# CHAPTER 7

# INTERNATIONAL LAW AND MORAL OBLIGATION

The instrumental theory of international law outlined in parts 1 and 2 was offered as an alternative to the conventional wisdom that international law has a normative component that pulls states toward compliance, contrary to their interests. Some traditionalists will claim that our purely positive, or explanatory, analysis is not responsive. Even if international law is best explained by states acting in their self-interest, states *should* obey international law's moral command. On this view, our preoccupation with the conditions under which states in fact comply with international law is of little interest. The important issue is what states should do; international law scholarship should press states to live up their obligations, regardless of whether it is in their interest to do so.

This argument's assumption, an assumption that permeates modern international law scholarship, is that states have a moral obligation to comply with international law. In this chapter, we argue that this assumption is wrong. Our claim is not that states should not follow international law, but that they have no moral obligation to do so. A state's instrumental calculus will usually counsel in favor of international law compliance, at least with respect to treaties that the state entered into self-consciously. But when the instrumental calculus suggests a departure from international law, international law imposes no moral obligation that requires contrary action. (For a discussion of the literature, see Buchanan and Golove 2002.)

## Can a State Have Obligations?

In common speech and the speech of politicians and diplomats, states are corporate agents that have intentions, interests, and obligations; they can declare war, make promises, and form alliances; they can grow, shrink, divide, and merge. For some scholars, the use of anthropomorphic language to refer to collectivities like states and corporations is a convenience only (Lewis 1991). According to these scholars, only individuals can have obligations, and references to state obligations are metaphors for the duties of rulers or citizens.

One could imagine an international law theory that started from these individualistic premises. An old version is that princes recognize that they owe one another moral obligations, and these obligations form the basis of international law. Hume (1978) took this position, qualifying it with the claim that because states depend less on each other for aid than individuals do, the obligations among princes have less force than the obligations among ordinary citizens. But with the rise of the nation-state, this view could no longer be sustained. For Morgenthau (1948b), nationalism spelled the end of international ethics because it destroyed the transnational social ties of aristocratic elites; it made leaders beholden to the masses of a single state and thus left them without any sense of obligation toward the masses of another state. The masses of one state will also not tolerate leaders who have ethical scruples; on the contrary, each state identifies its own values with the truth and seeks to impose them on others, through violent means if necessary. Under such circumstances there can be no international law that exerts influence on the behavior of states.

Morgenthau's (1948b) argument relies on a pessimistic empirical claim about citizens' sense of obligation. If one adopted a more optimistic view, could an individualistic theory of international law be created? Suppose that the government serves as an agent of the citizens, and when the government makes promises, the citizens inherit the obligation to keep the promises. They discharge this obligation by pressuring governments to keep their promises and removing governments that do not. Citizens also pressure the government to comply with other obligations under international law. When one government takes the place of another, citizens must pressure the new government to comply with obligations created by the old government.

The problem with this view for the international law theorist is that it contradicts the fundamental premise of international law theory, namely, that states—not individuals or governments—bear legal obligations. If international legal obligations were borne by individuals or governments, rather than by states, then an international obligation would end whenever a government was replaced or generations of citizens turned over. Treaties would constantly expire on their own; customary international law could not persist for more than a few years. In addition, nondemocratic governments would not be able to bind citizens to international law, and even in a liberal democracy, the problem of aggregating preferences through voting procedures and representative institutions would sometimes break the agency relationship. Because the state drops out of the picture, every international obligation would be vulnerable to the claim that citizens, or discrete groups of citizens, did not acquire the obligation through consent or some other acceptable procedure. For these reasons, international law is not built on the obligations of individuals.

The more common view is that a state, like other corporate bodies, can bear obligations. States have obligations to protect the rights of citizens. They have obligations to keep their promises, respect the sovereignty of other states, and help their allies (Maxwell 1990). It cannot be denied that people speak this way and that this way of speaking is meaningful. Similar language is used for corporations, religious associations, and other collective bodies, and it gives us no trouble in these contexts. Still, states do not act by themselves; they must be made to act by leaders and citizens. Even if states can be said to have obligations, the leaders and citizens must believe that they have a duty to guide the state in a way that is consistent with those obligations. If they do not, the obligations of the states are idle and of no importance.

A useful analogy comes from the corporate world. Corporations have legal and moral obligations that are independent of the obligations of shareholders and other stakeholders. When a corporation violates a legal obligation, it must pay fines and other penalties. To pay these fines and penalties, the corporation diverts revenues that would otherwise go into the pockets of shareholders. These shareholders have no basis for complaining that they are being made to pay for legal violations that they did not commit, did not know about, or could not have stopped, such as illegal acts secretly committed before current shareholders bought their shares. The reason they have no basis for complaint is that

they voluntarily accepted these obligations when they purchased the shares (Kutz 2000, 253). The price they paid reflected a discount for the market's estimate of existing corporate liabilities, however incurred, given that the shareholders' right to the corporation's revenue stream is, as a matter of law, secondary to the rights of holders of fixed obligations on account of the corporation's legal violations. Citizens, by contrast, do not purchase their citizenship. If a prior government made a bad promise, one cannot tell current citizens that their price of admission already reflects that obligation. If citizens have a moral obligation to cause the state to comply with its obligations, the reason cannot be similar to the reason that shareholders must accept the corporation's obligations.

The problem with the corporatist approach to international law is that it depends on citizens and rulers feeling that they have an obligation to live up to the state's obligations. The citizens and rulers are the people who decide what the state does, and they are free to disregard a state's obligations if they believe they are spurious. Citizens and rulers might believe that they inherit the state's obligations only if the state is a liberal democracy, or only if it is coextensive with the people or the *Volk,* or only if these obligations were acquired in recent memory. By contrast, we can demand that corporations comply with legal obligations, penalize managers and shareholders of corporations that do not comply, and justify the penalty by virtue of these individuals' freedom not to join the corporation if they prefer to avoid the corporation's liabilities. We can similarly blame the corporation for its wrongful behavior, holding shareholders responsible for this behavior and blaming them for not taking remedial action even if they cannot be blamed for the original act.

Thus, international law finds itself in a dilemma. On the one hand, if international law takes the state as the primary obligation-bearing agent, then it can have no direct moral force for the individuals or groups who control the state. There could be, by definition, state obligations under international law, but these obligations would have no influence over the behavior of states except when citizens (or, in autocratic states, autocrats) happen to identify closely with the state or have independent grounds for supporting international law. On the other hand, if international law takes the individual or nonstate group as the primary moral agent, then it can claim the agent's loyalty but it must give up its claim to regulate the relationships between states. It

becomes vulnerable to the births and deaths of individuals, migrations, the dissolution and redefinition of groups, and ambiguity about the representativeness of political institutions. States would flicker, and so would their obligations to treaties and rules of customary international law.

International law grasps the first horn of the dilemma: It purports to bind states, not individuals. Although individuals sometimes have obligations under international law, these obligations are derived from the actions of states. But if we grant international law the power to bind states—and we henceforth make this assumption—we still must ask why individuals and governments should feel obligated to cause the state to comply with its legal obligations.

## Consent

The most common explanation for why states have a moral obligation to comply with international law is that they have consented to it. This theory is reflected both in the *pacta sunt servanda* principle for treaty compliance and the *opinio juris* requirement for customary international law.

The first thing that must be said about the consent theory is that it has a narrower compass than its advocates pretend. Much of international law does not rest on consent. New states, for example, are expected (by old states) to comply with most, if not all, of international law at the moment of their emergence. Kazakhstan, for example, did not, as a region of the Soviet Union, consent to the international law commitments that bound it at the moment of its birth as a state. But even old states are bound by customary international law that they played no role in creating. International lawyers say that a state can be bound by failing to object to an emerging customary norm, and although this is true, it has nothing to do with consent. Silence rarely implies consent in morality or domestic law; it does at the international level only because consent is not a real requirement. Finally, as frequently noted, a state cannot eliminate its international law obligations simply by withdrawing consent. A state that acts inconsistently with a treaty cannot deny that it has violated international law just by saying that it no longer consents to the treaty (Brierly 1958). Although states often do consent to a particular obligation, including a treaty, consent

is neither a necessary nor a sufficient basis for creating an international legal obligation.

These points mirror arguments made about the role of consent in domestic political obligation. Against an old view that consent is the basis of political obligation, scholars have pointed out that people do not really have the option to consent to their own domestic political system: they are born into it, and the choice not to emigrate to another country is not the same thing as consent to the domestic political system. In addition, the normal ways one expresses consent to a political system (voting, tax paying) are themselves not based on consent but on decisions made by other people in the past. Consent cannot by itself ground political obligation (Hume 1978; Raz 1987). The most one can say is that citizens who enthusiastically express consent for the political system may have some kind of special moral obligation growing out of it (Raz 1987; Greenawalt 1987). But few citizens do this.

So states frequently fail to consent to international law, just as citizens rarely consent to their particular domestic political arrangement. Still, states consent to some aspects of international law—most notably, treaties—and so one might want to argue at least that states have a moral obligation to comply with treaties, just as ordinary individuals have a moral obligation to keep contracts as well as ordinary promises. However, the argument from consent at the international level is weaker than the argument from consent at the domestic level.

To see why, one must understand that a state, like a corporation, is not an agent whose well-being demands moral consideration. Although states make promises and enter treaties and so can be said to consent to certain courses of action, one must distinguish between the words that states use and the practices to which these words refer. States are not individuals, and what is true for individuals is not necessarily true for states. John can promise that he will perform some act in the future; but John cannot in the same way commit a third person, Mary, to perform an act. When a state at time 1 promises that it will act in a certain way at time 2, the state at time 1 is committing a different entity, the state at time 2, which might be as different from the state at time 1 as Mary is from John. The state at time 2 might be a liberal democracy, whereas the state at time 1 was a corrupt dictatorship, or the state at time 2 might have a different population, or a population with different interests. The relationship between the state at time 2 and the state at

time 1 is different from the relationship between John at time 2 and John at time 1.

One might argue that the state is like a corporation, and corporations make promises in contracts and are obligated to keep them. But, as we saw earlier, states and corporations differ in one crucial respect: the shareholders of a corporation voluntarily take on the obligations of the corporation when they purchase shares; indeed, the corporation's obligations are reflected as a discount in the price of a share. People who are born into citizenship of a state do not consent in a similar manner to take on the obligations that others have acquired in the name of the state.

Another way to stress the disanalogy between states and individuals is to focus on one reason consent is held to create a moral obligation for an individual. Consider an individual's promise to perform an action. On one view, the individual's duty to keep his or her promise derives from the relationship between promising and autonomy. Individuals should have the power to control their lives, to draft and execute "life plans," as it is often put, and an important part of this power is the ability to make binding promises. Those individuals who can make binding promises have more opportunities than those who cannot, for they can obtain the cooperation of others in projects that they cannot accomplish on their own.

States, however, do not have life plans. The power to make binding treaties might extend the range of opportunities that a state has, but a state's power to choose among opportunities is not a good in itself. Similarly, we don't say that a corporation should have the power to make binding contracts because corporations should enjoy autonomy. The reason for holding that the state or another corporate body should be able to make binding contracts or treaties cannot be that these entities should have freedom or autonomy in the way that human beings do; the reason can only be that human beings enjoy an enhancement in their autonomy if these institutions are able to make binding contracts or treaties.

But when a state enters a treaty, it binds a large number of people to policies to which they do not consent: people who are not yet born, people who have not yet immigrated, people who have no power under the existing political system. If states comply with their treaties, some people might enjoy greater autonomy—those people whose opportu-

nities are closely tied to the state's foreign policy or the benefits that the state obtains through cooperation with other states—but many others will not. The question is empirical, and it seems doubtful—keeping in mind the ambiguity of the concept of autonomy, the many ways that people exercise autonomy in their ordinary local activities, and neglect by many states of the interests of their citizens as well as those of third parties who might be affected by the promise—that there is a relationship between the autonomy of individual citizens and a state's power to enter treaties.

Perhaps it is sufficient to observe that most states throughout history, and even during recent history, have not been liberal democracies and have not placed any special weight on the autonomy of their citizens. The ability of these states to enter treaties is not likely to have an impact on the autonomy of their citizens. It would be odd to say that these states have an obligation to comply with international law, but whatever one's view on that issue, it would be odder still to say that other states, including liberal democracies, should expect these states to comply with international law against their interest. In such a nonideal world, it would be hard to say that liberal democracies' consent to treaties with these states should create any moral obligations. Perhaps liberal democracies ought to keep promises they make to each other, but we have seen that international law does not require this; international law requires all states to keep their treaties, regardless of the domestic political arrangements of the promisor or the promisee.

Take the case concerning the *Gabcikovo-Nagymaros* (1997), a casebook favorite that involved a treaty between Hungary and Czechoslovakia (subsequently, Slovakia) for the construction of a dam and hydroelectric power plants on the Danube River. The treaty was ratified in 1977, when both states were under communist rule; the project was widely seen as an environmental disaster. After Hungary made the transition to democracy, its government, bowing to public pressure, sought to withdraw from the treaty. Do members of the public really have an obligation to pressure their government to maintain adherence to a treaty that could only have disastrous effects for the state and its citizens and that never had any democratic legitimacy?

None of this is to say that a state should not comply with its treaties. Outside of coincidence of interest situations, states frequently comply with their international obligations, especially treaties, because it is in their interest, or their citizens' interests, to do so. The state's obli-

gation to keep promises is a prudential decision, not a moral decision. The decision to keep a promise turns on its effect on the good of the state. (This is hardly a new idea; see Spinoza 1958.)

## Well-Being

Consent is not the only source of obligations. Another theory for why individuals have the duty to obey the law appeals to the capacity of governments to do good for their citizens (Raz 1987). Governments have authority because a centralized, powerful institution is needed to coordinate the behavior of individuals, to enable them to pursue projects, and to protect them from one another. An institution that benefits people, and that is just, is owed a duty of allegiance by those who are so benefited. But then the legitimacy of the government and the individual's obligation to obey any law extend only as far as the government's success in enacting good laws.

Transferring this theory to the international context creates puzzles. Who is the international authority to which states owe allegiance? When we look for such an authority, we find none: no world government and no authoritative international institution. All we can find are rules of customary international law that have evolved gradually over hundreds of years, their provenance mysterious except that we know that current governments representing living individuals did not create them. Still, we might say loosely that this institution, or maybe "international society" (Bull 1977), has authority and can create obligations as long as it is good.

Domestic laws are good because they respect and promote the autonomy of citizens, or because they promote the welfare of citizens. But, as argued earlier, states do not have autonomy in the way that individuals do. States do not have projects and life plans; nor do states experience welfare or utility. States are vehicles through which citizens pursue their goals, and although we can talk meaningfully about whether the citizens of a state in the aggregate enjoy a high level of welfare or enjoy a great deal of autonomy, the state itself does not experience these things. The state's own autonomy (in the moral, not political, sense) or welfare cannot be a reason for complying with international law. When people argue that states should comply with international law, they always appeal to the rights or welfare of individ-

uals. Individuals would be better off in a world in which states had an obligation to comply with international law. *That* is why states should obey international law.

The first thing to see about this argument is that it is based on an empirical judgment. There are many reasons for thinking that this judgment is dubious. The main source of doubt arises from the fact that states do not always act in the interest of their own citizens, and even more rarely act in the interest of citizens of other states. States without representative political institutions, or with bad institutions, or with highly heterogeneous populations frequently do not serve the interests of their citizens or respect their autonomy. If states do not choose good domestic laws and policies, they will not enter good treaties either. In a world populated by bad states, it is doubtful that people are better off with international legal obligations.

One might argue that international legal obligations can be created only when the states involved are liberal democracies (Tesón 1998), or when the obligations themselves are good. But this is just an argument that international law, which does not limit its obligations in this way, must be changed. Perhaps such a legal system would be better, but it would not be current international law, which derives its power from its insistence that all states are equally subject to the law and that international obligations are not vulnerable to ambiguity about the quality of domestic political institutions, in which case many existing treaties and rules of customary international law would be thrown into doubt.

Even when states are liberal democracies, they never attach as much weight to the well-being of foreigners as they do to the well-being of their own citizens. (See chapter 8 for an elaboration of this view.) As a result, treaties and rules of customary international law will often advance the interest of the involved states at the expense of third parties. Two powerful states, for example, might enter a treaty that lowers tariffs between themselves but raises tariffs for imports from a third, competing state, which might be weaker and poorer and the home of a population greater than the combined population of the first two states. The democratic institutions of the first two states drive them toward these results as long as the interest groups or publics in those states care more about their own well-being than that of the population of the third state. The rules of international law facilitate cooperation, but do not necessarily facilitate cooperation benefiting the world.

The same can be said about domestic law, and for this reason philosophers tend to believe that individuals have a moral obligation to obey only good laws. If this is true for states as well, then states have no general moral obligation to obey international law and should obey only good international laws, a conclusion that, of course, would deprive international law of its authority (A. Simmons 1979). For Raz (1987), domestic law can have authority on epistemic grounds: the law might incorporate knowledge not available to citizens. But, however plausible this argument may be for domestic law, it is unlikely to be true for international law.

Despite the absence of a strong philosophical basis, commonsense thinking suggests that individuals have a prima facie moral duty to obey laws with a democratic pedigree, and we will assume for now that this view is correct. There are in this respect two important differences between domestic and international law. The first difference concerns the question of presumption. We presume that domestic laws are good in a liberal democracy, where citizens have influence over the political process. The same cannot be said about international law. Much of the foundational rules of international law evolved long before liberal democracy became a common mode of political organization; more recent international law, it is generally agreed, almost always reflects the interests of the powerful (and not always liberal) states rather than the interests of the world at large. The law reflects the interests of states, not of individuals; that is why apparent humanitarian interventions like the war in Kosovo can be illegal (Henkin 1999). For these reasons, it seems unwarranted to presume that international laws are good.

The second difference concerns compliance and enforcement. Domestic law is enforced in well-ordered societies. Thus, people's sense of moral commitment works hand-in-hand with the state's monopoly on force to ensure that law is usually complied with. This is important because people do not have an obligation to obey a law that everyone else violates (Rawls 1971); indeed, domestic laws that are not enforced (speed limits, drug laws in some places, certain kinds of tax laws) exert little normative force. What is the anomaly for domestic law is the norm for international law. Except when states construct self-enforcing treaties and when customary international law reflects stable equilibria, international law is not reliably enforced and depends entirely on states voluntarily setting aside their immediate interests. There is no reason

to expect the powerful states to take the role of a police force responding to every violation: that job would be an impossible burden and would provide few benefits to the citizens of the states that take it on.

As a further illustration of this point, compare a domestic contract that harms third parties and a treaty that harms third parties. At the domestic level, we can clearly distinguish the parties' legal and moral obligations. If the contract violates the law and is thus void, then the parties have neither a moral nor a legal obligation to keep their promises. This is true for a contract to fix prices. If the contract does not violate the law, then the parties have a legal obligation but might not have a moral obligation to keep their promises. Think of a contract between an owner and a builder that requires the latter to build a house that neighbors will think ugly. The owner and the builder learn the neighbors' opinions after they enter the contract but before either party has sunk any cost in the project, and they could cheaply switch to a different plan that would be less objectionable. Now, many people might argue that the parties do have a moral obligation to keep their promises (or, at least, that the contractor should build the house if the owner does not release him from the obligation) and should not worry too much about the neighbors. If building ugly houses is a public bad, then there will be a law against it; if not, it must not be a public bad. Perhaps the view is that modern architecture always meets resistance but should be encouraged on cultural grounds. The contractor who feels bad about offending the neighbors could say, with some justice, that he or she assumes that the contract is morally inoffensive because the government does not discourage it. If the contractor were to violate the contract merely on the basis of some protests, he or she would wrong his or her contracting partner without producing any offsetting benefit. This argument depends on the government having superior information and the contractor being justified in relying on the government's action (or inaction).

Whatever one thinks of this domestic case, it is hard to see how it would work at the international level. Suppose that two states enter a treaty under which they agree to impose economic sanctions on a third state. These sanctions are intended to coerce this third state to open its markets to products that citizens of the third state sincerely believe threaten their culture and values. One of the original pair of states then decides whether to violate the treaty or comply with it. In making this

decision, it cannot appeal to a higher government's judgment, in the way that the contractor could. It cannot, like the contractor, assume that, roughly, the law will release it if the treaty is bad and not otherwise. For there is no reason to think that international law will track moral right or the public interest, as there is a reason to think that domestic law in a well-ordered democracy will. Thus, the state must make its own moral judgment and (if it is inclined to be guided by morality) comply with the treaty only if compliance is the right thing to do. International law has no moral authority.

International law scholars tend to confuse two separate ideas: (1) a moral obligation on the part of states to promote the good of all individuals in the world, regardless of their citizenship; and (2) a moral obligation to comply with international law. The two are not the same; indeed, as we explore in detail in the next chapter, they are in tension as long as governments focus their efforts on helping their own citizens (or their own supporters or officers). If all states did have the first obligation (which is an attractive but utopian idea), and they did comply with that obligation, then they would agree to treaties that implement, and would engage in customary practices that reflect, the world good; then they might have an obligation to comply with international law in the same rough sense that individuals have an obligation to comply with laws, or most of them, issued by a good government. But this is not our world. In our world, we cannot say that if a particular state complies with international law—regardless of the normative value of the law, regardless of what other states do, and maybe regardless of the interests of its own citizens—or even treated compliance as a presumptive duty, the world would be a better place.

## Morality and International Legal Change

The morality or immorality of international law is exhausted by its content; international legality does not impose any moral obligations. The truth of this proposition is revealed most clearly in the phenomenon of international legal change. Every state act that is inconsistent with existing international law is open to two interpretations. First, the act might be said to be a violation of international law by a state that intends only to take advantage of other, compliant states. Second,

the act might be said to be a proposal for revision of existing international law; the state acts inconsistently with international law in an effort to change it, to stimulate a new equilibrium that better serves its interests and, in the usual case, the interests of other states that have sufficient power and influence.

Usually, the interpretation is made after the fact. At the time of the inconsistent act, many states will protest and take steps to reassert the status quo international rule. Other states that see an advantage in the proposed law will support the alleged violator. As an example, consider the military intervention in Kosovo. The intervention clearly violated the UN Charter, but many states and international lawyers who supported the intervention quickly claimed that the intervention reflected an evolving international law norm that provided that force can be used for humanitarian purposes. Again, we see how an act that is inconsistent with international law can be interpreted either as a violation of it or as a first step in its revision. If we had perfect information about the interests and capacities of all the states involved, we would know immediately whether the inconsistent act will later be considered a violation or instead the first step in a new legal regime. Because we do not, we will not be able to choose between these interpretations until many years have passed and it has become clear either that states routinely go to war for humanitarian reasons or do not.

This phenomenon—illegality leading to a new order—is not unique to international law. The ratification of the U.S. Constitution was a violation of the Articles of Confederation, whose amendment provision required unanimity. The formal illegality of the U.S. Constitution was of no importance because the citizens of the new state acquiesced in it and paid no more attention to the Articles of Confederation. Subsequent generations have, in turn, violated the formal amendment provision of the U.S. Constitution by recognizing constitutional rights and powers that were not originally in the document. Rather than saying that these new rights and powers are illegal, courts and others understand that when new rights and powers obtain sufficient acceptance among the public and the political class, they become real constitutional changes. Looking backward, we can identify new actions, say, the congressional-executive agreement, that had no clear constitutional warrant and thus might have been thought a violation of the Constitution, but that have been validated by practice rather than subsequently rejected.

But if both international law change and constitutional law change occur through actions that formally violate the law but subsequently receive support or acquiescence, the phenomenon is far more common at the international level than at the domestic level. The reason is that international law is more decentralized, and there is no generally accepted mechanism for changing international law. The closest thing to such a mechanism is the multilateral convention. But such conventions are cumbersome. Unless all states, or all major states, agree to the new rules—and this almost never happens, and when it does only with reservations, understandings, and declarations that hollow out the consensus—then the result of a convention will be ambiguous, and we do not know whether the convention really changes the law until we observe the subsequent behavior of states. Thus, many states bypass conventions and press for new legal changes by violating the old law.

This should make clear that we cannot condemn a state merely for violating international law. The question is whether by violating international law a state is likely to change international law for the better from a moral perspective. This is why so much international legal argument seems indistinguishable from moral argument. When people criticize the United States for intervening in Kosovo or Iraq, their argument should be interpreted as a claim that the status quo international rules are good and that they should not be changed. When they support these interventions, they are arguing that the use of force rules are outmoded and that they should be changed: to allow for humanitarian intervention in the first case, to allow for preemptive self-defense in the second case. As the debate between the two sides develops, international law, as an institution that exerts its own moral force independent of its content, falls away. The reason that it can exert no moral force comparable to the moral force of domestic law is that it has no democratic pedigree or epistemic authority; it reflects what states have been doing in the recent past and does not necessarily reflect the moral judgments or interests or needs of individuals. It can have no democratic pedigree because there are no international institutions that reliably convert the world public's needs and interests into international law and that can change existing international law when the world public's needs and interests change.

## Does It Matter?

We have not given the philosophical accounts of political obligation the detailed treatments that they deserve. Nor have we discussed, except in passing, various other theories of domestic political obligation, including the "fair play" theory, the "natural justice" theory, and the "gratitude" theory.[1] Conceivably, one of these theories might provide the appropriate analogical basis for international moral-legal obligation, but, given their controversy even for explaining domestic political obligation, this seems highly unlikely. The weakness of existing accounts of political obligation has led many philosophers to believe that individuals have no moral obligation to obey domestic law, and others to hold that such an obligation, if it exists, is quite narrow. If there is little reason to believe that citizens have moral obligations to their governments, there should be no strong expectation that states have moral obligations to the "international system." Indeed, the claim that states, or the citizens that control them, have moral obligations to other states faces formidable additional difficulties. International law is the product of agreements and practices of democratic governments that favor their own citizens over the rest of the world and authoritarian governments that favor some subset of their own citizens; of powerful governments imposing their will on others and weak governments submitting because they have no alternative; of governments pursuing time-bound interests with little concern for future generations. There is little reason to believe that the resulting system as a whole is just, though particular regimes or arrangements within the international system may be, and that individuals throughout the world, or their governments, owe any duty to it.

One might ask, Does it matter whether states have a moral obligation to obey international law? States do what they do; they might violate a moral obligation even if they have it, or they might comply with international law even if they do not have a moral obligation to comply with it. H. L. A. Hart (1961) denied that it matters whether states have a moral obligation to obey international law or feel that they have such a conviction; all that matters is that states have a reason to comply with international law. But Hart's philosophical concerns are different from those of international lawyers, for whom the question does matter.

It will become clear why after a short discussion of the methodological assumptions of international law scholarship.

International law scholars have long grappled with the question of whether international law is law. Some express impatience with this question as merely a matter of definition, but the question never goes away. The question does not go away because it reflects a puzzle about the purpose of international law scholarship and whether it has a distinctive role in the academy. One possible answer to the question is that international law is not law but politics. It reflects patterns of behavior that emerge in international relations. But if international law is just politics, understanding international law does not depend on any special legal expertise and should be the province of the political scientist.

Another possible answer is that international law is not law but morality. International law reflects the moral obligations that states owe to one another. Domestic law, by contrast, is not a pure reflection of moral principles, but instead limits them as is necessary to accommodate the need for clear guidelines, the time and expense of judges, the distribution of political power, and other constraints. The problem with international law as morality is not just that this view leaves the field in the possession of moral philosophers with nothing for international lawyers to do. The problem is that morality is so indeterminate and so contested, especially among states and peoples, that it can provide little guidance for international relations.

The mostly implicit methodological consensus among international lawyers threads a needle. The norms of international law are different from morality: they are more precise and reflect positions where moral principles run out. The norms reflect institutional constraints just as domestic laws do. But norms of international law are distinguished from agreements, customs, and other political accommodations by virtue of their moral specialness. A third category, between politics and morality, is separated out and made the subject of a special discipline, that of international law.

But as the domestic analogy shows, this third category is vexed. The (domestic) lawyer's task is easily distinguished from the moralist's and the political scientist's: laws, though influenced by politics and morality, can be distinguished as the rules created by special institutions like legislatures and courts. As there are no special world legislatures or

courts, at least, none from which all international law can be traced, the subject matter of the international lawyer is trickier to distinguish. The international law community has declared that some agreements and customs are law because the states say so or treat them that way, but they do not explain why these agreements and customs should be treated as the subject of a special discipline rather than as just a part of international politics that states call law. Instead, international lawyers raise the law part of international politics to a higher plane by claiming that states are more likely to comply with what they call "law" than with other agreements and customs.

Pressed for an explanation for why states would do this, international law scholars typically argue (as we have seen) that law is internalized, is given special status, or is obeyed because that is the right thing to do. But if states do not, in fact, have a moral obligation to obey international law, then this attempt to save international law from politics or morality must fail.

This is not to say that the international lawyer's view could not be given a different defense. States could have an intrinsic desire to comply with international law for reasons other than moral obligation. It is possible that even if states did not have a moral obligation to comply with international law, citizens and leaders might think that the state has an obligation to comply with international law. They might make this mistake for several reasons: they are under the spell of a legalistic ideology; they make unrealistic assumptions about the enforceability of international law; or they make some other error in moral reasoning. But none of this seems plausible and is certainly not a firm foundation for international law.

The more plausible view is that efficacious international law is built up out of rational self-interest of the type described in parts 1 and 2. It is politics, but a special kind of politics, one that relies heavily on precedent, tradition, interpretation, and other practices and concepts familiar from domestic law. On this view, international law can be binding and robust, but only when it is rational for states to comply with it.

This prudential view does not imply that international law scholarship is unimportant. The scholarship retains its task of interpreting treaties, past practices, and other documents or behaviors. When states coordinate with one another, or cooperate, they need to establish a point of coordination. For this purpose, interpretive techniques are

helpful. The international lawyer's task is like that of a lawyer called in to interpret a letter of intent or nonbinding employment manual: the lawyer can use his or her knowledge of business or employment norms, other documents, and so forth to shed light on the meaning of the documents, but the documents themselves do not create legal obligations even though they contain promissory or quasi-promissory language.

There is a practical reason why it matters whether states have a moral obligation to comply with international law. International law scholars who believe that states have such an obligation are, as a result, optimistic about the ability of international law to solve problems of international relations, and they attribute failures to the poor design of international treaties and organizations. They argue that if states entered treaties with more precise and stronger obligations, gave up more sovereign powers to independent international institutions, used transparent and fair procedures when negotiating treaties, and eschewed unilateralism and bilateralism for multilateralism, then a greater level of international cooperation would be achieved than is currently observed. All of these normative recommendations flow from the premise that states want to comply with international law. If that premise is wrong, then these recommendations have no merit, or else must be defended on other grounds.

The prudential view, by contrast, suggests that stricter international law could lead to greater international lawlessness. If treaties were stricter, then compliance with them would be more costly. But then states would be more likely to violate international law or not enter international agreements in the first place. Efforts to improve international cooperation must bow to the logic of state self-interest and state power, and although good procedures and other sensible strategies might yield better outcomes, states cannot bootstrap cooperation by creating rules and calling them "law."