

Ian Hurd

Law and the practice of diplomacy

At the boundary where states meet the outside world, we find public diplomacy. Distinct from private negotiation and covert action, diplomacy involves the presentation of the interests and actions of the state to an international audience. It includes a wide variety of activities, including formal interactions with other states over treaties and agreements, public statements by spokespeople to explain the state's actions, and positions taken in international settings such as the United Nations general assembly, among many other manifestations. These activities share two features in common: first, they are all at some level official products or byproducts of state behaviour, meaning that diplomacy is essentially connected to the business of the state; and second, they all involve situating state behaviour within the framework provided by international law. This article defends the claim that these two features make up the essential core of international diplomacy and examines implications for the practice and theory of international politics.

Seeing diplomacy in terms of international legal justification provides a novel perspective on the behaviour of states and on their interaction with

Ian Hurd is associate professor in the department of political science at Northwestern University. In 2010-11 he was a fellow at the Niehaus Center for Globalization and Governance at the Woodrow Wilson School, Princeton University.

international law. This has three elements. First, it emphasizes the *use* of law by states, suggesting that international law is a set of resources with which states construct the explanations for their behaviour. This view is an alternative to conventional philosophical positions on international law from the Hobbesian, positivist, and Kantian traditions. Second, it suggests that controversy over distinguishing compliance from noncompliance is inherent in the concept of international law, so that diplomacy is by nature a contest among competing claims about rule-following. This contradicts some common approaches to diplomacy and law that suggest that deliberation, argumentation, and diplomacy lead to greater consensus over the meaning of particular laws. Instead, I suggest that diplomacy complicates rather than simplifies the notion of compliance. Finally, it presents diplomacy as the medium of exchange between agents and structures in international relations. Studying the practice of diplomacy therefore provides an example of how the interactive process between agents and structures can be modelled for international relations theory.

This article seeks to substantiate two points: first, that diplomacy is a social practice of states; and second, that this practice consists of reconciling state behaviour to international law. The first section of the article explains what is entailed in seeing diplomacy as a practice, including the dynamic between state officials and “new actors” in diplomacy. The second examines diplomacy’s connection to compliance, contestation, and the rule of law. It suggests that compliance with international law is an intrinsic quality in the self-understanding of state action: states naturally see their behaviour as rule-compliant and the function of diplomacy is to substantiate that connection. As a result, competing claims about compliance cannot be resolved within the terms of diplomacy; they are political rather than legal artefacts. In conclusion, I explore the implications for the philosophy of international law, the concepts of compliance and noncompliance, and the agent-structure debate in international theory.

DIPLOMACY AS A PRACTICE

The interaction among sovereign states inevitably produces dialogues of diplomacy—states talking to states about the business of states. This is the “infrastructure of world politics.”¹ Public diplomacy is a subset of these dialogues, where the broader set also includes private negotiations and

1 See Ole Jacob Sending, Vincent Pouliot, and Iver B. Neumann, “The future of diplomacy,” in this issue.

secret interactions.² Among these, 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.

Public diplomacy is a “social practice.” It is a form of interaction among social actors that is structured by rules, norms, and habits, and that is productive of social resources. These rules define and constrain the practice of diplomacy, and they are in turn reproduced and changed in the course of being used. The new literature on practice in international relations is unified around the idea that there exists “a sociality that always interconnects, constrains, and enables the ‘particles’ of social life throughout their motion.”³ This insight can lead in many directions. For my purposes, states are the “particles,” and I focus on the macro effects of their motion through international law—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 statecentric, and it produces legal resources for the international system. This section outlines these aspects of the formal system of diplomacy, and the subsequent section addresses its substantive content in relation to international law.

The 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 therefore embedded in a social context of reasons, rules, and meanings that exist prior to the interaction. Meaningful diplomacy puts

2 Negotiation involves trading interests toward an agreement; reaching the point of agreement is essential to moving forward on a common project. See Vincent Pouliot, “Diplomats as permanent representatives,” in this issue. Covert action is defined by the state’s unwillingness or inability to provide the public justification that is central to diplomacy. The absence of a public justification may suggest that the state finds itself outside the bounds of the available social resources of justification, i.e., of existing laws.

3 Theodore R. Schatzki, *Social Practices: A Wittgensteinian Approach to Human Activity and the Social* (Cambridge: Cambridge University Press, 1996), 17. For international politics, see Emmanuel Adler and Vincent Pouliot, “International practices: Introduction and framework,” in Emanuel Adler and Vincent Pouliot, *International Practices* (New York: Cambridge University Press, 2011), 3-35.

these resources to work in order to explain and justify the actions of the state. Schauer describes giving reasons for behaviour in society as “the practice of engaging in the linguistic act of providing a reason to justify what we do or what we decide.”⁴ Public diplomacy is the international variant of this activity. It relies on the existence of international rules, norms, and laws to make sense of state action. Public reasons are among what Allen Buchanan calls the “epistemic requirements for justified action.”⁵ They are essential: social actors cannot operate without the resources with which to explain and to understand their actions.

This does not mean that the justification must be made publicly; diplomacy can be internal to the state, where the state deliberates within itself about the meaning of its interests and its behaviour. The internal deliberation in the Bush administration prior to invading Iraq shows some of this: a behind-closed-doors consideration of complex interests, rules, and actions, where the result was a coherent narrative that explained how the chosen action was consistent with US interests and with international law.⁶ This narrative was then sent out as a piece of public diplomacy. Diplomacy can therefore, in principle, be an internal practice. It can be done alone and it does not always need an audience. Its public, social quality arises because the resources for making these justifications come from the wider social setting in which the actor finds itself. This fits with a tradition on performative speech acts that Nicholas Onuf drew from Jürgen Habermas in the 1980s, in which norms are said to be “performatively sufficient,” meaning that their success does not depend on the audience’s response.⁷ One can therefore *do*

4 Frederick Schauer, “Giving reasons,” *Stanford Law Review* 47, no. 4 (April 1995): 633-59, quote on 634. For international organizations and law, see Simon Chesterman, “Who needs rules? The prospects of a rules-based international system,” discussion paper for the Institute of International Law and Justice, New York University, 2006.

5 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2007) quoted in Henry Shue and David Rodin, *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2007), 21.

6 For instance, John Yoo, “International law and the war in Iraq,” *American Journal of International Law* 97, no. 3 (July 2003): 563-75; Charles Hill, “Remarks by Charles Hill,” *ASIL Proceedings* 98 (2004): 329-31.

7 Nicholas Onuf, “Do rules say what they do? From ordinary language to international law,” *Harvard International Law Journal* 26, no. 2 (spring 1985):385-410, at 406. See also Jutta Brunnée and Stephen J. Toope, “An interactional theory of international legal obligation,” *Legal Studies Research Paper*, University of Toronto, no. 8-16 (2008).

public diplomacy all by oneself, though its *effects* in international politics depend very much on what others do in response.

This view emphasizes that diplomacy is an activity—something that states *do*—and that they therefore have agency over how they draw on legal resources to construct their actions. Diplomacy is a strategic behaviour governed by states' views of their interests. The choices that the state makes in selecting from these resources are revealing of the character or identity of the state itself, or of its strategic public presentation of its identity. France, for instance, in its recent intervention in Ivory Coast, explained itself in relation to the international rules and norms on humanitarian intervention and especially the actions of the United Nations. The political power of this diplomacy came from its ability to counteract narratives of imperialism and neocolonialism. They are like the “symbolic tokens” described by Zygmunt Bauman; they are adopted by agents and signal membership in groups or ways of thinking.⁸ It should be clear, however, that states are limited in their agency by the legal resources that they find around them. Their strategic behaviour around diplomacy and international law is therefore tightly structured by the legal environment. This is not a domain of free choice.

Diplomacy draws on these resources external to the state in order to make meaningful state action. This view implies a relationship between states and international rules in which the two are mutually implicating. 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 behaviour. For instance, humanitarian intervention is defined and governed by existing rules and precedents, and these rules change as states make use of them in justifying their actual interventions. The conceptual resources of the international system are the structural elements and states are the agents, and the practice of diplomacy draws the two together conceptually and empirically.

Diplomacy and statecentrism

The second feature of public diplomacy is that it is a practice of *states*, and not of other kinds of actors. This follows naturally from the formal structure of the activity and its connection to the inherently statecentric structures of public international law. Only states are obligated under public international law, and only states are therefore qualified to claim credit or to earn demerits

⁸ Zygmunt Bauman, *Intimations of Postmodernity* (London: Routledge, 1992), 196, discussed in Schatzki, *Social Practices*, 17.

for following or breaking international law. Firms and activists cannot engage in public diplomacy as I have defined it here because they are not subjects of the interstate legal system.

The injection of new kinds of actors (i.e., nonstate actors) into public diplomacy has dramatically increased the density of interaction, but it must be understood in the context of what remains a statecentric social field. Nonstate actors contribute to diplomacy, despite not being subjects of the rules of international law: they can invoke international rules, provide interpretations of behaviour and of rules, and construct arguments using the resources of public international law. This can be consequential in constructing the field in which public diplomacy takes place and in contributing resources to it. But this is ultimately directed toward influencing states, either by forcing them to act in certain ways or by giving them resources to pursue the policies preferred by the nonstate actors. For instance, the Center for Constitutional Rights, an American NGO, provides legal briefs to states regarding George W. Bush's responsibilities for torture.⁹ Its documents are designed to assist, or perhaps provoke, a national prosecutor's office in initiating a criminal investigation of Bush for alleged violations of the convention against torture, and to threaten states with being seen as noncompliant with their own obligations under that treaty. Similarly, the UN global compact program encourages firms to adopt voluntary standards of labour and environmental practices, and then 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 behaviour. Many other examples exist, such as the Ottawa treaty on land mines, the responsibility to protect, and the development of an anti-whaling coalition of states, each showing a slightly different arrangement of powers among NGOs, states, and international organizations. Activists, scholars, investigative commissions, and the media, among many other kinds of actors, use the language of diplomacy to shape the environment in which states operate. They hope thereby to change the behaviours of states.

The essentially statecentric nature of diplomacy could conceivably change if nonstate actors become more central to public international law, and specifically if nonstate actors can commit *violations* of international law. Two trends hint at this possibility: first, international criminal law may be developing such that individuals can begin to make meaningful claims about compliance with international law, and second, groups that aspire to be

9 "CCR announces Bush indictment for convention against torture signatory states," Center for Constitutional Rights, 7 February 2011, <http://ccrjustice.org>.

recognized as governments might publicize their adherence to international rules in order to support their claims to statehood. This is exemplified by the transitional government of Libya, which 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 the Gaddafi government in Tripoli as the formal representative of the country.

Productive aspect of diplomacy

As states use international law to explain their behaviour, they contribute to remaking and reinforcing those rules. Diplomacy therefore has a productive effect: it produces the public, social, and legal resources with which future state behaviour is understood, justified, and argued over. This 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.¹⁰ 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.¹¹ 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 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.¹² 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.

10 Ian Hurd, “Is humanitarian intervention legal? The rule of law in an incoherent world,” *Ethics and International Affairs* 25, no. 3 (2011).

11 Christine D. Grey, *International Law and the Use of Force*, third ed. (Oxford: Oxford University Press, 2008).

12 See, for instance, Michael Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton: Princeton University Press, 2008); Ian Hurd, “Breaking and making norms: American revisionism and crises of legitimacy,” *International Politics* 44 (March 2007): 194-213; and Shue and Rodin, *Preemption*.

The interpretive exercise of understanding the law relies on these historical moments as 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.¹³ And yet in international law this is something like the normal condition of being; the use of legal arguments is motivated by a 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 behaviour and their beliefs regarding what constitutes lawful behaviour, and so law *follows from* behaviour rather than leading it. This is the inverse of the conventional rule-of-law model, which says that states should narrow their behaviour according to their legal obligations. This may also hold true for treaty 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. Thus, when the US argued in its “war on terror” that its detainees were “illegal enemy combatants” and therefore separate from the Geneva conventions, it was generally seen as having made an error of legal interpretation.¹⁴ But its claims nonetheless entered the public sphere and interacted with existing international law, shifting the boundaries for future arguments about these issues. Whether the US claims were successful in legalizing US behaviour is not crucial to the existence of its productive effect. 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, statecentrism, 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.

13 Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

14 Michael P. Scharf, “Accountability for the torture memo: International law and the torture memos,” *Case Western Reserve Journal of International Law* 42 (2009): 321-58.

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.¹⁵

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.”¹⁶ The principle of *pacta sunt servanda* (agreements should be honoured) is the central norm of international law and politics. Academics argue endlessly about the foundations of that obligation (or lack thereof),¹⁷ but the premise of all this discussion is the shared commitment to the view that states are required to comply with the rules they have accepted. *Pacta sunt servanda*, consent, legal obligation, and the ordering power of the rule of law are fundamental, and effective law is law that states choose to follow despite holding an interest in noncompliance. This is uncontroversial in 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 discussion above, however, leads to the conclusion that the idea of compliance is built into the practice of diplomacy and so cannot be modelled 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 in order to present their interests and behaviours as consistent with the terms of

¹⁵ 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 defining feature of modern diplomacy. See Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton: Princeton University Press, 1999).

¹⁶ G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton: Princeton University Press, 2011).

¹⁷ Brunnée and Toope, “An interactional theory.”

international law. This is evident in the degree to which states do not admit to violations of the law. It also suggests that compliance and noncompliance are not structural equals in the process of international politics. Compliance occupies a privileged position as the default self-interpretation of state behaviour, and noncompliance is a term of diplomatic attack used against opponents.

This is sometimes taken as evidence that international rules are inconsequential, nonbinding, or epiphenomenal. This is the view of the “new sovereigntists” in US public discourse and neorealists in academic international relations. These conclusions are mistaken because they conflate the writers’ policy preferences (i.e., that the US *should* ignore international rules) with empirical research (for instance, on how states *actually behave* toward rules in practice). Public 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 which at once reinforce and undermine the idea of the rule of law. 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 public 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.¹⁸ It contradicts Hedley Bull’s suggestion that the role of the international lawyer is to “state what the rules of international law are.”¹⁹

18 Hans J. Morgenthau, “Positivism, functionalism and international law,” *American Journal of International Law* 34, no. 2 (1941): 260-84. See the discussion in Martti Koskenniemi, “Carl Schmitt, Hans Morgenthau, and the image of law in international relations,” in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2001).

19 Hedley Bull, *The Anarchical Society: A Study in World Order* (New York: Columbia University Press, 1977), 150. Stephen J. Toope, “Emerging patterns of governance and international law,” in Byers, *The Role of Law in International Politics*.

This is impossible when the content of the rules depends on how they have been used by states in past practice, as 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 recent work of the development of law in the EU. He says, “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.’”²⁰

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 in order to conduct diplomacy and in doing so they remake them. Their presentations of lawfulness do not need to be accepted by their audience in order 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, consensus, agreement, socialization, learning, or acculturation.²¹ Much of the literature on deliberation and communication in international relations and international law carries the assumption that the endpoint 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 Chayes and Chayes and Harold Koh, and, in international relations, Thomas Risse, Corneliu Bjola, Jennifer Mitzen, and

20 Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010), 21-22.

21 Jeffrey T. Checkel, ed., *International Institutions and Socialization in Europe* (Cambridge: Cambridge University Press, 2007) on socialization; on acculturation, see Ryan Goodman and Derek Jinks, “Toward an institutional theory of sovereignty,” *Stanford Law Review* 55, no. 5 (May 2003): 1749-88.

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 are conducive 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.²² Koh sees repeated transnational interaction over a rule as gradually clarifying it so that it becomes increasingly compelling to states.²³ 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 to winnow out unreasonable claims and can therefore reduce the incidence of unnecessary war.²⁴ The diverse membership of the council is an important component of this argument since it means that persuasion must be targeted to a variety of interests and identities and the filtering function of the process is therefore stronger.

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 therefore the formal structure of public 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, public diplomacy adds a language of law to a dispute, but it typically ends with as much disagreement as existed at the start. For instance, 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 through the departments of state and justice and other channels despite the US boycott of the proceedings. Recent diplomatic controversies over the law on preemption, from *Osirac* in 1981

22 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 25-26, 119.

23 Harold Hongju Koh, “Why do nations obey international law?” *Yale Law Journal* 106, no. 8 (June 1997): 2599-59.

24 Doyle, *Striking First*; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford: Oxford University Press, 2011).

to Iraq in 2003, have, if anything, made the law less clear rather than more. 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: on law as a resource, and on 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 favourable to the states’ interests. It is self-interested and instrumental, though because it operates with socially constructed legal resources it is not evidence of radical agency or autonomy on the part of the actors. 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 therefore a resource. As a tool, it is both empowering and limiting for its users.

This view is unconventional in international legal theory today, and it is at odds with two of the key research projects in legal scholarship. The first is the effort to remove politics from law and legal interpretation, which is central to Brian Tamanaha’s work cited above. He argues that the strategic use of law by instrumental actors, including judges and activists, is a threat to the conception of the rule of law, which he understands as necessarily apolitical. The second is the social science effort to understand the factors that conduce to compliance with international law. This is exemplified by the recent explosion of literature at the intersection of political science and international law which looks for correlation between features of law, of states, or of the international setting, and the rate of compliance with a treaty or rule.²⁵

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. These are the stuff of public diplomacy and their ubiquity suggests that they should not be so quickly dismissed by scholars. They are important in settings that lack a centralized judicial institution to provide authoritative judgments about competing legal claims. In such situations,

²⁵ See, for instance, the survey done by Emilie Hafner-Burton, David G. Victor, and Yonatan Lupu, “Political science research on international law: The state of the field,” manuscript, 2011.

arguing over the interpretation of compliance takes the place of arguing over the substantive questions in the dispute. For instance, the dispute over the wisdom of sovereignty for Kosovo took place in terms of an argument over the legal fine points of the secession declaration, with both sides claiming to represent the international rule of law. An International Court of Justice advisory opinion added legal resources to the fight but did not resolve questions of compliance and noncompliance. Similarly, disputed claims about self-defence 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 of “security” and to beliefs about threat. Legal claims under article 51 of the charter can in principle be refuted but require that outsiders make judgments about the dangers that leaders perceive, which cannot be made conclusively. The issue therefore 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 where an institution exists to give authoritative answers to questions of compliance and noncompliance. In those cases—for instance, in the World Trade Organization dispute settlement process or with an International Court of Justice decision—the parties may well continue to disagree with the outcome but the decision produces a “legal fact” that structures 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—or 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*.”²⁶ Instead of modelling international law as a device for differentiating

26 Alexander Wendt, “Collective identity formation and the international state,” *American Political Science Review* 88, no. 2 (June 1994): 384-96, quoted on 390 (emphasis in original).

compliance from noncompliance, we see it as the medium in which state behaviour 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 states are complying with the rules or not, and away from asking whether the rules serve as a constraint on the actors; these represent the agentic and structural approaches, respectively. Instead, we look at how the actors *use* the rules, and how the rules shape the actors and their possibilities. To paraphrase Thomas Sewell, international law is “both the medium and the outcome of the practices [that] constitute” this social system.²⁷ This is what Laurent Thévenot has called the “responsiveness” of the social environment in reaction to actors’ behaviour, 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.”²⁸

A provocative question is therefore raised regarding whether there can be international action in the absence of international rules and norms that define it. 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 cannot be taken. Can this be true? The history of humanitarian intervention, as documented by Martha Finnemore, suggests that it might: the invention of the concept made possible something that was not possible before. Without it, 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 is a social practice that consists of framing the state’s needs or choices in the language of international law, and is an example of Adler and Pouliot’s description of practices more generally: “world politics...[is] structured by practices” that “give meaning to international action, make possible strategic

27 Ann Swidler, “What anchors cultural practices,” in Theodore R. Schatzki *et al.*, eds., *The Practice Turn in Contemporary Theory* (London: Routledge, 2001), 78.

28 Laurent Thévenot, “Pragmatic regimes governing engagement with the world,” in Theodore R. Schatzki *et al.*, *The Practice Turn in Contemporary Theory*, 58.

interaction, and are reproduced, changed, and reinforced by international action and interaction.”²⁹ Diplomacy is an inherently public and statecentric activity, and it uses the social resources of world politics, the meanings, concepts, and history by which states and others make sense of state action past and present.

When presented in the frame of diplomacy, states’ claims about their compliance with international law may well be self-serving but are not cheap talk. They are part of the activity of interiorizing international rules and interpreting them in light of state interests. They deploy the law in the pursuit of political objectives and in doing so they reinforce, undermine, and rewrite the laws simultaneously. In terms of international relations theory, this involves both a logic of appropriateness and a logic of consequences, and resists the attempt to distinguish the two.

29 Adler and Pouliot, “International practices,” 4,