International law and the politics of diplomacy

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Diplomacy is the social practice by which states interact with other states. It takes place in the medium of international law as states use international law to explain and justify their policies to other states and other audiences and to understand them themselves. It is clear to see that in practice, states invoke law to strengthen their positions relative to other states by constructing justifications that situate their policies and preferences as consistent with international laws and norms. This is a ubiquitous practice in contemporary international politics. It can also be used to inform a theory of diplomacy as the intersection of international law and international politics.

This chapter advances two substantive points about diplomacy: first, that it is a social practice of states, and second, that the practice consists of reconciling state behavior with international law. The first section explains what is entailed in seeing diplomacy both as a practice and as state centric, including the dynamic between state officials and “new actors” in diplomacy such as activists, media, and non-state actors. The second section examines diplomacy’s connection to compliance, contestation, and the rule of law in world politics. Diplomacy makes state behavior sensible by explaining it in terms of existing international legal forms. It is therefore productive of foreign policy and international law. The contemporary international order rests on a widely shared commitment to the international rule of law—the belief that the primary virtue of states and the main machinery of international stability depend on compliance with international law. Public diplomacy operates in the
context of this commitment. States strive to be seen as acting consistently with their legal obligations, and public diplomacy is to substantiate and defend that position. In doing so, however, it is shaped by the tendency for states to see international rules as naturally consistent with their own interests and desires. As a result, competing claims about compliance are standard fare, and they cannot be resolved by recourse to either legal formalism or deliberative procedures. I end the chapter by presenting implications for the philosophy of international law, for the concepts of compliance and noncompliance, and for the agent-structure debate in international theory.

The chapter also contributes to contemporary debates about the relationship between international law and international politics, a topic that is receiving a good deal of attention. First, it suggests that international law provides the resources with which states talk about and understand their behavior, and these resources are reinforced and changed in the process. The power of international law lies in its utility to states for explaining their actions and interests. This view of international law is at odds with the philosophy of international law shared by Hobbesian, positivist, and Kantian traditions, as these all presume that legal rules exist independently of the interests and behavior of agents. Instead, I suggest that the practice of diplomacy is the *via media* in the mutual constitution of international law and foreign policy – the “law-in-use” meaning of international legal rules arises from how it is invoked in the diplomacy of states. Second, it implies that disagreements over the interpretation of international law are inherent in the legal project itself. States are naturally inclined to provide legal interpretations that serve their own interests, and as these will conflict the process leads to divergence rather than coherence in the law. The meaning of compliance is up for debate and is not resolved by legalized argumentation.

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Diplomacy generates competing opinions about the content of compliance and noncompliance with international law. The process of diplomatic interaction does not necessarily increase consensus, and its success cannot be measured in its contribution to public order or avoiding violence. Finally, this view sees diplomacy as a process of exchange between agents (states and others) and structures (international legal resources) in international relations. Studying the practice of diplomacy provides an example of how the interactive process between agents and structures can be modeled for international relations theory.

This approach to diplomacy draws on more conventional models but charts a distinct conceptual route through the practice. One traditional approach understands diplomacy primarily as a mechanism for reconciling (or failing to reconcile) the clashing interests of states (usually powerful states): for instance, when Germany wanted to take over Czechoslovakia in the 1930s, the various European powers sent their diplomats to Berlin to negotiate with Hitler’s government; the result was an agreement that allowed Germany to annex the Sudetenland—a classic episode of diplomacy. Similarly, Russia’s annexation of Crimea in 2014 was widely reported as a “failure” to bridge states’ differences through diplomacy. This narrative assumes that diplomacy exists when representatives of the state carry instructions and interests from home and discover where, if at all, these interests overlap. Diplomacy in this view is a function of interests, bargaining space, and representation—what Eyffinger calls “the juggling and balancing of the competing interests of these state-champions of autonomy.” Relative state power

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7 This is the model clearly explained and thoroughly critiqued in Carne Ross, *Independent Diplomat: Dispatches from an Unaccountable Elite* (Ithaca, NY: Cornell University Press, 2007).
mixes with diplomatic skill to determine where within the win-set the outcome rests. An alternative tradition of scholarship sees diplomacy as a function of discourse and argumentation— that is, as a process of communicative action. In this view, diplomacy involves parties using a common language to exchange competing interpretations of the situation; a filtering device, which might be public reason, an epistemic community, or something else, selects for the better argument. State interests might change in the course of argumentation, and the outcome might be unimaginable at the outset. The end result is that the parties come to a shared understanding around one interpretation, and this both settles the dispute and invests a new legal-political element into the discursive context for public order into the future.

I take a different starting point from both these approaches: I begin from the need of states to give meaning to their actions and those of others, which I see as a necessary implication of the constructivist insight that states and their actions are socially constructed. The meaning of state acts is neither self-evident nor fixed by material conditions; thus, actors are always involved in the process of interpreting and constructing their interests, their relations, and their ideas about the interests and relations of other actors. Diplomacy takes places as states (and other actors) invoke ideas and concepts to explain their needs and their actions to other states. International law provides a ready and socially legitimated pool of such ideas and concepts—these include ideas and rules around sovereignty, intervention, self-defense, humanitarian rescue, self-determination, and much more. Legal resources are useful, and powerful, instruments in the process of “sensemaking” for states.

The practice of making sense of the world through legal categories presumes both argumentation and competing interests; so as a scholarly attitude it implies both of the more conventional

approaches to diplomacy mentioned earlier. It is by reference to international legal rules and categories that states understand, explain, and justify their actions and policies to themselves and others. The process does not necessarily lead to agreement over either how the issue will be resolved or how it will be understood, but it consumes, produces, and is limited by international legal resources.

Diplomacy as a practice

The interaction among sovereign states inevitably produces diplomacy, that is, the dialogue of states talking to states about the business of states. This is the “infrastructure of world politics,” and it is made necessary by what Paul Sharp calls the “relations of separateness” that define sovereign states. Diplomacy is a subset of these dialogues, where the broader set also includes private negotiations and secret interactions. Negotiation involves trading interests toward an agreement, where reaching a point of agreement is essential to moving forward on a common project. It requires several actors in pursuit of their private interests where coordination with the other(s) carries the possibility of a greater payoff than does independent action. Secret interactions are defined by the state’s failure to provide a public justification for its action – the public justification being the crucial component of diplomacy. The absence of a public justification may have many reasons, one being that the state finds itself outside the bounds of the available resources of justification, that is, outside of existing international law. In studying diplomacy, I am interested in the pattern of public justification of state policy or action, undertaken by leaders, diplomats, and other government officials as well as by the professional staffs of foreign offices and other bureaus. Non-state actors participate in these processes as well.

Diplomacy is a social practice. It is a form of interaction among social actors that is framed by the existing social structures of rules, norms, and habits, and that is in turn productive of these structures.

14 Ole Jacob Sending, Vincent Pouliot, and Iver B. Neumann, “Introduction,” this volume.
15 Paul Sharp, Diplomatic Theory of International Relations (Cambridge: Cambridge University Press, 2009), 84.
These rules define and constrain the practice of diplomacy, and they are in turn reproduced and changed in the course of being deployed or invoked. The new literature on practice in international relations (IR) is unified around the idea that there exists “a sociality that always interconnects, constrains, and enables the ‘particles’ of social life throughout their motion.”17 This insight can lead in many directions. For my purposes, states are the “particles,” and I focus on the macro effects of their motion in relation to international law, that is, on the interaction between states around and through international law, including the reproduction of law by means of those interactions.

The practice of diplomacy is defined by three elements: it is social, it is state centric, and it uses and produces the legal resources of the international system. The following section outlines these aspects of the formal system of diplomacy, and the subsequent section addresses its substantive content in relation to international law.

Social component of diplomacy

Diplomacy is, first of all, a social activity. It connects a public language to the business of the state, giving meaning, reasons, and explanations for state action. It is embedded in a social context of reasons, rules, and meanings that exists before the interaction.18 The primary component of the contemporary legalized international order is the notion of an international rule of law in which states are expected to abide by the legal commitments that they take on. Through treaties, custom, and other mechanisms, the content of these commitments might be subject to competing interpretations, but the underlying idea of the rule of law and the importance of compliance are universally espoused and are presented as morally, legally, and politically good by states and publicists.19 The pervasiveness of the rule-of-law ideology in world politics is evident in the absence of critical contestation over it and in the degree to which compliance with international obligations is

18 Sending, Pouliot, and Neumann, “Introduction,” this volume.
19 I do not attempt to defend this view of international order fully here. For suggestions in this direction, see Hurd, “The International Rule of Law.”
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identified as the solution to a wide range of political problems – from human rights abuses to international conflict to economic development. The presumption of its inherently progressive character is on display in the long tradition of international legal promotion by scholars and activists.

Diplomacy puts these resources to work to explain, justify, or change the actions of the state. Frederick Schauer describes giving reasons for behavior in society as “the practice of engaging in the linguistic act of providing a reason to justify what we do or what we decide.” These reasons make action meaningful to the self, and potentially to others. Public reasons are among what Allen Buchanan calls the “epistemic requirements for justified action.” They are conceptually essential to action: agents cannot operate without the resources with which to explain and understand their actions. Diplomacy is the international variant of this activity. It draws on international rules, norms, and concepts to construct state action that is meaningful to the actor and its audience.

It is my contention that today the language of legality dominates the field of interstate discourse and thus that law constitutes the practice of


diplomacy. This was not always the case – the legitimating discourse for state affairs has not always been the discourse of law and legality. I do not examine here how this came to pass, but among historians of international politics, the growth of legalization is the subject of increasing study. Several scholars chart the behavioral manifestations of this process, including the growth in formal international organizations with explicit legal personality or with a mandate to adjudicate disputes through law; others account for the intellectual foundations on which these institutions rest – specifically, the historical developments that bring us to a generalized belief that legal institutions are the natural, appropriate, or expeditious means to accomplish international relations. Law and interests are today necessarily connected through the process of diplomacy.

The public, social quality of diplomacy arises because the resources for making these justifications come from the wider social setting in which the actor finds itself, from the legal concepts and rules that make up the corpus of international legal argument. These are the raw materials of state policy that the state uses to suggest, for example, that its use of force is an instance of humanitarianism rather than imperialism, that it is expropriating foreign assets for security reasons rather than to enrich the state, or that its aerial drones are part of a lawful war against a non-state enemy rather than an assault on the


sovereignty or territory of another country.\textsuperscript{28} When France sent its military to Cote D’Ivoire in 2011, it explained itself in relation to the international rules and norms on humanitarian intervention, and especially the actions of the United Nations.\textsuperscript{29} The power of this diplomacy came from its ability to distinguish between the image of humanitarian intervention and images of imperialism and neocolonialism. The competing narratives of humanitarian intervention, colonialism, and imperialism are like the “symbolic tokens” described by Zygmunt Bauman – resources deployed by agents that signal membership in groups or ways of thinking.\textsuperscript{30} These concepts have content because of how they have been used in the past, sometimes in treaties or legal texts but always in the practice and discourse of states. How they have been used and understood and argued over in the past shapes how they can be used today.

With the use of these tokens, diplomacy involves both internal and external processes in the state. Internal deliberation draws on the conceptual resources that exist in the external legal environment and may be done with an external audience in mind. As the state deliberates within itself about the meaning of its interests, obligations, and behavior, the connection between these interests and their international legality is never irrelevant, and so the power of legal resources to define legality is consequential even without an external audience. The internal effect of international law may be “performatively sufficient” (in the sense defined by Nicholas Onuf from Jürgen Habermas)\textsuperscript{31} – it may operate within individual agents to organize their understanding of the world and their place in it, independent of any audience effect. The deliberation within the Bush administration prior to invading Iraq in 2003 shows some of this: a behind-closed-doors consideration of the complexity among interests, rules, and actions, which included a need

to reconcile the invasion with a self-understanding of the US government as a peaceful rather than an aggressive actor. The prohibition against aggression under international law forced the war’s planners to define their policy as something other than that. The result was a series of attempts to associate the invasion with American self-defense, humanitarian rescue for people in Iraq, and a defense of the UN Security Council’s resolutions against the Iraqi government. 32 This narrative, constructed in opposition to the concept of aggression, was then sent out as a quantum of international public discourse where it was widely disparaged by governments, academic lawyers, and others. 33 It failed to convince its external audience, but the urge to construct a legal frame for the invasion was inseparable from the US government’s internal deliberations on the war itself.

Rules and norms define the possible actions available to states, and states articulate those rules and norms by making reference to them in their explanations of their interests and behavior. This suggests that international diplomacy bridges between state interests and their external environment in two ways: first, states make use of legal resources and contribute through that use to remaking them, and second, states exercise agency in the construction their legal positions but within constraints set by the history and politics of their context. The first suggests the mutual constitution of states and rules (or interests and international law), and the second suggests the interconnection between structure and agents. International diplomacy can show the way for IR scholars in the empirical study of mutually implicating phenomena. 34

Diplomacy and state centrisn

The second feature of international diplomacy is that as a practice, it is necessarily connected to states rather than to other kinds of actors. This


34 Sending, Pouliot, and Neumann, “Introduction,” this volume.
does not mean that non-state actors cannot engage in the practice—rather, it means that when they do, they are engaged in an activity that is directed toward states, in a process of using international social resources to influence state behavior. This follows naturally from the formal structure of the activity and its connection to the state-centric framework of public international law: only states are obligated under public international law, and only states find themselves in a position to claim credit or earn demerits for following or breaking international law.\(^{35}\) The politics of international law center on claims about compliance or noncompliance, and non-state actors are not in a position to comply or violate it. This does not mean that non-state actors may not engage in diplomacy, nor is it a challenge to the widely held view that non-state actors are taking a larger role in diplomacy than they previously had.

The interposition of new kinds of actors (i.e., non-state actors) into public diplomacy has dramatically increased the density of interaction, but it remains a state-centric social field. Non-state actors contribute to diplomacy despite not being subject to the rules of international law: they can invoke international rules, provide interpretations of behavior and of rules, and construct arguments using the resources of public international law. This can be consequential in constructing the field in which diplomacy takes place and in contributing resources to it. However, this is ultimately directed toward influencing states, by either forcing them to act in certain ways or giving them resources to pursue the policies preferred by the non-state actors. For instance, the Center for Constitutional Rights, a US non-governmental organization (NGO), provided legal briefs to states regarding George W. Bush’s responsibilities for torture.\(^{36}\) Its documents are designed to assist, indeed to provoke, national prosecutors’ offices in initiating criminal investigations regarding violations of the Convention Against Torture. It also implicitly threatens states with being seen as noncompliant with their own obligations under that treaty. Similarly, the Global Compact program at the United Nations encourages firms to adopt voluntary

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\(^{35}\) There are exceptions, of course, including public international organizations and individual persons in relation to certain international crimes.

standards of labor and environmental practices, and then it enlists NGOs to monitor them. It builds a pseudo-legal structure out of international norms and uses the imagery of compliance and noncompliance with those norms to induce firms to improve their behavior. The environmental group Sea Shepherd International explains its interference with Japanese whaling boats in the southern ocean on the grounds that Japan is violating the International Convention on the Regulation of Whaling and that Sea Shepherd is acting as that treaty’s enforcement agent. It refers to itself as “the only organization whose mission is to enforce these international conservation regulations on the high seas.” Many other examples exist. Activists, scholars, investigative commissions, and media, among many other actors, use diplomacy to shape the environment in which states operate. Thereby, they hope to change what states do or are.

The essentially state-centric nature of diplomacy could conceivably change if non-state actors become more central to public international law, and specifically if non-state actors were able to commit violations of international law. Two trends hint at this possibility: first, international criminal law may be developing in such a way that individuals can begin to make meaningful claims to compliance with international law, and second, non-state groups that aspire to be recognized as governments increasingly publicize their adherence to international rules (which under international law cannot apply to them) to support their claims to statehood. This is exemplified by the transitional government of Libya, which, while still fighting Gaddafi in the spring of 2011, declared its support for “all international and regional agreements” relevant to Libya, at a time when the vast majority of countries

continued to recognize Gaddafi’s government in Tripoli as the formal representative of the country.  

Productive aspect of diplomacy

As states use international law to explain their behavior, they contribute to remaking and reinforcing those rules. Diplomacy therefore has a “productive” effect in the sense of the term defined by Barnett and Duvall: it produces the public, social, and legal resources with which future state behavior is understood, justified, and argued over. This is the effect identified by Sending, Poulion, and Neumann by which “forms of diplomacy come to constitute the basic political fabric of world politics.” The productive effect of diplomacy provides one dynamic for change in international law and international relations since the content of international law at any point in time is a function of how it has been deployed by actors in the past.

The productive elements of diplomacy can be seen in many recent cases where international law has developed through practice. Humanitarian intervention, for instance, is increasingly seen as legal under certain circumstances, despite its tension with the ban on war and other rules of the UN Charter. This process was largely driven by governments using the language of legalized humanitarianism to justify their positions on intervention, and the effect has been to change the prevailing definition of the laws on the use of force. Similarly, one cannot explain the content of the laws on preemptive war without making reference to the moments of state practice in the past when these laws were invoked and argued over in practice. These span from the Caroline incident in 1837 to the Six-Day War in 1967, the Osirak

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42 Sending, Poulion, and Neumann, “Introduction,” this volume.


attack in 1981, and on to the 2002 US National Security Strategy. Determining what is or is not allowed as preemptive force depends on a close reading of these and other incidents.\textsuperscript{45} Even though states generally present their legal interpretations as seamlessly continuous with past practice, the reproduction of law through its use means the content of the rules is dynamic.

The interpretive exercise of understanding the law relies on these historical moments for its raw materials, where acceptable state practice defines what is legal rather than the other way around. This is precisely what some legal theorists most fear: that self-interested and ad hoc interpretations might become formal pieces of law.\textsuperscript{46} And yet, in international law this is something like the normal condition of being; the use of legal arguments is motivated by their congruence with actors’ interests. This is neither an indictment of the law nor an abuse of it by states. Indeed, it accounts for the possibility that diplomacy can be a source of change for international law as these references to the rules can shift their meaning. Long-standing doctrine on customary law is that it changes when states change their behavior and their beliefs regarding what constitutes lawful behavior, and so law follows from behavior rather than leading it. This is the inverse of the conventional rule-of-law model that says that states should narrow their behavior according to their legal obligations. It holds true for treaty law as well as customary law.

The productive effect of diplomacy is not dependent on a consensus around the meaning of the new claims, only on the fact that the rules were deployed and interpreted to fit the case. Arguments about the epistemic community of international lawyers go too far when they presume that this community is in a position of authority over states or over the construction of legal arguments.\textsuperscript{47} This overstates the position of international legal experts and understates both the public and the variegated qualities of the diplomatic process. The most politically


\textsuperscript{46} Brian Tamanaha, \textit{Law as a Means to an End: Threat to the Rule of Law} (Cambridge: Cambridge University Press, 2006).

\textsuperscript{47} See, for instance, Sending, Pouliot, and Neumann, “Introduction,” this volume.
important legal concepts do not have a settled meaning governed by the community of lawyers – they are open to competing interpretations serving competing political purposes in the hands of governments and other actors. Thus, when the US argued in its “war on terror” that its detainees were illegal enemy combatants and therefore not covered by the Geneva Conventions, it was generally seen as having made an error of legal interpretation. But its claims nonetheless entered the public sphere and interacted with existing international law and shifted the boundaries for future arguments about these issues. Whether the US claims were successful in legalizing US behavior in the eyes of the international community of legal scholars is not crucial to the political impact that it sought to accomplish – or, at a minimum, the two outcomes are somewhat independent of each other. States often aspire to use their diplomacy in an activist manner to change international rules or situations but may or may not end up with the desired effect. The social nature of diplomacy ensures that these changes are never fully under the control of any single actor, and that the strategic direction of diplomatic activism is always uncertain. The meaning of precedents depends on how states and others choose to use them.

As a social practice, diplomacy has these three formal qualities: sociality, state centrism, and a productive effect. The substantive content comes from its connection with international law, and especially with the ideology of the rule of law, which I discuss next.

**Diplomacy and law**

Diplomacy operates at the boundaries between politics and law and between the internal needs or interests of the state and their explanation in an external language. It translates state policies and needs into the language of international law. It is therefore deeply bound to the idea of rule following, and the practice of diplomacy is constituted by the political appeal invested in the idea of compliance: diplomacy means providing rule-following explanations for the choices of the state.49

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49 One could imagine other moral schedules for diplomacy at other times and places, where the primary value involved reconciling state needs to, say, justice or natural law or sustainability or some other good. Rule following is the
Diplomacy and compliance

It is often said that the modern era of international politics is characterized by the idea of the rule of law. Ikenberry, for instance, suggests that the post-1945 “liberal international order” is distinct for being “relatively open, rule-based, and progressive.”\(^{50}\) The principle of *pacta sunt servanda* (“agreements should be honored”) is the central norm of international law and politics. Academics argue about the foundations of that obligation (or lack thereof),\(^ {51}\) but the premise of all this discussion is the shared commitment to the view that states are required to comply with the rules that they have accepted. The conventional approach has it that *pacta sunt servanda*, consent, legal obligation, and the ordering power of the rule of law are fundamental to international society, and that effective law is law that states choose to follow despite holding an interest in noncompliance.

This is uncontroversial to many scholars of international law and politics, but it is contradicted by the practice of diplomacy, where all states claim to be uniformly complying with their own interpretation of the rules. The preceding discussion leads instead to the conclusion that the idea of compliance is built into the practice of diplomacy and so cannot be modeled as a matter of choice. States face an international environment in which complying with international law is valued and noncompliance is in almost all situations a negative. They therefore engage in diplomacy to present their interests and behaviors as consistent with the terms of international law. This is evident in the degree to which states do not admit to violations of the law.\(^ {52}\) It also suggests that compliance and noncompliance are not structural equals in the process of international law and politics. Compliance occupies a privileged position as the default self-interpretation of state behavior, and noncompliance is a term of diplomatic attack used against opponents.

This is sometimes taken as evidence that international rules are inconsequential or non-binding or epiphenomenal. This is the view of

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\(^{51}\) For a summary, see Brunnée and Toope, “An Interactional Theory.”

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the “new sovereigntists” in US public discourse and neorealists in academic international relations. 53 These conclusions are mistaken because, among other things, they conflate the writers’ policy preferences (i.e., that the United States should ignore international rules) with empirical research (e.g., on how states actually behave toward rules in practice). Diplomacy is ubiquitous precisely because there are political gains to be earned by portraying oneself as compliant and one’s opponents as noncompliant; these payoffs are as appealing to revisionist states as they are to status quo powers, and to nationalists and cosmopolitans alike. The power of law is evident in the eagerness of states to make use of it, and in the consequences one can imagine should a state fail to make use of it when others expect it to.

Diplomacy generates a constant stream of claims regarding compliance. States’ references to law and lawfulness in explaining their actions often mask rule violation and also often construct new law, and often do both at the same time. The function of international law in these cases is to provide the resources for diplomacy, and individual rules are consequential only insofar as they are invoked by actors and deployed in the public domain. The law-making capacity of diplomacy points to a philosophy of international law along the lines suggested by Hans Morgenthau, following Carl Schmitt, that law emerges from the struggle among social forces rather than from formal legislation. 54 It contradicts Hedley Bull’s suggestion that the role of the international lawyer is to “state what the rules of international law are.” 55 This is impossible when the content of the rules depends on how they have been used by states in past practice – the meaning of past practice is not fixed and stable. It depends on the political goals of those who draw on it. Peter


Lindseth arrives at a similar point in relation to the development of law in the EU:

The very nature of public law has itself deeply evolved. It has become less a system of rules marking seemingly clear lines between “valid” and “invalid” exercises of authority, as classical understandings of... the rule of law have demanded. Instead, public law has evolved toward something more focused on “the allocation of burdens of reason-giving,” or, as European scholars are increasingly calling it, “accountability.”

Diplomacy and contestation

This view presents diplomacy as inherently relational, but it suggests that the relation is between the state and the international environment of legal resources rather than between one state and another. Actors draw on these resources to conduct diplomacy and in doing so they remake them. Their presentations of lawfulness do not need to be accepted by their audience to be legally and politically powerful; disagreements over what it means to comply with a given international law are endemic to the international legal field, and it is a rare exception when an international dispute is resolved by determining the true meaning of compliance. The key relation in diplomacy is not between the speaker and the audience but rather between the actor and the structure of international legal resources.

The fact that the audience for diplomacy need not agree with the claims being made by the state suggests that the most important product of diplomacy is not persuasion or consensus or agreement or socialization or learning or acculturation. Each of these may indeed be important in international politics in various and interesting ways, but they are generally presented as means for overcoming disagreement, as embodying a means for reducing or eliminating divergent views. This makes them less relevant for thinking about the contestation around diplomacy and international law where disagreement is endemic and is not resolved by the process of interaction. Much of the

literature on deliberation and communication in international relations and international law carries the assumption that the end point of diplomatic interaction is a consensus or shared understanding of either the rules in question or the interests and needs of the other party. Versions of this argument are well known in the international legal literature, from the Yale School through Abram Chayes and Antonia Chayes and Harold Koh, and in IR in Thomas Risse, Corneliu Bjola, Jennifer Mitzen, and others dealing with communicative action. Most rest on a variant of the idea that public reasoning over differences of opinion drives toward new shared understanding, consensus, and legitimation, all of which conduce to compliance with the rules. Chayes and Chayes suggest that argument and persuasion can lead to compliance as “good” legal arguments carry more force than “bad” ones.\(^58\) Koh sees repeated transnational interaction over a rule as gradually clarifying it so that it becomes increasingly compelling to states.\(^59\) This is commonly applied to international diplomacy and is often suggested as a key feature of the UN and other places where states gather to deliberate on their relations. Michael Doyle and Ian Johnstone, among others, argue that the persuasive process by which Security Council decisions are made helps winnow out unreasonable claims and can therefore reduce the incidence of unnecessary wars.\(^60\) The diverse membership of the Security Council is an important component of this argument, as it means that persuasion must be targeted to a variety of interests and identities, and the filtering function of the process is therefore stronger.\(^61\)

My view suggests instead that the argumentation that makes up diplomacy does not move toward consensus. Inherent in the concept of diplomacy is the possibility that the audience will disagree with the legal representations that one makes, and the formal structure of public

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\(^{61}\) This motivates many of the proposals for increasing the diversity in the Security Council by adding new members. See the discussion in Ian Hurd, “Myths of Membership: The Politics of Legitimation in UN Security Council Reform,” *Global Governance*, 14(2), 2008.
diplomacy anticipates contestation over who is or is not complying with the law. There is no teleology toward shared understanding in disputes over law. In any number of cases of international disagreement and deliberation, we can see that the process of interacting around international law bears no necessary relationship to a shared understanding as the result. Indeed, diplomacy adds a language of law to a dispute, but it typically ends with as much disagreement as existed at the start. For instance, the US diplomacy around the Nicaragua case in the 1980s included a detailed legal argument explaining why it had done nothing wrong. This was “exported” to the International Court of Justice (ICJ) through the Departments of State and Justice and other channels despite the US boycott of the proceedings. The court’s judgments in that case, which were decisive as a legal matter under the UN Charter and the ICJ Statute, did not solve the problem of competing interpretations of legal terms that was central to the politics of the dispute. Other diplomatic controversies over the law on preemption, from Osirac in 1981 to Iraq in 2003, have likely made the law less clear rather than more, as they are deployed to shift the understanding of the law. Even unsuccessful claims to “legitimacy through legality” have constitutive effects on the rules and norms through which they are presented.

Implications

This has several implications for theories of international law and politics, two of which I examine in this section: law as a resource and the relation between agents and structures. First, all uses of law in this process can be seen as being strategic on the part of states, in the sense of being designed to produce a result that is favorable to the states’ interests. It is self-interested and instrumental, though; because it operates with socially constructed legal resources that are not fully controlled by the actor, it cannot be taken as evidence of radical agency or autonomy by the agent. The function of law here is to provide permissive passage of the policy that is preferred by the state or alternately to provide a legal critique of the preferences and actions of an opposing state. Law is a resource. As a tool, it is both empowering and limiting for its users.

This view is at odds with the effort to remove politics from law and legal interpretation, as seen in the work of Brian Tamanaha and other legal scholars. Tamanaha argues that the strategic use of law by
instrumental actors, including judges and activists, is a threat to the rule of law, which he understands as necessarily apolitical.\textsuperscript{62} It also conflicts with the social-scientific effort to operationalize compliance as a variable and identify the factors that conduce to it across cases. This is exemplified by the recent explosion of literature at the intersection of political science and international law that looks for correlations between features of law, of states, or of the international setting and the rate of compliance with a treaty or rule.\textsuperscript{63}

A resource view of law is incompatible with both of these projects because it recognizes the political power of states’ self-serving interpretations of the law.\textsuperscript{64} Competing interpretations of law are ubiquitous in international law and international relations. They persist precisely because states see a payoff in being on the side of compliance rather than noncompliance, and they will not disappear as a result of arguing through to an end point of agreement. These legal disagreements are important in settings that lack a centralized judicial institution to provide authoritative judgments about competing legal claims. In such situations, arguing over the interpretation of compliance takes the place of arguing over the substantive questions in the dispute. The dispute over sovereignty for Kosovo, for example, took place in part as an argument over the legal fine points of the secession declaration, with both sides claiming to represent the international rule of law—an ICJ advisory opinion added legal resources to the fight but did not resolve questions of compliance and noncompliance.\textsuperscript{65} Similarly, disputed claims about self-defense are impossible to resolve without making judgments about matters internal to the identity and security of the state, such as how the military operations relate to national perceptions.


\textsuperscript{64} Among others on this, see Ingo Venzke, “Is Interpretation in International Law a Game?” in Andrea Bianchi, Daniel Peat, and Matthew Windsor, eds., \textit{Interpretation in International Law} (Oxford: Oxford University Press, 2014).

of security and to beliefs about threat. Legal claims under Article 51 of the United Nations Charter (on self-defense) can in principle be refuted but require that outsiders make judgments about the dangers perceived by national leaders, judgments that cannot be made conclusively. The issue necessarily remains open for dispute. Controversy over these kinds of issues is the stuff of diplomacy, and it is not amenable to objective judgment; answering the question about compliance versus noncompliance amounts to taking sides in the substantive political content of the dispute.

The situation is different when an institution exists to give authoritative answers to questions of compliance and noncompliance. In those cases (e.g., in the World Trade Organization dispute settlement process), the parties may well continue to disagree with the outcome, but the decision produces a legal fact that shapes the possibilities for future disputes. The legitimacy of the rule-of-law ideology adds power to the legal fact, and a dissenting state will generally organize its diplomacy such that it claims to be accepting that fact while continuing the dispute in other forms.

The second implication follows from the recognition that diplomacy is a domain in which state interests and international rules are ontologically combined. This leads to a new conceptualization of the relationship between states and international rules, norms, and laws. Making sense of the politics around diplomacy requires a method that integrates states and rules (i.e., agents and structures) so that the act of using the rules to justify the state becomes the unit of analysis. Alexander Wendt said, “In the last analysis, agents and structures are produced or reproduced by what actors do.” Instead of modeling international law as a device for differentiating compliance from noncompliance, we can instead see it as the medium in which state behavior is explained, understood, and argued over in terms of international rules and norms. The perspective of social practices puts the focus on the interaction between states and rules.

This moves away from asking whether or not states are complying with the rules, and away from asking whether the rules serve as a constraint on the actors; these represent the agentic and the structural

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approaches respectively. Instead, one can look at how the actors use the rules, and how the rules shape the actors and their possibilities. To borrow a phrase from Thomas Sewell, international law is “both the medium and the outcome of the practices which constitute” this social system.67 This is what Laurent Thévenot has called the “responsiveness” of the social environment in reaction to actors’ behavior, and he suggests framing research toward the ways the actor takes these responses into account when acting: “the dynamics of this material engagement between an agent and his environment is a central issue in the study of pragmatic regimes.”68

A provocative question is raised regarding whether there can be international action in the absence of international rules and norms that define it, and in the absence of the diplomatic process of attaching these rules to state policies. If international rules are the resources with which action is understood and given meaning (both by the actor and by the audience), then it would seem that actions that are not envisioned in the rules could not be taken. This is consistent with the philosophical literature on the essential role of social resources in making possible meaningful action by agents.69 Can this be true of foreign policy as well? The history of humanitarian intervention, as mentioned earlier in relation to Martha Finnemore, suggests that it might: the invention of the concept of humanitarian intervention made possible something that was not possible before. Without the concept, states were more limited in their policy choices than they were after its invention, which implies that the absence of the concept in the field of international law was effectively a constraint on their power and choices.

Conclusion

Diplomacy occupies a position at the intersections between law and politics, between domestic and foreign affairs, and between agency and structure. It consists of framing the state’s needs or choices in the


68 Laurent Thévenot, “Pragmatic Regimes Governing Engagement with the World,” in ibid., 58.

language of international law. This is an example of Adler and Pouliot’s broader notion of practices and their place in international relations: “world politics [is] structured by practices” that “give meaning to international action; make possible strategic interaction; and are reproduced, changed, and reinforced by international action and interaction.”

The state-centric nature of diplomacy is a product of the place of states and state agency in the prevailing framework of the international rule of law: only states are full subjects of international law, able to act in relation to international law, either consistently with it or in contradiction of it. The legalized international society of today validates compliance with international law and is ostensibly committed to punishing violations. The purpose of public diplomacy is to make state policy and desires consistent with the state’s legal obligations. The practice depends on the existing stock of legal categories and concepts. It also remakes them as they are invoked in relation to particular cases and policies.

Recourse to international legal explanations is inescapable for states. Its use helps illuminate the political dimensions of the international rule of law, which are often overlooked in international legal theory. States’ claims about their compliance with international law are indeed self-serving, but they are not mere cheap talk. The need to see and explain foreign policy as consistent with international law is deeply internalized in states, so much so that states often seem incapable of imagining that their most important policy desires might conflict with existing legal rules. The motivation to interpret international law as permitting what the state wants can be preconscious in the state – that is, occurring before the state is confronted with a choice between complying with or violating its obligations. This does not contradict the idea of the rule of law for world politics or weaken the power of international law. Instead, it shows how profoundly it shapes states and their sense of their interests – states find it impossible to conceive that their deep-seated needs might not be served by law because they have fully internalized the project of an international legal order.