The Rule of Law in World Politics

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ABSTRACT

Many scholars have noted the importance of the rule of law as an institution or an ordering principle in world politics. These include historically oriented scholars such as John Ikenberry who document the rise and spread of a "rules-based international order" after 1945, normative writers who warn about the Hobbesian state of nature that they see as the alternative to law, and empirical scholars seeking to identify features that correlate with compliance with the law. These approaches find consensus over the premise that states should comply with their legal obligations. The practice of states around law however shows that this cannot be sustained. For the most important controversies in international law states are in competition to define what constitutes compliance. The meaning of compliance is endogenous to state practice and is not a reliable guide to differentiate rule breaking from rule following. This paper examines the implications for the power and place of international law in world politics.

The Rule of Law in World Politics

The idea that international politics should take place within a framework of law is widely accepted and rarely doubted. A commitment to the rule of law for international affairs is the premise of almost all scholars of international politics and international law and almost all policy makers, as either a descriptive fact about world politics or a normative goal to be sought or both. States might argue about what the rules should be, and about who is following them, but they do not argue about the fact that there *are* rules, that it is *right* that there should be rules, or that states ought to *follow* the rules that exist. These are unchallenged premises in most IR/IL scholarship -- social science debates over the effects of international rules and law take place in the context of this premise, as does policy debate over the value or wisdom of a particular piece of international law.

The rule of law as it applies in international relations is generally taken to mean that states should comply with their legal obligations. In the realm of public international law, which is my interest here, these are obligations that states owe either to each other through explicit agreements such as treaties or to the international community as a whole through more general devices such as *jus cogens* rules and law *erga omnes.* While there may be disagreements about the content of these obligations or about why, when, and how states comply with them or don't, there is little dissent from the view that compliance is both a legal good in itself and the preferred substantive outcome.

This paper examines the idea of the rule of law as applies to world politics. It considers the meaning of the term as it has been developed in domestic legal theory, and how it has been adapted to the international setting. The rule of law is central to both the conception of the modern state and to the study of international law and world politics. And yet how it works in practice is at odds with how it is conceived as a theory.

Against this theoretical model of international rules, I turn to a more empirical and practical consideration of what states actually do in relation to international law. What does the rule of law look like in the practice of inter-state diplomacy and politics? The practice of states reveals a role for law that is inconsistent with the doctrine of the rule of law in domestic settings. The problem is not simply the familiar one that states

sometimes choose to break international law, or that there is no world-state to enforce judicial decisions. Simple rule-breaking is not the problem. Instead, the problem is that the legal content of many international rules is dependent on, rather than independent of, the behavior of states. This has two consequences for the idea of the rule of law: first, what counts as compliance as opposed to non-compliance with international law is not stable and cannot be determined independently of the practice of states; and second, the international rule of law in practice does not include a universal or consistent preference for rule-following over rule-breaking. The international rule of law must accommodate these facts, and the conventional model cannot.

There is an asymmetry in international law between compliance and non-compliance. These are not mutually exclusive categories. The paper therefore aims to reconstruct the theory of the rule of law in a manner that accords with the practice of states and lawyers and yet is also conceptually useful for observers and scholars. The concluding section outlines the contribution toward the conceptual and empirical understanding of the relationship between states and rules in international politics.

The Domestic Theory of the Rule of Law

From policy-makers to the UN to scholars and beyond, the rule of law is widely presented as a universal good. Its meaning, however, is uncertain.[1] There are at least as many conceptions of the rule of law as there are writers on the subject, and probably more. In this section I describe some core features of the concept, taking a provisional position among the controversies over its conceptualization. The goal here is to see the general parameters of how the idea is used in domestic legal scholarship before turning to its manifestation in international relations.

In domestic settings, the rule of law is generally understood to include three components: that the society should be governed by stable, public, and certain rules; that these rules should apply equally to the governed and the rulers; and that they should be applied equally and dispassionately across cases and people. These three are called by Tamanaha 'formal legality,' 'government limited by law,' and 'rule of law,

[1] Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law*, 2008, 56.

not man.'[2] They rest on different historical foundations and arose as answers to different political problems, but they are generally seen as mutually reinforcing and as underpinning a modern mode of governance, law, and society. Tom Bingham, in his recent popular account of the rule of law, highights as series of historical episodes, beginning with the Magna Carta in 1215, by which these ideas have come to have an institutional representation in British, Continental, and American legal-political structures.[3]

Formal legality describes the sense in which rules must be made in such a way that individuals can distinguish between legal and illegal actions. The rules must be clear and public, they must be forward-looking, they must be written in language that is sufficiently specific and yet be designed for general categories of behavior rather than particular incidents. For law to be a useful guide for behavior, the citizen considering some act must be reasonably confident that she or he knows whether the authorities will consider it to be a violation or not. Unless the rules are public, prospective, and somewhat stable, the citizen cannot meaningfully taken them into account when acting. Thus: Hayek's point that the predictability of the law is core by which law contributes to human liberty by disinguishing between lawful and unlawful behavior. This component of the rule of law is critical to the law's capacity to influence decisions, to organize society, and to predict general patterns of mass behavior.

But the knowability of the law is not enough. The rule of law also insists on a particular form of equality, and thus Tamanaha's second component ('goverment limited by law') requires that "the state and its officials are limited by the law" just as are other citizens.[4] A more expansive version was provided by A.V. Dicey in the late 19th Century: "not only that with us no man is above the law, but… that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[5] This condition appears to be in tension with

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[2] Tamanaha 2004, Ch.9.

[3] Tom Bingham *The Rule of Law*, Penguin 2010.

[4] Brian Tamanaha 2004, 114.

[5] A.V. Dicey *An Introduction to the Study of the Law*, 1885/1945, p. 188, cited in Tom Bingham p.4.

natural tendencies of powerful actors to resist being controlled, giving rise to some of the great contests in constitutional history in which societies mobilize in various ways to reign in the unchecked

Finally, the rule of law requires that the law be applied across cases in a particular manner -- that judges and government officials follow or apply the relevant body of rules to the situation before them.[6] This is usually seen as being in distinction to the arbitrary exercise of power of some individuals over others, or to decisions taken based on the particular character or identity of the parties.

Theories of the rule of law in domestic society generally acknowledge these different ideas about the rule of law, but then treat them as component of a mostly coherent bundle of ideas, institutions, and rights or obligations. Together they make up the 'rule of law society' in which citizens know the rules in advance, know the procedures by which particular laws are made, and expect them to be applied consistently and equally.[7]

Two important consequences flow from this bundle. First, it generates the obligation on individuals to obey the law. And second, it contributes to valuable substantive social outcomes, such as respect for individual rights and private property, and lower levels of government corruption.

On the first, the rule of law is said to be the source of citizens' obligation to follow the law. It produces the reasons why compliance is expected. This is at once a legal obgliation, a political obligation, and a moral obligation. People are required to obey the law as a matter of law, and politically forced to (accepting some degree of non-compliance as unavoidable), and morally obligated since the rule-of-law criteria are often seen as producing an ethical imperative -- since the rules were produced legitimately, it is said, there is a moral obligation on the individual to comply. Taken together, they lead to Raz's conclusion that "people should obey the law and be ruled by it."[8] The rule of law is thus intrinsically linked to the idea of compliance on the part of

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[6] Tamanaha 2004,126.

[7] Raz 1977, 198-201.

[8] Raz 1977, 196.

the subjects. In a society organized by the rule of law, one is expected to comply with the rules, and should be able to trust that others will generally comply with the rules. This gives order and predictability to society and marks one kind of transformation from a state of nature to society.

The second effect that follows from the rule-of-law society relates to substantive outcomes: various good things are assumed to follow from having the legal-political arrangement described above. These might include respect for human rights and dignity, a free press, anti-corruption, private property and transactions, individual autonomy, the capacity to plan in advance, and more. These outcomes give the rule of law its political appeal, since it is often thought that it represents an institutional arrangement that is more likely to produce them than are other alternative arrangements. This is what Lon Fuller sought to capture with the claim that the rule of law has an "affinity with the good."[9] This is different than what is often called a 'substantive' theory of the rule of law. The substantive theory suggests that the rule of law does not exist unless the content of the rules works to preserve certain substantive goals, such as human dignity or equality. It is a response to the complaint that the thin, procedural conception of the rule of law discussed here does not clearly rule out social evils such as Nazism or torture if these have been duly enshrined in the relevant laws of the land. A substantive approach makes this conceptually impossible by marrying the idea of the rule of law to a substantive theory of social goods, so that a regime that fails to respect human rights (for instance) can at best be described as performing 'rule by law' but cannot be described as governed by the rule of law.[10] In my conception, which derives from procedural or 'formalist' models, these desirable social goals are believed to follow naturally from the institutional arrangement of the rule of law, and so they are consequences of it but not constitutive of it.

While Joseph Raz and others warn against bundling these substantive goods into the conception of the rule of law, many writers are less restrained and therefore the

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[9] Lon Fuller 1975, cited in Tamanaha 2004, 95.

[10] On the concepts, see Tamanaha 2004 Ch. 7. On the practice of 'rule by law' see Tom Ginsburg and Tamir Moustafa *Rule By Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, 2008.

tendency to equate the rule of law to substantive social and political goods is common. Tom Bingham, for instance, explains the contribution made by the rule of law by describing society as it would exist in its absence. He says "the hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless."[11] To produce this list, Bingham implicitly assumes that the things we find abhorent are illegal, with the result that a perfectly faithful adherence to the rule of law will lead to a world in which these things do not happen. He constructs a model of the rule of law in which *non-compliance* with the law is the problem that needs addressing in the pursuit of greater human welfare. Compliance with the law is therefore the path to social goods, and non-compliance is a problem in search of a remedy.[12] Similarly, the historian Paul Johnson describest the absence of the rule of law as a permissive condition for atrocity: "[the Soviet Union] lacked the rule of law entirely, and as a result Stalin was able to murder 30 million of its citizens and die safely in his bed, unarrainged and unpunished."[13] More bluntly, John Locke said "Wher-ever law ends, tyranny begins."[14]

The International Rule of Law: in Theory

The core commitment at the heart of the international legal system is the obligation of a state to comply with its legal obligations. The idea of compliance as the fundamental legal act is a necessary requirement if the legal system is to function: "any other view would amount to denying the existence of international law in general."[15] Any

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[11] Bingham, 9.

[12] See Downs, Rocke and Barsoom, who say "instances of apparent noncompliance are problems to be solved, rather than violations that have to be punished" 1996, p.381.

[13] Paul Johnson "Laying Down the Law," 1999, *Wall Street Journal*, March 10.

[14] John Locke "Second Treatise of Government," sec. 202, 1690/1980, ed. C.B. Macpherson. Hackett. p. 103

[15] Wehberg, "Pacta Sunt Servanda," *American Journal of International Law*, 1959, p.782.

number of canonical texts in the discipline can be brought to bear to sustain the view that compliance is central to the project of international law. Brierly, for instance, says "The best evidence for the existence of international law is that every actual state recognizes that it does exist and that it is under obligation to observe it."[16] The unit of analysis for much legal and political scholarship is the *act of choice* between compliance and non-compliance.[17] The conventional scholarly view is that law is effective when it induces a state to change its behavior from a non-compliant prior position to a compliant after position.[18] It is important in this model that the prior condition be one of non-compliance because this allows one to see a contrast between the law and state interests. In the standard model of international law, these must conflict for the law to play a meaningful role in state decision-making. If interests and the rule align from the start, says Andrew Guzman, "one would expect a high rate of compliance, but one would not conflude that international law is achieving anything. An agreement of this kind is akin to a treaty stating that the citizens of treaty signatory countries will breathe in oxygen and breathe out carbon dixoide. The treaty is in some sense complied with, but it does not do any work."[19]

The obligation to comply is central to theories of international law. Even thought both the source and nature of this obligation are subjects of great debate, the *fact* of the obligation is nowhere seriously challenged. Disagreements exist over whether the source of the obligation is natural law, or the functional need for reciprocal binding, or some version of state consent to the meta-rule of binding contracts, or some other

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[16] Brierly 1944, *The Outlook for International Law*, p., 5 cited in Harris p.3, fn.5.

[17] For an alternative, see for instance W. Michael Reisman on the place of 'cases' in the practice of international law. Reisman "International Incidents: Introduction to a New Genre in the Study of International Law," in W. Michael Reisman and Andrew R. Willard eds. *International Incidents: The Law that Counts in World Politics*, Princeton University Press, 1988.

[18] The standard practitioners' view is likely different, where it would made little sense for a diplomat to propose a treaty that is not in the interest of the government.

[19] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, 2008, p. 26.

foundation.[20] Similarly, international lawyers variously argue that the rule has the status of a 'general principle of law recognized by civilized nations' as defined in the Statute of the International Court of Justice, or of a *jus cogens* norm, or of a deeply embedded piece of customary law.[21] These matters remain open questions, but none of them deny the essential component of the obligation to comply.

The individual obligation to comply is encoded in the concept of *pacta sunt servanda*. As Chayes and Chayes explain:

> ... the fundamental norm of international law is *pacta sunt servanda* (treaties are to be obeyed). In the United States and many other countries, they become part of the law of the land. Thus, a provision contained in an agreement to which a state has formally assented entails a legal obligation to obey and is presumptively a guide to action.[22]

Pacta sunt servanda functions as a meta-norm in international law, perhaps *the* meta-norm. It is the foundational element of the legal architecture, serving as the basis for all other obligations in treaties and other instruments of international law. Without it, international law would not function. Wehberg says "If a contract, validly concluded, were not binding, then international law would be deprived of a decisive foundation and a society of states would no longer be possible."[23]

Scholars and policy-makers routinely reinforce the idea that compliance with international law is the highest virtue of the modern civilized state. It is repeatedly demanded of states by the UN Security Council, for instance of Libya in Resolution 1973 in 2011. The UN Charter requires of states that "each state undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[24]

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[20] See for instance Martti Koskenniemi *From Apology to Utopia: The Strutcture of International Legal Argument.* Cambridge University Press, 2009, esp. Ch.5; Kenneth W. Abbott and Duncan Snidal "Why States Act Through Formal International Organizations," *Journal of Conflict Resolution* 1998, 42(1): 3-32; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law*. Cambridge University Press, 2010.

[21] See the discussions in Wehberg 1959, Amerasignhe 2003, Farrall 2007.

[22] Chayes and Chayes, 1993, 185.

[23] Wehberg 1959, p.782

[24] Art. 94(1).

It is cited as a requirement of political entities aspiring to recognition as states.[25] Madeleine Albright used compliance to define 'rogue states:' "those who, for one reason or another, do not feel that they should cooperate with the rules that have been established by other nations of the world."[26]

The United Nations stands as a central institution in the international rule of law system, both as a contributor and as a subject. The first strand, particularly prominent since 1992, is reflected in its efforts to promote the rule of law in domestic societies, both through general recommendations to members in instruments such as the Millennium Development Goals (MGD) and by incorporating the rule-of-law construction into UN peace missions. The second strand involves whether and how the UN itself should or must abide by international law.[27] Is the UN a subject of international law? At one level it undoubtedly is, since it las legal personality as a corporate actor and its constitutional instrument, the Charter, follows the traditional rules of inter-state formal treaties. However, the question becomes more nuanced with respect to the UN Security Council, in large part because the UN Charter defines the Council's authority in terms of "threats to international peace and security" rather than of breaches of international law. It was designed to provide political and perhaps military solutions to international problems and not legal solutions. Must the Council comply with international law? This is an unresolved question.[28] As we shall see below, once we recognize the jurisgenerative capacity of the Council (and other international actors) we can reconcile the Council's legal and political functions in international relations with a revised concept of the rule of law ideology.

As with the domestic version, the individual obligation to comply (if enacted) is presumed by the rule-of-law model to produce desired collective and social

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[25] For instance, Allen Buchanan *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* Oxford University Press, 2007.

[26] Madeleine Albright, Address to the Institute for International Economics Sept. 18 1997, http://www.iie.com/publications/papers/paper.cfm?ResearchID=290.

[27] See generally C.F. Amerasinghe *Principles of the Institutional Law of International Organizations* 2nd ed. Cambridge University Press, 2003.

[28] Jeremy Matam Farrall *United Nations Sanctions and the Rule of Law*, Cambridge University Press, 2007.

consequences. In international relations, compliance with international law is thought to bring peace, order, prosperity, and stability to world politics. John Ikenberry sees the post-1945 international system as being characterized by the presence of negotiated and consensual international rules: "rules and institutions operate as mechanisms of governance" and the system as a whole is "an open and rule-based order."[29] "State power is not extinguished in a consent-based order, but it is circumscribed by agreed-upon rules and institutions."[30]

The centrality of compliance can also be seen by examining how non-compliance is traditionally understood in international law. Rule-breaking has consequences at three levels of analysis: for individual states, for the rule itself, and for the international order most generally. For a state, non-compliance is a problem of reputation. According to Andrew Guzman, violations of international law give a state a bad reputation and will reduce the willingness of others to enter into mutually beneficial arrangements in the future.[31] Reputation can therefore act as an incentive to comply.[32] As Albright suggested above, systematic violation of international law or a comprehensive declaration against the idea of international legal obligation qualifies a state for 'rogue' status, at which point various outside interventions are easier to undertake and the security of the state is therefore more precarious.[33] For the law itself, non-compliance is a dangerous sign. Success of the law is usually measured in its ability to shift state behavior from its previous default position to a condition of compliance, and the failure to do that is taken as evidence of weakness and failure in

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[29] G. John Ikenberry *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* Princeton University Press, 2011, p.?, and p. 2.

[30] Ikenberry, p. 15.

[31] Andrew Guzman *How International Law Works: A Rational Choice Theory*, Oxford University Press, 2010.

[32] The force of this incentive assumes that violations will be punished by others in the system, and that the actor and the audience share the same judgment about how to interpret behavior. See Rachel Brewster "The Limits of Reputation on Compliance," *International Theory*, 2009, 1(2).

[33] Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in International Law*, Cambridge University Press 2004.

the law.[34] Legal scholars see persistent non-compliance as evidence of desuetude in the law, a condition where the rule has no remaining legal force and cannot be appealed to as an obligation. This, according to both Thomas Franck and Michael Glennon, has been the fate of Article 2(4) of the UN Charter which bans the use of force between states.[35] Finally, for world order, non-compliance with international law is often understood as contributing to chaos and disorder. Rule violation undermines international order, and turns the system either toward anarchy[36] or toward brute power-politics.[37]

The International Rule of Law: in Practice

The practice of international law in world politics gives reasons to doubt that this approach to the rule of law is useful for describing how states and their diplomats actually behave. If the international rule of law is understood as being about compliance, then the distinction between compliance and non-compliance with international law is made to carry more weight than it can sustain. The difficulties in isolating compliance and non-compliance in state behavior undermine the conceptual apparatus that Ikenberry and others have constructed for international law. This section explores the difficulty in distinguishing compliance from non-compliance in international relations, and argues that the difficulty cannot be overcome using the resources of legal scholarship or argument. For many of the most important controversies in international law and politics, the difference between compliance and non-compliance is not stable, and the conventional approach to the rule of law is not helpful. In the subsequent

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[35] Thomas Franck, "Who Killed Article 2(4)?" *American Journal of International Law*, 1970; Michael Glennon, "Why the Security Council Failed," *Foreign Affairs* May/June 2003.

[36] Hedley Bull *The Anarchical Society: A Study in World Order,* Columbia University Press, 1977.

[37] The contrast between law and power politics is evident in the work of many writers. In US circles, this premise is shared by liberal internationalists and realists alike who, while they may disagree on the capacity of states to choose law over power, are equally committed to the Lokean idea that power prevails where law ends. See for instance the discussion of the importance of laws on preemptive war in Michael W. Doyle *Striking First: Preemption and Prevention in International Conflict,* Princeton University Press, 2008, and Harold Hongu Koh's response in the same volume.

section I reconstruct a model of the rule of law that is appropriate for the international setting.

Chayes and Chayes illustrate the conventional model of law-breaking in legal scholarship with their discussion of the antiballistic missile (ABM) treaty. Writing in 1993, they noted that without the treaty the Soviet Union "would have been legally free to build an ABM system" and that their doing so would surely prompt urgent meetings in Washington regarding the appropriate US response. But, they say, the reaction would be very different in the presence of the treaty: "The same act, the construction of an ABM system, would be qualitatively different... if it were done in violation of the specific stipulations of the ABM treaty. Transgression of such a fundamental engagement would trigger not a limited response, but a hostile reaction across the board, jeopardizing the possibility of cooperative relations between the parties for a long time to come."[38] This sets out the normal view of law-breaking set out by scholars of international law and politics: rule-breaking is presumed to be met by outrage and reaction. It accords with Andrew Guzman's claim that compliance with international law is enforced by the payoffs that come from having a good reputation; non-compliance undermines that reputation and reduces the likelihood that others will engage in mutually beneficial cooperation in future.[39]

Yet the practice of international affairs shows something else entirely: governments argue with each other about whether their acts constitute self-defense, what 'imminent' means in the law on preemption, how torture should be understood as a legal category, whether Japanese whale hunting is 'scientific research' or a commercial enterprise, and much else. These arguments do not take place in a zone of pure deliberation - their arguments are deliberately self-serving, and there is no expectation that they will lead to a new consensus over the meaning of any of the terms. The meaning of compliance in these cases is contested even while the facts of each case might be more or less agreed upon by the parties.

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[38] Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47(2), 1993, p. 186. Also Harold Honju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal*, 106, 1997.

[39] Guzman, *How International Law Works*.

The practice of international law shows that compliance is endogenous to state practice, not independent of it. In other words, we cannot know what is permitted or forbidden under the rules without considering what governments say their believe is permitted or forbidden. How states have argued over and used international rules in the past constitutes the rules today. The traditional rule-of-law model compares actors' behavior to fixed rules and assessing the distance between the two. For international law (at least for that subset of rules without a compulsory judicial institution) judging compliance in international law requires aiming at a moving target: the rules follow from state practice as much as they anticipate and regulate it. Thus, while it is easy to identify gaps between what countries promise to do and what they actually do, it is almost impossible to find conclusive cases of non-compliance.

Governments have many tools with which to manipulate their relationship with international rules. These instruments transform acts of non-compliance into acts that are compliant. The international system condones, even encourages, this process, and so we can see how both individual actors and the international system operate to redefine rule-breaking into rule-following. This is the process that helped to 'legalize' humanitarian intervention in the 1990s, helps keep the Security Council operating despite the outmoded language of the UN Charter, and allows states to create be-spoke legal obligations tailored to their needs. In all these cases, the obligations with which states are expected to comply are derived from state behavior rather than the other way aaround.

There are three main devices by which rule-breaking is remade into rule-following: state consent to treaties permits selective states choose among treaty obligations, states provide , supplying competing interpretations, and the international system can provide collective legitimation of apparent violations. All three reconcile aberrent behavior with the rules of international law and so they reduce the amount of non-compliance in world politics, and yet none involves states changing their behavior to comply with the rules. They therefore point to the need for a model of the rule of law that is not premised on the act of compliance.

1. Refining treaty obligations

States can redefine their obligations so that what would previously have been a violation becomes lawful. This is the strategy that North Korea adopted after its nuclear weapons program became public in the 1990s. Building nuclear weapons is explicitly forbidden under the Nuclear Non-Proliferation Treaty (NPT), which North Korea ratified in 1985, but there is no general prohibition on nuclear weapons in the wider body of international law. North Korea reconciled the contradiction between its behavior and the NPT by withdrawing from the NPT in 2003. In doing so, it eliminated its legal obligation to refrain from making nuclear weapons and thereby transformed its rule-breaking into rule-following. (It may still be in violation of Security Council resolutions, which are binding on it through the UN Charter.) It even followed legal procedures for withdrawing from the treaty, giving the required three months' notice in December 2003.

Canada made a similar move in 1994 when it revised its optional-clause declaration to the International Court of Justice. This is the document by which a government asserts when it will accept the automatic jurisdiction of the Court, and the declaration itself is entirely option for a state (they come under Article 36(2) of the ICJ Statute). Countries without such declarations can be sued at the Court only with their consent in each particular case. Optional-clause declarations usually accept compulsory jurisdiction when a dispute involves another state that has made a comparable declaration. Canada was faced with the imminent threat that Spain would ask the ICJ to review Canada's policies on North Atlantic fish stocks. Canada had recently had a confrontation with Spanish fishing vessels on the high seas and it seemed likely that the Court would find that it had acted illegally. To preempt Spain's case, Canada submitted to the Court a new optional-clause declaration that stated explicitly that it did not accept the ICJ's jurisdiction for cases concerning "dispute arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO [Northwest Atlantic Fisheries Organization] Regulatory Area."[40] With that, Spain was no longer in position to bring its case, and the Court could never be asked whether Canada's fisheries policies were legal or not.

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The Canadian and North Korean moves are typical, even expected, in international law. They are so familiar that often the more surprising case is when a countries *does not* remove itself from a setting of non-compliance. Myanmar has been violating its obligations to the International Labor Organization for many years over the issue of forced labor, and the ILO has pushed the matter to the limit of its enforcement powers. The biggest question in that case is why Myanmar hasn't chosen to simply leave the organization to avoid its needling. The ILO's weak enforcement power and low political profile may explain why Myanmar has not felt that its reputation would be better served by withdrawing, but it must be bearing some reputation costs to remain in the ILO.

Because states must consent to the obligations contained in international treaties, they retain the authority to remove their consent and unilaterally redefine what is legal and illegal for them. Lawrence Helfer has shown how important the 'exit' option is to maintaining the international legal system.[41] Laws can remain in place for other states, but there is no longer a basis for claiming that the country is breaking international law. One might maintain that the Canadian example in particular constitutes taking advantage of a technicality or a loophole in international law, which it may well be, but it is also a fully legal tactic. Treaty exit has the result of causing a large collection of apparent rule-violation to disappear.

The agency that states retain over their legal obligations is reflected in the nuanced way in which the UN Millennium Development goals describe the commitment to the international rule of law: "We resolve therefore… to strengthen respect for the rule of law in international as well as national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties."[42] The UN cannot make a straightforward claim that states should comply with all international law since only that subset of law chosen by the state itself is binding.

The patchwork of bespoke legal obligations is a familiar phenomenon to diplomats and international lawyers. Indeed, much of the work of the ICJ in deciding

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[41] Laurence R. Helfer, "Exiting Treaties," *Virginia Law Review*, 91, 2005.

[42] A/RES/55/2, II/9.

contentious cases comes in trying to establish which international laws apply to the states in question and which do not. States avoid the obligations in treaties by withdrawing from or declining to sign them, and they can customize their customary-law obligations through what is known as the 'persistent objector' norm. The conclusion to be drawn is that states have some agency to manipulate the catalog of legal obligations that is binding on them, and they will take advantage of this to eliminate as much non-compliance as they can.

Some legal obligations cannot be dropped, for either political or legal reasons. There may be unacceptable costs in terms of reputation or self-identity, or the rules may have a normative quality that makes them binding on all states (ie. *jus cogens*). The rules against aggressive war, genocide, and torture, among others, have these qualities: the international system would not accept the legality of a state's declaration to withdraw from the general prohibitions against these behaviors. For these rules, states engage in other means to fit their actions within the rules.

2. Competing interpretations

The torture laws provide an example of the second mechanism for managing non-compliance: competitive interpretation. The US under George W. Bush sought to avoid these rules but found that it could not. While maintaining that "we do not torture," Bush adopted policies that permitted waterboarding, beating, humiliation, and mock executions, of prisoners. All are forbidden by the Convention Against Torture and other international instruments. Rather than withdraw from these treaties, the US provided a series of legal explanations that sought to define the law such that it did not intersect with US behavior.

The American arguments included three distinct themes: that the people held by the US did not qualify under these treaties for protection against maltreatment, that the conduct of US officials did not not include the specific acts covered by the treaties, and that the US president has constitutional authority to trump the treaties. None of the arguments were convincing to the majority of international lawyers, or of governments, but the fact that they were made reveals how thoroughly embedded is the culture of compliance in foreign affairs.

The US strategy was designed to situate American behavior within the contested terrain of international legal interpretation. This would deprive its opponents of the clear moral and political force that comes from being able to point to explicit rule-breaking and so might dull the costs of non-compliance. Much of the ensuing argument over US policies was indeed over the interpretive questions of how torture is defined, whether US prisoners were involved in 'international' war against the US or something else, and how the US Constitution distinguishes Presidential power relative to international treaties. These questions will not find answers within the terms of international law itself, at least not without an international court to decide them, and so for the defenders of US behavior the indeterminacy that they created was a useful tool against the empirical evidence of torture.

Torture is not an unusual case. Disagreements about the meaning of international law are the standard fare in foreign affairs and international diplomacy. The International Whaling Commission has for years been in stalemate between two competing and incompatible views of its legal obligations, which happen to map perfectly onto its pro-whaling and anti-whaling blocs of members.[43] The debate over preemptive and preventative war, a hot topic since the early 2000s, had produced little new legal consensus on the matter.[44] The main output of this process has been to make absolutely clear how widely divergent policy preferences can all be legitimated by reference to state practice since *Caroline* in 1837-38. Continuing deliberation and study of the subject is unlikely to lead to compelling insight into the content of the law because the real point of contention is the wisdom of the particular acts of preemption.

What is striking in these disputes, from torture to whaling, is the degree to which they take place in terms of what international law allows and forbids. The language of argument is the language of legality and compliance. Governments appear to feel a compulsion to present their actions as within the terms of law. And this is as true for strong states, who presumably have other instruments for getting their way, as it is for

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[43] Ian Hurd, "Almost Saving Whales: The Ambiguity of Success at the International Whaling Commission," *Ethics and International Affairs*, 2012, 26(1):103-112.

[44] Well summarized and moved forward in Michael Doyle, *Striking First: Preemption and Prevention in International Conflict*, Princeton University Press, 2008.

weak ones. 'Lawfare' is a widely distributed instrument, not only a weapon of the week; and a normal practice of the international legal system, not an abuse of it.

3. Collective legitimation and constructive non-compliance

Some rule violations are so widely accepted by countries that their status as violations is essentially forgotten. This represents the collective legitimation of violations, turning them into informal revisions of international law.

Take for instance the practice in the Security Council of treating abstentions by permanent members as something other than a veto. This has been the consistent practice since the earliest days of the Council and yet it contradicts the plain meaning of the Charter clause that regulates voting in the Council. Art. 27(3) says "Decisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Abstentions are not 'concurring,' and yet the Council operates as if they were. The first time the practice was used (in 1946) the irate ambassador from the Soviet Union stormed from the room in protest, but its repeated use and its practical advantages quickly extinguished any controversy.[45] Today, most states seem to accept it as an informal revision of the Charter, and indeed the ICJ affirmed as much in a 1971 opinion that rejected South Africa's claim that a resolution against it was illegal because three permanent members had abstained when it was passed.[46]

A similar development has underwritten the concept of humanitarian intervention since 1990. The use of force for humanitarian purposes is illegal under the UN Charter unless authorized by the Security Council. The UN's 192 members have all committed to Article 2(4) of the Charter, which forbids them from the "threat or use of force against... any state." Advocates of the Responsibility to Protect, however, have successfully promoted the opposite position: that RtoP means that humanitarian intervention can indeed be legal under certain circumstances even without the UN's collective approval through the Council. The case in favor of the legality of

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[45] Sydney Bailey.

[46] South Africa's argument does suggest that the consensus is something short of universal, or at least that there remains an opening for the strategic use of their complaint when it serves their interests.

humanitarian intervention rests on two pillars: it examines recent history and finds many statements by states, international organizations, and others in favor of the practice, and it argues that failing to intervene sometimes leads to undesirable outcomes in many instances.[47] Together, these form the foundation of the argument that a progressive development in the law has taken place so that Council approval is not necessarily a requirement for legal intervention. In both cases, powerful players in world politics decided that the new interpretation is a desirable improvement over the plain language of the UN Charter and therefore that it should not be considered rule-breaking.

The mechanisms show how violations of international law are routinely and systematically 'managed' away. Some are made ambiguous and some are redefined as compliance. In this way, the practice of states is jurisgenerative. The original concept of 'jurisgenerative' described the process by which judges create law in the course of providing judgments in cases by endorsing or killing off competing interpretations and norms.[48] For international law, we can extend the concept to include the process by which states themselves create legal obligations in the course of making decisions and taking actions. International courts are for the most part expressly forbidden from producing new formal laws out of their decisions. This is the case with the International Court of Justice, for instance, when its founding Statute declares that decisions of the Court have "no binding force except between the parties and in respect of that particular case" (Art. 59). The Court's decisions cannot be relied on as precedents, since their legal effects are limited to the parties to the present dispute. However, as Shahabuddeen has shown, these decisions often (and by design) become important legal and political resources for the future -- that is in large part their political purpose.[49]

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[47] Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," *Ethics and International Affairs*, 2011.

[48] Robert M. Cover, "The Supreme Court, 1982 Term -- Forward: *Nomos* and Narrative," *Harvard Law Review* 97(4), 1983; Julen Etxabe, "The Legal Universe After Robert Cover," *Law and Humanities*, 4(1), 2010; Paul Schiff Berman, "A Pluralist Approach to International Law," *Yale Journal of International Law*, 32, 2007.

[49] Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, 1996.

The transformation of non-compliance into compliance reduces the amount of 'official' rule-breaking in the international system, but the act of non-compliance retains its political weight and therefore the doctrine that puts compliance at the center of the rule of law remains in place.

The scholarly project of international law is committed to enhancing compliance with the law. The rule of law in world politics is presented as being at once an analytic category and a normative goal of those who talk about it. David Kennedy and others have noted the peculiar fact that most legal scholarship seeks to *enhance* the workings of the rule of law, and therefore has an inherently activist slant. International lawyers "see themselves and their work favoring international law and institutions in a way that lawyers working in many other fields do not -- to work for a bank is not to be for banking."[50] Hathaway, Koh, Bingham, Chayes & Chayes, Ikenberry, Guzman, Slaughter all make clear that they believe that more compliance with international law is a good thing, and they are engaged in projects that seek to show states both why they should and how they can comply better with the rules.

It is difficult to find a stream of scholarship that does not subscribe to this view of the relation between law and politics. The closest that one might come is the legal-skeptic school promoted by Eric Posner, Jack Goldsmith, and others in US legal-academic circles. Posner and Goldsmith maintain that there are in fact few compelling legal obligations on states, and that those that do exist are poor predictors of actual state behavior. They conclude that US policy makers should therefore pay little attention to international law and instead by guided in their decisions by their beliefs about American interests. It is not clear in this argument whether they are suggesting that governments should ignore or break their legal obligations, or if they are only saying that a proper reading of international law reveals few actually binding laws. It therefore is not clear whether they are taking a position against the rule of law in general.

A clearer legal position against the rule of law comes, ironically, from the work of Thomas Franck, one of the foremost international legal scholars of the past 50 years

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[50] David Kennedy "A New World Order: Yesterday, Today, and Tomorrow," *Transnational Law and Contemporary Problems*, v.4, 1994, p.7.

and a huge figure guiding recent developments in international law. In his later work on the law of humanitarian intervention, Franck argued that military operations such as that in Kosovo in 1999 can be desirable even though they are illegal. He suggested that states should be applauded for disregarding the laws against the use of force, including Article 2(4) of the UN Charter, when this serves the more important goal of avoiding a humanitarian disaster.[51] Compliance with the law in these cases is not required because it would produce a worse outcome than non-compliance, and the obligation to comply is therefore tempered by consequentialist considerations.

Compliance in International Law: from practice back to theory

These examples show that the real-world of international law does *not* possess the universal preference for compliance over non-compliance that is expressed by the theory of the international rule of law. In practice, non-compliance is embraced as acceptable, legitimate, and legal, in certain circumstances. This requires a particular framing of the act in question using the devices above by which the relationship between agents and rules is defined. The capacity for the 'agency' of states to redefine the 'structure' of international rules suggests that the international rule of law cannot be accounted for by the standard model borrowed from domestic politics.

The existence of 'constructive non-compliance' highlights the fact that the transformation of rule-breaking into rule-following happens both as a result of the self-interested behavior of states as individual actors and also through a systemic permissiveness that reinterprets non-compliance as change in the rules. It is therefore not only an artifact of the self-serving manipulation of law by states; it is also endorsed by the system itself. The systemic aspect has the effect of reducing the danger that violation might de-legitimate the entire legal structure, and can be seen as a release-valve for pressures that are inherent in any legal system. However, it also undermines the central concept of the rule of law, that agents should change their behavior to conform to the rules. In international politics, compliance is often achieved by changing the rule to conform to the behavior.

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[51] Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002.

We cannot infer from this that the rule of law does not exist in world politics. Instead, we should conclude that the rule of law means something different than its ideology suggests. Despite the ambiguities of compliance, international law satisfies what Hayek called "the basic intuition" underlying the rule of law: that "the law must be capable of guiding the behavior of its subjects."[52] At the international level, however, it is not possible to separate law from the subjects of law -- or, put differently, to separate agents from structures.

In a world where rule-breaking can be made to disappear, what is left of the rule of law? Quite a lot. First, governments seem to care very much that their behavior be seen as consistent with their international obligations. The above cases show the lengths to which states will go to maintain the image of their own rule-following. This may well be both an internal and an external imperative, in the sense that they want to been seen by others as good legal citizens and they are attached to their self-identity as a rule-following state. In other words, they may genuinely believe their own stories -- and even when they don't they feel it is worthwhile to provide these justifications.

Second, the justifications they give can over time change the rules themselves. What states do and say about international law helps to constitute the rules. Instead of being separate, international rules and state behavior are in a relationship of co-dependence: each needs the other. This suggests that the power of international law cannot be understood in the classical Newtonian way of the conventional rule-of-law model. The rules exist only because they are invoked and used by states, and states need the rules to explain and justify their behavior. Foreign policy both makes and reflects international law. Legality is not a quality of an act, it is the product of the interaction between law and practice.

Finally, compliance may be wrong metric for assessing the impact of international law on governments. Howse and Teitel recently argued that what the call the 'compliance model' underestimates the impact of law on states' interests and behavior.[53] For laws that are not subject to an adjudicative body (which is to say: most of them)

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[52] Hayek cited in Tamanaha 2004, p.93

[53] Robert L. Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy*, 2010.

governments will universally present their actions as rule-compliant and their claims can by challenged only by providing a competing interpretation of the act, the rules, or the connection between acts and rules. This means that international legal disputes have a natural tendency to turn into debates about the proper interpretation of the meaning of compliance, in the context of all parties claiming to represent the *fact* of compliance.

In place of compliance, we should look at two other sources for evidence of the power of an international treaty or rule: first, how much do governments make use of the rule to explain and justify their behavior? And second, how much do governments work to hide their actions in relation to the rule or treaty? These are somewhat in tension with each other, but both evasion and use are evidence that the rule has a powerful hold on states. When the US defended its invasion of Iraq on the grounds of the Security Council resolutions of 1990 and 1991, it reaffirmed the importance of UN Charter rules on the use of force, especially Article 42 on collective military action and Articles 24 and 25, which give the Council the authority to act on behalf of all states. The US believed, or perhaps believed that its audience believed, in the legality and legitimacy of these rules and their relevance to the situation at hand. Its use of these rules reflected the power of the rules, and indeed reinforced it. That it flatly contradicted the anti-UN, anti-internationalist spirit of much of the first George W. Bush administration makes it all the more interesting.

Secrecy is another response to the impact of law. When governments reach the limits of their ability to invoke international rules to justify their behavior, they often switch to a strategy of secrecy. This maintains the policy and avoids the rule-violation, at least at the level of official diplomacy. The value of secrecy is the inverse of the power of the law; secrecy is the tribute that expedience pays to law in international affairs.

The Unspoken Alternative to International Law

One way to see the role of law in international politics is to consider its alternative. How do we imagine world politics in the absence of law? This is rarely addressed directly but the implicit comparison is present in much international legal and political scholarship.

The conventional answer to this question is that brute power is the alternative to law. Countless diplomats, legal scholars, and politicians have said words essentially similar to President Eisenhower's from 1959: '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."[54] In an almost unbroken tradition from Woodrow Wilson to Harold Koh, the rule of law in world affairs is seen as an alternative to the rule of power, coercion, and war.[55] The energy invested in creating international rules is justified, it is said, by the desire to see "law as opposed to arbitrary power" as the governing mechanism for disagreements among states.

Law cannot be the opposite of power.

Ikenberry points toward a theory of law and power, although it is not entirely in the direction which he suggests. His prescription for sustaining American influence in international affairs involves creating international rules and institutions that inscribe US preferences into laws and norms. This rests on his belief that such institutions do in practice limit the choices made by other states. The fact that international institutions have constraining power on others makes it worthwhile for the US to consciously construct the rules in ways that sustain its interests and also to promote the rule of law as a more general norm. To the extent that the rule of law defines world politics, he suggests that American power is affirmed and entrenched by creating rules in the image of that power. Compliance with the rules serves the interests of those who wrote them.[56]

Conclusion

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[54] Statement of April 30, 1959, cited in William W. Bishop "The International Rule of Law," *Michigan Law Review*, v.59, 1961, p.555.

[55] This is the liberal tradition in US legal and political scholarship. Wilson ..., Taft ..., Nixon ..., Koh, Anne-Marie Slaughter. Soviet legal advisor Tunkin?, The 'almost' is due to the complicating presence of Morgenthau, Mearsheimer, Posner et al. in this tradition. It is unclear if these skeptics reject the concept that law functions as an alternative to war or if they only reject the claim that it can actually be made to work in practice.

[56] This recalls Friedrich List's complaint about Adam Smith's policy of free trade: by cementing existing industrial and economic inequalities among nations, it served the interests of Britain against Germany.

Paul Johnson identifies the rule of law as "the greatest public achievement of the second millennium," and sees it having been firmly and permanently established in the US and UK by the 19th century." About international rule of law he is confident, even triumphant: "we will surely get there eventually, and the rule of law throughout our planetIt is likely to be among the achievements of the third millennium, as its establishment nationally was of the second."[57] What might this mean?

The domestic rule of law is an inventional that is designed to deal with a very particular problem of governance: the arrangement of political power among competing actors in the hierarchy between state and citizen. This includes its construction and its legitimation. The international rule of law is addressed to a different problem: interdependence among actors, and the externalities and the potential mutual gains that arise when jurisdictions are free to make their own decisions in horizontal space.

Governments' use international law to legitimate their actions. They invest in explanations that situate their behavior within the law, and they promote those aspects of international law that favor their interests. This is not a failure of the law, nor is it a problem to be fixed; it is the system operating as it was designed. However, for these justifications to work, there must already exist a widespread belief in the importance of law, compliance, and the rule of law more generally. Without a generalized commitment to the rule of law among states, the legitimating function of claims to compliance would not take place. It is a perpetual dilemma of international law that these claims about compliance are relatively easy to make and therefore tend to be in over-supply. They have not however lost their utility or their appeal to governments.

Governments' claims about their relationship to the rules contribute to remaking the international legal environment. Their interpretations of the rules in past situations are the raw materials out of which officials construct the legal justifications for today's policies. In the process, a lot of rule-breaking can be made to count instead as rule-following. Both -following and -breaking are elements of rule-making.

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[57] Johnson, *Wall Street Journal*, 1999.