

as a leading supporter of international peace, it had made sure that the new instrument in no way determined or restrained central parameters of its foreign policy, such as the Monroe Doctrine. Coates approvingly cites the historian Charles DeBenedetti, who has portrayed the broad US support for the Briand Kellog Pact as being the result of its marginal political and legal relevance: ‘Conservatives favored its standpat substance, progressives hungered for its millennialist promise, and all appreciated its unflinching nationalism’ (at 174). By combining a minimalist legal and institutional design with idealistic content, the Briand Kellog Pact equally accommodated pacifist, imperialist, nationalist, isolationist and internationalist sensibilities. No wonder then that almost all other nations could ratify it rather light-heartedly, not without, however, entering reservations regarding armed interventions and war in their respective zones of influence.

*Legalist Empire* is a major contribution to a deeper understanding of a decisive era in US foreign policy. We now better understand when, how and by whom some of the legal techniques of ‘modern imperialism’ were created in the state department and legally justified.<sup>8</sup> With the book’s focus on a handful of international legal practitioners and ‘client-oriented’ scholars and their contributions to expanding US economic, political and military power, it also further contributes to unsettle the self-image and perception of a discipline that more often than not preferred to see international law and empire in juxtaposition. Even if the role of US international legal scholarship and transnational doctrinal discourse in this whole endeavour remains somewhat under-explored, the book fills a lacuna both in US diplomatic history and in the history of the institutionalization of the US international legal profession.

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Ian Hurd, ***How to Do Things with International Law***. Princeton: Princeton University Press, 2017. Pp. 138. \$29.95, £24.95. ISBN: 9780691170114

The questions of what the rule of law entails and how it manifests on the international stage are the subject of considerable scholarly debate. But in one prominent account, the rule of law is, at bottom, about establishing public norms that constrain the ways in which governmental officials exercise power. What matters here is that there be relatively precise and transparent codes of conduct that are consistently and impartially applied, including against state officials. For example, UN Secretary-General Kofi Annan embraced this account in the following often-quoted statement:

The ‘rule of law’ ... refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated .... It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

<sup>8</sup> Schmitt, ‘Völkerrechtliche Formen’, *supra* note 1.

participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>1</sup>

The same account animates the common suggestion that international courts and tribunals advance the rule of law by providing for the law's 'consistent and impartial enforcement, ... ensuring that legal rules prevail over power in the settlement of disputes, and rendering the law clearer, more predictable, and more coherent'.<sup>2</sup>

Ian Hurd's *How to Do Things with International Law* argues that this account of the rule of law was developed for domestic settings and is not a useful way of thinking about international law. As he puts it, 'the domestic and international variants [of the rule of law] ... developed separately, in response to different political needs and challenges, and are based on different arrangements of political power' (at 30). Hurd contends that the rule of international law is less about delimiting what states may do than it is about manifesting the 'belief that states should conduct themselves according to international law, which in practice means that they will use the resources of international law to explain and justify their policies' (at 45). This argument resonates with the work of international legal theorists who underscore that international law is first and foremost an argumentative practice.<sup>3</sup> Like them, Hurd describes international law as 'the language that states use to understand and explain their acts, goals, and desires' and an arena 'within which the normal conduct of politics and contestation takes place' (at 45, 46). He also emphasizes that international 'law and politics are closely intertwined, even inseparable' (at 47).

The book's principal contributions are not in presenting an entirely new conception of international law but in expanding on, and challenging international lawyers to internalize the lessons of, a view that has been in circulation for decades. Hurd makes three especially provocative points. First, he argues that it is wrong to assume that international law is feckless or dysfunctional if it does not constrain powerful states. Even when it does not, he says, it almost always structures a social practice for criticizing and justifying state conduct.<sup>4</sup> According to Hurd, the fact that states persistently use international law in this way shows just how powerful it is. More precisely, it shows that states are committed to the idea that they should comply with international law and that 'acting lawfully is a determinant of state legitimacy' (at 48). But, he argues, because states themselves define and fight over what compliance means, the 'widespread belief in rule-of-law ideology' does not translate into limiting their power through impartially administered codes of conduct (at 48).

Second, Hurd claims that, since contestation is inherent in the practice of international law, asking what it requires in discrete contexts is often misguided. This question assumes that international law meaningfully delineates lawful from unlawful behaviour. In fact, legality is contested

<sup>1</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, para. 6.

<sup>2</sup> De Baere, Chané and Wouters, 'International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities', 48 *New York University Journal of International Law and Politics* (2016) 715, at 752, 753; see also K.J. Alter, *The New Terrain of International Law: Courts, Politics, and Rights* (2014), at 340 (arguing that 'diminishing the absolute power of governments is, of course, the objective of the rule of law' and that international courts and tribunals advance that objective by 'undermin[ing] a government's monopoly power to determine for itself what international law requires and allow[ing] international legal norms to become politically salient in places and in ways that may not be directly servicing national interests defined by governments').

<sup>3</sup> See, in particular, M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, 2005).

<sup>4</sup> I have recently made a similar point. See Hakimi, 'The Work of International Law', 58 *Harvard International Law Journal* (2017) 1.

and constructed through case-specific interactions. Third, Hurd argues that the interests of states – and especially of powerful states – ‘become encoded inside “compliance” with the law’, so we should not assume that international law is ‘naturally progressive and protective against state power’ (at 3, 60). Rather, because ‘international law and international power cannot be separated’, we should take ‘law’s normative valence [a]s a question for investigation’ (at 3, 9).

Hurd is onto something important here. Much of what he says strikes me as, at the very least, plausible and worth taking seriously. That alone is a significant accomplishment, and I mean it as a compliment. But I also think the book has real limits. Many of its claims are insufficiently substantiated or refined. The risk is that international lawyers will use these limits as excuses to disregard what Hurd says. They should instead treat them as opportunities for further research and analysis. In that spirit, I highlight two lines of thought that need more attention.

First, Hurd’s thesis rests on the proposition that states argue through international law because they are committed to a compliance ideal. He says that ‘[t]here would be *no* law-based justifications if actors were not generally committed to the importance of compliance and the rule of law’ (at 50; emphasis added). It is odd to claim, as Hurd does, both (i) that the rule of international law is fundamentally about establishing the resources for contest and (ii) that states use it to disagree because of a commitment to compliance. Hurd never explains why we should interpret the practice in that way. In other words, why is the frequent resort to law for contestation evidence that states are committed to a compliance ideal, rather than evidence of something else? Maybe states are instead committed to the idea that, in the modern era, most governance issues are of global concern. Or maybe they are committed to particular methods for justifying their decisions.<sup>5</sup> In either event, they might use international law to communicate their positions to global audiences, to argue about the considerations that are at stake in particular contexts, and perhaps even to try to legitimize their choices. But their resort to international law would not necessarily reveal a commitment to compliance.

To clarify what I mean, consider Hurd’s example on self-defence. As is well known, the United States has been advancing an expansive and controversial interpretation of the right to use defensive force. Hurd asserts that ‘[r]egardless of the controversy’ about how to apply the *jus ad bellum* in concrete cases, ‘it is clear that ... the United States desires to be seen as acting lawfully, and this desire reflects political power that comes from the international rule of law as an ideology’ (at 75). Even if Hurd’s assertion is correct, it would not follow that ‘[t]here would be no law-based justifications’ without a compliance ideal (at 50). The United States has been far out in front of the law on this issue for a long time, and there is quite a bit of evidence that its claim has not yet prevailed.<sup>6</sup> Yes, the United States probably wants to be seen as compliant. And yes, it is pushing the law in a direction that would make it so. But the proposition that it keeps using international law for those reasons is not substantiated. Indeed, until the US claim is more broadly accepted, its constant resort to law in this context exposes that it is not complying with what many understand the law to be and that it does not care enough about being seen as compliant to change its conduct. Any claim that the United States is drawn to international law because of a compliance ideal needs more work. We need a fuller account of what a commitment to compliance entails and why this example supports it. We also need to entertain the alternatives – the possibility that the United States is drawn to international law for reasons other than or in addition to compliance.

Second, Hurd repeatedly hints at, but does not grapple with, the tension between international law’s constitutive and regulatory effects. His goal is plainly to emphasize the constitutive.

<sup>5</sup> Cf. Waldron, ‘The Rule of Law as a Theater of Debate’, in J. Burley (ed.), *Dworkin and His Critics* (2004) 319, at 330: ‘A society ruled by law, according to Dworkin, is a society committed to a certain method of arguing about the exercise of public power.’

<sup>6</sup> See Brunnée and Toope, ‘Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?’, 67 *International and Comparative Law Quarterly* (2018) 263; Hakimi, ‘The *Jus ad Bellum*’s Regulatory Form’, 112 *American Journal of International Law* (2018) 151.

'My point', he says, 'is that what it means to comply, to act consistently with one's obligations, is the currency of contestation in the politics of international law' (at 8). As such, 'the distinction between legality and illegality in these cases is more political construction than legal fact. Determination of lawfulness follows use of international law rather than preceding it' (at 13). This claim suggests that international law has little regulatory purchase – and does not meaningfully constrain states – in cases of contest. For example, when discussing the *jus ad bellum*, Hurd says that, because states construct the meaning of defensive force in the very cases in which it is invoked, 'the ban on war [is] infrangible: if war is lawful when it serves the genuine security interests of the state, and states make their own judgments about the threats they face, then the ban on war has become "law that cannot be broken"' (at 60). Put differently, the *jus ad bellum* 'allow[s] the self-identified security interests of states to determine the legality of their actions and so make[s] legality derivative of those interests rather than a source of external judgment of state action' (at 68).

Notice how Hurd's language suggests that international law can be either constitutive or regulatory but not both simultaneously.<sup>7</sup> As he describes the *jus ad bellum*, the possibility of invoking the right to use defensive force and the constitutive effects of the resultant legal debate mean that 'lawfulness follows use of international law *rather than* preceding it', that 'the ban on war [is] infrangible', and that it cannot be 'a source of external judgment of state action' (at 13, 60, 68; emphasis added). But the fact that the *jus ad bellum* is fluid and open to change does not mean that it is, at any given moment, entirely up for grabs, such that legality is determined only in real time and not inflected by pre-existing expectations. It also does not mean that the general prohibition of the use of force cannot be violated or that 'the conceptual distinction between "following the law" and "following interests" has been eliminated' (at 76). As Hurd himself recognizes, the outcome of a legal debate – and thus the determination of what it means to 'follow the law' in this telling – might be to condemn the use of force and uphold the prohibition<sup>8</sup> or to advance the interests of only some states at the expense of others. Thus, even if the *jus ad bellum* is heavily constitutive, it might still be capable of violation and might not align with state interests. Hurd's strong statements to the contrary are overdrawn.

To be fair, Hurd at times retreats from those statements. He repeatedly emphasizes that he does not mean to suggest that international law is never constraining on states. Here is an illustrative passage:

[C]onstraints from law are important as well. Both a general and a specific form of constraint is worth considering: first, the need for legal justification is a kind of general constraint on governments in that the desire for legal legitimation makes it more difficult to take actions for which legal justifications are hard to find; and second, for the ban on war, the [UN] Charter clearly outlaws wars that are not motivated by self-defense, and so make it more difficult for states to engage in wars of aggression, profit, humanitarianism, and other motives. (at 75)

That passage seems right to me, and it suggests that the *jus ad bellum* has some regulatory bite. But it also is deeply in tension with what else Hurd says on the topic. If the ban on war 'clearly outlaws' certain wars, then it is not infrangible. Some wars will be 'more difficult for states to engage in' because they are and have long been understood to be unlawful.

<sup>7</sup> Elsewhere, Hurd reinforces this dichotomy. He says that to interpret the practice as a manipulation of the law is to 'treat[] the law as a regulative rule *rather than* a resource of legitimation' (at 79; emphasis added).

<sup>8</sup> Cf. United Nations Security Council, Draft Resolution, UN Doc. S/2014/189, 15 March 2014 (vetoed Security Council resolution that, in the context of Russia's activities in the Crimea region of Ukraine, 'reaffirm[ed] that no territorial acquisition resulting from the threat or use of force shall be recognized as legal').

This tension goes to the very heart of Hurd's argument, so it ought to be grappled with and addressed head on, not just elided. If one accepts his strongest statements, then his rule of law argument is compelling. A conception of the rule of law that centres on constraining states would be mismatched for how international law actually works. But the more one concedes that international law can or does constrain states, the less reason one has to dismantle that conception and adopt his alternative, at least not without a richer normative account of why his version better embodies the rule-of-law ideal. Developing such an account might, therefore, be where the research agenda should now go.

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Michael Ignatieff, ***The Ordinary Virtues: Moral Order in a Divided World***.

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At some point midway through *The Ordinary Virtues*, I noticed I became agitated. Ignatieff was discussing, with his customary lucidity, the genocide in Srebrenica, and criticizing the attitude of the Dutch tasked with protecting the United Nations-proclaimed safe haven. What caused my agitation though was his rather one-sided representation, portraying the Dutch as partying nincompoops, ignoring their task and celebrating with the Serbs. All of that, I knew and know, is not far removed from what actually happened, but, even so, I found his description annoying. Should he not also have mentioned that the big powers agreed not to provide air support, which made protecting the camp so much more difficult?<sup>1</sup> And should he perhaps have mentioned the role of Canadian troops, who protected the camp before the Dutch stepped in but had somehow lost interest or stamina, or the promises made by Secretary-General Boutros Boutros-Ghali to get the reluctant Dutch to take on the role to begin with? Should not the Canadian writer, thinker and sometime politician Ignatieff have mentioned these factors in addition to badmouthing the Dutch? Or should the Dutch-born reviewer Jan Klabbers not get so worked up if the acts of his compatriots are discussed? Would Klabbers have been just as agitated if Ignatieff had been discussing in similar terms (that is, largely accurate, but possibly with a few omissions) the behaviour of the Belgians in Rwanda circa 1994?

There are, at least, two considerable ironies at work here. One is that Ignatieff was presenting the story of Bosnia 20 years after the peace was formally concluded; it is the one story in his book to which internecine strife is central, where violence related to national identities turns out to be difficult to counter, let alone come to terms with, and where reconciliation is 'glacial' (at 115). My response to his writing probably suggests a glimpse into why this would be so; I took his characterization of Dutchbat as an unwarranted slight, close to an insult, and then reciprocated. I could not help but wonder whether Ignatieff's own nationality had something to do with it; blame the Dutch so as to hide Canada's failings. Yet, both he and I should know better.

The second irony is that this is a book about creating or regaining communal trust in the face of difficult situations and, thus, should not give rise to patriotic reflexes. Ignatieff discusses how people manage to live together among multiple ethnicities in the two biggest US cities, despite all sorts of riots having spelled trouble. He discusses how ordinary people live in a thoroughly

<sup>1</sup> For an excellent journalistic account, see F. Westerman, *De slag om Srebrenica: de aanloop, de val, de naschok* (2015) (the title translates as *The Battle for Srebrenica: Prelude, Fall, Aftershock*).