

Why Do States Mostly Obey International Law?

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HEATH PICKERING, FEB 4 2014

All states in the contemporary world, including great powers, are compelled to justify their behaviour according to legal rules and accepted norms. This essay will analyse the extent to which states comply and the reasons for their compliance. Essentially, the extent to which states follow their international obligations has developed over the past 400 years. From a historical perspective, international obligations and accepted norms were founded following two key developments in European history. In 1648, the Treaty of Westphalia ended the Thirty Years' War by acknowledging the sovereign authority of various European princes.[1] This event marked the advent of traditional international law, based on principles of territoriality and state autonomy. Then in 1945, again following major wars initiated in Europe, states began to integrate on a global scale.[2] The UN Charter became the international framework for which norms of sovereignty and non-intervention were enshrined. Now, as a result of modern technology, communication, transport, and more, the evolving process of *Globalisation*, "The internationalization of the world", [3] has provided an opportunity for international law and accepted norms to reach every corner of the globe.

However, the development of international law and accepted norms has not compelled states to comply all the time. Instead, the trend over the past 400 years has shown that states have been *mostly* compelled to justify their behavior according to legal rules and accepted norms. The emphasis on *mostly* should be stressed. Even though the UN Charter does not permit violating sovereignty through the use of aggression, the extent to which states follow their international obligations varies. Louis Henkin's book, *How Nations Behave*, articulates the extent of compliance.[4] He said, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time".[5] As such, the trend in contemporary international relations is that war remains possible, but it is much less acceptable now than it was a century or even half a century ago.[6] The benefit of the trend is that almost full compliance is said to lead states into a pattern of obedience and predictable behaviour.[7] Therefore, conflict only arises when countries fail to comply.

States attempt to manage the friction with ongoing compliance through the principle of *pacta sunt servanda* – the adherence to agreements.[8] Over time, such agreements to norms and treaties have diminished sovereignty, increased international institutions, given rise to non-state actors, and rapidly developed the contemporary customary and treaty based rules system.[9] The evolution of the dispute-settlement procedures of the World Trade Organisation (WTO), the establishment of the International Criminal Court (ICC), and the establishment of numerous global treaties illustrate states agreeing voluntarily to give up a portion of their sovereignty.

Degrees of Compliance

The difference in compliance varies from state to state. The variance is not limited to weak and powerful states, but also to comparatively similar states. A study by Tanja Börzel et al. illustrates the distinction of varying compliance between EU member states.[10] Their data finds that EU member states' non-compliance with European law varies between and within member states.[11] This is despite the fact that all member states have to comply with exactly the same legal requirements. For example, the UK and Italy are similar in many regards—population, size of economy, and both are large EU member states. Yet, the findings suggest Italy has a threefold non-compliance record compared with the UK.

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Other data also indicates varying degrees of commonalities. Transparency International maps levels of corruption in a global index and claims the United Kingdom (17) is 55 places ahead of Italy (72).[12] Whereas, the Foreign Policy Group's Failed States Index measures the stability of a state and finds the two countries differ by only 12 places.[13] The data suggests compliance between powerful states varies. One could argue that the UK's legal system is more advanced than Italy's system, which suggests domestic institutions affect the extent of compliance. This could be true, but as will be discussed later, there are other variables that influence state behaviour.

Likewise, the compliance between weak states also varies. In Africa, Whitaker completed a study on the extent to which Kenya, Tanzania, and Uganda complied with anti-terrorism programs.[14] She argued that these countries are similar in many regards—all are East African states, former British colonies, allies of the United States, and all are weak economies that rely on development aid. Despite these similarities, Whitaker said all three governments demonstrated varying levels of compliance.[15] All three cooperated constructively, but some were more active than others. Domestic factors within the country were key factors. One reason proposed by Simmons is that cases involving small weak countries provide them with little to lose by going through legal processes.[16] For example, negotiating to comply with anti-terrorism measures may allow these African states to negotiate for more aid. Hence, compliance could relate to factors such as self-interest, regime type, and or the capacity of domestic institutions.

Theoretical Explanations

Why states comply with international law is often analysed through a combination of three key theories: realism, liberalism, and constructivism.[17] Realism is naturally skeptical that treaties or formal agreements significantly influence state behaviour. Simply, self-interest is the key factor advanced by realism. For example, Mearsheimer suggests that if states comply with the standard of an international treaty, they do so because it is in their interest even if the treaty did not exist.[18] He thought that this could be attributed either to convergent interests or prevailing power relations. However, Morgenthau, another realist, has admitted that during the four hundred years of its existence, international law had in most instances been rigorously observed.[19] Even so, Whitaker's study of three African states found that compliance was highest in countries with convergent interests. Although one could argue that to determine one's interests, one has to also determine the regime type.[20]

Classical arguments from figures like political philosopher Jean-Jacques Rousseau are often interpreted to describe international law as being an ineffective restraint on international competition.[21] Whereas, Hobbes was slightly more optimistic for believing the development of international law among states would allow them to live in a state merely troubled by peace, but not permanent war.[22] One dilemma illustrated by Goldsmith and Posner is that the state may have obligations under international law, but these obligations would have no influence over the behavior of states, except when in the interests of the citizens (in democracies), or autocrats (in autocracies).[23] Ultimately, states may follow international law, but the legal status of the treaty has no real effect on whether they do. Therefore, self-interest is likely to be a factor for how nations behave.

Liberals agree with realists that state interest is central. However, they believe that institutions can help states enforce agreements. Regime type is crucial to understanding the role of law in interstate relations.[24] Under this view, compliance depends significantly on whether or not the state can be characterised as a liberal democracy with representative government that supports civil and political rights, and a legal system respecting the rule of law. However, liberals like Keohane argue that states form agreements to mitigate international anarchy.[25] This argument is supported by James Morrow's study that found in terms of laws of war, ratification by democracies correlates with greater compliance.[26] Thus, democracies are most likely to comply with international law compared with illiberal regimes. This hypothesis also supports the democratic peace theory, which argues among other things, that democracies do not go to war against each other. Therefore, regime type is also a factor for how nations behave.[27]

A growing body of research focuses on normative considerations to explain state behaviour.[28] Unlike interest theorists, who treat self-interests as fixed, constructivists argue that states and their interests are socially constructed by "commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse".[29] In this view, norms establish standards of appropriate behaviour that are created socially, which then guide states to

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expected levels of conduct.[30] Constructivists like Wendt and Finnemore believe that shared understandings are highly valued by states, such that states comply because they respect norms greater than the actual treaties.[31] Finnemore argues that the utility of force hinges on legitimacy. Essentially, states calculate their interests according to what is considered acceptable. Therefore, as international law and abiding by accepted norms are considered acceptable behaviour, states are likely to comply.

Variables

These theories offer useful explanations for how states behave. Yet, there are numerous variables that a state must also consider when deciding to follow international law and accepted norms. For example, in international law, the structure of a treaty can be a factor. Chayes and Chayes explain noncompliance as stemming from the ambiguity in the language of the treaty and actual fairness of the treaty.[32] Deliberate ambiguity in international agreements has been used to settle disagreements.[33] Ambiguity is often based on the premise that vagueness is required to bring treaties to closure and that the resulting ambiguity can be clarified at some time in the future. Often international agreements are written to allow a range of interpretations regarding the parties' obligations.[34] A state may be criticised for non-compliance with a treaty. However, depending on how the treaty was written, that same state could counter argue that it is complying.

All states are sovereign equals. Yet, not all states are the same in terms of wealth, power, capacity, and more. The asymmetry can cause states to act differently against a common treaty. For example, 161 states have ratified the Ottawa Treaty banning landmines.[35] However, obvious omissions result from the three largest arms manufacturers—the US, Russia, and China, who have not ratified the treaty. That is because the treaty adversely affects these states significantly more than other states. On the other hand, a country such as New Zealand has virtually no use for, nor has historically used, or has any significant arms manufacturing. Therefore, the fairness of the treaty affects the US disproportionately than it does New Zealand. However, the US and China have publicly stated that they no longer produce landmines. So in effect, these countries are complying without commitment. Therefore, the extent to which a treaty distributes justice equally among states is a factor that countries consider when choosing to comply or not comply.

Similarly, states reevaluate their compliance to international law when treaties are brought into disrepute by scandals or disputes over membership. Wealthy nations like Japan, which are “pro-whaling”, have been accused by some states and NGOs of “vote buying” from poor member states.[36] As a result, the International Whaling Commission was forced to improve transparency and improve the effectiveness of its operations.[37] If the allegations were true, an incentive could exist for states to comply with a law (by become a treaty member) for immoral reasons (intentional corruption). Also, landlocked Switzerland is able to vote on whaling issues for which it has little to no authority on such an issue. Essentially, the principle of each sovereign state receiving one vote is not necessarily democratic. For example, Nye calculated that a citizen of Nauru, a UN member, would have 10,000 times more voting power than a citizen of China.[38] Ultimately, a structure of a treaty can motivate states for a number of reasons.

Consent

States who have agreed to ratify a treaty or to comply with accepted norms have a legal and moral obligation. Simmons illustrates that legal obligations are reflected in the *opinion juris sive necessitatis*, which is the principle of international law where states believe or accept that a practice exists and must be followed, thus adding to customary international law.[39] However, compliance would only be applicable to states that consent

As previously mentioned, the US has not consented to the Ottawa Treaty banning landmines. Therefore, the extent of compliance is not applicable to the United States. Conceptually, the US may sign the treaty if other appropriate forms of technology provide similar or better outcomes. For example, 21st century aerial drones could replace antiquated mines. If this was the case, the US could ratify the treaty as a measure to improve its reputation, by arguing a moral case against landmines (although years delayed). However, skeptics could also view the act as tokenism. This example supports the realist self interest argument and undermines the norms already accepted by 161 states. Yet a constructivist might say that compliance without ratification illustrates how states are compelled to behave to the

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accepted norms. This is because norms matter when they create a particular pattern of behavior that a different agreement would not.

Conforming And Obeying

States may conform but not necessarily obey. Due to the State of Nature, Hart argued international law contains rules that nations comply out of a moral, not legal, obligation.[40] In effect, Hart defined obedience to international rules as conforming or complying, but never obeying. While a realist might argue that some states comply for the sake of reputation or to appear legitimate, they might not want to comply in the first place. However, conforming and not obeying does not necessarily mean states are not committed. Instead, the capacity of a state to comply with legal rules and accepted norms is a key factor.

Essentially, states do not always comply with norms because they may lack the capability to carry out their obligations. For example, in weak states, new norms may not have the ability to be implemented by domestic institutions, or new norms could conflict with existing norms.[41] Whitaker found that poor domestic institutions hampered the ability of weak African states, leading to poor anti terrorism compliance. Even powerful states can lack the capacity if domestic institutions hamper compliance. For example, if the US Congress were diametrically opposed to a particular treaty, it would never be ratified and therefore not accepted by US law.

Paradox of Hegemony

Bruce Cronin's article illustrates the dilemma that upholding the law and acting unilaterally is an equation that powerful states must manage.[42] If hegemony act unilaterally, they undermine the international legal system. Yet it is suggested that they cannot remain hegemony if they undermine the system that they are trying to lead. The tension between self-interest and international responsibility creates a phenomenon called the "paradox of hegemony".[43] For example, if international law is as powerless as realists claim, then why is it followed by powerful states?

One argument is that states are persuaded to follow the law in order to uphold the legal system.[44] This would explain why the US complied with the WTO 'Shrimp-Turtle Case' despite the case going against American interests. Another argument is that complying with the rules carries a high degree of legitimacy.[45] As a result, it follows that legitimacy exerts a 'pull' on all states to comply.[46] For example, a powerful state like the US was founded on liberal democratic principles and respect for the rule of law. Undermining the international legal system would also undermine the very nature of the United States, as well. For weaker states, the pull exists to vindicate the status of a state's existence.[47] Hence, the belief is less about remaining legitimate, and more about obtaining legitimacy. A state like the Democratic People's Republic of Korea (DPRK) may choose to cooperate in some areas of international law, by becoming a member of the United Nations, which guarantees sovereignty and non-intervention. But North Korea may only be pulled to becoming a UN member as a safeguard against aggression.

Conclusion

The development of international law and accepted norms over the past 400 years has affected state behaviour. The effect has consistently demonstrated that states reliably behave with international law *most* of the time. The key problem is that it has been far more difficult to prove a causal link between legal commitment and behavior.[48] The key theories provide persuasive explanations. However, the number of variables that affect a state's behaviour distorts the analysis. No single theory is able to adequately explain why states are compelled to justify their behaviour according to legal rules and accepted norms. The best explanation involves interpreting the issue as a *process* that considers all theories. The process can be explained as an ongoing interaction between states that involves creating and trying treaty norms in a continuing dialogue. In time, the norms and practices in the international system evolve and develop.[49] This process argument is similar to a constructivist argument. However, the strategy also factors state interest, regime type, the international society, and internal frameworks within states to capture all likely variables.[50] Ultimately, the most persuasive argument to explain why all states, weak and strong, behave according to legal rules and accepted norms involves interpreting the major theories and various variables that are likely to influence state behaviour.

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[12] Transparency International 2012. Lower scores indicate less corruption. The UK places 17th and Italy 72nd.

[13] Foreign Policy Group 2012. Higher scores indicate better stability. The UK places 158th and Italy 146th.

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[16] Simmons, Beth (1998) "Compliance with International Agreements", p. 90.

[17] Morrow's (2007) analysis examines Realism, Liberalism and Constructivism; Simmons (1998) analysis examines a fourth strand – Functionalism; and Whitaker's (2010) study specifically focuses on the liberal regime type argument.

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