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Recommended Citation

Eric Posner, "Do States Have a Moral Obligation to Obey International Law?," 55 Stanford Law Review 1901 (2003).

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Do States Have a Moral Obligation to Obey International Law?

Eric A. Posner*

INTRODUCTION

In 1960 Israeli agents kidnapped Adolf Eichmann from Argentine territory. This violation of international law sparked protests from all quarters. Israel, having accomplished its goal, apologized to Argentina, which had no great desire to draw attention to its colony of former Nazis and accepted the apology.¹ The world turned its eyes to Eichmann's trial, and the incident was forgotten.

Should Israel have refrained from kidnapping Eichmann because this act was a violation of international law? There are two ways to answer this question. The first assumes that the only reason to comply with international law is to avoid retaliation from other nations or to avoid their distrust. Kidnapping Eichmann would have been wrong if other states had retaliated against Israel or had concluded from its actions that Israel could not be trusted to comply with the treaties that it has signed. If these are the only costs of violating international law, then criticizing Israel for kidnapping Eichmann amounts to a prudential claim that Israel did not properly calculate the costs and benefits of its behavior. In this argument, there is nothing special about law: Violating the law is morally neutral, like deciding to raise tariffs against Argentine imports in order to protect a domestic industry even though doing so will hurt Argentine industry and invite a punitive response.

The second possible answer to the question is that Israel should have refrained from kidnapping Eichmann because it is wrong to violate international law. The wrongfulness of violating the law is distinct from the wrongfulness, if any, of kidnapping Eichmann. One might believe that it would have been morally permissible for Israel to kidnap Eichmann if international law had not forbidden this behavior, just as one might believe that it is morally permissible to build a house on a seashore but would be wrong to

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1. HANNAH ARENDT, *EICHMANN IN JERUSALEM* 239-40 (rev. ed. 1994).

do so if a law forbade construction on the seashore. Criticizing Israel for kidnapping Eichmann is a moral argument, not a prudential argument; and if one thinks that Israel has a moral right to kidnap Eichmann, then the critique is based on the conviction that Israel has a moral obligation to comply with international law.

On the first view, international law is a source of expectations about how states will act under various conditions. If an international law forbids behavior X, then states might retaliate against someone who engages in X. But whether they do so or not depends on their own interests and capacities. Each state makes a cost-benefit decision, albeit a sophisticated one that takes account of the reputational consequences of that decision, and it makes such a decision both when deciding whether to comply with an international law and whether to retaliate against another state that violates international law. On the second view, international law is a source of moral obligations that influence states by constraining their prudential decisions. In the Eichmann case, the likelihood that Argentina would be too embarrassed to raise forceful objections to Israel's violation of international law, and that other nations would have no strong interest in keeping Eichmann in Argentina, are legitimate considerations under the prudential view but not the moral view. Under this view it is wrong to break the law even when one can escape sanctions.

This Article argues that states do not have a general moral obligation to comply with international law. The Article assumes for the sake of argument that states can have moral obligations,² for if they could not, a fortiori they could not have a moral obligation to obey international law. But if states have moral obligations, there is a further question whether citizens and leaders inherit the state's moral obligations (all or some of them). I will address that question in Part I. Part II discusses whether states have a moral obligation to keep their promises. Part III addresses the main question, which is whether states have a moral obligation to comply with international law. In the Conclusion, I return to the premises and goals of international-law scholarship.

I. 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.³ According to

2. For an exhaustive discussion of the arguments for and against the moral obligations of states, see MARY MAXWELL, *MORALITY AMONG NATIONS: AN EVOLUTIONARY VIEW* (1990).

3. See, e.g., H.D. Lewis, *Collective Responsibility (A Critique)*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 17 (Larry May & Stacey Hoffman eds., 1991). Dworkin discusses the many difficulties that arise

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 starts from these individualistic premises. An old version is that princes recognize that they owe one another moral obligations, and these mutual obligations form the basis of international law. Hume took this position, qualifying it only 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.⁴ But with the rise of the nation state, this view could no longer be sustained. For Morgenthau, nationalism spelled the end of international ethics because the masses of one state do not feel 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 nation identifies its own values with the truth and seeks to impose them on others through violent means if necessary.⁵ Under such circumstances there can be no international law that exerts influence on the behavior of nations.

Morgenthau's 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 is

when ascribing actions to collectivities. See RONALD DWORKIN, *LAW'S EMPIRE* 62-65 (1986).

4. DAVID HUME, *A TREATISE OF HUMAN NATURE* 567-69 (L.A. Selby-Bigge ed., 1888).

5. HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 270-74 (1948); see also REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* (1936).

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.⁶

The more common view is that a state, like other corporate bodies, can bear obligations.⁷ 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. 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.⁸ 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

6. A Kantian international law—one that is derived from individualist premises—is not recognizable as international law; compare this with Tesón's theory of international law, which amounts to the claim that liberal democracies should refuse to cooperate with dictatorships. FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998).

7. *Id.* at 39.

8. See CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 253 (2000).

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, 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 is caught in a dilemma. On the one hand, if international law takes the state as the fundamental obligation-bearing agent, then it can claim no loyalty from the individuals or groups upon which the state relies for its power. 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 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 fundamental 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 scholarship grasps the first horn of the dilemma: International law purports to bind states, not individuals.⁹ 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 will 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.

II. INTERNATIONAL PROMISES

Before turning to international law, I want to discuss whether states have an obligation to keep their promises. These obligations would not be legal: There is no international law requiring states to keep their promises. If these obligations exist, then they must be a different kind of obligation. They are worth discussing because they are simpler than obligations under international

9. TESÓN, *supra* note 6, at 39.

law, but they are also related, and this preliminary discussion of promises will foreshadow the arguments about international law.

Individuals have an obligation to keep their promises, but sometimes they should break their promises. For example, a person should break a promise to help out in a scheme that turns out to be harmful. The competing obligation not to harm others defeats the obligation to keep a promise. A promise is a reason to act in a certain way—to perform the promise—but it is not a conclusive reason to act in that way. If one promises to do X, one creates the expectation that one will do X unless one has a special reason other than a disinclination resulting from a change in one's private interests.¹⁰

One might argue that when states make promises, they must be creating obligations for themselves; that is what it means to make a promise. But 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, John, 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 arguably 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 even if not, 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 1.¹¹

One might argue that the state is like a corporation, and corporations make promises and are obligated to keep them. But, as we saw before, 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. Although Locke argued that people give implicit consent to their government by not emigrating, no one takes this argument seriously anymore. Consent requires more than the ability to choose an extremely disagreeable alternative.

States are different from individuals and corporations; the question of whether states have an obligation to keep promises cannot be answered by identifying the state with the one or the other. However, we can apply the

10. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 140-41 (1975). It hardly needs to be said that there are many alternative views. See, e.g., John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955) (arguing that promises create obligations).

11. If John is different enough at time 2, the same argument applies to individual obligation. See DEREK PARFIT, *REASONS AND PERSONS* 326-29 (1984).

reasoning about the promises of individuals, and see how far it takes us toward understanding whether states should keep their promises.

On one view, the individual's duty to keep his 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. A person who can make binding promises has more opportunities than the person who cannot, for he can obtain the cooperation of others in projects that he cannot accomplish on his own.

States, however, do not have life plans. The power to make binding promises 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 making binding promises because corporations should enjoy autonomy. The reason for holding that the state or another corporate body should be able to make binding promises 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 promises.

But when a state makes a binding promise, 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 keep their promises, some people might enjoy greater autonomy—those people whose opportunities 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 make binding promises.

A second view traces a state's duty to keep its promises to utilitarian premises. Some philosophers say that individuals have an obligation to keep their promises because there is greater utility in a society in which people keep their promises than in a society in which they do not.¹² Promises enable people to make commitments, and commitments are necessary in order to obtain the cooperation or value-increasing reliance of others.

However, states do not have utility. A theory that the ability to make binding promises maximizes the utility of individuals thus cannot apply to states. Similarly, we do not say that corporate promising maximizes utility

12. HUME, *supra* note 4, at 522.

because it increases the utility of corporations. Corporations are just vehicles through which the utility of individuals is increased.

The argument must be, instead, that if states can enter binding promises, that power will maximize the utility of their citizens, and perhaps the utility of citizens of other nations as well. But we see the same problems here as in the autonomy argument. The argument assumes that the promises made today will enhance the utility of citizens when performance is due; again, this might or might not be the case.¹³ The argument also assumes that the state maximizes the utility of citizens, but it might not—particularly if it does not have representative institutions, or if democratic institutions are controlled by interest groups or selfish elites.

None of this is to say that a state should never keep its promises. The leaders of a state might think that the utility of its citizens will be maximized if they keep some promises. They might think that they will be able to borrow tomorrow only if they pay debts from yesterday. Or the leaders might think that keeping promises advances the autonomy of citizens. But these views make the state's obligation to keep promises a prudential decision, not a moral decision. The decision to keep a promise turns on its effect on the good of the nation.¹⁴

Some public spirited leaders might want to increase the amount of welfare or autonomy in other countries as well as their own. They will thus take actions that advance the "world good." But then their decision whether to keep promises made in the past, many of them possibly by less public-spirited leaders, will turn only on their value for the world, not on the fact that a promise was made. This argument recalls the standard criticism of act utilitarianism, that it cannot explain the existence of obligations. The rule utilitarian response is that conventions such as promise keeping could produce greater welfare than decisions that directly seek to maximize welfare. Here, the rule utilitarian defense of the claim that states have an obligation to keep promises asserts greater welfare in the world if such an obligation exists. Whatever one thinks of this argument, it is considerably weaker than its analogy, for history and common experience suggest that individual promising generates more welfare for the individuals involved, at least in a well-ordered society, than promising between states generates for the citizens who will be affected. More will be said about this distinction in Part III.

Let me sum up with the help of an example. A powerful nation like Britain before World War II promises to protect a small nation like Czechoslovakia from a potential threat. The threat occurs, and now the powerful nation must

13. The literature on intergenerational equity generally assumes that people do not engage in adequate conservation of resources for the benefit of the future. *See, e.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* 289-90 (1971).

14. This is Spinoza's view about promises and treaties. *See* BENEDICTUS DE SPINOZA, *THE POLITICAL WORKS: THE TRACTATUS THEOLOGICO-POLITICUS IN PART, AND THE TRACTATUS POLITICUS IN FULL* 139-41 (A.G. Wernham ed. & trans., 1958).

decide whether to keep the promise. Its rulers determine that a war at the current time is not in the national interest; and that although the nation's international guarantees will, if the promise is broken, carry less weight in the future, avoiding war is the more important consideration. These are all prudential reasons for breaking the promise; but are there offsetting moral reasons for keeping it? Should Britain, to revert to the historical example, keep the promise because it consented to the obligation? But who gave this consent, and what is to prevent the current generation from withdrawing it? Should Britain keep the promise in order to vindicate its, or anyone else's, autonomy? But, by hypothesis, breaking the promise serves the national interest, so if it seems to make Britain appear weak, that is only because Britain *is* weak. Britain has no "autonomy interest" separate from its national interest; and the autonomy of British citizens is not affected by the state's violation of a promise. Does breaking the promise undermine a valuable international institution? It is hard to see how: Other nations might trust Britain less, but this is a cost that Britain is willing to bear. The promises of other nations would not become less trustworthy because of Britain's actions; therefore, their citizens are not injured. Is breaking the promise immoral because Czechoslovakia is harmed? Yet Britain has no obligation to aid Czechoslovakia, or, if it does, that obligation is independent of the promise. Czechoslovakia might have been harmed less if it had never relied on Britain's promise, and it could blame Britain for misleading it. But, Britain could argue with equal justice that Czechoslovakia should have realized that Britain would keep its promise only if it were prudent to do so. Czechoslovakia should have relied only to the extent that it believed that Britain's concern for its reputation, or its national interest in deterring Nazi aggression, would have been sufficient to cause it to live up to its promises.

III. INTERNATIONAL LAW

Promises are not the same as treaties. Treaties are exchanges of promises accompanied by solemn acts that signify the seriousness of the commitment. In this way treaties are like contracts. A promise, which might or might not be morally binding, becomes incorporated in a contract or a treaty when certain formalities are met.

It follows that although international-law commentators often say that treaties are binding because the state consents (*pacta sunt servanda*), that cannot be the whole story. An act of consent is not a sufficient condition for creating an obligation: A promise, which is an act of consent, is not a legal obligation. What is necessary for an act of consent to create a legal obligation is the satisfaction of additional formalities which themselves are not the creation of the parties. These formalities are provided externally by domestic or international law, and are not the result of consent by individuals (in

domestic law) or states (in international law).¹⁵ The Vienna Convention now incorporates the rules for treaty creation, but states' consent to the Vienna Convention is not what makes the rules binding.¹⁶ For if that were so, then the Vienna Convention itself would not be binding, as it was brought into being by actions prescribed by a treaty (itself) that did not yet exist. These nonconsensual rules were themselves understood to be rules of customary international law. For this reason, one must understand the Vienna Convention as an effort to record and clarify the existing nonconsensual customary international-law rules that determined how treaties are created and interpreted.

Commentators make the same mistake about customary international law as they make about treaties: They say that customary international-law rules are binding because states consent to them (*opinio juris*). But, again, an act of consent is not sufficient to create a legal obligation. Formalities must be satisfied, and these formalities are themselves nonconsensual rules. It is thus not surprising that international law has evolved to the point where customary international-law rules are said to apply to states that did not consent to them, and even treaties can apply to states that did not consent to them. Commentators who see these developments as radical or paradoxical do not understand that international law has never solely been a matter of consent, and that therefore the developments are nothing new.

Following Hart, we can divide international law into two components: "primary" rules, which are the legal obligations, and "secondary" rules, which determine the conditions under which particular acts give rise to legal obligations.¹⁷ The secondary rules are conventions that evolved over time, and states today can make themselves understood as entering legal obligations only by complying with those conventions, whether they like them or not—just as an individual can make a legally binding will under domestic law only by complying with the relevant rules (number of witnesses and so forth), even though he never consented to those rules. The primary rules, like the contents of the will, are much more in control of states, though there are exceptions. But the point is that because the secondary rules are not validated by consent—states cannot meaningfully refuse to consent to the international legal system—

15. As Carr points out: Treaties are like contract; the rules of contract law are not voluntary. See EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919-1939*, at 181 (3d. ed. 1964). The analogy to contracts is not complete, however. See Jack Goldsmith & Eric A. Posner, *Understanding Treaties: A Rational Choice Approach*, 43 VA. J. INT'L L. (forthcoming 2003).

16. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

17. H.L.A. HART, *THE CONCEPT OF LAW* 89-91 (1961); see also Benedict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 1, 28-30 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990).

one cannot say that the obligations of international law are based on the consent of states.¹⁸

This should be enough to dismiss the popular notion that the binding nature of international law is based on consent of states, but let me say a few more words about this idea, which has proven to be as tenacious and enduring as the related and equally problematic view that consent accounts for the obligations of individuals to their government.¹⁹ This argument has never been a satisfactory explanation for domestic legal obligation because individuals do not have the freedom to withhold consent from their government. Still, some people consent more wholeheartedly to their government than others, and the former group might be said to have stronger legal obligations because of their consent.²⁰ Some states consent more wholeheartedly to an international rule or system than others, and the former might have stronger international legal obligations.

This argument, however, runs into the problems we saw in Part II. Even if some states have wholeheartedly consented to the international law system, as one might call it, the consent argument implies only that those citizens who have wholeheartedly consented to their government, and to their government's participation in the international system, are morally obligated to cause the government to comply with international law. The argument thus suggests at best that only some states have an obligation to comply with international law, and within those states only some citizens have an obligation to cause the state to comply with international law. This argument is the flimsiest possible basis for a theory of international legal obligation.²¹

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.²² Governments have authority because a centralized, powerful institution is needed in order 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, extends only

18. This is a version of the more general argument that consent cannot ground obligation; the classic statement is from Hume. See HUME, *supra* note 4, at 542.

19. See Joseph Raz, *Government by Consent*, in AUTHORITY REVISITED, XXIX NOMOS 76 (J. Roland Pennock & John Chapman eds., 1987). For a survey, see KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987).

20. See JOSEPH RAZ, THE MORALITY OF FREEDOM 88-94 (1986).

21. Brierly similarly criticizes the consent theory by arguing that if consent were the basis of international law, a state could eliminate its international obligations simply by withdrawing consent to them. See JAMES LESLIE BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS 9-18 (1958). Hart notes that international law is binding on new states that have not consented to it. See HART, *supra* note 17, at 221.

22. RAZ, *supra* note 20, at 100.

as far as the government's success in enacting good laws. Individuals have a duty to obey the good laws but not the bad 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 is a series of conventions 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—this set of conventions, or maybe “international society”²³—has authority, and can create obligations, as long as they are 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 in Part II, 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 individuals. 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 an empirical argument. There are many reasons for doubting it. 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,²⁴ or when the obligations themselves are good. But this is just an argument that current secondary rules—which make no such provision—must be changed. Perhaps, such a system would be better, but it would not resemble what is currently 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

23. See HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977).

24. Cf. TESÓN, *supra* note 6, at 25.

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 their own citizens. 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 only obey good international laws—a conclusion which, of course, would deprive international law of its authority.²⁵ For Raz, domestic law can have authority on epistemic grounds: The law might incorporate knowledge not available to citizens.²⁶ 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 liberal democracy where citizens have influence over the political process. The same cannot be said about international law. Most of the secondary rules evolved long before liberal democracy became a common mode of political organization; and more recent law almost always, it is generally agreed, reflects the interests of the powerful countries rather than the interests of the world at large. The law reflects the interests of states, not of individuals: That is why relatively clear humanitarian

25. See, e.g., A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 192-93 (1979); Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611 (1991); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973); see also GREENAWALT, *supra* note 19.

26. Raz, *supra* note 19, at 53.

interventions like the war in Kosovo can be illegal.²⁷ 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, and it does not seem to matter for this obligation whether other people's compliance is due to their moral sense or the state's threat of force. By contrast, international law, like the law in anarchic societies, is not 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 police force: That job would be an enormous burden, and would provide few benefits to the citizens of the state.

We thus expect that states would violate legal obligations more often than individuals do. International law scholars like to say that states almost always obey the law.²⁸ Franck even argues that international law prevents states from shooting down civilian airliners—the Soviet Union's destruction of Korean Airlines flight 007 only shows how frequently it and other states respect the law.²⁹ But states would gain nothing by shooting down civilian airplanes. The most plausible reason why states do not violate international law more often than they do is that the law is so exceedingly weak—the rules are vague, states can withdraw from treaties, and so forth—and when the law is not weak, states frequently violate it.³⁰ Imagine a society where there are only a few, weak laws that already reflect people's interests—you must eat at least once every day, you must wear clothes on cold days. The observation that people in this society frequently obey the law is of little value. Perhaps, they have an obligation to obey their own laws, but if we know that they would violate laws that impose significant costs—tax laws, for example—then their obligations would extend only to the weak laws that are generally respected and not the strong laws that are routinely flouted.

International law scholars 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, they are in tension as long as governments focus their efforts on helping their own citizens (or their own

27. See, e.g., Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824 (1999).

28. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3-4 (1995); LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2598 (1997).

29. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 20 (1990).

30. For a discussion, see Goldsmith & Posner, *supra* note 15.

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 engage in customary practices that reflect, the world good; and 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 issued by a good government, or most of them. 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, and regardless of what other states do, and maybe regardless of the interests of its own citizens, and so forth—or even treated compliance as a presumptive duty, the world would be a better place.³¹

It should be clear by now that my argument is confined to the existing international system, where powerful states have more influence than weak states and compliance is rare. I do not argue that there is no alternative international system that could generate moral obligations on the part of individuals or states. Indeed, one interpretation of international-law scholarship, and perhaps some veins of political-science scholarship, is that states should comply with international law because doing so would create a culture of international legality, one in which international cooperation would flourish. If states entered into more treaties with stronger and more precise obligations; if they yielded more of their sovereignty to international organizations; if they submitted to multilateral rather than bilateral obligations; and if they relied on better and more transparent international decisionmaking procedures; then international law would be stronger as well as better, and compliance would be deeper and more uniform.

I do not have the space to discuss this larger project, but it is worth noting because so much criticism these days is directed at the United States for *not* entering treaties (like the International Criminal Court treaty) or for (legally) withdrawing from treaties (like the Anti-Ballistic Missile treaty), rather than for violating treaties. It needs to be understood that the assumption that respect for international law, whether in the sense of complying with it or in the sense of creating more of it, will create a culture of international legality does not have

31. This problem also affects Rawls's fair-play argument. See John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* (Sidney Hook ed., 1964). Rawls argues that individuals who are part of a common enterprise that produces benefits for all, and who accept their share of the benefits, have a duty to do their part in contributing to the enterprise. But it seems doubtful that the international system can be called such an enterprise. For criticisms in the domestic context, see SIMMONS, *supra* note 25, at 110-18, who argues that it is wrong to say that citizens in a meaningful sense "accept" benefits from governments; a similar point can be made about states and the international order. A similar problem afflicts the effort to apply Rawls's natural-duty-of-justice argument (cited in RAWLS, *supra* note 13, at 334-37) to the international sphere, where it is doubtful that one can say that international law is just when most people live in unjust states that are supported by that system. It is also hard to explain, as it is for domestic political obligation, why a person or state would have this duty.

any empirical support. A government that takes its responsibility to be that of protecting the national interest, and even one that cares about the well-being of citizens in other nations, would be ill advised to comply with laws that do neither in the hope that the compliance by itself would help create a culture of international legality.

CONCLUSION: WHAT IS THE POINT OF INTERNATIONAL-LAW SCHOLARSHIP?

I have not given the philosophical accounts of political obligation the detailed treatments that they deserve. Nor have I discussed, except in passing, various other theories of political obligation, including the “fair play” theory, the “natural justice” theory, and the “gratitude” theory.³² There is already a vast literature devoted to these topics. But what I have said should be enough to cast doubt on the notion that states have a moral obligation to obey international law—or that leaders and citizens have a moral obligation to cause a state to obey international law. The weakness of existing accounts of political obligation have 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.” And 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 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.³³ But Hart’s philosophical concerns are different from those of international lawyers, for

32. See discussion *supra* note 31. See generally GREENAWALT, *supra* note 19.

33. HART, *supra* note 17, at 225-26.

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 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 to the question 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 could 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.³⁴ 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 which states call "law." Instead, international lawyers raise the "law" part of international politics to a higher

34. *Id.* at 223-24.

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 lawyers typically argue that law (but not necessarily other agreements or customs) is internalized, or 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 simply 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 the law is built up out of rational self-interest. 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. A political theory is needed to explain why states respect and comply with international law.

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 that point of coordination. This can be ambiguous, and so 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 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 quasipromissory 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 obligation³⁵ are, as a result, optimistic about the ability of international law to solve problems of international relations, and

35. See Henkin, *supra* note 27. For a summary of international-law views, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002).

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.³⁶ 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. Because states have no intrinsic desire to comply with international law, all international law is limited by the rational choice of self-interested actors. Efforts to improve international cooperation must bow to this logic, and although good procedures and other sensible strategies might yield better outcomes, states cannot bootstrap cooperation by creating rules and calling them "law."

It can be useful for international-law scholars to point out that an act of the United States or some other country "violates international law" as long as we understand what this phrase means. It means that the United States is not acting consistently with a treaty or customary international-law norm, and as a result the expectations of other states might be disappointed (or not), and these states might retaliate (or not), or adjust their expectations in ways that might not be to the advantage of the United States. These are all reasons not to violate international law, but they are prudential reasons, and they are reasons to be taken into account even when international law is not at issue. The phrase does not mean that the United States has a moral obligation to bring its behavior within the requirements of the treaty or customary international-law norm, nor that its citizens or leaders have a moral obligation to cause the United States to do this.

For these reasons, the argument advanced in this Article should not be interpreted as a proposal that the United States or any other country tear up treaties and go on a lawless rampage. As I have argued elsewhere, behavior that apparently complies with international law can be understood as merely prudential behavior.³⁷ The reason for criticizing the view that international law creates moral obligations is that this view sows confusion and causes harm rather than good.

36. *E.g.*, CHAYES & CHAYES, *supra* note 28, at 3; FRANCK, *supra* note 29.

37. Jack Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).
