The International Rule of Law: Law and the Limit of Politics

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The international rule of law is often seen as a centerpiece of the modern international order. It is routinely reaffirmed by governments, international organizations, scholars, and activists, who credit it with 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.

In light of this apparent consensus, my goal here is to understand what the rule of law means for international affairs, both in practice and as a concept. In this essay I examine how it is used by states and others to shape world politics and from that practice derive a definition. Because it is rarely carefully defined and its alternatives are not explained, the international rule of law appears as a charmed concept, essentially without critics or doubters.

I find that, rather than being a universal institution that expresses the shared interests and goals of states, the international rule of law provides political resources with which states and other actors legitimize and delegitimize contending policies. The atomistic nature of the interstate system means that the international version of the concept cannot be modeled on the domestic one, but also that it cannot be reduced simply to the obligation on states to comply with their legal commitments. In practice, the meaning of compliance is the very thing that states are arguing over in many international controversies.

The alternative, then, is to see international law as a set of resources, as tools that governments and others use to explain, legitimate, and understand their policies. This view does not presume a consensus around the meaning of compliance, and yet can account for the pervasive practice of using law to frame and argue over

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international actions. This is an instrumental view of international law that does *not* deny the power of international legal rules and institutions; rather, it shows how international law is situated within international politics, as opposed to the more conventional view that sees international law as an alternative to it. To appreciate the political power of international law involves more than just asking questions about who writes the rules and for whose interests. It also means examining how international law is used, what it means, and what it replaces.

By "international law" I mean the rules and institutions of interstate, public international law, such as are outlined in the "sources of law" clause of the Statute of the International Court of Justice. These include treaties and conventions consented to by governments and legally binding upon them, as well as non-treaty devices such as customary international law and *jus cogens* norms, which are binding even in the absence of explicit state consent. My definition excludes soft-law rules as well as international norms, as neither of these create formal legal obligations on governments.

The Rule of Law, Domestic and International

The concept of the "rule of law" describes a social system that divides society into political and legal domains. It separates the legal from the political, 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 they do so knowing what the rules specify and the implications of compliance and violation. In its domestic manifestation, this idea has been thoroughly debated and contested, but there has been less discussion of how the idea applies to the relations among states in the international system.[1] 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. The role of international law in the relations among sovereign states is not analogous to the role of law among people in a domestic society.

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.[2] Simon Chesterman has summarized these three commitments as "regulating government power, implying equality before the law, and privileging judicial process."[3] 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, these commitments preserve space for the autonomy of individuals and groups under the authority of a state.[4] Clear, stable, and equal laws are essential if a legal system is to give what Joseph Raz calls "effective guidance" to citizens on how their behavior will be judged.[5] Thus, as Renáta Uitz 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."[6]

The international rule of law is premised on the opposite concern. In a system of atomistic, decentralized authority units such as sovereign states, the "individuals" have more legal autonomy than the common good can tolerate. The excess autonomy of the units must be limited in order to preserve international society itself. The traditional view of international law is that it provides a self-imposed set of limits on states in order better to 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."[7]

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. This is evident in the fact that practices that are 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. Moreover, self-interest is accepted as the motivating force behind these choices. For instance, states pick and choose which international obligations to accept and which to decline; to some extent 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.

As a consequence, it cannot be said that treaty commitments apply equally to all states. One cannot assess the legality of an international act without knowing the identity of the actor. 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 (ICRW) 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.[8] 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. 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.

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.

In Search of a Definition

If the international rule of law is not simply the interstate version of its domestic counterpart, then what is it? The most common answer is that the international rule of law exists in the obligation on states to comply with their legal commitments. I suggest below that this is problematic, but let us first consider the claim on its own terms.

It is no overstatement to say that compliance has a central place in the contemporary international legal system. It links legal causes to behavioral effects; it is the

measuring stick for the success or failure of a law; and it is the reference point for the normative evaluation of a state's choices, and of the state's character itself. Compliance is almost universally preferred over violation. This is true whether one approaches the issue in moral, legal, or consequential terms: compliance is morally desirable, legally required, and consequentially beneficial for humankind. Legally, it 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. While the origin or foundation of this obligation is up for debate, it is uncontroversial to assert that states have a legal obligation to comply with their treaty commitments and other sources of law.[9]

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, 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."[10] 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,[11] international stability,[12] and perhaps even the progress of civilization itself[13] are said to be dependent on compliance.

Where there are differences of opinion about legal issues, the classical schools of international law point to the legal process of argumentation and interpretation as the solution. Alexander Orakhelashvili says that the interpretive process can resolve these questions and reveal the "objectively ascertainable" obligations of states.[14] Ian Johnstone, indebted to Habermas and the "argumentative school," suggests that consensus can emerge as actors argue their positions using the common language of the international legal epistemic community.[15] Both have faith that disagreements over compliance can be talked through to a resolution. As Hersch Lauterpacht noted, "subjectivism has no place in international law . . . . [A]lthough the will of the state is essential for the creation of the common will, it is the latter, and not the will of the individual state, which is the source of international obligations."

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 rather than violate international law, and to pursue the negotiated common position rather than the individualistic, short-term self-interested one. The dichotomy between law and power is popular among scholars of both domestic and international politics. Habermas, for example, said that social order rests on the "normative taming of political power through law."[16] And it is this spirit that David Kennedy recognized when he noted 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."[17]

The emphasis on compliance leads to several conceptual and practical problems. As Rob Howse and Ruti Teitel have pointed out, much of the energy animating international political disputes comes from competing visions of what constitutes "compliance" in the first place.[18] It is no simple matter to code international behavior as "compliance" or "noncompliance" with legal obligations; this requires several interpretive moves, each of which entails much controversy. First, which international rules apply? Second, what do those rules mean? 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 explicitly reaffirms a state's inherent right to self-defense. These difficulties lead many scholars to avoid trying to measure compliance at all when assessing the behavioral impacts of international law. James Morrow asks instead "whether broad patterns of acts . . . are consistent with the standards of the relevant treaty," rather than whether state acts are technically compliant.[19] In a similar fashion, Beth Simmons operationalizes compliance in terms of changes to a state's human rights policies.[20] More dramatically, Lisa Martin concludes that the attempt to achieve an objective coding of compliance is often futile, and argues that the positivist research program on international law needs to look elsewhere for its dependent variable.[21]

Half of the problem is thus that compliance is underspecified. The other half is that even where compliance does have settled meaning, that meaning can change in response to state practice: states remake international law in the process of invoking it to justify or argue over their policies. This is easy to see in customary

law, where the progressive development of law proceeds through deviation from existing law.[22] It is equally true of treaty law, where the expectation is that treaty rules should be interpreted in light of contemporary problems and needs.[23] For instance, the voting rule for the UN Security Council has come to be understood to say that only a negative permanent-member vote counts as a veto, while the plain language of Article 27(3) says clearly that everything other than an "affirmative" vote is a veto.[24] The change came about because the permanent members realized early in the Council's history that the body would function better if the rule were understood in the new way rather than in the way written in the text.

To summarize: States possess some capacity to transform their apparent noncompliance into compliance. Withdrawal from treaties is one form; the collective legitimation of new treaty interpretations through "constructive noncompliance" is another.[25] As David Kennedy and others have noted, the favorable legal interpretations that states give to legitimate their own actions are part of the process of international politics, which are inseparably legal and political.[26] 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.

Law and Politics

For much of international law, the meaning of "compliance" follows from state practice, as opposed to existing prior to it. Orakhelashvili says that international law is whatever it is *agreed* to be by states, and not what academics, diplomats, and others might like it to be.[27] This is a useful corrective to *de lege feranda* wishful thinking, but it must be read broadly to include the ways in which the content of law shifts in response to state practice. Reducing the concept of the international rule of law to the idea that states must comply with their obligations is to eliminate the concept's political content. Such an obligation indeed exists, but it does not adequately characterize the relationship between international law and international politics.

The view that international law supplants politics in world affairs is also deep-seated. It is embodied in the classical theories of Lauterpacht and J. L. Brierly, who sought to identify the distinctive legal realm and insulate it from the political.[28] It

lies behind President Eisenhower's diagnosis of the nuclear dilemma, when in 1959 he said that "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."[29] William Bishop, in defining the international rule of law, argued that "the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals."[30]

This position has been updated for the twenty-first century by John Ikenberry. His recent book, *Liberal Leviathan*, suggests that the consensual nature of the international legal system is its defining characteristic, and that it distinguishes the contemporary U.S.-led international order from an "imperial" system:

> Order based on consent is organized around agreed-upon rules and institutions that allocate rights and limits on the exercise of power. Frameworks of rules and arrangements are constructed that provide authoritative arrangements for international relations. State power is not extinguished in a consent-based order, but it is circumvented by agreed-upon rules and institutions. Disparities of power between states may still matter in the structuring of consensual, rule-based order, but the rules and institutions nonetheless reflect reciprocal and negotiated agreements between states. The British and American-led liberal orders have been built in critical respects around consent.[31]

Ikenberry is confident that the international legal system embodies the goals of U.S. foreign policy and also stands for international good governance, and he promotes compliance with international law as the best policy choice for U.S. leaders and those in other countries. American "global governance" thus takes place through the mechanism of compliance with existing laws, and the power and politics behind the rules are obscured.[32]

The separation between law and politics in international affairs, presented as two competing modes of organizing or motives for behavior, is misleading. It sidesteps the political power of law and the legal framing of politics. To appreciate the complexities between the two requires us to think more broadly than measures of compliance, and to turn our attention instead to how international law is used in politics and how politics is shaped by law. This is what Oscar Schachter sought to identify in his examination of how Dag Hammarskjold, as Secretary-General of the United Nations, made use of legal resources in diplomacy. "By a

discriminating and skillful use of legal principles," he notes, Hammarskjold "was thus able to further his diplomacy of conciliation and by its success reinforce the effectiveness of law."[33] Schachter's view reveals a more realistic account of the practical relationship between international law and politics, and is a step toward understanding the distinctively *international* version of the rule of law.[34] The political power of international law is evident in the degree to which it is at once constraining on state choices, enabling of them, and constitutive of the categories of behavior and meaning that make it possible for states to act and interact.

All three aspects (constraint, enabling, and constitution) are evident in the formulation of U.S. foreign policy in regard to the use of chemical weapons in Syria in August 2013. The chemical weapons episode demonstrates how the idea of compliance is at once central to the discourse of international law and also shifts under the influence of the political uses of the law. After the gas massacre in the Damascus suburb of Ghouta on August 21, 2013, several governments and activists sought a military response against President Bashar al-Assad and the Syrian regime. This was motivated by a desire to damage the Assad regime's capacity to carry out further chemical attacks, to weaken the government and aid the rebels, and to make a symbolic gesture against Assad and in favor of a principle of nonuse of chemical weapons. As military strikes were opposed by Russia (and perhaps also by China) in the Security Council, it became a pressing policy question whether the United States or others could, would, and should use military force without the Council's approval. In this instance, the constraining force of law is clear in that unilateral military action is generally seen as a violation of the UN Charter and thus as illegal.

In the face of this consensus against the unilateral use of force, the United States sought alternative legal pathways to justify its desired policy. It sought two pieces of evidence in international law: a piece of international law that Assad's gas attack had violated, and a piece of international law that could encompass a military response. The first was easily found in Common Article 3 of the Geneva Conventions. This is part of a treaty that the Syrian government has signed and ratified. (It had not, at the time, signed the Chemical Weapons Convention and so could not be accused of having violated that treaty.) The second legal justification was more difficult to find, given the relative consensus over the ban on war in the Charter. President Barack Obama's argument for the legality of the planned attacks ultimately rested on the apparent threat to U.S. national security, along with violations of international norms or "our sense of common humanity."[35]

A formal justification in black-letter international law was missing, which was noted widely in legal and policy circles as a significant weakness in the case.

This episode demonstrates the importance of legal justification. Failing to provide such justification, Obama's policy was widely seen as lacking a foundation. This is the constraining effect of international law in action: if legal resources can be found to legitimate a policy, its passage is smoothed; where they cannot be, the policy is at minimum more controversial and perhaps off the table entirely. The constitutive effects of law are evident in the degree to which states remain embedded in the international legal system regardless of their desires. States may often wish to operate outside the frames provided by international law—as the United States arguably did with respect to its invasion of Iraq in 2003 and in its use of torture under President George W. Bush—only to find that their actions are interpreted by others in terms of the categories provided by law. Despite great material power and a strong desire to take action, the United States in these instances could not escape the fact that its acts would be understood in relation to existing categories in international law, and as violations of them.

The use of law to legitimate and delegitimate state policy around the Syrian crisis shows that the political power of law extends beyond the domain of legal institutions and jurisdictions. This contradicts Brierly's view that the international legal realm is identifiable solely by the existence of judicial or arbitrary institutions to which states give consent.[36] The law has a powerful effect even without such institutions, and it is this power that states seek to harness with their strategic construction of legal arguments. These arguments are powerful even when they are not addressed to a legal institution or audience, or when they are deployed by nonstate actors who do not have legal personality, such as when Sea Shepherd claims to be an enforcement body for international laws on whaling.[37] To deploy international law in defense of one's policy is continuous with the political strategy of the state—it is not a step outside of politics.

Conclusion

In *The Illusion of Free Markets*, Bernard Harcourt examines the concepts of "free markets" and "excessive regulation"—ideas whose apparent universality has contributed so much to the construction of our world since the sixteenth century. Looking at the details of how markets have been constructed, policed, and

regulated—from the *police des grains* in *ancien régime* France to the Chicago Board of Trade at the end of the twentieth century—Harcourt finds that the concepts do not exist as prior categories with fixed meaning. "The categories themselves are misleading and empty," he says, since all markets are regulated; they rest on regulation and cannot exist without it.[38] It is political rhetoric, used to justify one form of regulation over others, that brings the categories into existence.

I find something similar in the categories of compliance and noncompliance in international law. Their content—at least for much of international law—is a function of state practice, the accumulated references to and arguments over what they permit or forbid. Their meaning, therefore, depends on their use in the political process between powerful actors. It does not stand independent of or prior to those processes. Like the notion of a "free market," international compliance is said to produce a spontaneous order that is political and morally beneficial. The normative commitments of many scholars of international law are pro-compliance because compliance is assumed to lead to substantively good outcomes. This occurs by the same dynamic that Harcourt identifies in the physiocrats' theory of the market, refined by Friedrich Hayek: "The achievement of human purposes is possible only because we recognize the world we live in as orderly. . . . Without the knowledge of such an order of the world in which we live, purposive action would be impossible."[39]

To be clear, this does not imply that international law is unimportant, or that state interests remake international law as they wish. Quite the opposite: the legal framing for state policy is a very strong force. It puts a heavy hand on state choices in international life and has enormous influence over how states think about their interests. The important point, however, is that these effects are all the more remarkable for the fact that they appear in a setting where "compliance" as a meaningful category of law follows from, rather than precedes, state behavior.

NOTES

[1] An excellent exception is Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law* 56, no. 2 (2008), pp. 331–61.

[2] The concept, of course, cannot be specific with finality, and the ongoing debates center on whether substantive individual rights must be included in the definition, whether practice ever does or can live up to the ideal, and its relationship with political power. See respectively Tom Bingham, *The Rule of Law* (London: Penguin, 2010), esp. ch. 7; Gianluigi Palombella, "The Rule of Law and its Core," in Palombella and Neil Walker, eds., *Relocating the Rule of Law* (Portland, Ore.: Hart, 2009); and the essays in Mindie Lazarus-Black and Susan F. Hirsch, eds., *Contested States: Law, Hegemony and Resistance* (New York: Routledge, 1994).

[3] Chesterman, "An International Rule of Law?," p. 336.

[4] For instance, Brian Tamanaha, "A Concise Guide to the Rule of Law," in Palombella and Walker, *Relocating the Rule of Law*.

[5] Joseph Raz, "The Rule of Law and its Virtue," ch. 11 in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979): cited in Stéphane Beaulac, "The Rule of Law in International Law Today," in Palombella and Walker, *Relocating the Rule of Law*, p. 203. See also Friedrich Hayek, who said "the laws must be general, equal, and certain," in *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt, 1955), p. 34 cited in Beaulac, "The Rule of Law in International Law Today," in Palombella and Walker, *Relocating the Rule of Law*, p. 202.

[6] Renáta Uitz, "The Rule of Law in Post-Communist Constitutional Jurisprudence," in Palombella and Walker, *Relocating the Rule of Law*, p. 82.

[7] 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, no. 10, at p. 18.

[8] This is nuanced by rules that permit some species or some geography for commercial hunting. See the International Convention on the Regulation of Whaling (1946) and its Schedule as amended.

[9] For a nuanced examination of the controversies over the obligation to comply, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010).

[10] Madeleine Albright, "International Economic Leadership: Keeping America on the Right Track for the Twenty-First Century" (address before the Institute for International Economics, Washington, D.C., September 18, 1997), www.iie.com/publications/papers/paper.cfm?ResearchID=290.

[11] Ruti Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

[12] Oona A. Hathaway and Scott J. Shapiro, "On Syria, a U.N. Vote Isn't Optional," *New York Times*, September 3, 2013.

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

[14] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (New York: Oxford University Press, 2008), p. 286. "Interpretation," he says, "must be able to lead to a concrete and conclusive outcome" (ibid., p. 287).

[15] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (New York: Oxford University Press, 2011).

[16] Jürgen Habermas, *The Divided West* (Cambridge, UK: Polity, 2006), p. 116: cited by Ruti Teitel in "Humanity Law: A New Interpretive Lens," *Fordham Law Review* 77, no. 2 (2008), p. 668. Teitel herself says "law offers a transnational normative language." Teitel, *Humanity's Law*, p. 200.

[17] David Kennedy, "A New World Order: Yesterday, Today, and Tomorrow," *Transnational Law and Contemporary Problems* 4 (1994), p. 335. Emphasis in original.

[18] Robert Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Matters," *Global Policy* 1 (2010). See also Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law," *Michigan Journal of International Law* 19 (1998), pp. 345–72.

[19] James Morrow, "When Do States Follow the Laws of War?" *American Political Science Review* 101, no. 3 (2007), p. 562 cited in Lisa L. Martin, "Against Compliance," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013), p. 597.

[20] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009) cited in Lisa L. Martin, "Against Compliance," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013), p. 593.

[21] Lisa L. Martin, "Against Compliance," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).

[22] Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell University Press, 1971).

[23] For instance, Thomas Franck, "What, Eat the Cabin Boy? Uses of Force that are Illegal but Justifiable," in Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002).

[24] On change to Article 2(4), see Franck, "Who Killed Article 2(4)?" *American Journal of International Law* 64, no. 5 (1970).

[25] On withdrawal, see Laurence R. Helfer, "Terminating Treaties," in Duncan Hollis, ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012). On "constructive noncompliance," see

Ian Hurd, "The UN Security Council and the International Rule of Law," *Chinese Journal of International Politics* forthcoming (2014), pp. 1–19; and in relation to changing laws of humanitarian intervention, see Hurd, "Bomb Syria, Even if It Is Illegal," *New York Times*, August 28, 2013.

[26] David Kennedy, *The Dark Sides of Virtue* (Princeton, N.J.: Princeton University Press, 2004). Also Talal Asad, "Thinking about Terrorism and Just War," *Cambridge Review of International Affairs* 23, no. 1 (2010).

[27] Orakhelashvili, *The Interpretation of Acts and Rules*, p. 288.

[28] See the excellent discussion in Orakhelashvili, *The Interpretation of Acts and Rules*.

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

[30] Bishop, "The International Rule of Law," p. 553.

[31] John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton, N.J.: Princeton University Press, 2012), p. 15.

[32] See Samuel Moyn, "Soft Sells: On Liberal Internationalism," *The Nation*, October 3, 2011.

[33] Oscar Schachter, "Dag Hammarskjold and the Relation of Law to Politics," *American Journal of International Law* 56, no. 1 (1962), p. 6.

[34] Hammarskjold's use of law owes much to Schachter himself, who served as his legal advisor. Kofi Annan said in 2003 that "Professor Schachter did more than any other official of the United Nations to help shape the rule of law." Cited in Wolfgang Saxon, "Oscar Schachter, 88, Law Professor and U.N. Aide," *New York Times*, December 17, 2003.

[35] Barack Obama, "Remarks by the President in Address to the Nation on Syria," The White House, Office of the Press Secretary, September 10, 2013, www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.

[36] J. L. Brierly, *The Basis of Obligation in International Law, and other papers* (Oxford: Clarendon Press, 1958), cited in: Orakhelashvili, *The Interpretation of Acts and Rules*, p. 15.

[37] The group says that it performs "a law enforcement role as provided by the United Nations World Charter for Nature." Sea Shepherd website, "Mandate," accessed November 15, 2013, www.seashepherd.org/who-we-are/mandate.html.

[38] Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, Mass.: Harvard University Press, 2011), p. 25. Emphasis removed.

[39] Hayek, quoted by Bernard Harcourt, *The Illusion of Free Markets*, p. 129.