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Three models of the international rule of law*

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ABSTRACT

While it is common to refer to the international rule of law, it is less common to define it or to explore what it means. In this essay I examine the international rule of law both in practice and as a concept. This is important because many controversies about the direction of world politics in fact rest on different accounts of the international rule of law. Understanding the various ways the idea is used, and their implications for policy-choices, can help clarify what it and what it is not being argued over in global controversies. I set out three distinct approaches to the concept of the international rule of law and compare them to contemporary state practice. The first is anchored on the obligation of states to comply with their international legal obligations. The second draws on an analogy with the domestic rule of law. The third begins from the observation that states invoke international law to explain and justify their policies - from this it expands into a model of law as integral to political legitimation. I find that the third provides the most conceptually coherent understanding of the international rule of law, and has interesting implications for the study of international law and politics.

PALABRAS CLAVE
international rule of law, international politics, policy-choices, contemporary state practice.

RESUMEN

Aunque es común referirse al imperio internacional de la ley, es menos común definirlo o explorar lo que significa. En este ensayo examino el imperio internacional de la ley en la práctica y en teoría. Esto es importante porque muchas controversias sobre la dirección de la política mundial se basan de hecho en explicaciones diferentes del imperio internacional de la ley. Comprender las diferentes maneras en que se usa esta idea y sus implicaciones para la elección de políticas puede ayudar a clarificar lo que se está discutiendo y lo que no en las controversias globales. Yo planteo tres enfoques distintos del concepto de imperio internacional de la ley y los comparo con la práctica estatal contemporánea. El primero está anclado en la obligación de los estados de cumplir sus obligaciones legales internacionales. El segundo traza una analogía con el imperio doméstico de la ley. El tercero parte de la observación de que los estados invocan la ley internacional para explicar y justificar sus políticas – de aquí se amplía a un modelo de la ley como parte integral de la legitimación política. Me parece que el tercero ofrece la comprensión conceptualmente más coherente del imperio internacional de la ley y tiene implicaciones interesantes para el estudio de la ley y la política internacionales.

KEYWORDS
imperio internacional de la ley, política internacional, elección de políticas, práctica estatal contemporánea.

* This essay draws on material from Hurd (2014).

Three Models of the International Rule of Law

The expansion of international law and organizations is a remarkable development of world affairs in the past 60 years or so. Increasing numbers of policy areas are now the subject of inter-governmental legal institutions, and increasing numbers of actors now find themselves covered by these institutions. This phenomenon rests on and reinforces the idea that international affairs should be governed by the rule of law - a premise that is usually taken for granted but which deserves closer attention.

The importance of the international rule of law is routinely affirmed by governments, international organizations, scholars, and activists. It is variously credited with, among other things, reducing the recourse to war, preserving human rights, and constraining (albeit imperfectly) the pursuit of state self-interests. It is commonly seen as supplanting coercion and power politics with a framework of mutual interests that is cemented by state consent (Guzmán, 2008).

While it is common to refer to the international rule of law, it is less common to define it or to explore what it means. In this essay I examine the international rule of law both in practice and as a concept. This is important because many controversies about the direction of world politics in fact rest on different accounts of the international rule of law. Understanding the various ways the idea is used, and their implications for policy-choices, can help clarify what it and it is not being argued over in global controversies.

I set out three distinct approaches to the concept of the international rule of law and compare them to contemporary state practice. The first is anchored on the obligation of states to comply with their international legal obligations. The second draws on an analogy with the domestic rule of law. The third begins from the observation that states invoke international law to explain and justify their policies - from this it expands into a model of law as integral to political legitimation. I find that the third provides the

most conceptually coherent understanding of the international rule of law, and has interesting implications for the study of international law and politics.

The Rule of Law Based on Compliance?

The conventional account of the international rule of law defines it in terms of the obligation on states to comply with their legal commitments. In other words: states are free to take on legal obligations as they see fit but once they do they are required to comply with them. The idea that states should comply with their legal obligations is fundamental to conventional accounts of the contemporary international legal-political system. It is central to international law and is almost universally preferred over violation.

Compliance is widely seen as a legal, political, and moral imperative for states. Legally, the obligation to comply is institutionalized in the principle of *pacta sunt servanda* and in the "good faith" clauses that appear in many international treaties, including in the Vienna Convention on the Law of Treaties. Morally, it is usually assumed to lead to normatively good outcomes, at least as compared with the consequences of violation. It is also a key political obligation, in the sense that a consistent record of compliance is taken to be a marker of appropriate international behavior—and its opposite is seen as a danger. Madeleine Albright (1987), for instance, defined rogue states as "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." International law scholars often identify the features of states or of laws that correlate with compliance and with noncompliance in order to maximize the former and minimize the latter. Human rights, international stability, and perhaps even the progress of civilization itself are said to be dependent on compliance with international law.

The normative preference for compliance over violation is deep-seated in international legal scholarship, in part because law is seen as the alternative to power politics. Thus, a legal order appears to be the antidote to coercion. Many thinkers, from Woodrow Wilson to Hedley Bull to Anne-Marie Slaughter, have argued that international order depends on states' choices to comply with international law and thus to pursue a negotiated common position rather than an individualistic, short-term self-interested one. The dichotomy between law and power is popular among scholars of both domestic and international politics. Habermas (2006), for example, said that social order rests on the "normative taming of political power through law" (p. 116). And it is this spirit that David Kennedy (1994) recognized in noting the tendency of international lawyers and associated scholars "to see themselves and their work as favoring international law and institutions in a way that lawyers in many other fields do not —to work in banking is not to be for banking" (p. 335).

Moreover, in scholarship on international law, compliance is often seen as important for methodological reasons: it is seen as providing the link between legal causes and behavioral effects, and thus becomes the measuring stick for the success or failure of a law. A law that is measurably complied with is seen as successful and one that is violated is seen as a failure.

Problems soon arise when this emphasis on compliance is brought into contact with how international law actually operates in real-world international politics. Compliance is not self- evident or objectively ascertainable. As Howse and Teitel (2010) have noted, much of the energy animating international political disputes arises from states' competing visions of what constitutes "compliance" in the first place 6 Indeed, it is no simple matter to determine whether the act of a state constitutes "compliance" or "noncompliance" with its legal obligations. To identify compliance as opposed to violation of international law requires several interpretive moves, each of which entails much controversy. First, which international rules apply? Second, what precisely do those

rules permit, forbid, or require? And third, what is the meaning of the present case with respect to those rules? To decide, for instance, if Iran is violating its commitments as a member of the International Atomic Energy Agency (IAEA) requires decoding Iran's internal motivations for conducting its atomic research, as well as the relationship between Iran's IAEA commitments and other international instruments such as the UN Charter, which among other things explicitly reaffirms a state's inherent right to self-defense.

These difficulties lead many scholars to conclude that compliance is a poor centerpiece for assessing the impact of international law. Faced with the deep difficulties associated with the effort to measure compliance, James Morrow (2007) suggests instead that scholars should consider "whether broad pattern of acts… are consistent with the standards of the relevant treaty" (p. 562). Similarly, Beth Simmons (2009) operationalizes compliance in terms of changes to a state's human rights policies rather than whether the state has technically complied with the treaty. More dramatically, Lisa Martin (2013) concludes that the attempt to achieve an objective coding of compliance may be futile and argues instead that the positivist research program on international law should to look elsewhere for its dependent variable.

The Rule of Law Based on the Domestic Analogy?

Faced with the difficulties in making sense of 'compliance,' it may be tempting to understand the international rule of law as a derivative function of the domestic rule of law. Many references to the international rule of law draw directly from ideas developed in domestic settings.

The two clearly share some features of in common. In both, the "rule of law" describes a social system that divides society into political and legal domains and situates the latter within the former. A rule-of-law system is one in which the choices of an actor are made in light of rules that are fixed and external relative

to that choice. Actors may opt to violate the rules but when they do they do so knowing what the rules specify and considering the implications of compliance and violation.

However, despite the popularity of domestic analogies among international relations scholars, the international rule of law cannot simply be derived from the domestic version because the two rest on unique historical and political foundations and consequently they operate very differently in practice.

The domestic and international versions of the concept arose as responses to different political problems, and they are consequently different in their logic, history, and content. In a domestic context, the rule of law addresses problems associated with an overly powerful centralized authority. It describes a political system based on three commitments: that laws should be stable, public, and known in advance; that they should apply equally to a government and to its citizens; and that they should apply equally among the citizens without regard for their particular circumstances. Simon Chesterman (2008) has summarized these three commitments as "regulating government power, implying equality before the law, and privileging judicial process" (p. 336). Each pillar contributes to distinguishing between a legal and a political domain in society, and together they counteract the centralizing tendencies of domestic political power. According to Brian Tamanaha (2009), these commitments preserve space for the autonomy of individuals and groups under the authority of a state. Clear, stable, and equal laws are essential if a legal system is to give what Joseph Raz (1979) calls "effective guidance" to citizens on how their behavior will be judged. Thus, as Renáta Uitz (2009) argues, "the minimum requirement of the rule of law is that all actors, including both private individuals and the state, behave in accordance with the law" (p. 82).

The international rule of law is premised on the opposite concern: in a system where authority is decentralized and atomistic, such as exists among sovereign states, the units have more legal autonomy than the common good can tolerate and the 'excess'

autonomy of the units must be limited in order to preserve society itself. The traditional view of international law is that it provides a self-imposed set of limits on states in order to better allow those very states to pursue their mutual and individual interests. It is consistent with the idea of state sovereignty because it is the sovereign states that bind themselves to the law, which reconciles their autonomy with the fact that coordination among them is often desirable. Expressing an extreme version of this positivist approach to international law, the Permanent Court of International Justice said in the Lotus case: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will".[1]

Thus, practices that would be considered normal in international law would be violations of the rule of law in the domestic setting. For example, states in the international context retain the agency to tailor their legal obligations largely as they see fit, and self-interest is accepted as the motivating force behind these choices. States pick and choose which international obligations to accept and which to decline; they author their own reservations and interpretations to fine-tune treaty obligations; and their conduct toward and interpretations of these obligations are significant factors in the determination of their meaning. Each state has a unique set of legal obligations as a consequence of its past statements and actions and it cannot be said that treaty commitments apply equally to all states.

In international affairs, the legality of an act is dependent on the actor doing it - it is impossible to assess the legality of an inter-

[1] This judgment from 1927 centered on whether Turkey could prosecute the French crew of a French ship for a collision on the high seas with a Turkish ship. It is remembered today mainly for its paradigmatic statement regarding the free will of sovereign states. The "Lotus principle" says that, in the absence of a clear legal prohibition, the acts of states are presumptively legal under international law. The Case of the S.S. "Lotus" (France v. Turkey), "Judgment of 7 September 1927," PCIJ Series A, n°. 10, at p. 18.

national act without knowing the identity of the agent. Consider an example: a whale is killed on the high seas and brought on board a whaling ship. Is this legal or illegal? The International Convention for the Regulation on Whaling is the dominant legal instrument on the question, and the central obligation of ICRW members is to abide by the catch limits set by the International Whaling Commission. Since the mid-1980s the Commission has maintained that the catch limit for most commercial whaling shall be zero —that is, it has imposed a moratorium on killing whales for commercial purposes. Australia, Iceland, and Japan are all signatories to the ICRW, but Iceland has opted out of the moratorium while Japan authorizes its whaling as 'scientific' rather than 'commercial.' The act of killing a whale is therefore illegal if it is done by Australia, which accepts the moratorium and does not grant scientific hunting licenses, but is legal for Iceland (Hurd, 2012).15 It is legal as well for Japan if Japan submits the prior paperwork to declare that its whaling has a scientific purpose, as it consistently does even after the recent decision of the International Court of Justice.

This is not an anomaly. The international legality of an act depends on which state undertakes it and what that state says about the act and what it has previously said about its relationship to the pieces of international law that may apply. International legal obligations therefore attach to states in a particularistic fashion that contradicts the element of equality that is said to be essential for the domestic version of the rule of law. In domestic law, the identity of the actor should not enter into the assessment of how law regulates the act; in international law, it must.

The Rule of Law Based on Justification?

The third alternative draws from the ubiquitous practice of states using international law to justify their policies. States routinely provide explanations for how their conduct is consistent with their international commitments, and as a consequence we are

accustomed to competing diplomatic and legal accounts regarding compliance and there is no possibility for an 'objective' settling of the differences. Rather than see this as a formality or cheap-talk, it can instead be seen as the core of the rule of law itself. Governments find political value in showing that they are complying with the law —the third approach sees this as a discourse of legitimation rather than as a comparison with an objective standard of compliance (as in the first approach).

The premise for this approach is that social action is impossible without a conceptual framework of meaning and language, which allows agents to understand, explain, and justify their desires and their actions (Hurd, 2015). In the international setting, this implies that states need some set of resources by which they can give meaning to their actions and those of others —and I suggest that international law provides those resources for foreign policy and international affairs. This is a necessarily implication of the constructivist insight that states and their actions are social constructed. Since the meaning of state acts is neither self-evident nor fixed by material conditions, actors are always involved in the process of interpreting and constructing their interests, their relations, and their ideas about the interests and relations of other actors. Governments use the categories and concepts provided by international law to explain their needs and their actions — these include ideas and rules around sovereignty, intervention, self- defense, humanitarian rescue, self-determination, and much more.

Belief in the "ideology" of the international rule of law ensures that legal resources carry political weight, and that being seen as acting legally is politically powerful for states. They are an available pool of and socially legitimated pool of such ideas and concepts. Legal resources are a useful, and powerful, instrument in the process of 'sense-making' for states.

The practice of making sense of the world through legal categories presumes both argumentation and competing interests, and so as a scholarly attitude it implies both of the more conventional approaches to diplomacy mentioned above. It is by reference to

international legal rules and categories that states understand, explain, and justify their actions and policies to themselves and others. The process does not necessarily lead to agreement over either how the issue will be resolved or how it will be understood, but it consumes, produces and is limited by international legal resources.

Conclusion

Seeing the international rule of law as consisting of the use of law to legitimate state policy leads to three implications for the relationship between international law and politics.

First, it leads to an instrumental view of international law. That is, it sees law as a resource which states and others put to use in the pursuit of their goals. State interests are therefore inseparable from the practices of international law. This contradicts a common assumption that law must stand independent of the preferences of the agents. My view is that it is unrealistic to insist on that separation — it is abundantly clear that in practice governments strive to make international law work for them by invoking it in defense of their policies. The conventional view rejects such uses of law as threats to the underlying legal order; I see them as essential to the legal system, and indeed as constitutive of it.

Second, my approach sees international law as a set of resources. This complements the instrumental point above, and recognizes that law contains the capacity to legitimate state policy. International law provides the resources with which states talk about and understand their behavior.

Finally, I suggest that the content of international law is changed in the process of being used to legitimate state policies. Through the practices of diplomacy, as states give legal justifications for their actions, one can see the mutual constitution of international law and foreign policy. The meaning of international legal rules arises from how it is invoked in the diplomacy of states. As David Kennedy and others have noted, the favorable legal in-

terpretations that states give to legitimate their own actions are part of the process of international politics, which are inseparably legal and political. Moreover, the practice is unavoidably productive of international legal resources: it situates, specifies, and refines the rules. As governments and others deploy international law to explain and justify their actions, they contribute to the meaning of the rules they invoke. This is both motivated by the political desires of states but also constraining on them.

The approach that I set out here suggests that disagreements over the interpretation of international law are inherent in the legal project itself. This reflects the political nature of the system of international law and its utility in the political struggle over legitimation and delegitimization for states.

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