HOW INTERNATIONAL LAW WORKS

A Rational Choice Theory

Andrew T. Guzman

OXFORD
UNIVERSITY PRESS
2008

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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, NY 10016

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Library of Congress Cataloging-in-Publication Data
Guzman, Andrew T.
How international law works : a rational choice theory
/ Andrew T. Guzman.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-19-530556-2
1. International law. I. Title.
KZ3410.G89 2008 341—dc22 2007016343

Printed in the United States of America
on acid-free paper

To Mom and Papa,
Who taught me to question
and showed me the world.

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PREFACE

When teaching international law, one is confronted with foundational questions from the very start of the course. Does international law affect state behavior, and if so, how does it do so? Why would states pay any attention to international law in the absence of coercive enforcement mechanisms? What do we mean when we say international law is "binding," given that states can almost always choose to violate it? Every instructor of the subject must find a way to respond to these questions, if only so that the class can get on with the business of learning the rules of international law.

But no matter how these questions are addressed, there is no escaping their importance. Those of us who study international law tend to believe that it affects state conduct and that it can usefully be deployed to address serious problems among nations. But if we venture outside the comfortable community of international legal scholars, that belief is challenged. And rightfully so. Whatever the strengths of international law, it remains almost entirely without coercive enforcement—the primary tool used to generate compliance in domestic systems. Those of us who believe in international law, then, need to offer a persuasive explanation of why and when it works. This book seeks to do just that.

I am certainly not the first to take up this challenge, and many of those who have done so before me have informed my thinking. What this book seeks to contribute is a comprehensive and theoretically sound account of international law from a rational choice perspective. It seeks to explain how international law is able to constrain states, even when those states are selfish and have no intrinsic preference for compliance with the requirements of international law. Building this

HOW INTERNATIONAL LAW WORKS

1

INTRODUCTION

International Law at Work

In June 1993, Jose Ernesto Medellin participated in the rape and murder of two girls in Houston, Texas. He was subsequently arrested by the Texas police, and informed them that he was a Mexican national. He was convicted of murder in September 1994 and sentenced to death in October of the same year. Medellin appealed to the Texas Court of Criminal Appeals, which affirmed both the conviction and the sentence.

In April 1997, Mexican consular officials learned of Medellin's situation. A few weeks later, Medellin filed a state *habeas corpus* petition in which he raised, for the first time, the claim that he had been denied his rights under the Vienna Convention on Consular Relations (VCCR), an international treaty to which the United States and Mexico are both parties. Under this treaty law enforcement authorities are required to inform foreign nationals, upon their arrest, of their right to contact their consulate and have their consular officials notified of the arrest.[1] At the time of his arrest, Medellin was not informed of these rights.

Medellin's state *habeas* petition was denied, and that was followed by similar failures in his appeal of this state *habeas* petition, his federal *habeas* petition, and his appeal of that federal ruling.[2]

While these domestic legal proceedings were moving forward, Mexico pursued the issue at the international level by filing a case against the United States at the International Court of Justice (ICJ). Mexico alleged violations of the VCCR in the Medellin case and in the cases of 53 other Mexican nationals sentenced to death in the United States. Jurisdiction was based on article 1 of the Optional Protocol of the VCCR, to which both Mexico and the United States were parties, which

provides that disputes related to the VCCR are within the jurisdiction of the ICJ.

The ICJ issued its decision, in what is known as the *Avena* case, on March 31, 2004.[3] It ruled that the United States had violated its obligations under the VCCR, and ordered the United States to provide the affected individuals with a review of their convictions and sentences "with a view to ascertaining whether in each case the violation of Article 36 . . . caused actual prejudice."

On the basis of the *Avena* decision, Medellin renewed his federal *habeas* petition, but was again denied by the Fifth Circuit. In December 2004, the United States Supreme Court granted certiorari on the question of whether the United States must follow the ICJ ruling.[4]

At this point in the proceedings, President Bush had several options, including the option of simply waiting for the Supreme Court to rule on the relevance of the ICJ decision to federal and state courts in the United States. By doing nothing, Bush could hope that the Supreme Court would deny Medellin and others the relief ordered by the ICJ. Indeed, in 2006 the Supreme Court delivered just such an opinion in a different VCCR case known as the *Sanchez-Llamas* case;[5] the Court ruled that ICJ decisions are "entitled only to . . . respectful consideration" and are not themselves binding on U.S. courts.[6] Had such a ruling emerged from the Supreme Court in Medellin's case, there would have been no need under domestic law for the president to insert himself into the issue at all. Even if the Supreme Court had ordered the state courts to take some action in response to *Avena*, the president could have remained comfortably above the fray.

Rather than wait, however, President Bush acted. On February 28, 2005, he issued a memorandum stating: "pursuant to the powers vested in me as President by the Constitution and laws of the United States of America . . . the United States will discharge its international obligations under the [*Avena*] decision . . . by having State courts give effect to the decision." In other words, the president was ordering the states to follow the instructions of the ICJ. By issuing this order, President Bush generated a conflict between his administration and the governments and court systems of several of the states and exposed himself to the accusation that he was doing violence to the federalist structure of the United States.

As of this writing, the president has lost this battle with the states and has done so in ways he surely would have liked to avoid. Four judges from the Texas Court of Criminal Appeals concluded, for example, that

"the president has exceeded his constitutional authority by intruding into the independent powers of the judiciary."[7] A *New York Times* headline stated: "Texas Court Ruling Rebuffs Bush."[8] The *ABA Journal*, a publication of the American Bar Association, featured the headline "Texas Court Tells Bush to Back Off."[9] The United States Supreme Court granted certiorari and will hear the case in late 2007, and so it is conceivable that the president's memorandum will ultimately be viewed as binding on the states.[10] Even this result, however, delivers no real benefit to President Bush, and the alternative of a defeat is surely politically costly, as is the entire conflict between the president and the states.

Looking only to the domestic side of things, then, one wonders why the president injected himself into this case where he had a lot to lose and so little to gain. Looking to the international level for answers fails to reveal any obvious pressure on the United States to follow the *Avena* ruling. The ICJ has no ability to enforce its ruling on the United States, and there were no credible threats of sanctions by any states. One might think that perhaps the president or the United States wanted to support the ICJ as an institution or uphold the integrity of the VCCR, or that it hoped to preserve its ability to use the ICJ in future cases to protect the rights of American nationals arrested abroad. All of these possible explanations are ruled out, however, by the fact that on March 7, 2005—one week after the executive memorandum instructing states to give effect to the *Avena* decision—the United States announced its withdrawal from the VCCR's Optional Protocol, depriving the ICJ of jurisdiction over future disputes.

Why would the United States (through the president) do this? Why would the country respond to a ruling of the ICJ, even as it was denying that institution authority over future disputes? How does international law work?

One answer to these questions is that the ruling in the *Avena* case generated an international legal obligation for the United States. This explanation, however, raises a deeper question: why would a "legal obligation" for which there are no obvious enforcement mechanisms affect the behavior of the world's most powerful country? Why did the president and the United States not choose to simply ignore the ICJ decision? How could the mere fact that the United States has an obligation under international law—without more—make it do anything it does not want to do, including engage in an internal constitutional struggle between the different levels of government?

The Medellin case is not, of course, the only example one can find in which international legal rules affect state behavior. The judicial organs of the World Trade Organization (WTO) have decided many cases, and one could assemble a long list of disputes in which those decisions led to either compliance by a losing defendant or acquiescence by a losing complainant (Wilson 2007). For example, in 2003 the United States removed its safeguard measures on steel following a loss before the WTO's Appellate Body;[11] and in 2005 Mexico reformed its telecommunications regulations so as to come into compliance with the decision of a WTO panel.[12] Similar examples of changed behavior to come into compliance with international law are visible in other areas. A 1996 decision of the ICJ resolved a longstanding border dispute between Namibia and Botswana in favor of Botswana. Namibia accepted the judgment, bringing the dispute to an end.[13] On January 12, 2000, the British government bowed to two 1999 rulings from the European Court of Human Rights (ECHR) requiring that openly gay individuals be permitted to serve in the armed forces.[14] Speaking before the House of Commons, Britain's defense secretary, Geoffrey Hoone explained the British government's decision: "The . . . ruling makes very clear that the existing policy in relation to homosexuality must change."[15] The ECHR also issues monetary judgments under article 41 of the European Convention on Human Rights that are routinely paid by states (Scott and Stephan 2006).

State efforts to come into compliance with international law are not limited, to the way they react to judicial decisions. There are many instances in which states have made changes to domestic legislation in response to the demands of international agreements. For example, in response to the 1972 Biological Weapons Convention requiring signatories to ensure that the treaty's fundamental prohibitions are enforceable under domestic law, Britain adopted the Biological Weapons Act in 1974.[16] Following negotiation of the North American Free Trade Agreement (NAFTA), the United States, Canada, and Mexico each made a host of changes to relevant laws. To list just one such change, the United States altered the immigration rules for professionals from Canada and Mexico.[17] The Mine Ban Treaty of 1997 requires states to "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited" by the treaty.[18] As of 2004, 36 countries had enacted domestic legislation to comply with the treaty, and 23 countries were in

the process of adopting legislation.[19] In 1994, the United States passed the Foreign Relations Authorization Act;[20] section 506 of which includes implementing legislation for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[21] This legislation amends title 18 of the United States Code to establish criminal penalties for persons committing or attempting to commit torture outside the United States. The Chemical Weapons Convention Implementation Act requires that the U.S. government (through the State Department) seek the issuance of a search warrant in response to a demand from the Organization for the Prohibition of Chemical Weapons to engage in a challenge inspection of a public or private facility.[22] The Basel Accord on International Convergence of Capital Measurement and Capital Standards, a soft law instrument that sets standards governing the capital-asset ratios maintained by central banks, was initially signed by the G-10 countries and Luxembourg, but has subsequently been implemented by more than 100 states.[23]

Of course, even implementation of domestic legislation does not provide an absolute guarantee that a state will comply with its obligations. It can, after all, change the legislation at some future point. Nevertheless, changes to domestic legislation in response to an international agreement are powerful evidence that the agreement is exerting some influence.

Further evidence of how international law affects state behavior can be found by examining individual state decisions and drawing inferences about whether those decisions are motivated by the relevant international rules. It is widely accepted, for example, that the Helsinki Final Act, a soft law agreement including the United States, Canada, a number of European countries, and the Soviet Union, served to reduce Cold War tensions and solidify then-existing national boundaries. Following each of the successfully completed rounds of negotiation at the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), states complied with the obligations they had accepted by reducing their tariff levels and making other changes to their domestic systems. Extradition treaties routinely govern the handling of even very controversial cases. In July 2006, for example, Britain concluded that Gary McKinnon, a British citizen accused of hacking into American military computers, should be extradited to the United States. This was done despite concerns about potential human rights violations should he be turned over to

the United States and anger over the terms of the treaty itself. Countless more examples of states entering into agreements and changing their behavior as a result could be listed.

It comes as no surprise to most international lawyers that international law can affect states, though social scientists are sometimes more skeptical. But whatever one's perspective on international law, its ability to alter state behavior raises the same critical question—how does it do it? With rare exceptions, no coercive force will be applied to get states to comply with international law. Indeed, in many instances there is no explicit enforcement of any kind.

The puzzle of how international law gets sovereign states to alter their behavior is what motivates this book.

It has long been an article of faith among international legal scholars that international law affects state conduct, and a number of the field's most eminent scholars have written on the question (Chayes and Chayes 1995; Franck 1995; Henkin 1979; Koh 1997). Though these contributions shed considerable light on international law and help us to understand the international legal system, they do not offer a satisfying theory of how and when states comply with international law or when international law is more or less likely to work.

Social scientists—most prominently political scientists—have used a different set of methodological tools to examine international law. This literature has produced a range of important insights into the international legal system (Downs, Rocke, and Barsoom 1996; Keohane 1984; Krasner 1999; Lipson 1991; Mearsheimer 1995; Mercer 1996; Morgenthau 1973; Morrow 1994) but has not generally been focused on international law as such and has not generated a comprehensive account of the field.

Finally, a number of scholars, working at the intersection of law and social science (often falling under the heading "international law and international relations") have studied the workings of the international legal system (Abbott 1989; Brewster 2006; Dunoff and Trachtman 1999; Ginsburg and McAdams 2004; Goldsmith and Posner 2005; Hathaway 2002; Raustiala 2005; Scott and Stephan 2006; Setear 1997; Slaughter 2004; Swaine 2002; Sykes 2004). This book fits most easily into this third category, and like these other works, it borrows from both traditional legal scholars and social scientists.

Despite the important contributions from the authors listed here and many others, the field of international law remains largely without a

comprehensive and coherent theory that seeks to explain how the system works across its full spectrum. This book offers just such a theory.

The book explains how international law is able to affect state behavior despite a lack of coercive enforcement mechanisms. In contrast to much of the existing literature, it seeks to explain the various sources of international law within a single framework. Indeed, as the following chapters make clear, agreements and practices that are normally not considered "law"—soft law and norms—must be part of the discussion about international law if we are to make any sense of how the international legal system influences state behavior. More specifically, formal treaties, soft law, customary international law, and international norms all operate through the same basic set of mechanisms. The difference among these sources of legal or quasi-legal rules is a matter of degree rather than of kind. Formal treaties lie at one end of a spectrum of commitment, with mere norms at the other end and customary international law and soft law in between. The matter of legal form—treaty, soft law, custom—however, is only one factor affecting the impact of international law. States have myriad ways to increase or decrease the credibility of their promises (e.g., dispute resolution, escape clauses, reservations, monitoring, etc.) and these tools are also part of what must be understood.

The theory developed in this book explains how what I call the "Three Rs of Compliance"—reputation, reciprocity, and retaliation—allow international legal arrangements to bolster international cooperation. Because reputation, in contrast to reciprocity and retaliation, is poorly understood and undertheorized, I develop a model of reputation to explain how and when reputational concerns can provide states with an incentive to comply with international legal rules.

Establishing a more theoretically satisfying approach to international law yields immediate payoffs. With respect to treaties, the book demonstrates (among other things) that both bilateral and multilateral agreements have the potential to influence state behavior, how states choose between hard and soft law instruments (and why it makes no sense to treat these alternatives as conceptually distinct), how substantive content and form interact within an international agreement, and why agreements vary so widely in their scope and membership. With respect to customary international law, I show that a rational choice model of state behavior is fully consistent with customary legal rules that affect the actions of states, and that such a model of customary international law requires a rethinking of some of the traditional

doctrinal approaches to the subject, including the very definition of customary international law and the role of state practice in its creation. Specific doctrinal issues within customary international law, including the doctrines of persistent and subsequent objectors, and the treatment of new states, are recast in light of this model.

It is also worth noting some of the claims this book does not make. It does not assert that international law is always respected or always effective. Such a claim would be extremely difficult to make as a matter of theory, and would fly in the face of what we observe. Nor does the book make any strong empirical claims about international law. The most a theoretical discussion such as this one can do is offer an explanation of how international law can influence states. It cannot compare the power of international law to the many other pressures a state faces and, therefore, cannot come to any strong conclusions about how effective international law is in practice. Critics of international law might charge that I have failed to disprove the claim that international law is irrelevant. That is true, but it seems to me that this charge places the burden of proof on the wrong side of the debate about international law. The empirical evidence that we have—imperfect though it is—offers good evidence that international law does, indeed, affect state behavior.

It takes a very powerful prior belief in the irrelevance of international law to conclude that the burden of proof should be placed on those who believe that international law matters. A number of commentators have carried out case studies that provide examples of international law at work. Mitchell (1994) studies the role of international law in the context of oil pollution and concludes that international treaties are able, under certain conditions, to elicit compliance from states. Haas (1990) examines the causes of compliance with the Mediterranean Action Plan, an environmental protection regime for the Mediterranean Sea, and concludes that the existence of the regime made states more supportive of the underlying substantive standards. Roberts (1994) explores the role of the laws of war in the first Persian Gulf War, concluding that they were effective in constraining the activities of coalition troops. Tomz (2007) looks at sovereign debt obligations and finds that even without a threat of coercive sanctions, states have honored these legal commitments.

Case studies can, of course, be criticized because they do not represent a random sample of behaviors or because their conclusions rely on subjective judgments by the author of the study. An alternative approach that does not suffer from these problems uses large data sets and

econometric techniques. Studies of this sort have similarly found evidence that international law matters. Simmons (2000b) shows that legal obligations have an effect on state conduct in international monetary law. Tomz, Goldstein, and Rivers (2005) demonstrate that the GATT led to an increase in trade. Neumayer and Spess (2004) offer evidence that bilateral investment treaties cause an increase in foreign direct investment between developed and developing countries. Morrow (2006) finds evidence that international humanitarian law affects state conduct. Leeds, Long, and Mitchell (2000) find that alliance obligations are honored at a much higher rate than earlier studies had indicated, suggesting that alliance agreements constrain state behavior to a greater degree than previously thought, while Leeds (2003) analyzes the conditions under which compliance and violation occur. Though some of the foregoing evidence is controversial (Rose 2004; Tobin and Rose-Ackerman 2004; Von Stein 2005) there is a growing body of evidence that international law can affect state conduct in some instances and under certain circumstances.

The attitude of states and nonstate actors toward international law also provides evidence that the institution is important. Virtually every individual and state that participates in international dealings appears to take international law seriously, suggesting that the institution of law has some force. The case for international law is further supported by the remarkable resources that are invested in the creation of international rules and in discussion and debate about compliance with them. If international law does not affect the behavior of states, why would they invest so many resources to create international law, to evaluate the legality of their own conduct, to persuade domestic and foreign observers that their actions are consistent with international law, to monitor the legality of foreign conduct, and to dispute the content of international law? Wouldn't they be better off spending time and money on the many other problems they face?

Put simply, given that international law is an expensive proposition, why do states participate? Why, for example, do states work so hard to obtain a Security Council resolution authorizing the use of force? Why has the United States argued so aggressively and for so long that there is a customary international law requiring "prompt, adequate, and effective" compensation when foreign investment is expropriated? Why has the United States government invested resources in multilateral environmental agreements, whether to encourage their formation or to prevent

U.S. participation? Why does the country maintain a large and expensive cadre of lawyers in the State Department and elsewhere who spend much of their time evaluating the legality of American and foreign conduct?

The answer, at least within a rational choice model, must be that international law matters in some fashion. That is, states must experience some gain as a result of their engagement with the international legal system, and that gain must be larger than what they invest. The most obvious interpretation is that states get benefits from international engagement in the form of reliable commitments from other states. If that is correct, international law must be having an effect.

Though this is the most obvious inference, others are possible. It may be, for example, that international engagement helps leaders with their domestic constituencies without affecting the behavior of states. This can only be true if the relevant domestic constituencies are persuaded that international commitments serve their interests even when in fact these commitments have no effect on behavior. For example, if human rights agreements fail to affect state behavior, they may be explained by the desire of the proponents of these agreements to persuade their domestic constituents that they are working to improve human rights internationally. There may be something to this explanation in some instances, but it is difficult to believe that it can explain international rule-making across the many different substantive areas in which law is made or that it could be true for every state in the international system.

Another possibility is that international law serves primarily to shape preferences and express the views of states or other actors. Returning to the human rights example, states may be prepared to invest in human rights agreements as part of an effort to change the preferences and priorities of other states or of other actors within states. Under this view, the agreements do not have a direct impact on state behavior, but instead influence conduct indirectly by encouraging the internalization of certain norms.

The foregoing alternatives involve a relaxation of the rational choice assumptions that are made throughout the book. To be persuasive, these theories would have to be elaborated in a more comprehensive fashion than we have seen to date. Needless to say, that is not the task of this book, and so I put those theories to one side.

As far as I am aware, the only attempt to reconcile a view that international law fails to affect state behavior with the observed enthusi-

asm of states for creating and fighting over international law argues that state activity in this area is a form of "cheap talk" (Goldsmith and Posner 2005). In essence, the claim is that states' engagement with the international system (or with parts of the system) does almost nothing to affect behavior but takes place anyway because it costs virtually nothing and a failure to engage in the expected rhetorical dance will cause others to think that you are noncooperative. One problem with this notion is that there is little reason for states to avoid being seen as noncooperative with respect to international law if international law does not help states to achieve their goals. Another problem is that participating in the international legal system is, in fact, quite expensive. To illustrate, many poor states have quite limited staffing of their WTO missions when compared to the practice of richer states. This difference in staffing—which reflects one aspect of the cost of participating in the WTO system—affects the ability of these states to participate and influence WTO activities. For these states, it is simply too expensive to devote additional resources to the WTO. Finally, if participation in the international legal system is meaningless chatter, there is no reason for states to infer from the failure to engage in it that a state is noncooperative.[24]

All of the foregoing evidence suggests that international law affects the behavior of states in at least some instances and that international law has an important role to play in facilitating cooperation among states. The theory developed here helps us to understand how international law can fulfill that role.

Beyond simply addressing skeptics of international law, this book speaks to those, including traditional international law scholars, who believe that the system affects states. The study of international law has been (slowly) embracing a social scientific methodology since at least 1989 (Abbott 1989), and this book represents another step in that direction. Starting with a set of rational choice assumptions, the book seeks to develop a theory that can be used to understand how international law works. At times, the conventional wisdom regarding international law cannot be reconciled with the theory that emerges. Rather than attempting to defend that conventional wisdom, I have sought to explore why it might be wrong and what alternative view, consistent with the theory and what we observe in the world, should be adopted in its place. At times, this has led me to disagree with the views of international law scholars, international relations scholars, practitioners of international law, or all of these. It is my hope that the claims made in

the book will stimulate discussion with all those interested in international law.

Before turning to a discussion of methodological issues, it is worth saying a brief word about the European Union. Sixty-five years ago, Europe was embroiled in World War II—the single deadliest conflict the world has ever seen. Today, the European Union (EU) represents perhaps the single greatest example of international cooperation on political, social, and economic issues the world has ever witnessed. States that had been bitter rivals for centuries joined in a political union featuring the free movement of goods, persons, services, and capital. The evolution of Europe is a remarkable story of states cooperating in an anarchic world. Ironically, the dramatic success of the EU makes it a problematic model for cooperation among states, at least as discussed in this book. Because European states successfully delegated authority to European institutions such as the European Commission (EC), the Council of the European Union, and the European Parliament, the consent of all EU members is not required to establish rules governing their conduct. This causes the EU to take on some characteristics we normally think of as belonging to states, including its own laws, regulations, and courts. Furthermore, the EU represents such a deep level of integration that matters of compliance and defection take on a different character. State decisions are informed by the fact that they are engaged in the grand project of building Europe. To the extent a new Europe offers all states significant benefits, there is a greater incentive to accept individual arrangements that are costly.

These features of the EU—the presence of a Europe-level government and the increased incentive to be cooperative—make it a problematic case for the analysis that follows. Lessons drawn from the European experience—at least the recent experience—are unlikely to have general applicability because of the unique features of Europe. On the other hand, considering this extreme example of cooperation is likely to raise important questions and offer clues about what makes cooperation work. Ultimately, I have chosen to place less rather than more focus on Europe. There is not enough room in the book for a proper discussion of Europe within the context of the theory presented here, and extensive use of European examples strikes me as having little persuasive value when illustrating a general point about cooperation among states. The decision to focus on cooperation outside Europe does not imply that the theory has no applicability to the European context.

International law has played an important role in Europe, and I believe that the theory advanced herein helps us to explain that role. Because Europe is the most advanced example of cooperation in international law, it offers an interesting and important case study. It might, for example, help us to understand whether (and under what conditions) extensive cooperation makes reputation more valuable and allows for an upward spiral of cooperation; or it might help us to understand the reasons why states are sometimes willing to make important international commitments that compromise national sovereignty. To explore these questions properly, however, would take another book, and that project is left for another day.

Methodology

Even the most casual observation of the international system demonstrates that states do not always comply with their legal obligations. Any sensible theory of international law, then, must account for and seek to explain both instances of compliance and of violation.[25] For example, the simple and oft-repeated claim that states must comply with the law (*pacta sunt servanda*) is at times mistaken for a theory about how law works. But it cannot be such a theory because it tells us nothing about when compliance will come about and when it will not. It also, incidentally, fails to explain why states will or should comply with the law.

Fundamental to understanding international law is a recognition that it is just one of many factors that affect the incentives of states. Because a state's chosen course of action will depend on all relevant factors (rather than only international law) the relevant legal rules can at most put a finger on the scale in favor of compliance. International law obviously cannot render all other issues irrelevant.

One way to explain cooperation among states, consistent with the observation that international law operates at the margin, is to assume that states have a preference for such cooperation or that they have some other closely related preference that generates cooperation. For example, one could assume that states somehow find it costly to violate international law simply because of its status as law.

The most developed version of this approach comes from Chayes and Chayes (1995), the founders of the "managerial school" of international law. They claim that a focus on matters of enforcement and

sanctions in international law is misplaced. In their view, the primary source of noncompliance with international law is ambiguity in agreements and limits on state capacity to comply. It follows from this perspective that increasing compliance will come about through improved information flow, greater clarity in rules, increased capacity, and the like, rather than through enforcement efforts.

Critical to the Chayeses' approach is the assumption that there exists "a general propensity of states to comply with international obligations."[26] Under this assumption, the resolution of problems of cooperation becomes easier because the act of entering into an agreement, by itself, alters the costs and benefits of state decisions. Specifically, it imposes a cost on states that violate an agreement. By assuming an underlying preference for compliance, then, the Chayeses' approach can turn at least some difficult problems of cooperation into relatively simple ones.

Translated into the language used in this book, a propensity to comply with international law converts some problems of cooperation into easier to resolve problems of coordination. It seems clear, however, that many of the most challenging problems in international relations (human rights, environmental protection, use of force, and nuclear proliferation, to name a few) cannot be transformed into simple coordination problems by the signing of a legal document. So, although the managerial approach is a sensible frame through which to view a certain class of cooperative problems, and although within that class of problems, that approach complements the discussion in this book, there remain many other challenging cooperation problems with respect to which the managerial approach is of limited use.

An additional problem with the managerial approach is that it does not offer any underlying theory or explanation of why states prefer to comply with international law. Nor does it help us to understand when this preference for compliance will trump other concerns and when it will not prevail. It is conceivable that such a theory could be developed. There may be historical, behavioral, anthropological, or sociological reasons why such a preference exists. I am not aware, however, of any literature discussing the strength of state preferences for compliance, the factors that enhance or diminish the preference, the source of the preference, and so on.

In contrast to the Chayeses, I do not assume that states have a preference for compliance with international law. In the place of this

assumption, the book adopts a set of rational choice assumptions. States are assumed to be rational, self-interested, and able to identify and pursue their interests. Those interests are a function of state preferences, which are assumed to be exogenous and fixed. States do not concern themselves with the welfare of other states but instead seek to maximize their own gains or payoffs. States, therefore, have no innate preference for complying with international law, they are unaffected by the "legitimacy" of a rule of law (Franck 1995), past consent to a rule is insufficient to ensure compliance, and there is no assumption that decision-makers have internalized a norm of compliance with international law (Koh 1997).

These assumptions have at least two things to recommend them. First, they are standard assumptions among social scientists and many international law scholars (examples in the latter category include Abbott 1989; Brewster 2006; Dunoff and Trachtman 1999; Ginsburg and McAdams 2004; Goldsmith and Posner 2005; Hathaway 2002; Scott and Stephan 2006; Setear 1997; Swaine 2002), indicating that they are widely viewed as useful, though obviously imperfect, approximations of reality. Second, and more important, the assumptions are basically hostile to cooperation. They imply that states will only cooperate when doing so increases their own payoffs. Under these assumptions, it is relatively easy to construct scenarios in which cooperation fails (as often happens in the world). It is somewhat more difficult, however, to generate cooperation. Because the model is built on assumptions that make cooperation difficult, we can have greater confidence when the results suggest ways that cooperation can come about. If cooperation can be achieved in this model, it can also be achieved in the same way under a wide range of assumptions that are friendlier to cooperation.

Though this rational choice approach is conventional in economics and international relations and gaining in popularity among legal scholars, it is not without its critics. The difficulty with the criticisms is not that they are incorrect or misguided, but rather that there is no workable set of assumptions that can satisfy all relevant concerns. It is, therefore, possible for reasonable people to disagree with respect to their preferred set of assumptions. There should be no disagreement, however, with the fact that progress requires that some set of assumptions be made, and that the rational choice assumptions used here offer a reasonable starting point. That said, it is worthwhile to examine some of the possible objections.

Consider first the realist critique. The basic realist assumption of international relations is that security is the core concern of states and that they evaluate these concerns on a relative rather than absolute basis. Thus, for example, if all countries would benefit in absolute terms from a cooperative venture as a result of an increase in economic wealth, those that stand to benefit the least will perceive themselves as having lost relative to others and will, therefore, attempt to undermine cooperation. The implication is that meaningful cooperation is very difficult to achieve and international law and international institutions are generally unable to influence the behavior of states (Mearsheimer 1995; Morgenthau 1973; Waltz 1979).

The merits and demerits of realism have provoked heated debates within political science departments. Indeed, the disagreement between realists and institutionalists is one of the central themes of international relations scholarship, with institutionalists challenging realist assumptions as well as criticizing it on its own terms (Legro and Moravcsik 1999; Milner 1998). Rehashing these issues and critiques here is not fruitful, and this book makes no attempt to settle these decades-old debates. I instead simply observe that, at the end of the day, I do not find the realist assumption about the significance of relative gains to be appropriate in many of the contexts in which international law exists. Efforts to promote international trade or environmental cooperation, for example, are not closely tied to matters of power and security—the issues that realists tend to focus on the most. Even in the security realm, the bipolar standoff of the Cold War has been replaced with a more multifaceted set of interactions and conflicts that make simple calculations of relative payoffs less relevant. With many relevant players, even a realist approach does not rule out the possibility of bilateral cooperation. If two (or a few) states come together to cooperate in some way, it may be that they both benefit, even under the relative gains approach of realism. This is so because a state must be concerned with its position relative to all other states and not only those with which it interacts in a particular agreement. If states A and B both enjoy absolute gains as a result of their cooperation, and if those gains are not enjoyed by countries C and D, which are outside the agreement, then A and B may well find it in their interest to cooperate, even under realist assumptions.

Other approaches to state behavior are more complementary to the institutionalist approach taken in this book. Liberalism, for example, opens the black box of the state and considers the role of substate actors

(Moravcsik 1997). The most prominent legal scholar working in this tradition is Anne-Marie Slaughter (2004), who has famously argued that the modern state is "disaggregated," in the sense that informal networks of government officials engage in international legal governance. These government networks are, in Slaughter's opinion, critical to understanding international law. More generally, liberal theory and its close cousin public choice theory attempt to offer more realistic models of behavior by relaxing the institutionalist (and realist) assumption that the state is the primary entity and actor. This allows much greater flexibility, as one can consider, for example, the interaction of the legislature with the executive in the formation of public policy or evaluate the relative influence of competing interest groups.

The flexibility of these approaches, however, comes at a cost. To construct a liberal model of international behavior requires, first, the construction of a model of the inner workings of the state and substate actors. The interaction of interest groups is extremely complex, and the result of such interactions may not be stable over time. It is difficult, and perhaps impossible, to construct a general, tractable, and predictive liberal theory of policymaking in a single state, let alone one that also captures the interactions of many states. Moreover, although Slaughter's insight into the important role informal networks play in international governance is useful and important, it would be taking her argument much too far to say that the state does not retain a substantial measure of cohesiveness. After all, governments retain vertical lines of accountability, and at present, with the exception of Europe, supranational institutions remain relatively weak, in terms of their ability to affect legal outcomes, compared to those at the command of the state. Recognizing these issues, and wanting to provide a predictive model of state behavior, this book for the most part retains the assumption of a unitary state.

An alternative critique can be made from a constructivist perspective. Constructivism asserts that state preferences and, therefore, state objectives, are not exogenous to the system. International institutions, including rules of international law, therefore, are not simply inert structures established by rational states but are instead participants in the international legal system that influence the norms and attitudes of states. As a descriptive matter, there is an appealing plausibility to this account. Though international institutions are normally created and controlled by states, they also acquire a sort of life of their own that allows them to be players on the international stage. Among international

organizations, one might think of the United Nations, the WTO, the International Monetary Fund (IMF), the African Union, and many others that speak on the world stage in their own voice. Constructivists also argue that international agreements and rules can affect attitudes and beliefs. To take a popular example, international human rights agreements such as the International Covenant on Civil and Political Rights (ICCPR) are not simply tools intended to affect the payoffs of states; they also have an expressive function and have the potential to alter state beliefs and objectives (Lutz and Sikkink 2000). Once again, this perspective is likely to be an accurate description in at least some cases. It is surely true that norms matter in international relations and international law, and constructivism attempts to account for the fact that norms can shift over time.

Constructivist approaches have a relationship to this book that is similar to that of liberal ones. Constructivism, with its emphasis on the role of norms, rejects the rationality assumption made in this book (Finnemore and Sikkink 1998; Mercer 1996; Wendt 1999). As is true with liberalism, constructivism has more flexible assumptions that allow it, at least in principle, to more accurately describe state behavior. And as is true with liberalism, this flexibility makes it difficult for constructivism to produce a general and tractable theory of state behavior. Constructivist writers have to date not advanced a general model of state behavior. Until such a model exists, there is no way to use constructivism to study the full field of international law within a single framework.

Though this book adopts institutionalist assumptions, I recognize the value in both liberal and constructivist approaches. The most sensible approach when studying international law is to recognize that different approaches are suited to different tasks. Constructivism, for example, may be an important part of the explanation for broad changes in state behavior over relatively long periods of time. Since World War II, for instance, states have come to take issues of human rights much more seriously, and concerns for the citizens of other states have come to be much more accepted. This change is difficult to explain without resort to changing norms and preferences. Similarly, constructivist discussions of norms are a productive way to consider how human rights can be improved in the future (Goodman and Jinks 2004).

Liberalism or public choice can sometimes offer an explanation of events that are puzzling from a strictly rational perspective. A rational

choice model of international trade, for example, often fails to offer a plausible account of why the international trading rules look the way they do. An approach that recognizes the fact that political leaders may have interests that differ from their citizens can sometimes explain these puzzles (Sykes 1991).

Both liberalism and constructivism can be reconciled, at least partially, with an institutionalist approach. Institutionalism assumes that state preferences are given and fixed. One can think of liberalism and constructivism as theories that help us to understand how these preferences come about. Consider first a liberal approach under which it is assumed that the interplay of domestic interest groups determines state policy preferences. Once the domestic political process plays itself out, however, the state may pursue those policy goals on the international stage in a rational and unitary way. From this perspective, the liberal model serves as an input for the institutionalist model. Constructivism can be complementary to institutionalism in a similar way. If we assume that social norms matter but that they change slowly (or rarely), and if we model them as a form of preference, then it is reasonable to think of preferences as fixed at least over certain time horizons.

Neither liberalism nor constructivism can be reconciled with institutionalism in all instances, however. If one assumes that substate actors are themselves engaged in transnational interactions with other nonstate actors, liberalism is at least partially at odds with the approach used in this book. And if norms are thought to change quickly, then the assumption of fixed preferences that is necessary for a rational choice approach becomes problematic.

And so this book does what virtually all writing on the subject must do—it chooses its assumptions and makes them explicit. Of course, I have selected those assumptions that I believe to be the most promising for the study of international law. In my judgment, rational choice assumptions yield theory that is more parsimonious and predictions that are crisper and more falsifiable than is the case for alternative approaches. It is not the purpose of this book, however, to offer a defense of rational choice or to mount an attack on other methodologies. There is surely room within the study of international law for a multiplicity of methodologies. Our understanding of international law has been and can further be improved by serious inquiries using each of the aforementioned approaches (and no doubt others as well). With rational

choice assumptions in hand, however, the task of the book is to explore where they take us.

Because it starts with a set of assumptions, rather than observations, about state behavior, the analysis is primarily a theoretical one. Throughout the book, however, examples of events from the world are also included. These are intended to illustrate the theoretical points being developed and to give some context to the discussion. They are not intended to, and could not possibly, provide proof of the claim being made. Real-world events are often complex and multifaceted and are normally not fully explained by a single theoretical insight. Virtually all of the examples provided in the book, therefore, could be contested. One might argue that in each case some other underlying factors affected the payoffs of the states and that the particular influence at issue in the discussion was not an important factor. This is an inevitable feature of examples and case studies (though the latter have a greater capacity to respond to the critique). So the examples should be taken simply as illustrations. To make stronger causal statements about how and when international law affects outcomes requires more formal investigation, and that is an exercise for another time.

Compliance and Effectiveness in International Law

It is useful at this early stage of the book to clarify a terminological issue that recurs throughout the book. The impact of international law on states is often discussed in terms of "compliance" with international law. In fact, legal scholars have often moved rather quickly from the observed high rate of compliance to a conclusion that international law constrains state behavior. Henkin, who penned possibly the most famous line in international legal scholarship, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin 1979), is at times unfairly accused of confusing compliance with effectiveness in this way.

To get an accurate sense of the impact of law requires more than an observation that states comply most of the time. It is necessary to determine if and when international law changes the behavior of states. When law does so, it can be considered effective, and it is this effectiveness that is of interest in this book. In economic terms, law is relevant to the extent it generates a marginal increase in compliance. When evaluating a rule of law, the problem of course is that while we can (at times) observe whether or not there has been compliance, we cannot directly observe whether the law has been effective in the sense of affecting the conduct of states. This poses a challenge for empirical inquiry, whether in the form of qualitative or quantitative investigations. For my purposes, however, the problem is primarily one of terminology. The terms *compliance* and *effectiveness* will both be used in the book. Discussions will often be framed in terms of compliance, but will speak of "improved compliance" or whether compliance is "encouraged." Statements of this sort should be understood to refer to the impact of a rule or behavior on the level of compliance. That is, they are considering how the rate of compliance is affected, which is, of course, the same as asking if the rule in question is effective.

The Scope of the Book

This book is interested in questions relating to compliance with international law and cooperation in international affairs. This area has been the subject of considerable work in political science, economics, and law and cannot possibly be addressed in all its complexity here. It is necessary, therefore, to cabin the inquiry somewhat. To that end, the book focuses on international law and, more specifically, on the conventional sources of international law: treaties and customary international law. It also examines "soft law," which includes international agreements that fall short of formal treaties but nevertheless seek to influence state conduct.[27] Though not among the classical sources of international law, there is little serious doubt that soft law instruments are an important part of the international legal structure that assists states in organizing their relations. Once soft law instruments are considered, however, the distinction between international "law" and other international institutions begins to blur. Soft law clearly includes, for example, resolutions of the UN General Assembly. But to understand those resolutions may require a theory of international organizations, which would take us far afield.

Similarly, the book addresses the role of norms that fall short of any definition of international law. As with soft law, the line between norms that are considered relevant to a discussion of international law and