it is often held that the main fissure around international law is the one that separates those who see it as important and those who do not. The former includes liberal internationalists and others who suggest that international law can influence government decisions, either because people 'believe' in it or because they find it instrumentally useful.¹ The latter includes IR realists, American 'new sovereignists' and legal skeptics who for various reasons hold that international law does not or should not influence the decisions of governments.

This is a misleading characterization because it presents as a deep philosophical difference – Beth Simmons calls it a choice between 'naïve faith or cynical skepticism' (2009, p. 4) – something that is in fact a simple empirical question: do states adjust their actions in light of international law? To this, the answer is clear: of course they do. While 'how' and 'with what consequences' are open for discussion, the supposed debate around 'does law matter in world politics?' is a non-starter.

A more important schism is between those who operate with an 'enchanted' view of international law and those who do not. I suggest that these two groups really are separated by irreconcilable differences of philosophy and politics and that these carry significant implications for the political and moral status of international law as well as for the research methods of scholars. Some version of this distinction has long been central to the work of some international legal scholars² but it is almost entirely overlooked in the growing literature on interna-

tional law by political scientists and international relations (IR) scholars. This is surprising and unfortunate since the two represent alternative philosophies on key questions of international relations at the intersection of law, politics, policy making and global order.

I take the language of enchanted and disenchanted from Jane Bennett, who took it from Max Weber. Bennett uses it to describe attitudes toward materialism and the natural world: enchantment and disenchantment refer to sensibilities about things in the world and one's relation to them – enchantment 'entails a state of wonder' in relation to things, experiences and sensations, while disenchantment identifies 'mere' material objects as separate from the domain of human 'reason, freedom, and control' (2003, p. 5, p. 3).

I borrow Bennett's terms but use them differently: in what follows, 'enchantment' describes an intellectual position which assumes that international law occupies a privileged political and moral position, while 'disenchantment' refers to an attitude toward international law and politics that does not include this prior commitment.³

Enchanted and disenchanted

For international law, the 'enchanted' view begins from the premise that law represents an improvement over the political or legal relations that it replaces. It distinguishes law from politics by presuming that the turn to law adds rationality, procedure, fairness or accountability to a pre-legal antecedent condition. That prior condition is imagined as dominated by the influence of power

which the process of legalization improves by supplying a better way for settling disputes and deciding what should be done. The superiority, moral and political, of the legalized condition over the pre-legal state of affairs is taken as a given rather than asked as a question or discovered as a finding. This follows in the tradition of Max Weber for whom (in Stephen Humphreys' words) 'fidelity to law and legal process ... is the guarantor of both an efficient bureaucracy and of the smooth functioning of a market economy' (Humphreys, 2010, p. 15).

In the inter-state setting, law and legal institutions are said to bring rules and regularity to international affairs which replace unilateralism, coercion and power politics. Faithful compliance with these rules is presumed to produce assorted goods in both domestic and international society, including greater accountability, less impunity, more humane forms of war (Simmons, 2009; Leval, 2013; O'Connell, 2012). More generally, the enchanted attitude sees international law as the foundation of international order and stability (Lauterpacht, 1933/2011; Hathaway and Shapiro; 2013) and perhaps as the key to global human society itself (Bull, 1977). This is a common attitude and reflects the fact that international lawyers 'are trained to think international law makes an important difference and generally believe more international law is better' (Raustiala, 2006, p. 423).

The source of this faith varies. For some, it follows from the negotiated, multilateral and inclusive processes by which much international law is developed. This process is often seen as increasing the odds that what comes out in the end embodies the shared values and interests of its various authors and influencers. For example, John Ikenberry says that '[an international] order based on consent is organized around agreed-upon rules and institutions that allocate rights and limits on the exercise of power. Frameworks of rules and arrangements are constructed that provide authoritative arrangements for international relations. State power is not extinguished ... but it is circumscribed by agreed-upon rules and institutions' (Ikenberry, 2011, p. 15).

Others maintain that rule-following can itself produce better outcomes for society independent of the content of the rules. The logic here is that when everyone is obligated to follow the same rules, the result is a society characterized by stability, predictability and fairness that benefits everyone. This is reflected in Samantha Besson's search for what she calls 'content-independent moral reasons to obey [legal] norms qua legal norms' (Besson, 2014, p. 34), and Richard Baxter's defense of codification: 'The treaty-making process is a rational and orderly one, permitting participation in the creation of law by all States on a basis of equity' (Baxter, 1970, cited in Murphy, 2004, p. 27).

Still others suggest that international law embodies substantive goals and requirements that are inherently good and thus beneficial outcomes naturally follow from respecting them. Constraining state violence, for instance, is said to be a public good (Anderson and Gifford, 2004) and is presumed to be a core substantive commitment of public international law – Jens Ohlin says 'the whole point of the law of war is to build a system of reciprocal constraints between nations in order to minimize the horrors of war' (Ohlin, 2014, p. 47; also Ratner, 2015; O'Connell, 2012). Karen Alter reaches further and says that 'international law embodies principled ideas about best practices that have been signed off by governments thinking rationally and outside of the heat of the moment... There is nothing morally sacrosanct about international law. But 99 times out of 100, following international law is the prudent approach for avoiding provocation, and triggering retaliation, further violence and international instability' (Alter, 2014). Lon Fuller held a similar view: as Rosen summarizes, Fuller believed 'that since good is more logical than evil, the result of the reduction of contradiction through common-law reasoning will necessarily be "to pull those decisions toward goodness"' (Rosen, 2006, p. 6).

All three positions lead to the same end-product: a reason to see international law as inherently morally, legally or politically good. The conclusion is derived from first principles not from empirical assessment or historical inquiry, and is put to use as a guide both to scholarship and to policy advice.

What happens if one takes these political benefits of international legalization as empirical questions rather than as first-principle priors? Where the enchanted view assumes that international law leads naturally to these outcomes, the disenchanting view begins from a position of neutrality, of pragmatic skepticism. It removes the reassuring presumption that law necessarily leads to stability and order and instead makes this a subject of inquiry. This is motivated by twin concerns, one empirical and the other political.

Empirically, the disenchanting view takes as an open question that which the enchanted assumes to be true: the connection between international law and desirable international outcomes. It examines the process of legalization for the changes that it might bring, accepting that might well lead to more order, accountability, or justice but also that it might not. As a research strategy, this means that it seeks to take less for granted – or at least, it takes for granted something different. It avoids presuming that (for instance) an international court necessarily increases legal accountability (it equally avoids presuming that it does the opposite). It seeks instead to be guided by what the research finds. It advances what Ian Shapiro calls a problem-centered research method into IR and international law (Shapiro, 2007).

Politically, it encourages the study of power in the making, interpretation and application of law. Instead of assuming that law takes the place of power, or that the two are mutually exclusive, it accepts that power and law can be interrelated. This makes possible a wide range of research on, among other things: the political uses of international law (Hull, 2014), the politics that go into legalization (Moyn, 2011), the distribution of power by law (Pillinger, Hurd, Barnett, 2016), and connections between legalization and hierarchy (Chimni, 2004). Differences in power and differences in interests, desires and opinions shape the legal institutions of society just as they shape other institutions, and international law is consequently inseparable from international power – though not as *the same thing* as power. The disenchanted starting point for inquiry makes possible a broader research agenda regarding the place of international law in world politics.

What is at stake?

The move from an enchanted to a disenchanted attitude toward international law begins with a small change – the shift from making assumptions about the relation between law and politics to asking questions about it. From there, the two attitudes generate very different bodies of scholarship with different insights into world politics.

First and perhaps most obvious, the two differ on the moral content of international legalization. The enchanted view takes as an article of faith that legalization is politically and morally progressive. The disenchanted view does not. In consequence, the former sees good things following from the advance of law and legal forms; the disenchanted view is agnostic. The two may well end up at the same analysis of a particular application to international law to a particular instance – for instance, both perspectives would see it as a good outcome if a war criminal was prevented from further atrocities by international legal instruments – but the disenchanted view is open to a wider range of political outcomes that might follow from legalization.

Consider the phenomenon of sexual abuses by United Nations (UN) and other peacekeepers against local people. The enchanted view, attached to the premise that intervention undertaken within the framework of bilateral treaties and multilateral UN law embodies good global governance, is primed to see these as isolated incidents of wrong-doing by individual soldiers. They may mar the good works to which peacekeeping is aimed, but they are deviations on the course to better domestic and international order. In the recent scandal involving French peacekeepers in Central African Republic, French President François Hollande showed this in practice when he identified bad individuals as the source of the

problem: he said, ‘if some soldiers have behaved badly, I will show no mercy’ (*The Guardian*, 2015). The possibility that the legal structures of peacekeeping might be a source of the problem rather than a solution is kept out of the picture. The disenchanted view, by contrast, might ask how the legal immunity guaranteed to peacekeepers affects how they interact with local people (Verdirame, 2013). The exemption of peacekeepers from local criminal laws, and the peacekeepers’ distance from the legal system back at home, may well make these abuses more likely. Legalization and accountability do not necessarily move in the same direction (Veitch, 2007) and scholarship on IR and international law should be open to this wider range of possibilities.

Second, the two differ on the connection between legality and policy making. The enchanted view produces the implication that world order follows from state compliance with international law. It therefore offers policy makers the general advice that compliance is the correct policy choice by default; noncompliance is the choice of rogue states who desire to put the world on the path to international disorder. A pressing matter for ‘enchanted’ activists is to find ways to increase state compliance with international law – and indeed, a booming research industry on the ‘compliance problem’ strives to identify the causes, correlates and obstacles to state compliance, and to promote strategies to increase compliance through treaty design, courts and other features (Koremenos, Lipson and Snidal, 2004; Johns, 2015).

The disenchanted position sees no reason to assume that international law points to the ‘right’ answer for policy decisions, any more than one should assume in domestic law that existing tax policy is morally or politically right simply by virtue of being encoded in law. These should be questions for examination, evidence and discussion, not prior commitments. Indeed, prioritizing ‘the compliance problem’ makes the mistake that Judith Shklar identified as ‘legalism’: by conflating ‘lawfulness’ and ‘rightness,’ it short-circuits the process of political judgment by which people consider and argue over what should be done in society (Shklar, 1964; Veitch, 2007).

This is evident in debates around how to respond to atrocities in the Syrian civil war. When the Syrian government began using chemical weapons more or less openly in 2013, a hot debate erupted about the legality of outside intervention. In a carefully presented brief, Hathaway and Shapiro argued that intervention without Security Council authorization is illegal and therefore should not be considered – ‘this rule [prohibiting intervention] may be even more important to the world’s security – and America’s – than the ban on the use of chemical weapons’ (2013). The UK government among others maintained, on the contrary, that states are ‘permitted under international law to take exceptional

measures in order to alleviate the scale of overwhelming human catastrophe', which would make lawful military intervention in this case (Prime Minister's Office, 2013). These two disagree on the facts of the law but they agree that whether or not the policy is lawful adds something important, perhaps decisive, to the argument about whether it should be taken. Legality is easily elevated to a reason for action in itself, as many observers of legalization have pointed out (Kennedy, 2004, pp. 266–272; Dill, 2014; Peevers, 2013).

Finally, the distinction reveals underlying commitments about the connection between power, politics and law at the international level. The enchanted view implies that law and power are opposite modalities of governance. As Georg Sørensen said 'a purely power-based order is thin and shaky because it lacks legitimacy, the lawfulness that follows from being authorized by institutional consent' (2011, p. 141). Law's contribution is to control or delimit power. This is in line with Franklin Roosevelt's famous diagnosis of the choice posed by nuclear weapons: 'in a very real sense, the world no longer has a choice between force and law. If civilization is to survive it must choose the rule of law.'⁴ This view isolates law from power and encourages scholars to see the advance of one as the retreat of the other. It makes it difficult to examine the ways that the two are intertwined.

In this sense the enchanted view is expressly antipolitical. It presents law as an alternative to politics as means for settling disagreements over what should be done; legal procedures and institutions are expected to take the place of power struggles. Anne-Marie Slaughter has said 'the UN was founded on the premise that some truths transcend politics' (cited in Glennon, 2003, p. 31). Bonnie Honig described this attitude as the 'displacement of politics,' in which political issues are recast as 'juridical, administrative, or regulative' (1993, p. 3). Mahmood Mamdani suggests such a move underlies the contemporary human rights movement, which he sees 'as consciously antipolitical,' grounding its claims in a universal realm beyond politics and disagreement (2014, p. 2) – all that remains, he suggests, is 'implementation' (also, Moyn, 2016).

Against this antipolitics, the disenchanting view is motivated by an empirical interest: it seeks to understand the legalization of world politics. By presuming less about the normative direction of legalization, it makes it possible to consider the power-politics that goes on within and through international law and to examine how legalization shapes and is shaped by political power.

Not antilaw

The disenchanting view is not an argument *against* international law. It instead seeks to see law in its political

and historical context, looking for its effects on how actors behave and are constituted, and in how political power is used, made and contested. By opening inquiry into the connection between law and power, the disenchanting view is not in league with the IR realists, legal skeptics, and others who provoke their liberal counterparts with outsized claims about international law's irrelevance. I consider three of these approaches next and suggest that they separate law from politics in the same way as the IR liberals described above. While IR liberals often set aside international power when they turn their attention to international law, IR realists and others set aside law in order to focus on international power. Neither is useful for thinking about the real-world connections between international legalization and global power politics.

The realist position in IR is characterized by the presumption that legal constraints are unlikely to be sufficiently compelling that they induce governments to change their behaviors. As John Mearsheimer says, 'Neither the United Nations nor any other international institution has much coercive leverage over the great powers' (Mearsheimer, 2001, p. 363). IR realism begins with a materialist approach to power and as a consequence it is guaranteed to conclude that international law and institutions are not worth much attention. International rules and institutions are for realists something of a distraction from the main event – which they define as competition between great powers using military means – and is therefore likely to provide little reward to either scholars or policy makers.

A different kind of skepticism comes from the rationalist/legal pessimism of Goldsmith and Posner (2005) and others, who doubt that legal rules can change the incentives faced by governments and so cannot be expected to change states' behavior. This conclusion comes from first-principles assumptions that posit states as a particular kind of rational individualist agent with a coherent schedule of preferences, fixed in relation to outside events. With interests settled in advance, the opening for international law to influence the power of states is only through providing new information about policy choices or about other actors, and this, for the legal pessimists, is a small opening indeed.

A third model that puts 'power above law' comes from Carl Schmitt, who defines a category of 'legitimate extralegality' (in John McCormick's terms) to describe the situation where the needs of the state are made legal by reference to needs or resources outside of the actually existing law (Schmitt, 2004, p. xxiii). In international law, this translates into the claim that there might be some international acts which violate a piece of formal international law (say, a treaty) but which must be considered lawful because they protect more fundamental purposes

of the law (say, international peace and stability). Like the natural law approach, this focuses on values or resources beyond the black-letter law that are said to provide a foundation to law and policy. It is evident in Anthony D'Amato's suggestion that the US could lawfully violate the UN Charter and invade other countries to make them democratic (1990) and in the suggestion that the UN Security Council is not bound by international treaties when it uses its authority to respond to 'threats to international peace and security' (analyzed by Alvarez, 2005, Ch. 3).

In each of these approaches, law and politics are drawn in such a way that the needs and power of the state make international law mostly irrelevant, and they justify excluding legal resources from the study of world politics. As with the liberals above, these 'skeptics' of international law separate law from power and aim to study just one half of the pair. They share the enchantment of the liberals to the extent that they see law and politics as separate modes of social organization and motives for state behavior. They disagree over whether the law can actually constrain state behavior but they agree that the world would be better run if it did.

In encouraging scholars to take a disenchanted view of international law I am presuming that there is something left of international law once one moves away from the enchanted position. Many argue that this is not the case and that that international law is inseparable from certain political goals or premises. Sam Moyn suggests that contemporary international law embodies substantive political goals without which it could not exist (2011). Anne-Marie Slaughter made a similar point when she said that that international law is 'inescapably normative,' a feature which she says distinguishes it from 'the empirical discipline of IR' (Slaughter, 2013, p. 624). She sees this as a virtue of legal scholarship, though one that should be balanced by its IR alternative.⁵ For Moyn, international law embodies something like a Whiggish model of history animated by the policy desires of the American state. In their different ways, Moyn and Slaughter both seem to suggest that contemporary international law cannot (Moyn) or should not (Slaughter) escape its own enchantment.

My view is that one can take seriously the growing legalization of politics in world affairs without assuming that it contains a moral and political improvement over what existed before. The political power of international law is evident in many ways: the investment states make in presenting their policies as lawful; their effort to influence international rules so that they accord with their interests; the use of law and legal resources in strategies of legitimation and delegitimation, by states and by nonstate actors. That these practices are so common and so central to inter-state relations suggests that they deserve scholarly attention, which requires

getting past the pre-conceptions about law and politics within the enchanted perspective.

Conclusions

The insight I offer here is not new: the debate between enchanted and disenchanted views of law is just a small echo of a much larger conversation in legal and political philosophy on the arrangements between legality and morality, and law and politics. The classic works of John Austin, Carl Schmitt, H. L. A. Hart, Hannah Arendt, among many others, can be mined for insights on the international dynamics of power and politics in relation to rules, needs and goals. This task has been taken up by some international legal scholars, both as a matter of legal theory and of practical inquiry. My argument is simply that many of today's writers on international politics and law have lost track of the moral and political ambiguity that animated these writers and that the implications of this forgetting are worth addressing.

By setting up a framework in which law is the alternative to power, the enchanted view produces scholarship that does not consider ways that law interacts with power politics – either shaping, using, enabling, contesting, or remaking it, or all or none of these. At the same time, it encourages policy makers to substitute judgments about legality for judgments about wisdom or utility when considering policy option.

The disenchanted view is more empirically, historically and politically curious – it asks 'What are the effects of such-and-such a piece of international law?' and considers the answer. It is open therefore to the possibility that it might find that international legalization produces a wide range of effects with political consequences that are as diverse as those that follow from any other form of social relations.

Notes

1. Keohane 1997 is a classic presentation in which these two are seen as mechanisms that are distinct from each other.
2. This includes international lawyers who pay close attention to the history of the field and its practices, including Martti Koskeniemi, David Kennedy, Hilary Charlesworth and Frédéric Mégret, as well as global historians who pay close attention to law and legalization, including Isabel Hull, Susan Pedersen and Sam Moyn, and legal theorists who pay attention to the global scope of legal power, including Judith Shklar, Hannah Arendt and Scott Veitch, to name just a few in each category
3. David Kennedy uses this pair of terms with yet another meaning in Kennedy 2004.
4. FDR's 'Law Day' proclamation, 1 May 1958.
5. At this point Jane Bennett might agree, as Bennett's call to return to an 'enchanted' view was motivated by her sense that enchantment is a source of energy and activism: 'without enchantment, you might lack the impetus to act against the very injustices you discern' (2003, p. 128).

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