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### Noncompliance and the International Rule of Law

Jacob Katz Cogan

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# Essay

## Noncompliance and the International Rule of Law

Jacob Katz Cogan\*

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### I. INTRODUCTION

We treat noncompliance with disdain, and for good reason.<sup>1</sup> After all, what does it mean to be a law if violation is permitted? And what does it mean to be a legal system if disobedience is tolerated? This contempt for noncompliance is such that we scorn the legal system that fails to uphold its own rules. And just as we are conditioned to treat ineffective legal systems with disdain, so too do we condemn individual acts of noncompliance.

This law and order view of noncompliance is not only the ideal—it is also our own experience. In advanced national legal systems, such as that in

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1. I assume in this Essay that there is a general duty to comply with law, including international law, but I do not discuss the nature of that obligation. As will become clear, though, whatever the basis for this obligation, be it moral or prudential, I argue that it can be overcome in the international context in certain circumstances. There is, of course, an extraordinarily large literature exploring the obligation to obey the law. See, e.g., Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991). For discussions of the obligation to obey international law, see, for example, Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 941-64 (2005), and Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

the United States, though deviance from the rules occurs,<sup>2</sup> principled departures, such as acts of civil disobedience and vigilantism, are relatively rare—not because domestic law is infallible, but because authoritative legislative, executive, and judicial mechanisms create the rules and correct them, because the rules themselves reflect community values and are sufficiently specific, because obedience to the rules is recognized as crucial to continued public order, and because executive power has the means to enforce the system's rules when necessary. Our critical view of noncompliance, therefore, is reinforced by the relative success of our polity in stemming opportunities for disobedience and controlling disobedience when it does occur. In other words, we can afford to eschew noncompliance.

Other systems, such as international law, are structurally less capable of managing lawmaking and law enforcement at this sophisticated level. Though it is said that compliance with international law is high,<sup>3</sup> the international system contains few legislative, judicial, or executive processes analogous to those of States, and, consequently, the system's ability to self-correct and self-enforce is much more limited, creating gaps between aspiration and authority, procedures and policy.<sup>4</sup> It is no wonder, then, that, in the absence of effective mechanisms for decision and control,<sup>5</sup> States, on occasion, feel obliged, even absent community sanction,<sup>6</sup> to take actions that reflect current or developing expectations of lawfulness or make existing law effective—that is, to bridge the operational gaps in the international system. Sometimes these actions are legal,<sup>7</sup> such as when the United States threatened to withhold much-needed foreign assistance from Yugoslavia until that State transferred Slobodan Milosevic to the International Tribunal for the Former Yugoslavia in accordance with its international obligations.<sup>8</sup> But sometimes these actions violate existing norms, as with the humanitarian intervention in Kosovo,

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2. Such deviance reflects the lack of will to use coercive authority in particular situations (traffic regulations, the use of illegal drugs), and not the lack of means to employ such coercion. See Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 621 (2003). For discussions of lawful deviance in national law, see, for example, MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973). See also Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1519-20 (2004).

3. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979); cf. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313 (2001) (arguing that "the U.S. record [regarding treaty observance] has not been as negative as some have feared but that anxieties have been needlessly fueled in recent years by the reckless language of both officials and scholars").

4. On the limitations on enforcement mechanisms in general, see ELISABETH ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES*, at xii-xv (1984). On non-forcible coercive measures, see Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9 (1997).

5. There are, of course, a number of relatively effective methods of decision and control within the international system. For a discussion of institutional and treaty-based enforcement mechanisms, see Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345 (1994).

6. Such sanction could come from the Security Council, for example.

7. Such lawful acts are termed "retorsion." See ZOLLER, *supra* note 4, at 5. For their use by the United States, see, for example, ELISABETH ZOLLER, *ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION* 73-78 (1985).

8. See Marlise Simons, *Milosevic Is Given to U.N. for Trial in War-Crime Case*, N.Y. TIMES, June 29, 2001, at A1.

which, at least as a formal matter, breached international law.<sup>9</sup> This latter category can be called “operational noncompliance”—noncompliance that keeps a partially effective system,<sup>10</sup> such as international law, operational by reconciling formal legal prescriptions with changing community policies or by bridging the enforcement gap created by inadequate community mechanisms of control.

Operational noncompliance presents a special challenge to international lawyers, who, well aware of the weaknesses of the international legal system and eager to bolster the international rule of law and its substantive legal prescriptions, are inclined, perhaps more so than their domestic law colleagues, to take a reflexively hard line with noncompliant acts. This predisposition has become increasingly strong since the end of the Cold War, as the demise of the superpower conflict and the rise of the United States as the global “hegemon”<sup>11</sup> has led many to hope and desire that the international rule of law would finally reign.<sup>12</sup> It has grown stronger still since the Iraq war,<sup>13</sup> which many thought violated international law.<sup>14</sup> Indeed, the rule-of-law sentiment is so strong today that, for many scholars, the most important issue confronting international law is how to induce compliance with international norms, that is, how to encourage nations to obey international law.<sup>15</sup> In the words of Louis Henkin, what matters most is the creation of an

9. See, e.g., Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1 (1999).

10. See W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 9-10 (2000) (describing international law as an “effective but limited constitutive structure”).

11. “Hegemony” is the new shibboleth of the international legal literature. See, e.g., José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003); Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004).

12. See Martti Koskeniemi, *“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 160 (2002); see also, e.g., John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75 (1992); Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355 (2002); cf. Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 811 (2005) (noting the proliferation of references to the rule of law in international texts).

13. See, e.g., Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 620 (2003) (“What, then, is the proper role for the lawyer? Surely, it is to stand tall for the rule of law. . . . When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it. . . .”).

14. The United States and other States claimed that the invasion of Iraq was “consistent with the resolutions of the Security Council” and therefore legal, as a matter of international law. William H. Taft & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003). The claim that the invasion was formally illegal was articulated, of course, by a number of States that were not members of the coalition, as well as by a number of international lawyers. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (arguing that “the legal theory actually deployed by the United States is not persuasive”).

15. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (review essay). For reviews of this literature, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1942-62 (2002), and Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538 (Walter Carlsnaes et al. eds., 2002).

“international culture of compliance.”<sup>16</sup> It is no surprise, then, that the establishment of the International Criminal Court (ICC) was international law’s *cause célèbre* during the 1990s and that the ICC continues to be a central focus of (and occasional litmus test for) scholars, politicians, and activists today—the ICC, after all, is a symbol for its proponents of a “new world order based on the rule of international law.”<sup>17</sup>

Operational noncompliance—like all forms of noncompliance—does not fit well within this law and order approach. For those who espouse such a view, it matters little in the evaluation of a State’s acts that the international legal system contains gaps that hinder its effective operation—what matters is the formal obedience to the law and multinational processes<sup>18</sup> and particularly “the attitude of the State to the rule of law.”<sup>19</sup> Most feel that the dangers of disobedience are just too great. If the international community, for instance, recognized the unauthorized enforcement of international law, even for good cause, then, as Prosper Weil put it colorfully, “under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest intentions.”<sup>20</sup> Simply stated, “[t]he deficiencies of international law are no excuse for its violation.”<sup>21</sup> This assumption—now ubiquitous in international law scholarship and political rhetoric—that compliance is sacrosanct and the international rule of law inviolable was well put recently by Gilbert Guillaume, former Judge and President of the International Court of Justice, when he asserted that States, as they fight terrorism, “must . . . , of course, act in compliance with the law, and in particular with international law . . . . That is the underlying condition for the legitimacy of their action.”<sup>22</sup>

16. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 86 (1989).

17. Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 8 (1998); see also Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 92 (2000) (“The Rome Statute . . . represents in the minds of its supporters . . . the establishment of the rule of law in the international community . . .”).

18. See Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 174 (Michael Byers & Georg Nolte eds., 2003) [hereinafter UNITED STATES HEGEMONY] (“[T]he mere fact that some goals that appear desirable under a substantive conception of justice might be achieved faster and more easily within a hegemonic order does not justify the existence of such an order instead of a multilateral system based on equality.”); see also Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUR. J. INT’L L. 361, 379-80 (2000) (“[A] military operation taken in response [to the violations of human rights in Kosovo] which has laid itself open to accusations of bombardment of towns, attacks against civilian targets . . . surely cannot be considered the best way of promoting the ethical and rule-of-law platform on which the response was said to be grounded, and it runs the risk of eroding that very platform.”).

19. *Comments on Chapters 16 and 17*, in UNITED STATES HEGEMONY, *supra* note 18, at 480 (comments of Vaughan Lowe).

20. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 433 (1983).

21. Brigitte Stern, *How To Regulate Globalization?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 247, 260 (Michael Byers ed., 2000).

22. Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L & COMP. L.Q. 537, 548 (2004); cf. Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 RECUEIL DES COURS 21, 227 (1995) (“In the case of the Security Council there is no reason to assume a

This Essay takes issue with the law and order position and contends, instead, that noncompliance—particularly operational noncompliance—is a necessary component of less capable legal systems, such as international law. Though compliance, of course, is and should be the norm, those who discount operational noncompliance disregard the tension, which is acute in the international arena, between the necessity in a legal system of maintaining the principle that the law is to be complied with—because otherwise what does it mean to be a law?—and the role of noncompliance in developing new law and in enforcing current law. That operational noncompliance is not the ideal there is no doubt. Nor is there doubt that many, if not most, instances of operational noncompliance are unlawful and undesirable. Yet, the failure to acknowledge the functions and potential benefits of some instances of operational noncompliance mythologizes contemporary international law, limits our ability to achieve community policies, and risks making international law irrelevant.<sup>23</sup> Unless and until we have more effective international institutions, we will need to come to terms with noncompliance's role in the international legal system.<sup>24</sup>

The Essay proceeds as follows: Part II sketches the various causes of noncompliance and introduces the concept of operational noncompliance. Part III explains operational noncompliance in detail and provides examples, showing that operational noncompliance is an integral component of the international legal system. Part IV looks at the costs and benefits of operational noncompliance. Part V discusses whether operational noncompliance should be acknowledged as a component of the international legal system, and, if so, how we should appraise particular acts of operational noncompliance. Part VI concludes that we need to come to terms with noncompliance.

## II. THE CAUSES OF NONCOMPLIANCE

The roots of noncompliance are more complicated than scholars often let on, and it is important to disaggregate them if we are to understand noncompliance's role in the international legal system.<sup>25</sup> To this end, we can

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tension between effectiveness and legality. Common sense would suggest that the authority of a political organ must depend on respect for the Rule of Law and that there is an essential link between operational efficiency and legality.”).

23. There are other forms of noncompliance, such as efficient breach, that some consider beneficial, but which are not considered here. *Compare, e.g.,* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 5179 (2002), with John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation To Comply or Option To “Buy Out”?*, 98 AM. J. INT’L L. 109 (2004).

24. *But cf.* Bruno Simma, *International Crimes: Injury and Countermeasures: Comments on Part 2 of the ILC Work on State Responsibility*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 283, 315 (Joseph H. H. Weiler et al. eds., 1989) (“[I]t is a reason for concern that these new conceptions [of community interest] are being grafted upon international law without support through, and any attempt at, adequate institution-building.”).

25. *See Comments on Chapters 16 and 17, supra* note 19, at 479-80 (comments of Vaughan Lowe) (noting great differences between types of noncompliant acts and claiming that “[w]e need to take these crucial differences into account in evaluating non-compliance”).

look at the causes of noncompliance at three levels: the individual, the communal, and the structural.

On the surface, noncompliance is simply a function of the wrongdoer's ability and will—that is, the wrongdoing State's capacity or incapacity to comply with the law, as well as its desire to comply. Incapacity can be based on several factors: ambiguity in the rules themselves, as with the question of whether the International Court of Justice's provisional measures orders were binding;<sup>26</sup> limitations on the State's ability to take actions necessary to obey the rule, such as financial or technological deficiencies, as in the incapability of a number of States to satisfy the Montreal Protocol's chlorofluorocarbon consumption reporting requirements;<sup>27</sup> or, more simply, a mistake or a lack of intention to disobey, as with the United States's breaches of the consular information and notification requirements of the Vienna Convention on Consular Relations.<sup>28</sup> Capacity-based noncompliance, or what might be better described as intentional noncompliance, on the other hand, results from a State's willful decision to violate the law, which is based on the State's calculation of its interests, a complicated amalgam of advantages and disadvantages, costs and benefits, particular to, among other things, the primary rules, participants, and facts involved at any one moment.<sup>29</sup>

But noncompliance is often rooted in more than an individual State's capacities and whims; it is grounded as well in numerous second-order conditions—in inadequacies in how the international community creates, internalizes, and manages the rules. For example, there could be substantive and procedural flaws in the creation of legal norms that impinge on the rules' fairness and legitimacy.<sup>30</sup> There could also be deficiencies in norm internationalization, in the transnational legal process (as Harold Koh calls it), that reduce the likelihood that governments will feel constrained to obey the rules.<sup>31</sup> There could be, as well, failures in norm management that undercut cooperation and persuasion, thereby loosening the bonds and interdependencies that induce compliance.<sup>32</sup> And there could be defects in acculturation, "the general process of adopting the beliefs and behavioral patterns of the surrounding culture."<sup>33</sup> In these ways, the international

26. Only in 2001 did the Court decide that such orders were binding. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

27. See CHAYES & CHAYES, *supra* note 15, at 14-15; cf. U.N. Charter art. 19 (allowing the U.N. General Assembly to permit a member state to vote even if that state is in arrears "if [the General Assembly] is satisfied that the failure to pay is due to conditions beyond the control of the Member").

28. In the *Case Concerning the Vienna Convention on Consular Relations*, the United States admitted that in that case it breached the Convention's requirement that it inform detained foreign nationals without delay of their right to notify their consulates of their detention, but the United States indicated to the court that the breach was not deliberate. See *Case Concerning the Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248, 253 (Apr. 9). On incapacity generally, see, for example, CHAYES & CHAYES, *supra* note 15, at 13-15.

29. See, e.g., HENKIN, *supra* note 3, at 69-73; Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

30. See FRANCK, *supra* note 15.

31. See Koh, *supra* note 15.

32. See CHAYES & CHAYES, *supra* note 15.

33. Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International*

community creates the background conditions that permit or create the environment for noncompliance. Without the establishment of these enabling conditions, some, though not all, acts of noncompliance would never take place.

There is, finally, a third plane of noncompliance beyond those of the incapacity and will of individual States and the inadequacies of the international community in persuading States to accept the rules and acculturating States to conform to the rules. Noncompliance can also be based, on occasion, in the international system's structural inability to maintain and enforce international law and to control international institutions. Such operational gaps can provide opportunities for noncompliance in at least two ways: by reducing the risk that noncompliant acts will be punished, thus altering a State's cost-benefit calculus, or by inducing States to step in to ensure the operation of the system—the technique of “operational noncompliance.” As with community-based preconditions, noncompliance founded in the structure of the international system does not cause noncompliance in any proximate sense. It simply provides openings for noncompliant acts that otherwise may or may not be committed depending on other factors transpiring at that moment. Consequently, operational noncompliance requires both the existence of an operational gap in the international legal system, as well as an interest by a State or group of States to take an action in violation of international law that bridges that gap.

### III. OPERATIONAL NONCOMPLIANCE

Operational noncompliance, thus, fills the gaps created when the legal system itself will not or cannot act. That the international legal system contains such operational gaps is well-known. And that these gaps appear in all aspects of the international system—in lawmaking and law termination, in law enforcement, and in institutional control—is also evident.

Given the gaps in the operation of the international legal system, States occasionally take it upon themselves, individually and collectively, to fill these gaps through their own actions, when it is in their self-interest.<sup>34</sup> As a default, States attempt to fill operational gaps through legal acts, and this is uncontroversial. Such legal acts include acts authorized by treaties (such as

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*Human Rights Law*, 54 DUKE L.J. 621, 638 (2004).

34. See, e.g., W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN MARITIME BOUNDARY DELIMITATION 226 (1992) (“Quantitatively, the key international event in the formation and change of normative arrangements continues to be the precipitating act of a state seeking to serve its own interests and the counter-reactions of states who believe that the action prejudices rights and interests to which they are entitled.”); *Discussion*, in THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS—NEW LAW? 154, 171 (Jost Delbrück ed., 1993) (comments of W. Michael Reisman) (“No one in the world . . . is altruistic. Everyone is motivated by self-interest. When there has been a humanitarian intervention to stop gross violations of human rights, the critical question is not the motive of the party that intervened. The question is the gravity of the evil that the intervenor has addressed and whether it is removed at that particular moment. The motive is not critical.”). Given that these acts are based on the self-interest of States, responses to similar situations, such as human rights abuses, will inevitably be dissimilar and selective. See Lori Fisler Damrosch, *The Inevitability of Selective Response? Principles To Guide Urgent International Action*, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP 405 (Albrecht Schnabel & Ramesh Thakur eds., 2000).



retaliatory measures under trade agreements) and the suspension of non-mandatory acts (such as the suspension of foreign aid). Legal acts, however, are not always available or effective. When they are not, States may feel compelled, in certain circumstances, to resort to formally illegal acts in order to achieve their goals. Such gap filling through noncompliance, though not the norm in international relations, is not unusual either. Indeed, not surprisingly, it often happens in some of the most important situations confronting the international system—in crises in which international institutions, as presently constituted, cannot or will not act. Some examples from the three areas noted above—lawmaking and law termination, law enforcement, and institutional control—demonstrate how and when operational noncompliance occurs, and, therefore, how operational noncompliance has had a role—often a critical role—in the effective functioning of the international legal system. None of these examples is particularly obscure, but putting them together, as they rarely, if ever, are, provides us with a portrait of the international legal system that highlights the centrality of operational noncompliance.<sup>35</sup>

#### A. *Lawmaking and Law Termination*

Operational noncompliance in the area of lawmaking and law termination occurs most often as a result of a change in a fundamental assumption upon which a rule is based.<sup>36</sup> Thus, for example, an existing rule might have been founded on some previous conception of technological feasibility, a conception that has since become antiquated.<sup>37</sup>

Since States, as a default, prefer not to violate international law, they will first attempt to change the rule legally, through the reinterpretation of the rule, the termination of the rule, or the negotiation of a new rule. The mechanisms and possibilities for superseding the old rule will differ according to the form of the rule and the extent of the proposed change. Reinterpretation

35. International law scholars have treated these three areas of operational noncompliance separately. The author is unaware of other papers that view them as a single conceptual phenomenon.

36. Scholars have acknowledged, often reluctantly, the role of noncompliance in international lawmaking and law termination. *See, e.g.*, ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 98 (1971) ("Each deviation contains the seeds of a new rule."); FRANCK, *supra* note 15, at 151; HENKIN, *supra* note 3, at 42; MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 402-03 (1989); Michael Akehurst, *Custom as a Source of International Law*, 47 *BRIT. Y.B. INT'L L.* 1, 8 (1974-1975) ("There is no doubt that customary rules can be changed in this way, but the process is hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations."); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 *AM. J. INT'L L.* 834, 836 (1999) ("[G]eneral international law may change through breach of the current law and the development of new state practice and *opinio juris* supporting the change."). Others, especially recently, have criticized this method of lawmaking, *see* Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 177, 188 (J.K. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter *HUMANITARIAN INTERVENTION*], while still others have embraced it, *see* Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION*, *supra*, at 130. *See also* Robert E. Goodin, *Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers*, 9 *J. ETHICS* 225 (2005); Paul B. Stephan, *Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 *STETSON L. REV.* 1341 (1998).

37. *Cf.* Paul Gewirtz, *Constitutional Law and New Technology*, 64 *SOC. RES.* 1191 (1997).

is possible if the old rule is sufficiently opaque, which is often the case.<sup>38</sup> Creative reinterpretation, though, is limited by the text setting out the rule, as well as past practice, so that at some point the line between reinterpretation and renegotiation (and, indeed, violation) is crossed. If the rule is located in a treaty, then it is usually possible to terminate the treaty with notice,<sup>39</sup> though States may be reluctant to do so if the treaty contains other, more important provisions or time does not allow for the provision of adequate notice. If the rule is based on custom, however, termination, as such, is unavailable. With regard to both conventional and customary law, negotiation of a new rule to supplant the old rule is possible, but there is no guarantee that such negotiations would end successfully (especially in cases of multilateral negotiations where consensus is difficult to achieve), no certainty that negotiations would conclude within a particular timeframe, and certainly no assurance, particularly in the case of custom, that the agreement entered into would apply generally. The difficulties inherent in reaching consensus on a new rule apply even to the many modern treaty regimes that have developed creative techniques—through institutions such as conferences of the parties—that allow for some self-modification short of formal amendments.<sup>40</sup>

Consequently, in cases in which time is a factor or in situations in which consensus (as to reinterpretation or renegotiation) is unachievable—that is, in situations in which the international legal system, because of its decentralized lawmaking process, cannot accommodate current or developing conceptions of lawfulness—States may feel compelled to violate the existing rule, as it may be the only way to change the rule. In such circumstances, violation begins a process of claim and counterclaim, action and reaction, which leads to the rejection of the formally illegal act or, conversely, its ratification through the revision, clarification, or termination of the previous rule.<sup>41</sup> As the Supreme Court of Chile recognized in 1955, “a change in a norm . . . may arise from its violation by a State, when the custom does not conform to new needs.”<sup>42</sup>

Such operational noncompliance was the most important factor in the development of the international law of the sea during the twentieth century, a story that is well-known.<sup>43</sup> As technologies developed for the use of oil, gas,

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38. See Felice Morgenstern, *Legality in International Organizations*, 48 BRIT. Y.B. INT'L L. 241, 253-54 (1976-1977). On interpretation through performance, see W. Michael Reisman, *Necessary and Proper: Executive Competence To Interpret Treaties*, 15 YALE J. INT'L L. 316 (1990).

39. Vienna Convention on the Law of Treaties, art. 56, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1970).

40. See, e.g., Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

41. Of course, this process only works if States have an interest in engaging the initial claim. See REISMAN & WESTERMAN, *supra* note 34, at 202.

42. *Lauritzen v. Chile*, 23 I.L.R. 708, 711 (Sup. Ct. Chile 1955); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 109 (June 27) (“Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.”); cf. *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) (“Many of the usages which prevail [in the international system], and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.”).

43. See generally HENKIN, *supra* note 3, at 212-18.

and other natural resources and their mining in the oceans, demands increased for the seaward expansion of coastal state jurisdiction and sovereignty.<sup>44</sup> States economically dependent on fishing in their adjacent waters also sought such expansion in order to protect their national industries and food supplies. These claims, often in violation of established law, led to the revision of the law of the sea in a number of respects, two examples of which follow.

This process took place initially and most rapidly with regard to the continental shelf—the seabed and subsoil adjacent to the territorial sea down to a certain depth below sea level. In September 1945, the United States was one of the first states to assert a unilateral claim to rights regarding “its” continental shelf.<sup>45</sup> Thereafter, similar claims by other States quickly proliferated, and this led to the codification of the continental shelf regime in the 1958 Convention on the Continental Shelf,<sup>46</sup> which the International Court of Justice eleven years later described as “reflecting, or as crystallizing, received or at least emergent rules of customary international law.”<sup>47</sup> As one scholar concluded, “In general, the view was widespread among [contemporary] writers that the continental shelf doctrine did entail some modification of existing rules of international law.” But, that scholar continued, “it appears from the writings of jurists that they generally did not consider such a change in the existing law a bar to the emergence of a new customary rule as long as the disturbance in the established order was of a lesser impact than the public good derived from the change.”<sup>48</sup>

To take a second example, following the Second World War, States began to claim jurisdiction over waters beyond their territorial sea and into the high seas—the area of the oceans open to all States.<sup>49</sup> This was done despite the recognition that “the legal situation [in the early 1950s] appeared to be that the unilateral extension by a coastal State of its sovereignty over areas of the

44. See REISMAN & WESTERMAN, *supra* note 34, at 19-20.

45. See Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945) (Truman Proclamation).

46. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. The extent of the continental shelf was expanded in the 1982 Law of the Sea Convention. See United Nations Convention on the Law of the Sea, art. 76, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

47. North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 39 (Feb. 20) (emphasis added).

48. ZDENEK J. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF: A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW 32 (1968); see also *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 I.L.R. 144 (Lord Asquith, Umpire 1951) (noting the novelty of claims over the continental shelf in 1951, that these claims were in opposition to the law as it had been, and that they had not become law as of that date); Rudolf Bernhardt, *Custom and Treaty in the Law of the Sea*, 205 RECUEIL DES COURS 247, 291 (1987) (“[I]t was very doubtful whether the claims made [by the United States in 1945] were compatible with the international law of that time.”); James Crawford & Thomas Viles, *International Law on a Given Day*, in VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT 45, 62 (Konrad Ginther et al. eds., 1994) (“[T]he State Department fully understood that the United States was undertaking a new practice that was not consistent with current norms.”). But see Daniel Bodansky, *Non Liqueur and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153, 157 (Laurence Boisson de Chazournes & Philippe Sands eds., 2000) (arguing that there was a “gap in the law . . . which the Truman Proclamation sought to fill”).

49. See Bernhardt, *supra* note 48, at 294. See generally DAVID JOSEPH ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 1-31 (1987).

high seas constituted an unlawful act.”<sup>50</sup> Given its economic dependence on fishing, Iceland was one of the States that most actively expanded its exclusive seaward fishing jurisdiction.<sup>51</sup> This it did in violation of its obligations under general international law, as well as particular bilateral agreements. Iceland, however, was unashamed of its actions. In a pamphlet issued in 1972, Iceland claimed that “[u]nilateral action in questions of fisheries and territorial limits is the last resort a coastal state or an island state has if the international community is unable to find a satisfactory solution to such problems by agreeing on uniform rules in terms of international law.”<sup>52</sup> In Iceland’s view, such action would lead to the “progressive evolution of the international law of the sea.”<sup>53</sup> Iceland’s claims were given qualified support by the International Court of Justice in the *Fisheries Jurisdiction Cases*,<sup>54</sup> and many States followed Iceland’s lead in the 1970s, just as they had followed the U.S. example in the 1950s with regard to the continental shelf.<sup>55</sup> These deviations from the customary rule were largely codified in the 1982 United Nations Convention on the Law of the Sea in its provisions on the Exclusive Economic Zone.<sup>56</sup>

These are just two examples from one area of the law, but other examples from other areas—from the law of war,<sup>57</sup> for instance—would serve to make the same point. Noncompliance has been a central part of the international lawmaking and law-terminating processes, allowing international law to maintain its continued relevance despite the absence of effective institutions.

## B. Law Enforcement

Gap filling through noncompliance is also apparent in the area of law enforcement, that is, in the application of law.<sup>58</sup> The need for countermeasures, as such acts are termed, is clear—the international legal system has no effective centralized law enforcement mechanism, the Security Council notwithstanding, and thus a State may need to resort to acts that are otherwise unlawful in order to enforce an obligation it is owed (“individual countermeasures”).<sup>59</sup> Such self-help measures are needed, certainly, by an

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50. WINSTON CONRAD EXTAVOUR, *THE EXCLUSIVE ECONOMIC ZONE: A STUDY OF THE EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA* 89 (1979); accord ATTARD, *supra* note 49, at 6-7.

51. See, e.g., Resolution of the Althing on Fisheries Jurisdiction, Feb. 15, 1972, 11 I.L.M. 643 (Ice.).

52. GOV’T OF ICELAND, *ICELAND AND THE LAW OF THE SEA* 12 (1972).

53. *Id.* at 13.

54. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25); Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25); see also EXTAVOUR, *supra* note 50, at 294. See generally Richard B. Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 Wis. L. Rev. 37.

55. See Bernhardt, *supra* note 48, at 294.

56. See UNCLOS, *supra* note 46, arts. 55-57.

57. See, e.g., W. Michael Reisman, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003); cf. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004) (proposing a revision to the rules regarding the use of force in self-defense).

58. See generally LINOS-ALEXANDRE SICILIANOS, *LES RÉACTIONS DÉCENTRALISÉES À L’ILLICITE: DES CONTRE-MESURES À LA LÉGITIME DÉFENSE* (1990); ZOLLER, *supra* note 4.

59. See, e.g., Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France, 18 R.I.A.A. 417, 443-45 (1978).

injured State,<sup>60</sup> but they have also been maintained by third States, principally, in three circumstances. First, such “collective countermeasures” have been used when the injured State is unable to coerce the wrongdoing State into abiding by its obligations. In this situation, countermeasures by third States may be necessary lest weak states’ rights become worthless.<sup>61</sup> Second, collective countermeasures have been used when the international obligation owed and breached is not to another State but to a State’s own nationals. Here, the injured party—individuals—may not be able to enforce the international obligation, and thus third States need to be enlisted to assist in the enforcement of the international obligation. And third, countermeasures are maintained when the breach is of an obligation that is of general interest to States, such as when Iran breached the Vienna Convention on Diplomatic Relations during the Iran Hostage Crisis.<sup>62</sup> In these three cases, where international law’s traditional bilateralism breaks down,<sup>63</sup> third States have taken unlawful acts to enforce an international obligation when other, legal acts are unavailable or ineffective.<sup>64</sup>

Unsurprisingly, such collective countermeasures have increased as States have become more committed to the substantive prescriptions of international law. It is also unsurprising that breaches of human rights obligations have generated the greatest response from States in the form of countermeasures. Such acts are based on two of the three rationales for third party intervention—that the obligation owed is to individuals who cannot vindicate their rights because those rights are being violated by their own government, and that the rights in question are of general interest to the international community.

The humanitarian intervention in Kosovo is the most recent and dramatic example of this phenomenon. After various legal means of coercion failed and before NATO resorted to the use of force in violation of the UN Charter, less extreme measures were taken in violation of formal international law in order to convince Yugoslavia to discontinue its infringement of international human rights law. For example, the European Community (EC), in Regulation 1901/98, instituted an immediate flight ban on Yugoslav airlines,<sup>65</sup> and the implementation of this regulation by those EC member

60. See, e.g., John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881 (1991).

61. See ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 46-49 (1921).

62. See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 43 (May 24) (“[T]he Court considers it to be its duty to draw the attention of the entire international community . . . to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law . . . the maintenance of which is vital for the security and well-being of the [international community] . . .”).

63. On the bilateral tradition, see Simma, *supra* note 24, at 283-84.

64. See generally Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT’L L. 1 (1970); Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT’L L. 57 (1989); Frowein, *supra* note 5; D.N. Hutchinson, *Solidarity and Breaches of Multinational Treaties*, 59 BRIT. Y.B. INT’L L. 151 (1988); Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 BRIT. Y.B. INT’L L. 337, 355-56 (2001); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994).

65. See Council Regulation (EC) No. 1901/98, Concerning a Ban on Flights of Yugoslav Carriers Between the Federal Republic of Yugoslavia and the European Community, art.1, 1998 O.J. (L 248) 1.

states that had bilateral aviation agreements with Yugoslavia (France, Germany, and the United Kingdom) constituted breaches of those agreements.<sup>66</sup> As the mandatory notice period required for the termination of treaties had not run, Yugoslavia quite accurately described the immediate suspension of these agreements as illegal.<sup>67</sup> In explaining why the United Kingdom was disregarding the normal rules concerning the termination of treaties, British Secretary of State for Foreign and Commonwealth Affairs Robin Cook stated that “there [is] always a balance to be struck between our legal obligation under [the aviation agreement] and the need to bring [Yugoslav President] Milosevic to comply with his obligations.”<sup>68</sup> Milosevic’s “behaviour [by September 1998], and in particular his worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally apply [to the termination of treaties].”<sup>69</sup> Eventually, of course, when all other means failed, legal and illegal, including the failure to obtain Security Council authorization for the use of force, NATO resorted to the most extreme strategy available—military intervention in formal violation of the law—to ensure the enforcement of Yugoslavia’s international human rights obligations.

Again, other examples might be given,<sup>70</sup> but this should be sufficient to establish the role of noncompliance in the application of international law.<sup>71</sup>

### C. *Institutional Control*

Finally, operational noncompliance also takes the form of institutional control. In the absence of effective outside oversight and judicial review of the acts of international organizations, it is left to the institutions themselves to regulate the legality and effectiveness of their own activities. Such self-regulation can be pathological, and, consequently, individual members of these organizations are often left to fill the gaps created by the absence of effective mechanisms of institutional control. As with lawmaking and law enforcement, there is a spectrum of legal means States may employ in such circumstances, the most extreme of which is withdrawal from the

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66. See Agreement Concerning Air Services, art. 17, U.K.-Yugo., Feb. 3, 1959, 359 U.N.T.S. 339 (requiring a twelve-month notice period prior to termination of the agreement); Air Transport Agreement, art. 18, Fr.-Yugo., Mar. 23, 1967, 922 U.N.T.S. 59 (same); Air Transport Agreement, art. 21, F.R.G.-Yugo., Apr. 10, 1957, 463 U.N.T.S. 269 (same).

67. See Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, *quoted in* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission, U.N. GAOR, 56th Sess., Supp. No. 10 at 353, U.N. Doc. A/56/10 (Oct. 30, 2001) [hereinafter Draft Articles].

68. *United Kingdom Materials on International Law 1999*, 70 BRIT. Y.B. INT’L L. 387, 555 (1999).

69. *United Kingdom Materials on International Law 1998*, 69 BRIT. Y.B. INT’L L. 433, 581 (1998).

70. For additional examples, see Draft Articles, *supra* note 67, at 350-55.

71. The International Law Commission has recommended rules governing individual countermeasures, but was unable to agree on rules regarding collective countermeasures. For a review, see David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817 (2002); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798 (2002).

organization,<sup>72</sup> but if the stakes are high enough and the organization important enough, exit will be unavailable and formally illegal means may need to be employed instead.

Such gap-filling through noncompliance as institutional control occurs primarily in two circumstances. First, such acts of control manifest themselves through noncompliance with allegedly *ultra vires* decisions of the organization. Thus, a State could withhold its assessed contributions<sup>73</sup> from the organization—in violation of its obligation to pay dues—on the grounds that it refuses to support financially an *ultra vires* decision, as was the view of France and the Soviet Union with regard to UN operations in the Congo and the Middle East in the *Expenses Case* before the International Court of Justice.<sup>74</sup> Second, a State may be motivated to violate its obligations as a member state by its desire to reform the organization's operations, thereby making the organization more effective, as when the United States withheld a portion of its assessed contributions to the United Nations.<sup>75</sup> In each case, a State violates its obligations under international law in order to act as an institutional control when lawful controls are unavailable or ineffective. As with the other forms of operational noncompliance, noncompliance as institutional control fills an important gap in the international system.

#### D. *Operational Noncompliance and the Informal Legal System*

This quick review of operational noncompliance makes clear that States, when it is in their interests, breach international law in situations in which the international legal system does not or cannot operate effectively. By doing so, States act in a variety of ways—as lawmakers, as law enforcers, and as institutional checks—that are the responsibility of government institutions in highly developed legal systems. As an initial matter, then, one can say that, descriptively, operational noncompliance has been a part of the international legal system, as the actions of States in these cases serve functions—fundamental functions—that are characteristic of legal systems. This is not an insubstantial claim, as any understanding of a legal regime must take into account the actual operation of the system, including its informal processes.<sup>76</sup>

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72. For example, the United States withdrew from the International Labour Organization in 1977 (rejoining in 1980) and UNESCO in 1984 (rejoining in 2003). On the idea of control mechanisms, see generally W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 1-3 (1992).

73. See U.N. Charter art. 17, para. 2. ("The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.")

74. Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20). The ICJ rejected the French and Soviet views. For a defense of such practice in certain cases, see Francesco Francioni, *Multilateralism à la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget*, 11 EUR. J. INT'L L. 43 (2000).

75. See generally *Contemporary Practice of the United States Relating to International Law: Agreement on UN Financial and Structural Reforms*, 95 AM. J. INT'L L. 387, 389 (Sean D. Murphy ed., 2001); *Contemporary Practice of the United States Relating to International Law: Payment of U.S. Arrears to the United Nations*, 94 AM. J. INT'L L. 348 (Sean D. Murphy ed., 2000). Compare Jose E. Alvarez, *Legal Remedies and the United Nations' à la Carte Problem*, 12 MICH. J. INT'L L. 229 (1991), with Elisabeth Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 AM. J. INT'L L. 610 (1987).

76. Cf. KADISH & KADISH, *supra* note 2, at 146.

## IV. THE COSTS AND BENEFITS OF OPERATIONAL NONCOMPLIANCE

Thus far, this Essay has confined itself to a description of the constitutive processes of the international legal system that demonstrates the central role played by operational noncompliance in the absence of effective international institutions. This description has hinted at the constructive functions that acts of operational noncompliance can serve, but in order to understand these functions more fully, a more theoretical discussion is in order. Such a discussion will not only appreciate the benefits of noncompliance, it will also tally the costs of noncompliance. First the costs and then the benefits of operational noncompliance.<sup>77</sup>

A. *The Costs of Operational Noncompliance*

The costs of operational noncompliance, like the costs of all forms of noncompliance, can be two-fold—costs to the primary rule breached and costs to the principle of the international rule of law.

First, and most obviously, a breach of an international legal obligation can diminish the authority of the obligation itself. This might not be of concern to the breaching State, at least in the short-term,<sup>78</sup> but it will probably be of concern to the State to which the obligation is owed and probably be of concern as well (in the case of multilateral obligations) to non-breaching States that support or rely upon the obligation breached, even if they are not directly harmed by the particular breach at issue.

Second, noncompliance can impede the establishment and maintenance of the international rule of law.<sup>79</sup> This it can do in two ways. Noncompliance impinges on the principle that power must be exercised in accordance with the law, a principle that might be especially dear in our current unipolar world. Noncompliance also undercuts the establishment of a habit of obedience or the creation of what has been called “compliance pull”<sup>80</sup> or “obedience effect.”<sup>81</sup> As Louis Henkin wrote, “[i]f diplomacy can maintain a climate of

77. That is, costs and benefits to the system as a whole, not to individual States.

78. Sometimes States will violate international law (because of the necessities of the moment) but have no interest in diminishing the long-term value of the rule violated. In these instances, they are either willing to pay the price of noncompliance or seek a one-time exemption from the applicability of the rule.

79. The rule-of-law principle discussed here is the fairly basic and untextured one of legality. On the variety of meanings of the rule of law, see, for example, Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997). A substantive conception of the rule of law might cut the other way. See generally Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1377 (2001) (“[T]he rule of law as a principle of the new constitutionalism [elaborated by constitutional courts outside the United States] has started to recognize that legality alone does not entail legitimacy and that the faithful operation of law itself is no excuse for abuses that occur in law’s name.”).

80. FRANCK, *supra* note 15, at 24.

81. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 63 (1997). For a critique of the idea that noncompliance undermines the system as a whole because it disrupts habit formation, see *Systemic Costs of Non-Compliance with International Law—Effects on the System and on Interstate Relations*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES, PROCEEDINGS OF THE JOINT CONFERENCE HELD IN THE HAGUE, THE NETHERLANDS, JULY 4-6, 1991, at 65, 71-72 (1992) (remarks of W. Michael Reisman). For a critique of the idea that noncompliance jeopardizes multilateralism, both generally and in specific areas of cooperation, see George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the*



order and provide lawful means for achieving change, these will induce the acceptance of law and the development of institutions for its observance. Habits of accepting and observing law will, in turn, contribute to international order and stability.”<sup>82</sup> Thus, any breach of an international obligation can undermine not only the authority of the primary rule breached but also the authority and integrity of the international legal system itself because it undermines the assumption that states must comply with international law. Consequently, all States, even States that are not a party to the primary obligation breached, might have an interest in compliance because noncompliance affects the stability of the international system as a whole.

As is apparent, the costs of noncompliance can, at least as a theoretical matter, be significant. Not only can they be significant as a matter of the primary rule breached, more importantly they can also be significant in terms of the maintenance of the rule of law. Now, certainly, the costs of any particular breach will vary according to the nature of the breach and the primary rule at issue. Thus, we will probably worry more about violations of rules regarding the use of force than about violations of other rules. And the costs of the breach will also depend on the strength of the rule-of-law principle in the system. Thus, conceivably, we might worry more about the rule-of-law effects of a breach in the international arena than we do in the domestic arena precisely because the international rule of law is more insecure than its domestic counterpart and, consequently, in greater need of reinforcement.

#### B. *The Benefits of Operational Noncompliance*

If one is categorically committed to the international rule of law, then there is no need to proceed any further—all acts of noncompliance are to be condemned no matter the circumstances and no matter the benefits that may result. But for those who do not think in this fashion, operational noncompliance may provide two types of benefits, each mirroring one of noncompliance’s costs: benefits to the primary rule created or enforced and benefits that stem from the effective promotion and enforcement of the international legal system’s substantive policies.

First, there is the benefit in maintaining the integrity of the particular primary rule (in the cases of law enforcement and institutional control) or in nourishing the establishment of the nascent primary rule proposed (in the case of lawmaking). Depending on the particular case, such benefits may correspond to or be greater or lesser than the costs accrued as a result of the violation of the primary rule. It depends on the relative values of the competing rules.

Second, just as there are competing primary rules often involved in operational noncompliance, so too are there competing systemic principles—that of maintaining the international rule of law and that of maintaining the

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*Compliance Gap*, in INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 19, 25-26 (Edward C. Luck & Michael W. Doyle eds., 2004).

82. HENKIN, *supra* note 3, at 317.

operation of the international legal system (the “operational principle”). The operational principle has two primary benefits.

There is the benefit stemming from the efficient functioning of the international system itself. International law is all very well and good, but it is only useful—and it is only really law—if it actually has effect. Excessive adherence to the rule of law can lead to a breakdown in the system itself if strict adherence means, paradoxically, the non-enforcement of the rules or the inability to update the rules. As Elihu Root stated ninety years ago with regard to the enforcement of international law, “[i]nternational laws violated with impunity must soon cease to exist, and every State has a direct interest in preventing those violations which, if permitted to continue, would destroy the law.”<sup>83</sup> By maintaining the functionality of the international law, operational noncompliance ensures that the international legal system retains its effectiveness.

Operational noncompliance is also important to maintaining the continued relevance of international law. Legal regimes that are out of date or no longer fit political and social realities become obsolete or irrelevant unless they can be tweaked or transformed to change with the times.<sup>84</sup> If States or international institutions are unwilling or unable to recognize the evolution of contemporary international policies, operational noncompliance can bypass the formal system, ensuring that international law reflects such change.

Noncompliance’s benefits are evident, as are its costs. And just as with the costs of noncompliance, operational noncompliance’s benefits will vary with the nature of the breach and the primary rule at issue. The benefits of the breach will also depend on the sophistication of the legal system. Thus, the benefits of operational noncompliance will be greater in a less effective legal system, such as international law, than in a sophisticated legal system where the operational principle is structurally strong. Operational noncompliance’s importance will also vary within a legal regime, especially one as fragmented as international law, as some parts of the regime may be more inherently operational than others. Thus, acts of operational noncompliance are more likely to occur when an obligation is binding on large numbers of States—for example, in the cases of customary law (such as the law of the sea as described above) or a multilateral treaty regime—because such obligations are more difficult to modify. On the other hand, operational noncompliance will be less frequent in areas of the international legal system in which there are workable institutions that allow for legal change (for example, the WTO system), or law enforcement, or in which there are respected compulsory adjudication mechanisms that allow judges or arbitrators to alter and adapt the rules through interpretation (see the WTO system again).

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83. Elihu Root, *The Outlook for International Law*, PROC. AM. SOC’Y INT’L L. 2, 9 (1915); see also 1 L. OPPENHEIM, INTERNATIONAL LAW 13-14 (H. Lauterpacht ed., 8th ed. 1955) (footnote omitted) (“Self-help, and intervention on the part of other States which sympathise with the wronged one, are the means by which the rules of the Law of Nations can be and actually are enforced.”).

84. Cf. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1440 (2005) (testing the “notion that specific instances of legal rules, practices, and decisions that clash with commonsense notions of justice can promote widespread lawbreaking” and finding a correlation in certain cases).

## V. ACKNOWLEDGING AND APPRAISING OPERATIONAL NONCOMPLIANCE

As is apparent, there can be substantial benefits associated with operational noncompliance, though significant costs as well. It should be clear, though, that noncompliance is necessary to the effective functioning and the continued relevance of the international legal system. Even if this is so, should operational noncompliance be acknowledged as a component of the international legal system? If so, how should we appraise acts of operational noncompliance?

A. *Acknowledging Operational Noncompliance*

Should the role of operational noncompliance be openly acknowledged? Wouldn't it be better, instead, to maintain the myth of the international rule of law, despite obvious examples to the contrary? Wouldn't doing otherwise encourage noncompliant acts and undermine the reputation of international law, precisely the opposite of what our aim should be?<sup>85</sup>

Indeed, this might be an appropriate strategy in domestic legal systems, but in the international legal system, it falls short. States, by virtue of their role as participants in the constitutive processes of the international system, are well aware of the functions that noncompliance plays, and, consequently, rule-of-law rhetoric does not have the same effect internationally that it can have domestically. Propagating a myth will not serve as an effective deterrent to lawbreaking, and such a strategy may undermine international law's reputation even further by setting an impossible standard for international law to achieve. Since the rule of law is an important but not the only value that legal systems possess,<sup>86</sup> it would be a mistake to exclude operational noncompliance from our conceptualization of the international legal system, and it would be a mistake as well to attempt to hide this reality.

Why, then, does this preoccupation with the international rule of law persist and even flourish? Why does the belief that noncompliance is not a part, nor should be a part, of the international legal system retain such force?

In part, the rejection of noncompliance reflects a romantic vision of the international legal system. And, thus, the rejection of operational noncompliance is, in part, an exercise in long-term wish-fulfillment by those who hope to achieve an international system based on the rule of law that currently does not exist.<sup>87</sup> This romanticism is perhaps even more acute today

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85. To put it another way, wouldn't acknowledging the role of noncompliance eliminate the separation between decision rules and conduct rules in international law, undermining compliance? On the concept of decision rules and conduct rules, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

86. See JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 228 (1979) ("Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values.").

87. Cf. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 129 (2004) ("Steadfastly projecting the inevitability of a positive outcome [for the international rule of law] . . . is implicitly understood by [international lawyers] to be a necessary promotional step in its realization."); Glennon, *supra* note 1, at 990 ("In the end, the moralists' strategy is wrong because it rests on a bad bet. The bad bet is that the increase in long-range stability accomplished through delusion will outweigh the discredit done to international law by pretending that its rules are different than they actually are.").

than it was sixty years ago when the aspirations of international politicians and lawyers were tempered by the realism that the world they were creating was a work in progress.<sup>88</sup>

But there is more to it than that. International lawyers today are concerned with the overwhelming—and it is thought undue—influence that powerful States have on the development and enforcement of international law. Operational noncompliance takes place when there is a disjunction in the international system between institutional procedures and policy, and it is power that most often bridges this operational gap. Those who resist the role of operational noncompliance in the international legal system resist the role and prerogatives of power and politics.<sup>89</sup> In particular, they resist the role of the United States, the current global “hegemon,” in shaping international law to, presumably, meet its own ends. The rule of law, thus, is seen as the weak’s counterweight to the powerful,<sup>90</sup> and this is clearly the paramount reason why the rule-of-law rhetoric in international law has become so pervasive and extreme over the last decade.<sup>91</sup>

What this view misses is that law is the congruence of policy, authority, and control, and, thus, without power there is no law. Instead of resisting the role of power in making international law operable, international lawyers should acknowledge and take account of the special responsibilities of the powerful in shaping and enforcing international law and not just abiding by it.<sup>92</sup> This is not to suggest that international procedures can and should be overridden at will by the United States or any other powerful State. It is to suggest, instead, that today’s international legal system needs to reconcile itself to and make positive use of the disparate abilities of States, just as it has done in the past.<sup>93</sup>

### B. *Appraising Operational Noncompliance*

Recognizing the role of operational noncompliance generally in the international legal system is different, though, from appraising the legitimacy of particular acts of noncompliance. The importance of understanding an illegal act as legitimate is clear. Such a categorization recognizes the key

88. See HANS KELSEN, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS: A SUPPLEMENT TO ‘THE LAW OF THE UNITED NATIONS’ 912 (1951) (“[T]he principle *ex injuria jus non oritur*—law cannot originate in an illegal act—has important exceptions. There are certainly cases where a new law originates in the violation of an old law. . . . [In such cases,] we may say *ex injuria jus oritur*.”).

89. Cf. Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 5 (1990) (“The fight for an international Rule of Law is a fight against politics. . . .”).

90. Cf. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975).

91. There is an additional reason: international human rights advocates believe that the rule of law, including the international rule of law, will promote the observance of human rights. See Peerenboom, *supra* note 12.

92. On the notion of special or differential responsibilities, see W. Michael Reisman, *Towards a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers*, in JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 43 (Nisuke Ando ed., 1999); W. Michael Reisman, *The United States and International Institutions*, SURVIVAL, Winter 1999-2000, at 62; Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 276 (2004).

93. The most obvious example is the establishment of the U.N. Security Council with five permanent members.

status of the policies promoted by the act, provides incentives for States to undertake similar acts in the future, and bolsters respect for international law by demonstrating its operability. Yet, given the costs of noncompliance, not all acts of operational noncompliance deserve the imprimatur of legitimacy.

It is important to distinguish characterizing an act as “legitimate” from labeling it as “legal.” The determination that an act is legal is a formal exercise and, essentially, backward-looking because it compares what will or has happened with established law. Legitimacy, on the other hand, is forward-looking. It asks not what the rule is but what the rule should be in the particular circumstances. Something that is legitimate may also become legal in time, but that is not required, and, perhaps, more often than not, such a development would be undesirable. Indeed, the State that engages in a legitimate act of operational noncompliance may not wish the formal rule to change.

Though it is beyond the scope of this Essay, criteria for legitimacy should balance rule-of-law interests with operational interests, with a presumption in favor of compliance, since that is the preferred outcome.<sup>94</sup> An appraisal might look at: (1) the noncompliant act’s objectives (its policy component); (2) the available alternatives (the necessity test); (3) the act’s precision (the narrowness test); and (4) the consequences of action and inaction (the balancing of the harms).<sup>95</sup> To apply this appraisal would be intensely fact-intensive and controversial, and ex ante one cannot give a general account of how to weigh the factors. For present purposes, it is sufficient to emphasize the possibility that certain acts of noncompliance might be deemed legitimate.

Indeed, when acts of operational noncompliance have taken place, they have often been described or treated in terms that connote legitimacy, either explicitly or implicitly. For instance, many international lawyers described and justified what happened in Kosovo in ethical terms,<sup>96</sup> or as the Independent International Commission on Kosovo put it, as “illegal but legitimate,”<sup>97</sup> and the NATO countries were not criticized by the Security Council or otherwise punished for their actions. When States verbally

94. See Raz, *supra* note 86, at 228.

95. Cf. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995) (“[T]he choice between rules and rulelessness might well be based on a highly pragmatic, contextualized inquiry into the costs of the two approaches in the area at hand.”).

96. See, e.g., Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, 111 ETHICS 673 (2001); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23 (1999). For critiques of this approach, see Koskeniemi, *supra* note 12, at 159, and John C. Yoo, *The Dogs that Didn’t Bark: Why Were International Law Scholars MIA on Kosovo?*, 1 CHI. J. INT’L L. 149 (2000).

97. INDEP. INT’L COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000); accord HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, FOURTH REPORT, KOSOVO, 1999-2000, H.C. 48-II, ¶ 138 (“[W]e conclude that NATO’s military action, if of dubious legality in the current state of international law, was justified on moral grounds.”). This phrase was repeated by those who were similarly conflicted about the U.S. invasion of Iraq. See Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33. Some others, fearful of an uncontrolled global hegemon in the persona of the United States, categorically condemned the Kosovo intervention as a “serious threat to the rule of law.” Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT’L L. 19, 19 (2000).

condemn but otherwise do not sanction an illegal act, such as the Israeli bombing of the Osirak nuclear reactor in Iraq in 1981,<sup>98</sup> that is another way of tacitly acknowledging an act as legitimate. Thus, even when the word “legitimate” is not used, other words, concepts (exculpation, justification, exception, mitigation),<sup>99</sup> and actions (or inactions) by authoritative actors communicate the same (or similar) message.<sup>100</sup>

## VI. CONCLUSION: COMING TO TERMS WITH NONCOMPLIANCE

The international legal system is only partially effective—it often lacks the capacity of developed legal systems to create, alter, and enforce law and to control international institutions, creating operational gaps. Given these gaps, States, on occasion, violate the law and, by doing so, maintain the system’s operability. This is the technique of operational noncompliance. Because of the key role operational noncompliance plays in maintaining the efficiency and relevance of the international legal system, international lawyers should be more willing to acknowledge the role of noncompliance than their domestic counterparts but, in fact, they are not. Instead, international lawyers steadfastly resist operational noncompliance, even when such noncompliance might actually advance the relevance of international law by enforcing its rules, by ensuring its rules are in accord with current or developing policies, or by controlling international institutions. In the tradeoff between an effective international system and an international system with a high level of formal compliance, they prefer compliance. On this view, noncompliance, if it must exist, cannot be countenanced by the legal system.

This choice of procedures over policy, as this Essay has sought to demonstrate, is misconceived both as a descriptive and normative matter. The international legal system makes use of noncompliant acts in all its processes, as at times it must. This is not to suggest that all acts of operational noncompliance are legitimate or that rules are not worthwhile. The costs of operational noncompliance can be high and the benefits of maintaining community procedures can be great. But such noncompliance “occupies a distinguished and prominent place even in a legal system committed to rule-bound justice and the rule of law.”<sup>101</sup> Consequently, the legitimacy of noncompliant acts must be assessed carefully on a case-by-case basis. In an ideal world, this would not be the case, but we do not live in an ideal world, and given the state of international institutions today, ignoring operational

98. See generally Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584 (1983).

99. See, e.g., Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003); Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUR. J. INT’L L. 405 (1999). Compare, e.g., Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984), with Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551 (1999). Chapter V of Part I of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts proposes certain “circumstances precluding wrongfulness.” Draft Articles, *supra* note 67, at 48. These categories and definitions are helpful, but too rigid.

100. For examples of the variety of possible characterizations of acts under international law, see Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT’L L. 804, 819 (2003).

101. Sunstein, *supra* note 95, at 1023 (referring to casuistry).

noncompliance would limit the system's ability to achieve community policies and risk making international law irrelevant. We must, therefore, come to terms with noncompliance.