

A Rules-Based System? Compliance and Obligation in International Law

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Louis Henkin's assertion, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" drives into the heart of the compliance debate (1979, 47). If almost all states comply with international law almost all of the time, why do they do so? And why do states sometimes not comply? As Koh (1997) observes, International Legal and International Relations scholars have inquired into the power of the rules in international affairs for centuries. Despite this, the question of compliance remains. In modern debates, the compliance question relates to John Austin's claim that international law is not law because, unlike domestic rules, international legal rules are not enforced by a coercive sovereign (Koh 1997, 2608–2609). The compliance debate seeks to explain why states comply or do not comply with international law in a decentralized system. Some scholars contend that international law exerts a 'compliance pull' on states whereby they incur obligations. Whereas rationalists affirm that states, acting within their self-interest and power capabilities, comply with international law through concepts such as coincidence, cooperation, coercion, and consent. This essay draws on constructivist epistemology and argues that these concepts are not the only explanations of state behaviour nor are they necessary for compliance. They are constitutive institutions based on the perception of power, interest, and obligation determined by a community of practice through continuous interaction and congruence with underlying social norms.

Explanations of compliance often refer to a sense of legal obligation, the perception of the distribution of power, and the interests of states. Rational institutional approaches to compliance assume that state preferences are given and fixed (Guzman 2008, 21). By focusing on material interests as a reason for state behaviour, the concept of obligation holds no analytical interest for rationalist perspectives (Brunnée and Toope 2010, 12). Constructivism does not accept assumptions of power, interest, and the structure of the international system as given. The identities of actors are mutually constituted through interaction and communication with other actors (Wendt 1992, 399). International law, as a social process where the interests and identities of actors are shaped, is important in determining state behaviour (Brunnée and Toope 2010, 12). Unlike structuralists, the realisation of legal obligations is not unidirectional. Neither is the process of socialization or 'acculturation' (Goodman and Jinks 2004). Rather, the practice of legality holds a duality where agents and structures are mutually constitutive and inherently social (Finnemore and Toope 2001, 14). This essay thus allows for a wider approach regarding the constitution of legal enforcement mechanisms, including obligation. Constructivist approaches to obligation and compliance are first analysed. Normative, realist and rationalist perspectives are subsequently considered in reference to the concepts of coincidence, cooperation, coercion, and consent. Through this essay it is determined that these concepts depend on the perception of power and interest, allowing for a dismissal or a limited view of obligation and the role it plays in state compliance with international law. These four concepts can be constituted through a practice of legality, but one cannot effectively explain compliance by referring only to them.

While acting out of self-interest may guide behaviour, acting on the basis of an obligation is distinct from self-interest. For Reus-Smit (2003), obligations to comply with international law pre-suppose the existence of social relationships (595). Obligation can be considered as the reason for rule observance, whereas compliance is the fact of the observance of an obligation. Recognizing that one has an obligation to act in a particular way is to accept that one has a duty to act that way (Reus-Smit 2003, 594). Obligation can, therefore, counsel rule observance even when this conflicts with a state's self-interest (Reus-Smit 2011, 341). In order to have a satisfactory account of international

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legal obligation, Reus-Smit posits that obligations accepted by actors under legitimate institutions need to be historically and socially grounded (2003, 594). On the other hand, Brunnée and Toope (2011a) contend that just as international law is not reducible to economics or sociology, neither can it be reduced to history (352). Compliance, just as obligations, exists when actors build shared understandings and uphold a practice of legality (Brunnée and Toope 2010, 121).

The only source of obligation for states acting in their rational self-interest derives from consent to international legal rules (Reus-Smit 2003, 606). McDougal and Lasswell assert that international law only comprises of rules to which all states have consented (Armstrong, Farrell, and Lambert 2012, 93). Through consent, international law becomes a functional and regulatory institution of international society. Under the principle *pacta sunt servanda*, the rules and commitments contained in legalized international agreements are considered obligatory, subject to various defences or exceptions, and are not to be disregarded as state preferences change (Abbott et al. 2000, 409). Legal obligations are therefore different from those resulting from coercion, comity, or morality alone (2000, 408). States are legally bound to a rule or commitment in the sense that their behaviour is thereunder subject to scrutiny under the general set of rules, procedures, and discourse of international law (2000, 401). The concept of consent does not explain how states can be bound by self-imposed obligations. In attributing legal obligation to an internal feature of the international legal system, accounts of consent are forced into assumptions about the external legitimacy of the system (Reus-Smit 2003, 611). Reus-Smit determines this is the problem of interiority. Principles of legal obligation require positive reinforcement by a community of practice.

In their interactional account, Brunnée and Toope argue that obligation or 'fidelity' to comply with international law is generated because adherence to certain legal criteria, in the creation and application of norms, produces international law which is legitimate in the eyes of those to whom it addresses (2011b, 312). Legal obligation is created with the conditions of legality are met, providing legitimacy. International legal rules are not simply imposed and projected out to willing or unwilling recipients even if their preferences for compliance change (Brunnée and Toope 2010, 121). Rather, legal rules and their mechanisms of enforcement must be embraced by the salient community of practice and must become intertwined in their interactions (Brunnée and Toope 2010, 114). The congruence of existing legal norms and underlying social norms allows for the 'self-binding' effect of international law. Consent has the potential to be constituted and intertwined within a community's legal practices, but the existence of consent does not necessitate legal practice itself. Consent cannot be viewed as 'obligation inducing' but can only be understood as a 'signifier' of obligation constituted by a community of practice in response to the historical transformation of statehood legitimacy (Reus-Smit 2004, 43). States then act as if they were 'bound' by consent but obligation itself is derived from pre-existing social norms and interactions (Franck 1988, 755).

From a deliberative perspective, legal obligations are derived from determining the validity of the rule through communicative action. The prescriptive force of norms appears as a claim to validity, which is mediated by language and can be validated discursively (Kratochwil 2011, 97). The importance of communication and the use of legal language are reflected in various constructivist accounts (Onuf 1994). However, deliberative positions of international legal obligation assume to be intrinsic to all legal discourse and are not usually historically or culturally situated (Reus-Smit 2003, 603). As Barkin (2003) argues, constructivist works drawing on Habermasian theory cannot easily separate social theory (public spheres matter) from normative theory (public spheres are good) (336). Deliberation and persuasion, alongside contestation, acculturation, and coercion can be viewed as 'modes of interaction' that shape and are shaped by the norms within a community of practice but are not inherent in the practice of legality (Brunnée and Toope 2010, 111).

Franck's (1988) normative account claims that states are only obligated to observe international legal rules if it is legitimate or in accordance with a right or 'fair' process (711). Compliance is secured – at least in part – by the perception of a rule as legitimate by those to whom it is addressed. While Franck views legitimacy as a trait that can be added to rules already considered obligatory, Brunnée and Toope suggest that the legitimacy of international law, its obligatory force, and its compliance pull are inextricably linked (2010, 95). Despite criticism from liberal scholars (Tesón 1992), Franck's account of obligation ultimately rests on liberal normative ideas. Obligations to comply with international law would only incur to states in situations where liberal political and legal norms are embedded in wider social interactions (Reus-Smit 2003, 601). Koh argues that Franck's approach, as well as the Chayes's (1993)

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managerial approach, omits an account of the transnational legal process whereby global norms are not just interpreted but are internalized into the domestic legal system (1997, 2659). The habitual practice of international law ensures that states are morally obligated to comply. Brunnée and Toope's interactional account is complementary to Koh's. For norm internalization to occur, relevant communities of practice must expand to engage domestic actors in their shared legal understandings (Brunnée and Toope 2010, 118). Koskeniemi (2011) argues that Brunnée and Toope's interactional law tends to draw on the Chayes's managerial approach that doesn't question the need for 'compliance' and is only concerned with the legitimacy of institutions to which its actors are assumed to have already committed (320). Brunnée and Toope do agree with the general managerial argument for a cooperative, problem-solving approach to compliance but they suggest that the Chayes's do not sufficiently consider the circumstances in which enforcement can play in international law (2010, 109–110). Nevertheless, as these normative accounts demonstrate, obligation to comply with international law cannot be solely determined through legal obligations incurred through consent. Rather, obligations are constituted by states through continuous interaction and congruence with underlying social norms.

Normative ascriptions of legal or moral obligations for compliance are largely dismissed in realist and legal positivists perspectives. For these scholars, international law cannot transform state behaviour. The only sense of obligation derives from the fear of coercion or the perception of the potential use of force or sanctions (Reus-Smit 2003, 597). Drawing from command theory and the Austinian tradition, realists claim that international law is not 'law' as there is no sovereign to coerce states into compliance (Bolton 2000; Carr 2001). Patterns of state behaviour with international law are reflective of those that emerge in international relations where states act in pursuit of their self-interests and the distribution of power. As Morgenthau (1940) notes, "where there is neither a community of interests nor balance of power, there is no international law" (275). Under international law's decentralized system, there is a reliance on powerful states to enforce legal rules. Coercion is thus the only means of achieving state obedience to international law.

As international law serves the interests of powerful states, rules would only be subject to change if prompted by a change in the distribution of power. Smaller states, lacking in Westphalian sovereign autonomy, are coerced to obey international legal rules (Krasner 2000). However, smaller states are not simply subject to the will of powerful states as they can 'bandwagon' in order to hold powerful states accountable. The United States, for example, has been held accountable by international society for violating international legal rules at Guantanamo Bay (Reus-Smit 2004, 20). Even though it is possible to hold powerful states accountable through mechanisms such as coercion, realists would assert that this cooperation between states can only exist on an ad-hoc basis as states pursue relative as opposed to absolute gains (Mearsheimer 1994, 12). International legal institutions and any sense of obligation are not essential to ensure compliance with international law since international legal institutions only reflect the distribution of power.

Subsequently, legal language serves no legitimating function for compliance. If the language of law is perceived as legitimate by other states, powerful states acting as stand-in sovereigns can rationally act within their self-interest to use language to maximise their power (Gray 2008; Kennedy 2009). For Koskeniemi (2009), language should therefore not be viewed as transformative, as it hides the contingent nature of the choices made by states in order to rationally justify their actions (12). This dismissal of legal language does not adequately explain why states consistently speak as though international law is obligating (Reus-Smit 2003, 598). While obligation does not always supersede power or interest, it is an oversimplification to say that obligation does not have an impact on powerful actors (Brunnée and Toope 2010, 93). Brunnée and Toope note that powerful actors have less freedom to disregard international law due to the criteria of legality (2010, 93). All actors, even the most powerful, are thus constrained to some extent by international law.

Understanding compliance through materialist perceptions of power, that brute material forces have causal powers independent of ideas, allows for a dismissal of obligation as impacting the behaviour of powerful states. While power matters, so do the relationships and ideas that define it (Brunnée and Toope 2010, 93). As Wendt (1999) observes, material forces have the effect that they do because they interact with ideas (112). Power is not causal but is constitutive as interest provides meaning for power. Ultimately, it is our ambitions, fears, and hopes – the things we want material forces for – that drive social evolution, not material forces (1999, 113). Materialist perceptions of power cannot necessarily account for the meaning actors associate with them. Without Austin's ideas of international legal

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enforcement, powerful states cannot always use coercion as a mechanism of compliance. On the other hand, if the ideal is to maintain international order with international law guiding diplomatic relations, coercion is not always essential as states may hold a preference to comply (Bull 2012). Materialist conceptions of power, therefore, do not causally result in the use of coercion to ensure that states comply with international law. As Brunnée and Toope suggest, pressure exerted by powerful actors to enforce compliance is unlikely to be effective in the long-run unless embedded in a practice of legality (2010, 93). Power itself cannot causally explain international legal compliance. However, as Wendt notes, it is not ideas 'all the way down' since material sources can influence social relations (1999, 111). Nonetheless, ideas interacting with material forces do influence how coercion is constituted as a mechanism of enforcement but it is necessary for compliance.

Rationalist theories differentiate based on how power and interests are constituted with different ideas. Keohane's (1997) functional theory of institutions adopts the same assumptions as realists, where states act within their self-interest and power capabilities but determine that it is within a state's interest to comply with international law. By lengthening the 'shadow of the future', institutions provide information to participants, diminishing realist perceptions of uncertainty, and help facilitate cooperation (Keohane 1997, 499–500). Compliance with international law can be explained through cooperation, since institutions link normatively prescribed behaviours, such as filling commitments, to the continued receipt of material or normative reputational benefits (Guzman 2008, 212; Keohane 1997, 500). Institutional theory is limited in explaining how normative behaviour and reputations for compliance are considered 'good' and thus how preferences towards compliance are realized. Moravcsik (1997) contends that liberalism explains the configuration of state preferences that are assumed by institutionalists (537). Complementary to liberalism, legal process theory associates international law with the realization of values, including human rights, as opposed to the imposition of normative behaviour (Slaughter 1993, 211). Material incentives in interaction with liberal ideas can work to promote 'legitimate' behaviour and 'good' reputations for compliance. While neoliberal accounts of cooperation can effectively explain why states comply with international law, they can only do so when liberal norms are embedded in a community of practice. This can explain why it appears as though there is 'law among democracies' (Slaughter 1995). Explaining compliance as a means of cooperation thus relies on underlying social norms that incentivize a state's preferences towards compliance.

For rationalists, cooperation motivates states to 'codify' ambiguous customary international law through the establishment of modern treaties that increase determinacy and narrow issues of interpretation (Abbott et al. 2000, 414; Goldsmith and Posner 2005, 85). Franck notes that the more determinate or precise an international legal rule, the more difficult it is to justify non-compliance due to the rule's legitimacy (1988, 714). However, if a rule is too demanding, it could provide states incentives to break international legal rules (Keohane 1997, 496). Abbott and Snidal (2000) argue, 'softer' forms of legalization can offer superior institutional solutions since compliance does not rely on high forms of legalization. Finnemore and Toope (2001) are critical of this institutional approach as modern treaties are premised on the need for positive reinforcement of obligations rather than on adjudication and sanctions for non-compliance (752). Liberal moral obligations for compliance can incentivize states to cooperate through international legal institutions. However, this must be congruent with the underlying social norms of a community of practice. If a state violates a law because it is perceived to be within its interest, the rule in question may have been formally valid but might not have incited a sense of obligation that could have influenced or pulled against a state's interest (Brunnée and Toope 2010, 93). Non-compliance can be reflective of a disparity between international law and underlying social practice (Finnemore and Toope 2001, 744).

'Softer' legalization may be more indeterminate but it still relies on a continuum of the codification and institutionalization of international legal norms and rules. Ruggie (1992) observes that multilateral cooperation does not necessitate formal institutions to ensure compliance. He demonstrates how, until recently, neither regimes nor formal organizations played significant roles in the definition and the stabilization of international property rights (1992, 567). Drawing on H.L.A. Hart's account of formerly land-locked states, Reus-Smit also explains how states incur immediate obligations to comply with international law on the basis of their geography and the association of certain behavioural norms to holding access to the sea (2003, 600). Goldsmith and Posner (2005) note the inadequacy of this immediate obligation explanation as it determines that states can be bound to a customary law they had no role in creating (189). Additionally, Goldsmith and Posner are sceptical of multilateral cooperation since the establishment of treaties cannot solely solve collective action problems (2005, 87-88; Posner 2009). Treaties and

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institutions are ultimately not integral to explain cooperation. They can often appear to rational institutionalists as objective facts that reinforce certain behaviours (Wendt 1992, 411). As Wendt (1992) argues, intersubjective understandings and expectations can have a self-perpetuating quality, constituting path-dependencies that new ideas about the self and the other must transcend (411). The codification of international legal rules through treaties based on state preferences to cooperate is thus constituted as 'modes of interaction' that can only explain compliance if accepted by a community of practice.

Cooperation does not always require the coordination of normative ideas. For Goldsmith and Posner, states can cooperate on a coincidence of interests. Behavioural regularity among states occurs simply because each state obtains advantages from a particular situation, which happens to be the same action taken by another state, irrespective of the action taken by the other (Goldsmith and Posner 2005, 27). Explaining compliance as a coincidence of interests relies on wider social relationships and norms that constitute the interests of states. Reputation, for example, needs to be considered within the existing reputations states hold in international society. Otherwise, states can gain reputational benefits from compliance with international legal rules that are already consistent with their perceived behaviour (Guzman 2006, 383). This is a limitation of Goldsmith and Posner's 'rational' account. By not explaining which interests matter, how they are formed, and how they are discovered, Goldsmith and Posner provide a thin account of rationality that is more discursive rather than empirical (Hathaway and Lavinbuk 2006, 1406). As Hathaway and Lavinbuk (2006) note, a rational account, when not anchored by some larger theory of the world that provides additional assumptions about state interests or behaviour, tells us very little about the form and function of international law (1422). The underlying assumptions of Goldsmith and Posner's account rest on revisionist norms whereby states seek to maintain their 'democratic sovereignty' (Anderson 2006; Hathaway and Lavinbuk 2006). Power and interest explanations presuppose ideas, and to that extent are not rivals to ideational explanations (Wendt 1999, 135). Consequently, Goldsmith and Posner can appear more idealist than rational in their approach to cooperation and the coincidence of interest.

The coincidence of interests depends on the perception of states interests as well as underlying assumptions of normative behaviour. It is not a necessary explanation of compliance otherwise. This account of compliance also negates the roles interaction and communication play in generating and continuously constituting shared understandings in the practice of legality. If an actor merely follows their interest, or even their normative belief, without consideration of international law, Dill (2014) asserts that the intellectual and motivational effects of international law do not ensue (52). Koh's transnational account suggests that compliance is no 'coincidence' as the interests of states are influenced by the internalized habit of international law that instils governments with an obligation to comply. Goldsmith and Posner assert that normative accounts offer little 'empirical evidence' of the causal influence of international norms on state preferences (2005, 104). Keohane also questions this causal impact (1997, 493). For Goldsmith and Posner, what they call 'coincidence of interest' can seem to explain why states often appear to comply with treaty regimes (2005, 28). Finnemore and Toope argue that rational arguments for treaty compliance ultimately rest on the notion of 'promise keeping' as opposed to the transformative character of international law (2001, 752). States, therefore, cannot independently pursue their interests without interaction in the transnational legal process. Any sense of legal obligation or compliance would not occur.

Even Goldsmith and Posner concede that concepts of coincidence, as well as coercion, cannot fully capture compliance with international law. If each state engages in the same action for self-interested reasons regardless of what the other state does, then there would be no reason to invest resources to enter an agreement codifying behaviour (Goldsmith and Posner 2005, 88). They argue that modes of compliance such as coercion, coincidence, cooperation, and coordination cannot always independently explain compliance, but can in combination with one another. However, their thin rationality and limited explanation of compliance, allows the same legal rule to reflect all four models depending on changes in state interest and power (Hathaway and Lavinbuk 2006, 1423). Even when used effectively together, these concepts of compliance cannot account for the interactive and socializing process in which mechanisms of enforcement and state interest are constituted.

Constructivist and rationalist approaches to international relations and international law are often juxtaposed through the lens of 'logic of consequences' and 'logic of appropriateness'. Especially when materialist scholars do not take constructivism as its own methodology and are instead view it as an extension of the legal process or liberal

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approach to international law. As Guzman remarks, constructivism is a theory that helps rationalist approaches to understand how state preferences come about (2008, 21). As this essay demonstrates, rationalist perceptions of power and interest influence the constitution of coincidence, cooperation, coercion, and consent as concepts to understand state compliance with international law. If power is perceived to reside in the transnational legal process or if it is only within a state's preference to comply with international law that is 'fair', conceptions of obligation must also be considered. These concepts are thus not the only explanations of behaviour nor are they necessary for compliance. They are 'modes of interaction' determined by a community of practice based on the perceptions of power, interest, and obligation in congruence with underlying social norms. While the concepts of coincidence, cooperation, coercion, and consent can be constituted through a practice of legality, one cannot explain compliance only by reference to them.

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