

Many of the issues addressed under international law fall into one of three categories: military, markets or morals. “Military” encompasses security concerns, such as the use of force and peacekeeping. “Markets” focuses on economic relations, including trade and investment agreements. And “morals” concentrates on questions of justice and human rights. Practitioners and scholars have traditionally analyzed each category through one of three logics—realism for military issues, institutionalism for markets, and justice for morals. In recent decades, however, confining the logics within the strict boundaries between military, markets and morals has ceased to satisfy those working in each area. Instead, each school of thought is struggling to become the dominant mode of analysis for international law.

Military issues have long been the domain of political realists. Realism is a hard-nosed theory of international relations, which posits an anarchic international system navigable only by states. These states are self-interested, rational actors who answer to no higher power and take no actions that do not promote their own, narrowly-defined goals of survival or aggrandizement.¹ States do not cooperate or trust each other—they exist on the edge of war.² International interaction is characterized by constant bargaining, the results of which depend entirely upon the relative power of those at the table.³ Realism depends upon unitary states, sees international institutions as simply the state-controlled products of power-based bargaining⁴, and discourages global aspirations as a dangerous distraction from the pursuit of real interests.

Realism approaches questions of security with a singular focus on survival and increased power.⁵ Most fundamentally, this focus guides the choice of when and where to use force.

¹ See Stephen D. Krasner, *Realism, Imperialism, and Democracy: A Response to Gilbert*, 20 POL. THEORY 38, 39 (1992).

² John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 9–10 (1994–95).

³ See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EJIL 1, 5 (1995).

⁴ Krasner, *supra* note 1.

⁵ See, e.g. the writings of Hans Morgenthau and Kenneth Waltz.

Realists would support U.S. participation in World War II because it posed a direct threat to the nation's survival.⁶ They would, however, question engagement in more ideological wars such as Vietnam or even the second war in Iraq, which required a disproportionate sacrifice given the United States' interests.⁷ Realism also permits states to participate in cooperative security efforts, such as U.N. peacekeeping forces, military alliances or even international institutions focused on security, provided that such participation reflects a rational, interest-based calculation rather than an ideological commitment or a false hope of softening the grim reality of an anarchic world.

Within the market paradigm, realism's focus on states in constant competition has held less sway. Institutionalism is the dominant analytical logic in international economic law. It claims that states can gain through international cooperation. Like realism, it envisions rational states, but holds that rational calculations can lead to cooperation, rather than suspicion and fear. Adopting rational choice theory, institutionalism claims that states have well-ordered preferences and make choices with the goal of achieving the best possible consequences within that preference system.⁸ But, in a classic prisoner's dilemma, states cannot maximize preferences simply by pursuing their own, narrowly-defined interests. Rather, they must cooperate for mutual gain. This, however, requires that states have sufficient information to understand their own and others preferences, and that they trust one another to not cheat on mutual agreements. This, in turn, requires cooperation, which institutions facilitate by specifying and stabilizing rules, gathering and disseminating information, monitoring enforcement and, sometimes, settling disputes between parties.

⁶ Krasner, *supra* note 1 at 41–3

⁷ *See, e.g. id.* (noting that Hans Morgenthau was early opponent of war in Vietnam because it was not in U.S. interests and would deplete country's ability to participate in more important military actions).

⁸ Robert O. Keohane, *Rational Choice Theory*, XXXI J. LEGAL STUDIES S307, S308 (2002).

Take international trade as an example. In a system in which all states are cutting tariffs and opening borders, trade is (at least theoretically) in states' best interests. If, however, a state games the system by raising tariffs or subsidizing industry, it can gain short-term economic advantages at the expense of its trading partners. Facing this conundrum, rational states have created the WTO and other institutional mechanisms that make it easier to cooperate and, therefore, harder to cheat in international economic relations. By enhancing cooperation, institutionalism says that organizations such as the WTO can bring order to the international system, thereby promoting greater peace and prosperity.⁹

The logic of "morals" takes a decidedly different track from realism or institutionalism. Rather than focusing on the rational states pursuing their own best interests, "morals" analysis seeks to achieve justice. This approach actually gives rise to two analytical frameworks with very different conceptions of what justice means and how it is realized.

First, there is cosmopolitanism. Cosmopolitanists see international law as a means of achieving global justice. Global justice is based upon a set of universal values that transcend borders, cultures and politics. Accordingly, political cosmopolitanism attributes less significance to the system of sovereign states, while emphasizing the role of a legal order comprised of institutions and organizations of global governance.¹⁰ The inter-state framework of international law somewhat diminishes in favor of a global community, in which individuals have equal right to and responsibility for a shared set of norms that dictate how they should treat one another.¹¹ A global community requires an international system that can articulate and apply these norms. International human rights instruments, such as the Universal Declaration of Human Rights and

⁹ On the challenges posed by institutional settings like the WTO, see the news article by John H. Cushman Jr., *International Business; Trade Group Strikes Blow at U.S. Environmental Law*, NYTimes, April 7, 1998.

¹⁰ David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 *Legal Theory* 1, 34 (2002).

¹¹ *Id.*

the ICCPR express cosmopolitan values in international law. They attempt to establish universally-held and universally-applicable standards owed equally to all human beings, regardless of nationality or place of birth, and to create a system for realizing those standards worldwide. While focusing on equal legal standing and personal rights, cosmopolitan positions frequently recognize the importance of democracy and deliberation as legitimating principles for globally constituted regimes.¹²

Second, morals issues can be viewed from a state-focused conception of justice. This approach, which Thomas Nagel calls the political conception, claims that the “global community” is too weak to establish and enforce universally-held norms.¹³ Justice is not owed to all individuals from all individuals; it is not global. Rather, it derives its meaning and power from the bonds of nationality, from living together within a sovereign state.¹⁴ Individuals have a duty to promote nationally-defined values at the national level, but they cannot and should not try to establish equality across borders. The political conception questions the legitimacy of the “universal” values expressed in human rights treaties, and makes no call for an international system beyond states to ensure a just world.

It is easy to see realism, institutionalism and the justice approaches as distinct analytical tools that apply respectively only to military, markets or morals cases. In reality, however, each approach is actually attempting to define a set of meta-principles for decision-making that is relevant across the spectrum of international interaction. Realists focus on security not because they do not believe they have anything to say about other areas of international law, but because they believe that security concerns are international law’s only relevant concerns. Peace and stability in the international system depends upon the balance of power between states, not on

¹² *Id.* at 31-32.

¹³ Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFFAIRS 114, 120 (2005).

¹⁴ *Id.*

institutional cooperation. To maintain or build their power, states should determine economic policy nationally and on a strict self-interest calculation, not as a cooperative game in which they try to make everyone better off. Similarly, they should avoid grand moral commitments to global justice that distract from the “clear-eyed analysis of power and interest”¹⁵ that are necessary to avoid war.

Similarly, institutionalists believe that the possibility and benefits of cooperation extend far beyond economics. In security, institutions can provide information and a forum for international decision-making that can facilitate trust, mitigate the threat of violence and bring some order to an otherwise anarchic world.¹⁶ In morals, they can bring actors together to define common, if not universal, values and create the conditions necessary for their realization. Cosmopolitanism agrees that institutions are important, but wants them to serve as mechanisms for elucidating and ensuring justice, not for enforcing state interests. Economic law should focus on creating economic equality rather than on profit maximization. Security decisions should be made on the basis of what is just, not what permits maintenance of power. At the other end of the justice spectrum, the political conception counsels against making economic or security decisions on the false hope of global justice, and in joining international institutions that weaken the sovereignty of nation states.

If the logics are applicable across fields, then it becomes far more difficult to embrace each one as an answer to a particular set of problems. The principles underlying the logics address in very different ways the structure of the international system, the goals and content of international law, and the roles and responsibilities of international actors. If one is more right than another, it should be the basis for structuring the international legal order. But whether a

¹⁵ Jake Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 48 (2003).

¹⁶ Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 International Security 39, 43–4 (1995).

single logic is right depends on whether one believes that states act rationally, or that the international system is anarchic, or that it is possible to define universal rights and values. It depends upon one's view of politics, history, philosophy and the meaning and role of international law. The international system will look and function very differently depending on whether it is based on a realist, institutionalist, cosmopolitanist or political justice perspective. This reality makes the choice of which perspective to take a complicated decision, but also an incredibly important one.

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