REVIEW ESSAY

How Not to Do Things with International Law

Anne Peters

How to Do Things with International Law, Ian Hurd (Princeton: Princeton University Press, 2017), 200 pp., $29.95 cloth, $29.95 eBook.

"These strikes do not settle anything, but they terminate a system to which we have become accustomed, namely, that somehow the field of law has become the field of the weak."[1] This was the French president's answer to a question about the missile strikes launched by the United States, the United Kingdom, and France against Syrian targets on April 14, 2018. How would Ian Hurd interpret this statement, and does it fit his model of the utility of international law? Hurd's highly stimulating and intriguing book seeks to demonstrate how international law is being used—mainly by the powerful actors.

The goal of Hurd's *How to Do Things with International Law* is to examine "how the concept [of the rule of law] is used in world politics and to what ends" (p. 2). Hurd attacks the understanding that "law is a counterpoint to power," declaring that the "counterpoint" model "both overstates and understates the power of the rule of law in international affairs" (p. 4). That model, he argues, overstates the law's power to the extent that it (wrongly) assumes that new rules will lead to changes of behavior. And it understates the power of law because the model (erroneously) assumes that the main function of law is to constrain powerful actors—and then analysts must admit that this function is not performed well. Hurd's principal point is that the "legalization of politics" (that is, the use of law and of legal arguments and justifications) enables rather than constrains political actors because the law (or the rubber stamp of lawfulness) has become "the marker for acceptable policy, masking the substantive politics" (p. 3).

Ethics & International Affairs, 32, no. 4 (2018), pp. 483–491.
© 2018 Carnegie Council for Ethics in International Affairs
doi:10.1017/S0892679418000746

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

Hurd's method is empirical in a loose sense. He seeks to examine international law's "normative valence" in three case studies, rather than assume it in advance. The case studies are wars of self-defense (chapter four), weapons of mass destruction and drones (chapter five), and torture (chapter six). Hurd finds that in these three areas "international law is often much more successful at constituting and legitimating government policies" than it is at "differentiating compliance from violation" (p. 3).

Building on his three case studies, Hurd conceptualizes his "Empire of International Legalism" (chapter seven), arguing that the international rule of law not only "is a structure of governance" (p. 130) but that it is an empire, because it is "inescapable, hierarchical, global" (p. 137). Within that structure, international law is at once constraining, empowering, and constituting. The rule of law constitutes the international system because its ideological demands condition every policy (pp. 129–30). All that matters for policy outcomes is a skillful deployment of legal resources: "Whether the results are emancipatory and beneficial to human welfare, or whether they justify aggression, repression, and coercion are open questions" (p. 131). Hurd concludes that "the hegemony of the international rule of law is not manifest in compliance. It is manifest in the universality of law as a source of justification and contestation. States cannot opt out in favor of some other logic of justification. There is simply no alternative to legalism. In this sense, law is sovereign" (p. 133).

Realism in Disguise

How to Do Things with International Law is an eye-opener, although it fails to convince me on two core points: It does not offer a real alternative to realism in international relations, and it does not offer a rich alternative concept of the international rule of law. Rather, I read it as realism in disguise, and as (perhaps unwittingly) reinforcing the realist stance that international law is power politics in disguise.

Hurd situates his theory between two strands. He purports to espouse neither the "liberal" claim that law is a progressive force in world politics nor the realist claim that state power overwhelms international law. Rather, "law itself produces resources that states find useful; it is a source of power in which states invest" (p. 137). Hurd does not deny the ambivalence of law as both an antidote to naked power and as a vehicle for exercising power and entrenching oppression,

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

which therefore cannot be put in a single box. Instead, his approach is, first and foremost, realistic (and critical-legal-studies-like): "Foreign policy decisions have to come with legal reasons, and political disputes turn into arguments over what the law permits or forbids. In theory, one cannot say what the results will be. The real political consequences, however, are likely to favor the powerful" (p. 138). But Hurd also seeks to inject a dose of constructivism. He professes a belief in the socializing power of the law, telling us that law can explain and frame competing policy choices, and is in this sense "pervasive and even foundational" in international affairs (p. 5). And while the usual realist posture is that international law is relatively unimportant in global politics, Hurd reaches the opposite conclusion—that it is centrally important.

Power Politics in Disguise?

Hurd's core claim is based on a contrast between the domestic rule of law and the international rule of law. According to Hurd, the domestic rule of law basically means stable, publicly debated, and general rules that not only bind citizens but also governments in a consistent manner across cases. International law, by contrast, is unstable, nontransparent, selective, does not bind actors such as the Security Council, and does not provide identical obligations across the board. Despite these features, however, Hurd still perceives the influence of the international rule of law as being such that "Governments are motivated to fit themselves into the confines of international legality because it brings them political legitimation. This is the heart of the international rule of law" (p. 75).

I have two objections here. First, the difference between the domestic rule of law and the international rule of law is overstated, and this stark distinction does not fully capture extant practice that builds on the similarity.[2] The picture of international law that Hurd paints is very classical, to say the least, building heavily on the private law analogy in which international law is seen "as private law writ large."[3] Against this, current practice has developed public law–like features of international law: for example, transparent rulemaking;[4] legal limits and accountability of the Security Council;[5] and "integral" treaty regimes, stemming from multilateral treaties[6] or even forming a web of bilateral ones.[7] Taking these more recent forms of international law into account, the rule of domestic law and the rule of international law look less distinct than Hurd depicts. Moreover, normatively speaking, the principle of legality addressed to states *should not* be categorically different in

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

both spheres, because states have the potential to harm human beings in their activities both inside and outside their territories, and therefore should be contained by both domestic and international law.[8] This is why, for example, the school of global constitutionalism to some extent extrapolates the rule of law to the international sphere. Indeed, I have elsewhere tried to square constitutionalism with the dual function of law that Hurd describes, and have tried to show how "constitutionalism 1.0" sought the empowerment of international organizations, while "constitutionalism 2.0" focused on their constraint.[9]

My second objection is that Hurd's concept of the international rule of law is problematic. Indeed, if his descriptions thereof were correct, it would be a misnomer to call this scheme a rule of law at all. His objective is not to identify which legal arguments satisfy the juridical standards. On the contrary, Hurd aims to show that this question is *irrelevant* for international law to play a role. But here I must respectfully object. Giving up any attempt to distinguish between tenable and untenable legal arguments misses an important feature of the international legal discourse. It is true that international law does a bad job at distinguishing lawful from unlawful behavior. However, if this function of the law is completely set aside or given up (for practical and analytic purposes), then the law is indeed (as Hurd also says) simply *raison d'état* in disguise. Calling this the international rule of (international) law borders on Orwellian newspeak. It is actually not a rule of law, but at best a rule *by* law, to use the distinction drawn in the Chinese debate. It might even be more appropriate to qualify the functionality of international law that Hurd has drawn out as a *travesty* of the rule of law.

Not only from a legal perspective but also from an international relations perspective, the crucial question remains: How bad may it get? It is empirically not the case (notwithstanding Hurd's examples) that every legal justification, however aberrant it may be, "confirms" a rule in substance. A capricious legal justification only confirms that international law is the language of states. But a "language" whose content (*what* is said) is irrelevant is only an empty shell, and indeed is "power politics in disguise."[10]

International Legal Arguments as Speech Acts

The "How to" of the book's title alludes to John Langshaw Austin's speech act theory.[11] But a speech act theory of 1955 is no longer sufficient as an explanation of

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

international legal discourse. We need to take note of Jürgen Habermas and others' observation that each speech act implicitly contains a claim to validity, and that the speakers do not or rather cannot exercise power with their speech because they inevitably have to accept the other speakers' claim to validity, and validity excludes categories of strategy. Once we understand the process of lawmaking and law-interpretation as an "interpretative struggle,"[12] then arguing and reason-giving matters. Actors could even be caught in the process of arguing from which they can escape only at a certain cost, or what Thomas Risse has called "argumentative self-entrapment."[13]

Hurd, too, writes that "this is the constitutional meta-norm that makes international diplomacy and politics recognizably contemporary: giving, receiving, and arguing over the *legal reasoning* that authorizes state acts" (p. 45; emphasis added). But he insists that these "legal justifications are not deliberative procedures in the sense envisioned by theorists of communicative action—they are not based on public reasons or reasoning, and there is no expectation that they will lead to a telos of consensus. They are instead self-interested and instrumental" (p. 46). It seems that at this point Hurd wants to have his cake and eat it too. The "communal resources of international law with its internal logic and particular structure" (p. 46) sit ill with pure cynical uses of the law.

Hurd's above assessment of legal justifications misses that international law, by being a specific discursive technique that demands certain argumentative standards—coupled with substantive norms such as the formal equality of state votes in the making of treaties and of secondary law, the principles of transparency and inclusiveness, and the formalized proceedings before a court (including the equality of arms, publicity, burdens of proof, standards of evidence)—can in a modest way level power imbalances in the processes of lawmaking and law application. So even if we do not purchase the currency of the "pure" theory of communicative action, it remains the case that the language and craftsmanship of international legal discourse simply does not allow every kind of argument. Although the law is vague, and although its substance reflects the bargaining power of those sitting at the negotiation table, it still forces the players (or speakers) into a Procrustean bed of reasoning that must also connect to past precedents and interpretations. The arguments given may of course be strategic, too, but then the speakers are subjected to the "civilizing force of hypocrisy."[14]

Put differently, the practice of giving legal reasons is not completely empty. And therefore the nascent legal obligation to justify political and legal acts (such as the

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

exercise of the Security Council veto) can be functional near-substitutes for a currently unattainable international democratic rule of law. But practice constantly oscillates between realizing an approximation of and just feigning democracy-like procedures. The lack of a bright line between proper or "tenable" legal arguments does not mean that no distinction is possible. And, importantly, the distinction between the unsustainable and the sustainable legal argument is *not* only a function of the power relationships in the legal discourse. Even if we no longer believe in any external or metaphysical standards of "rightness" of a legal claim, the middle-range and long-term general (though not necessarily unanimous) acceptance and *acceptability* of legal arguments is, as all experience shows, not totally random. Instead, acceptance and acceptability flow from reliance on habitualized standards of argumentation, applied in specific institutional settings.

Christian Marxsen has suggested some criteria to identify the "tipping point at which invoking the law clearly can be viewed as cynical because it is so badly done" and "at which justificatory attempts can be seen as being entirely absorbed by politics, and, thus, as losing their connection to the normative system of law."[15] An important factor is *who* speaks. A legal argument by a self-interested actor, such as a state seeking to justify its course of action, is examined and assessed with less reverence and more suspicion than a legal argument by a court that offers some institutional guarantees of impartiality. Further factors influencing not only the factual acceptance but also the normative acceptability of legal arguments include sentiments of fairness and morality that are themselves subject to change through time and are dependent on the relevant interpretive community.

Back to Syria

Let us return to the air strikes on Syria by the Western allies on April 14, 2018, for testing Hurd's claims. The United Kingdom and France, but not the United States, behaved as Hurd's model predicted. In fact, the United States did not offer any legal argument,[16] and the U.S. president stated only that "the purpose of our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons."[17] In contrast, the British government explicitly justified the air strike by reference to international law: "When the Cabinet met on Thursday [April 12], we considered the advice of the Attorney General. Based on this advice, we agreed that it was not just morally right but legally right to take military action."[18] The prime minister relied on the country's well-known criteria

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

for humanitarian intervention.[19] However, from a positivist and consensus-based international law standpoint, the United Kingdom was wrong to carry out the strikes. A "humanitarian intervention" (that is, military action for humanitarian purposes but without an authorization by the Security Council) is *not* permitted by international law.

The French prime minister declared that his country relied on Security Council Resolution 2118 of 2013.[20] This legal claim is also unsustainable. The resolution did not authorize states to take military action, but only announced that the Security Council would in the future consider measures under Chapter VII (which never happened because of Russian vetoes). In order to make it a full-fledged argument, France would have had to argue (and could have without self-contradiction) that the recurring Russian vetoes against contemplated military interventions to stop ongoing massacres, and even against an investigation into war crimes, are abusive. France has, as a permanent member of the Council, assumed a responsibility not to veto in a responsibility-to-protect situation,[21] and may therefore expect other permanent members to do the same.

Russia claims that the three Western states, in carrying out the strikes, respected the red lines that it had previously drawn.[22] This is plausible, because the three would certainly not have wanted to risk a confrontation with Russia. This tacit arrangement marginalizes international law even more: In reality, the big powers have portioned among themselves zones of influence in Syria. Despite Hurd's protestations, we are back to realist power politics masked by legal language. Nevertheless, to some extent this recent incident corroborates Hurd's main thesis: The allied action is a demonstration of the strength of the three Western permanent Council members, backed by international legal arguments, bending or even breaking the law as it stands. But did the law-speak create political legitimacy? Maybe a short-term social legitimacy (acceptance). In the long run, however, normative legitimacy (acceptability) can only persist if the standards of the legal discourse are satisfied (for example, by reliance on precedent, invocation of general legal principles, and proper distinctions)—which is not the case here. In addition, we see time and again that the legal assertions must find moral purchase with the target audience.

These observations by no means diminish the value, originality, and sophistication of Hurd's provocative new book. The author has processed elements from both international relations and international law and has woven together concepts and methods from both. He has undertaken a new and illuminating type

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

of analysis; and it should be extended to further areas of international law, such as environmental law and trade law. Finally, *How to Do Things with International Law* is a must-read for all international lawyers who are not blindly pursuing their business but who are open to nagging doubts about the performance and value of international law.

NOTES

[1] "Ces frappes ne règlent rien mais elles mettent fin à un système auquel nous nous étions habitués, qui est que, en quelque sorte, le camp du droit serait devenu le camp du faible." Emmanuel Macron (@EmmanuelMacron), Twitter post, April 17, 2018, 3:57 a.m., twitter.com/twitter/statuses/986196919235104769. (Question and Answer session before the European Parliament of April 17, 2018, devoted to the missile strikes of April 14, 2018, launched by the United States, the United Kingdom, and France at three places that had been associated with chemical weapons production by Syria.)

[2] Compare, for example, Resolution 67/1 of the UN General Assembly, entitled "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels," November 30, 2012, A/RES/67/1, para 1, www.un.org/ruleoflaw/files/A-RES-67-1.pdf.

[3] Thomas Holland, *Studies in International Law* (Oxford: Clarendon Press, 1898), p. 152.

[4] See the recent public debate about the Transatlantic Trade and Investment Partnership (TTIP), in which public criticism (besides the new U.S. president) was one factor that stalled the project.

[5] International Criminal Tribunal for the former Yugoslavia (ICTY), case no. IT-94-1-AR72, Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber of October 2, 1995, paras. 26–28.

[6] Doubting this feature of WTO law: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003).

[7] Stephan Schill, *The Multilateralization of International Investment Law* (New York: Cambridge University Press, 2009).

[8] Jeremy Waldron, "The Rule of International Law," *Harvard Journal of Law & Public Policy* 30, no. 1 (2006), notably at p. 23.

[9] Anne Peters, "International Organizations and International Law," in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone, eds., *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), pp. 33–59.

[10] Georg Schwarzenberger, *Power Politics: A Study of World Society*, Third Edition (London: Stevens & Sons Ltd., 1964), p. 203.

[11] John Langshaw Austin, *How to Do Things with Words: The William James Lectures delivered at Harvard University in 1955* (Oxford: Clarendon Press, 1962).

[12] Compare, for example, Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (New York: Oxford University Press, 2012), p. 37 ("semantic struggles").

[13] Thomas Risse, "Let's Argue: Communicative Action in World Politics," *International Organization* 54, no. 1 (2000), p. 23; see also Venzke, *How Interpretation Makes International* Law, p. 218.

[14] Jon Elster, "Deliberation and Constitution Making," in Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998), p. 111.

[15] Christian Marxsen, "Violation and Confirmation of the Law: The Intricate Effects of the Invocation of the Law in Armed Conflict," *Journal on the Use of Force and International Law* 5, no. 1 (2018), pp. 8–39.

[16] But see the former legal adviser Harold Koh, "Not illegal: But Now the Hard Part Begins," *Just Security* (blog), April 7, 2017, www.justsecurity.org/39695/illegal-hard-part-begins/.

[17] The White House, "Remarks: Statement by President Trump on Syria," April 13, 2018, www.whitehouse.gov/briefings-statements/statement-president-trump-syria/.

[18] Syria: Statement of Theresa May, Prime Minister, U.K. House of Commons, Hansard Vol. 639, April 16, 2018.

[19] U.K. Government, "Policy Paper, Syria Action—U.K. Government Legal Position," April 14, 2018.

[20] French Prime Minister Edouard Philippe in the National Assembly, April 16, 2018.

[21] Laurent Fabius, "A Call for Self-Restraint at the U.N.," *New York Times*, October 4, 2013.

[22] Vladimir Isachenkov, "Russia: US Did Not Violate Red Lines During Syria Strikes," *Associated Press*, April 20, 2018.

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press

Abstract: In his recent book, Ian Hurd argues that international law is pervasive and foundational in international affairs and that the international rule of law is hegemonic over states. While the book is provocative and compelling, it fails to convince on two core points. First, Hurd does not offer a real alternative to international relations realism. Indeed, the book could unwittingly reinforce the realist stance that international law is simply power politics in disguise. Second, the book offers a problematic conception of international rule of law. What Hurd describes is at best a rule *by* law, or perhaps more appropriately qualified as a *travesty* of the rule of law.

Keywords: international law, rule of law, realism, liberalism, speech act theory, constitutionalism

https://doi.org/10.1017/S0892679418000746 Published online by Cambridge University Press