International Theory (2009), 1:2, 335–343 © Cambridge University Press, 2009
doi:10.1017/S1752971909990091

How international law works: a response to commentators

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I owe thanks to the three commentators who have provided such helpful and insightful reactions to my book, *How International Law Works*. Each has raised interesting and challenging questions, demonstrating that we are in no danger of running out of topics for debate on the subject of international law and its effect on state behavior. Because I have limited space to respond, I am unable to give each comment the attention it deserves. I instead organize my response around the most important issues raised by the commentators.

Different types of reputation

For most of the book, the concept of reputation is discussed as if each state has a single reputation that can be affected by its conduct. This is, of course, a simplification because a state is likely to have many reputations. Its reputation may vary by issue area – a good reputation for compliance with trade agreements may coexist with a bad reputation in human rights, for example. Its reputation may also be viewed differently by different states – the United States, for example, has a different reputation with Canada than it does with Iran.

This theme, that a state has several reputations rather than only one, is picked up by Brewster. Her concern is that a state's reputation can differ from one regime to another, meaning that a change of regime may also bring about a change in reputation. This observation implies that a government may not fully internalize the impact of its actions on the state's reputation. Brewster's point here is clearly correct and, indeed, is acknowledged in the book. 'When regime changes are as dramatic as (Chile's move from Allende to Pinochet) it is easy to see why a state's reputation would change. Though less dramatic, it is likely that more modest regime shifts also affect a state's reputation' (Guzman, 2008a: 106).

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https://doi.org/10.1017/S1752971909990091 Published online by Cambridge University Press

Noting that a particular regime may have interests that diverge from those of the state, however, is only a starting point. Because states survive beyond a single regime, and because regime changes are rarely so dramatic as to be fairly described as a complete rebirth of the state, there is some carry-over of reputation from one regime to the next. In the United States, for example, the arrival of the Obama administration surely influenced the way in which the world views the United States. But this change of regime has not fully washed away the reputational consequences of the Bush administration, let alone the reputation that the United States has acquired as a result of its actions over many decades.

In the book, I provide a detailed discussion of how reputation can change from one issue area to another, and the implications this has for international law. In brief, while reputation is surely, in part, specific to a particular issue-area, there is also a more general component to reputation that applies across all areas (Guzman 2008a, b: 100–106). I then explain that '[b]ecause the same basic ideas apply to [other dimensions, including regime changes], I discuss them in a more abbreviated way' (2008a: 100). The point is that while reputational effects are surely reduced as one moves from one administration to the next (or from one subject area to the next), they are not completely eliminated (2008a: 100–111).

A related issue is whether or not a given regime has an incentive to invest in future reputation. A government facing an election in a few years, for example, may not have much concern for the state's reputation in the distant future. This is a fair point, and one that may weaken the force of reputation in at least some instances, as I observe in the book. On the other hand, if it is correct that reputation changes (at least somewhat) from one regime to the next, one must ask where a given regime's reputation comes from. The answer must be that it comes from the behavior of that regime. This leads us back into the same reputational dynamic that applies to states, but in the context of individual regimes. Each regime has an incentive to develop its own reputation for compliance with international law so that when it seeks to, for example, enter into its own international agreements, its promises are credible. This generates an incentive to comply with existing rules of international law. So even if each regime has its own reputation, there remains an incentive to comply. Of course the credibility of its promises will depend in part on expectations about future regimes, and today's regime has only a limited ability to influence those expectations. Those expectations are formed by that portion of a state's reputation which is not changed from one regime to the next.[1]

[1] In separate critique, Kydd argues that my approach 'conflates two different reputations'. He has in mind that I ignore the potential for states to cooperate in a repeated game, even in the face of a prisoner's dilemma, in the absence of promises to cooperate (Kydd, 2009: 295–305).

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When compliance fails

A second strand of comments underlines the practical reality that even if the theory I advance is correct, international law cannot cure all the world's ills. This fact is emphasized by Brewster, who focuses on the very limited progress that has been achieved in the climate change area. Her strongest assertion is that '[r]eputational sanctions are unlikely to be an effective means to enforce public goods agreements…without a strong overlap with a different issue area' (Brewster, 2009: 323–333).

I certainly agree that climate change is a vexing problem for which there are no easy solutions, but I am not persuaded that this one example demonstrates that reputational sanctions are ineffective in the multilateral context. Brewster herself points out that 'reputational concerns about compliance could theoretically deter governments from joining the [Kyoto Protocol]' (Brewster, 2009: 323–333). This is correct and, it seems to me, demonstrates the point that reputation can encourage compliance. After all, the only reputation-based reason to avoid entry into an agreement is to avoid the costs associated with a future violation. These same costs also deter violations once states are party to an agreement.[2]

The key question raised by Brewster, then, is not whether reputational effects matter, but whether they are large enough to help resolve important problems? As I observe repeatedly in my book, the force of reputation is limited and there are problems it cannot solve. Brewster expresses dissatisfaction with the fact that the theory I advance simultaneously focuses on reputation as a driving force in the working of international law while acknowledging several limits, including information, uncertainty, issue area scope, and so on. Her criticism here is that I have not pinned down the magnitude of the reputational impact.

This goes, ultimately, to the empirical question of how strong reputational forces are; something which is not addressed in my book and cannot be addressed in a theoretical treatment. As the conclusion of the

The distinction Kydd makes is an important one, but it is also one that I address. '[I]t is possible to demonstrate that… repetition can, by itself, sometimes be enough to allow states to overcome a prisoner's dilemma. This form of cooperation can take place without any international law or any exchange of promises' (Guzman, 2008a: 41). Kydd and I agree that the question of interest for international law is whether international law can change how states behave. 'Can, for example, the signing of a treaty affect behavior and outcomes even when the treaty itself is just a piece of paper' (2008a: 41).

[2] Reluctance on the part of states to join an agreement raises interesting questions about the relationship between efforts to encourage compliance with an agreement and efforts to get states to join. My book mentions this, but in only the briefest way, and it is one of the areas that strike me as the most interesting for future research (Guzman 2008a: 170–177).

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book says, I have not sought to contribute to the important and ongoing empirical debate about the impact of international law.[3] So while it is correct to say that I have failed to pin down a useful empirical estimate of the force of international law, that was never the objective of the book. I sought instead to move our theoretical understanding of the problem forward.[4]

The role of domestic politics

The book's rational choice assumptions include an assumption that states are unitary actors. This is a simplification that inevitably attracts comment.[5] Any project that seeks to understand state behavior must grapple with the fact that the relevant actors are states, in the sense that we are most interested in what the state does, but the key decisions are made by human beings. My solution in the book, which I describe in the introduction and then again when it comes up in various specific instances, is to stick with the assumption of rational unitary states as much as possible. While Kydd is correct when he says that 'a host of issues relating to international law can hardly be understood without reference to domestic political actors' (Kydd, 2009: 295–305), I think he overlooks the fact that despite progress made on the question of how domestic politics influences international conduct, we lack a satisfactory model of domestic politics that would allow the development of a general theory of international law.[6]

The question of how to deal with domestic politics was on my mind from the very beginning of the project. How could I address the reality that domestic politics matters while simultaneously developing a general analysis? Ultimately, I chose to stick with a model of unitary states, but to relax that assumption from time to time when there is reason to doubt that the model is capable of explaining behavior, or when there is a literature on the subject that provides a useful connection between international law and domestic politics.

[3] Ibid. at 218.

[4] To be sure I have thoughts about the empirical issues, and the introduction to my book betrays my perspective: '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 matters' (Ibid. at 10). Following this statement, the book lists a number of empirical studies, of differing methodological approaches, that find evidence of international law affecting behavior.

[5] Kydd (2009: 295–305); Brewster (2009: 323–333); Thompson (2009: 307–321).

[6] It is perhaps telling that when the commentators or others call for greater inclusion of domestic politics, the examples that are provide inevitably involve assumptions about the relevant domestic politics that apply only to the narrow example in question.

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Nothing in this world is perfect, and my book is certainly no exception. Nevertheless, I believe that the balance I have struck is reasonable and appropriate. Consider, for example, that while the commentators raise the issue of domestic politics in discussing my analysis, it is only when they make the specific point that domestic politics is relevant that the component parts of the state are discussed. Each of them reverts to a unitary-state model when the focus of their discussion is anything other than the question of whether domestic politics is adequately included.[7]

It is also my view that I have taken domestic politics into account in those instances where it is most important to do so. Kydd, who advances the most sustained commentary on the issue of domestic politics, asserts that 'state centrism leads [Guzman] astray' (Kydd, 2009: 295–305) in the context of the choice between hard and soft law. I think this criticism is misplaced. The book quite explicitly acknowledges the role of domestic politics in this choice. I explain that the decision to require domestic ratification of agreements is explained in several different ways, all of which call on some understanding of domestic politics. It may increase the legislature's involvement (Abbott and Snidal, 2000), it may serve a signaling function (Martin, 2000), and it may be part of a process of seeking legislative changes.[8]

Even in this area, however, domestic politics alone is not enough to explain what we observe, and a model of unitary states helps to understand what is going on. Contrary to what is often believed, formal international treaties do not actually require any engagement with domestic politics.[9] There is sometimes confusion within the United States on this point because 'treaties' under the US Constitution require ratification by the Senate. But agreements that are treaties under international law (meaning that they are binding under international law) may have a different name under the laws of the United States (e.g. sole executive agreements). So even in the United States it is possible to enter into binding international agreements without seeking approval from Congress (these are then called treaties internationally but not within the United States). It is also possible for states to enter into agreements that fall short of treaties (soft law) while engaging domestic legislatures in the process.

This suggests that there are two distinct decisions being made by political leaders. First, there is a decision about whether to enter into a

[7] See, for example, Kydd (2009: 295–305) (discussing why unitary states sometimes write agreements and other times rely on customary international law); Thompson (2009: 307–321) (presenting a model of enforcement that features unitary states); Brewster (2009: 323–333) (discussing the problem of public goods without any reference to sub-state actors).

[8] Each of these is acknowledged in my book (Guzman, 2008a: 146).

[9] See Article 11, Vienna Convention on the Law of Treaties.

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treaty or a soft law agreement under international law. Second, there is a decision about what engagement with the domestic political process should be undertaken.[10] To understand these decisions obviously requires an understanding of how domestic politics impacts international decisions. My book combines this point with the claim that a model of unitary states also offers insights into how states make these decisions (Guzman, 2008a: 138–143).

How hard is it to retaliate?

Brewster describes my book as 'optimistic about the possibility of achieving high levels of compliance' (Brewster, 2009: 323–333). Thompson, in contrast, argues that 'the book's bottom line is in fact fairly pessimistic…[leaving] open a wide range of scenarios where compliance should not occur' (Thompson, 2009: 307–321).

I have already addressed Brewster's views, which are founded on a claim that I over-estimate the role of reputation. Thompson, on the other hand, takes the position that I understate the importance of retaliation. The basic thrust of his comment is that punishing violators is less costly than my discussion assumes.

Before turning to his model, it is helpful to review the basic concern about retaliation. By definition, retaliatory sanctions are costly to impose (Guzman, 2008a: 34). A rational state will only choose to impose retaliatory sanctions when doing so offers some positive payoff. Retaliation is insufficient, by itself, to ensure optimal levels of compliance because it is not renegotiation-proof, especially in the case of a violation that is not ongoing. Once a violation has taken place, a would-be retaliating state has little incentive to impose an optimal level of retaliation. But for the potential to develop a reputation for retaliation, there would be no incentive to ever impose any retaliation.

Retaliation is weakest in the context of multilateral agreements that deal with public goods. These include many human rights, environmental, arms control, and other agreements. Agreements in these areas confront a free-rider problem because the sanctioning state captures only a portion of the gains generated by the sanction.

Thompson's comment is best seen as a modification to the story of retaliation that I have just summarized. His model works as follows. When a state (State V) violates (or is accused of violating) international law, an observing state (State S) can choose to retaliate by sanctioning. If

[10] There is also a vibrant debate among legal scholars about how the content of binding international agreements influences the political processes that are requires under the domestic law of the United States (Hathaway, 2008).

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it does so, it imposes costs on both State V and State S. If the retaliation causes State V to end its violative conduct, State S benefits. In a multilateral setting, however, all other states in the system also benefit – creating the standard free-rider problem.

Thompson assumes that other states, represented in the model by State R, then choose whether to 'support' or 'oppose' the sanction. Supporting the sanction is costly for R, which may be penalized for supporting unilateralism. If R opposes the sanction, on the other hand, R faces a different cost, z, which represents punishment imposed by S.

If one accepts the assumptions made, and if the relevant variables have the necessary magnitudes, it is clearly the case that sanctioning is made less expensive when R offers its support. This creates additional room for international law to function because it can help to distinguish behaviors that are permitted from those that are not. In this way, international law helps State R distinguish cases in which retaliation is legitimate from those in which it is not, and this ultimately serves to increase the incentive to comply.

I find the proposed model to be interesting, but am not fully convinced by the conclusions that are drawn. For example, when R opposes the sanction imposed by S, it faces punishment by S. Presumably if it supports the sanction it can be punished by V. The model can accommodate this but it requires a reinterpretation of the z variable,which now must be seen as reflecting S's power to punish relative to V's. The implication is that depending on the value of z, retaliation may be either more or less costly than it is in the standard account of retaliation.

In addition, it is assumed that State R has an incentive to support the sanction if and only if the sanction serves to 'enforce international law and therefore a public good' (Thompson, 2009: 307–321). The claim here is that failure to support the policy will cause it to be 'branded as "unlawful" by its own public or the international community' (Thompson, 2009: 307–321). But surely these same forces apply to state S, the one that imposes the sanction in the first place. Would it not be worried about failing to sanction a violating state? If so, Thompson could generate the same results in a simpler model with only countries V and S. A key question here is whether one believes that the penalty for inaction (whether by country S or country R) is large enough to make a difference.

Whatever one think of the model, however, Thompson's broader point – that retaliation is a powerful force for compliance – is clear. Aside from the important empirical question that this raises (and that I do not engage in my book), the development of a more nuanced model of reputation would certainly be welcome. If Thompson can demonstrate that the theoretical problems with retaliation are less severe than previously

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thought, we will have an additional reason to think international law can influence state behavior. In the end, I view Thompson's argument as complementary to my own. There is no deep conflict here, and one could certainly believe us both to be correct.

Extensions

One of the by-products of this exchange is a list of questions and concerns that I view as proposals for future research. By this I mean that they are not fundamentally critiques of the book or its arguments, but are instead avenues that were not explored (or not explored in detail) in the book but that would be consistent with the overall approach. Thompson's model of retaliation discussed above, fits into this category. These suggested extensions are numerous and intriguing. I want to briefly mention a few of these possibilities along with my initial thoughts and reactions. Each of these ideas is stimulating and deserves further inquiry.

One intriguing question raised by Kydd is why international lawyers are so important to the system. In a domestic system lawyers are important, in part, because they can identify the legal obligations of the parties. In the international setting this may also be true, but if the legal obligations cannot be enforced before a court, lawyers may be selected strategically by states so that they provide the preferred advice. To the extent this is so, however, lawyers lose their role as an expert and simply become another political player.

Other issues lie immediately below the surface, and an inquiry into the functioning of any international institution is likely to raise them. Kydd points, for example, to the WTO. 'In the World Trade Organization context, what issues do governments litigate, what industries do they attempt to protect, why do they advance claims and drop them before trial…' (Kydd, 2009: 295–305). This area is close to my heart as I have sought to address some of these questions in other work (Guzman and Simmons, 2002, 2005).

Another interesting issue that I do not explore in any detail is how states can be induced to enter into agreements. Because consent is required, many value-increasing agreements may be frustrated by the fact that not all states benefit. It may be possible, however, for one group of states to impose costs on other states if the latter refuse to join an agreement. Kydd sketches a context in which this may be the case (Kydd, 2009: 295–305). It would be a significant step forward to fully develop this possibility.

I should also return to the empirical questions that are ever-present and that are raised by both Brewster and Thompson's comments. Empirical

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work on these issues exists, of course, and continues to be done.[11] Our understanding of the international legal system requires more work on both theoretical and empirical fronts.

Conclusion

If there is a single message to be taken from the exchange between the commentators and myself, I think it is that the discussion of international law and international relations has grown to be a vibrant and healthy one. The question of how and why international law works was never going to be resolved with one book. Indeed, even if many books and articles follow, as I hope they do, there will always remain questions to answer. From the perspective of international law, however, the continuing application of sophisticated social science to the field is invaluable. The commentators have stimulated my own thinking and have appropriately pushed me to defend the claims I make in my book. For that I am very grateful.

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[11] Tomz (2007) and Simmons (2000) provide two prominent examples.

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