

Compliance in International Law: The Role of Legitimacy and Effect on States' Material Power

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COMPLIANCE IN INTERNATIONAL LAW: THE ROLE OF LEGITIMACY AND EFFECT ON STATES' MATERIAL PWOER

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Abstract: Why do some states follow international laws while others do not, and why is this generally accepted? To explain variation in state compliance with international law, this Article explores under what conditions international legal institutions are most effective. Using a series of case studies, this Article examines how two independent variables influence a law's effectiveness: its legitimacy and effect on states' material power. This Article concludes that legitimacy and a positive (or neutral) effect on a state's material power must be present for international legal compliance. If one of these factors is absent, then a state's compliance is unpredictable, rendering the law ineffective as related to its ultimate purpose: increasing predictability between distinct states. To evidence its claim that both variables must be present to guarantee legal compliance, this Article most critically examines China's violation of UNCLOS in the South China Sea and Japan's respect for the UN Security Council's 1994 decision to impose sanctions on North Korea.

Introduction

In the midst of a global pandemic, cooperation among states has never been of greater importance. As of late April 2020, the United States Center for Disease Control and Prevention (CDC) reported over three million novel coronavirus cases across over two hundred countries, although the real number of cases may be much higher.¹ Effectively combating this global threat is imperative to decreasing the total number of deaths caused thereby and assisting the global economy with bearing the brunt of an impending economic downturn. To fulfill these ends, international institutions, such as the World Health Organization (WHO), are helping states coordinate mitigation efforts, medical research, and personal protective equipment distribution,

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¹ U.S. Department of Health and Human Services, "Coronavirus Disease 2019," Centers for Disease Control and Prevention, last modified April 27, 2020.

especially to those countries most seriously impacted by COVID-19.² Despite the important work that the WHO and other international organizations are doing during this near-unprecedented crisis, the legitimacy of the WHO, for example, is being threatened by the United States and other countries who plan on withdrawing funding to organizations which allegedly mishandled the COVID-19 outbreak.³ While it is unclear how this cut in funding will affect the WHO, there is no question that this pandemic has raised important questions about the role that international institutions play in world order.

President Donald J. Trump's repeated attacks on the WHO are not the first instance of powerful states questioning international organizations; in fact it is a continuation of the realist legal and institutional worldview that became prominent after the 1948 publication of Hans Morgenthau's *Politics Among Nations*. In this book, Morgenthau argues that international institutions and laws are not effective because of their inability to be enforced, an issue that has plagued legal institutions for years, from the League of Nations to the United Nations' Conference on the Law of the Sea.⁴ Nevertheless, the difficulty of legal enforcement on the international stage does not make them, as some might argue, completely useless. As in the case of the WHO and COVID-19, international institutions are beneficial because they help states coordinate policy, thus increasing transparency and trust; however, these institutions and laws are most effective when they are recognized and adhered to by as many states as possible.

To increase a law's propensity to be followed, this Article examines under what conditions international legal institutions are most effective, beginning with a discussion of the existing literature regarding the (in)effectiveness of international laws. Afterwards, this Article compares the Geneva Protocol banning chemical weapons, the League of Nations, the United Nations Conference on the Law of the Sea (UNCLOS), and Japan's 1994 decision to follow the UN Security Council's imposition of sanctions on North Korea.

Although these are all different types of international legal institutions, they are not all widely followed: what explains this variation? For example, why is the Geneva Protocol

² "Coronavirus Disease (COVID-19) Pandemic," World Health Organization, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

³ Betsy Klein and Jennifer Hansler, "Trump halts World Health Organization funding over handling of coronavirus outbreak," *CNN*, April 15, 2020.

⁴ Hans J. Morgenthau, "The Main Problems of International Law," in *Politics among Nations* (n.p., 1948), HathiTrust.

followed by all member states, while UNCLOS is only adhered to by small powers?⁵ Comparing these cases elucidates how the legitimacy and effect on material power influence a state's propensity to comply with these specific institutions. Evidence from these cases supports this Article's foundational argument that international legal institutions are most effective when they are regarded as legitimate by the international community, and do not damage the material power of the states interested in compliance. Without both of these factors present, compliance with a law cannot be guaranteed.

The Arguments Behind Effectiveness

An institution's effectiveness is measured by its ability to compel states of great power to comply with it, and numerous states at that. Measuring the effects of two independent variables on an institution's compliance propensity will help delineate under what conditions international legal institutions are most effective: these independent variables are (1) a law's legitimacy, and (2) its effect on a state's material power. In this context, legitimacy refers to "the normative belief by an actor that a rule or institution ought to be obeyed," which is subjective and shaped by a state's inherent perception of the institution.⁶ Thus, the legitimacy of an institution is measured by the number of member states, or alternatively, the number of states which are a party to an international legal code. The general view which the member states have of the institution, and if they see it as a positive or negative entity, also impacts the institution or law's legitimacy. The general presumption places institutions into two categories: legitimate or not legitimate.

The second independent variable this Article will analyze is the legal institution's effect on a state's material power during a state's period of compliance; an institution affects a state's material power insofar as it positively or negatively impacts the state's economic resources or national security during the same period of compliance. The two categories this Article uses to measure effects on material power are: (1) positive/no effect, and (2) negative effect. The

⁵ Graham Allison, "Heresy to say great powers don't bow to tribunals on Law of the Sea?," *The Straits Times*, July 16, 2016.

⁶ Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53, no. 2 (Spring 1999), JSTOR.

combination of these variables creates a matrix that lends itself to the more critical exploration of four case studies.

Legal Institution	Legitimacy	No Legitimacy
Positive/Neutral Effect on Material Power	Case #1	Case #2
Negative Effect on Material Power	Case #3	Case #4

As mentioned earlier, many realists hold that international laws are not effective because of their inability to be enforced; in fact, on this topic, Morgenthau writes that “there can be no more primitive and no weaker system of law enforcement than this.”⁷ This theory is championed by international realist scholars who would otherwise disagree with the premise of this article: that international laws are effective under specific conditions.

In contrast to Morgenthau, Stephen Kocs argues that international laws emerge “because they [correspond] to the needs and interests of the states in the system.”⁸ Put in other words, he argues that when adhering to international law is advantageous for the party states, an enforcement system is not necessary because states will always comply with what is in their best interest. Nonetheless, there are few organizations whose laws benefit *all* member states *all* of the time: for example, the UN cannot benefit all 193 members with every decision it makes. In these cases, compliance variation in the international order emerges, which is thus the subject of this Article’s inquiry. Unlike Morgenthau and Kocs, however, the case studies cited by this Article demonstrate that even if a law or policy is not advantageous to a particular state, compliance can still follow.

Institutional legitimacy is an important factor in its compliance potential, and some have even argued that it is the most important factor: in “The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice,” James Gibson and Gregory Caldeira assert that for legal institutions, no attribute is more important than legitimacy

⁷ Hans J. Morgenthau, "International Law and International Politics: An Uneasy Partnership," *Proceedings of the Annual Meeting (American Society of International Law)* 68 (April 27, 1974)

⁸ Stephen A. Kocs, "Explaining the Strategic Behavior of States: International Law as System Structure," *International Studies Quarterly* 38, no. 4 (December 1994): [Page 542]

because institutional legitimacy generates respect for the decisions thereby.⁹ In “Legitimacy and Authority in International Politics,” Ian Hurd also argues that there are instances in which states comply with international agreements that are not necessarily in their best interest, contradicting Kocs’s belief that laws only exist because of the benefits they afford.

While legitimacy is of great importance, there are other factors that impact a state’s compliance with a law: most notably, the law’s effect on material power. Taking into account the realist argument that compliance is tied to state interests, this Article argues that a positive or neutral effect on material power is the second factor that determines compliance potential on the international stage. If one of these factors is absent, then a state’s compliance is unpredictable, rendering the law ineffective as related to its ultimate purpose: increasing predictability between distinct states.

An understanding of this argument explains why the League of Nations was practically ignored and why the Geneva Protocol is still respected: both factors of effectiveness are present in the case of the Geneva Protocol, but were not present in the League of Nations. Though it is more difficult to explain why China did not comply with UNCLOS in the South China Sea while Japan did comply with the Security Council’s decision to impose sanctions on North Korea, a detailed analysis reveals that the differential presence of these two factors created markedly different outcomes despite the fact that the United Nations mediated both decisions.

The League of Nations’ failed attempt to ban war supports the realist argument that international laws are ineffective because they cannot be enforced, but also contradicts Kocs’s argument that agreements are only upheld when they represent individual state self-interests. Indeed, the League failed because (1) member states were not self-enforcing its laws, and (2) because having the ability to make war is in every state’s interest. Thus, entering into an agreement to abolish war was not sustainable for member states. The Geneva Protocol disproves Morgenthau’s argument insofar as the law has been in effect since 1925 and has prevented the use of these chemical weapons between states despite the fact that they were used quite effectively in warfare. This dichotomy supports this Article’s argument that both legitimacy and a minimally neutral effect on material power must be present for international legal compliance.

⁹ James L. Gibson and Gregory A. Caldeira, "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice," *American Journal of Political Science* 39, no. 2 (May 1995): [Page 460]

Admittedly, however, Japan's experience with the UN Security Council certainly complicates this narrative as only one factor was present, a situation that thus warrants additional exploration.

In all of the cases this Article's cites, Morgenthau would assert that lack of enforcement potential made these institutions relatively useless, while Kocs would assert that they were all effective because they would have not been created if not for the benefit of their constituent states. In this Article's estimation, both of these assertions are oversimplifications and thus encourage the case-specific balancing it explores in the UNCLOS and Security Council examples.

Explaining Variations in International Legal Compliance

The Geneva Protocol banning the use of chemical weapons was signed on June 17, 1925. This protocol has had near-unprecedented levels of compliance from both small and great powers, making it an ideal case study in this Article's two-part model. The Geneva Protocol exemplifies a success in international law because it: (1) aligns with state interests, per Kocs's argument, and (2) has legitimacy amongst the international community. With its net-zero impact on all states' material power, the Geneva Protocol is an exemplary Case #1.¹⁰

Case #2 represents an institution that is not seen as legitimate but has a positive or neutral effect on a state's material power; however, this combination does not exist because if an international law had a positive effect on a state's material power, it would be seen as legitimate by at least one state. Furthermore, if an institution existed that was neither legitimate nor impactful on a state's material power, it would be wholly inconsequential.

Two cases of institutions perceived as legitimate, but with a negative effect on material power, will be used for Case #3: both UNCLOS and the UN Security Council are entities of the UN, which is seen as a legitimate institution, but both institutions damaged the material power of China and Japan, respectively. Despite the similar categories that UNCLOS and the UN Security Council fall under, China does not comply with UNCLOS while Japan recognized the Security Council's 1994 sanction decision, even in light of the economic blowback it created. The variation in these two seemingly similar cases is critical to understanding what conditions are most important in international legal compliance.

¹⁰ When this Article references case numbers, refer to the matrix found on page five.

Case #4 represents an institution that (1) lacks legitimacy, and (2) has a negative effect on material power, perhaps the best example of which is the League of Nations. As the League failed to achieve its goal of banning war, it supports Morgenthau’s argument that international institutions will be ineffective without a method of enforcement. Within the model that this Article proposes, the League would have never been successful because it has neither factor of effectiveness.

Studying these four independent cases using the aforementioned matrix comparison will help determine under what conditions international legal compliance is most likely.

Legal Institution	Legitimacy	No Legitimacy
Positive/Neutral Effect on Material Power	Geneva Protocol	N/A
Negative Effect on Material Power	UNCLOS UN Security Council	League of Nations

The Geneva Protocol banning chemical weapons is an effective law because it is perceived as legitimate and it does not substantially affect state power. The Geneva Protocol was proposed by the Allied Powers following the widespread use of chemical weapons during World War I. Although the United States did not sign the original protocol, it recognized in 1943 that “the protocol had become part of customary international law,” and the United Nations also came to recognize the law after its formation in 1945.¹¹ In addition to the UN’s endorsement of the Geneva Protocol, the legitimacy of this legal norm can be traced to the fact that lethal chemical weapons have been used quite rarely since World War II.¹² Indeed, in most of the instances where chemical weapons have been used, the battle was not between two separate states, but instead in the context of civil wars, and thus not under the jurisdiction of the Geneva Protocol.

¹¹ Thomas Graham and Damien J. LaVera, "The 1925 Geneva Protocol," in *Cornerstones of Security* (n.p.: University of Washington Press, 2002), [Page 8], JSTOR.

¹² H. Martin Lancaster, *Why We Need the Chemical Weapons Convention* (n.p.: Stimson Center, 1995), <https://www.jstor.org/stable/resrep11010.9>

Perhaps the most well-known use of chemical weapons in recent years was in Syria: the chemical weapons attack in Ghouta, Damascus was launched by the Assad regime on rebel groups as part of the Syrian Civil War, but the non-discriminatory nature of the chemical weapons “killed hundreds of civilians, including large numbers of children.”¹³ This attack was publicly condemned by the United States, Arab League, and Russian Federation, one of Syria’s closest allies. While former President Barack Obama did not execute his “red line policy” threat and did not call for military strikes in Syria, the United States and Russia did reach an agreement on Syrian chemical weapons: in September of 2013, the two states “called for Syria’s arsenal of chemical weapons to be removed or destroyed by the middle of 2014.”¹⁴ This ability of an international law to compel Russia’s allyship with the United States to disarm one of its closest allies makes a strong case for the legitimacy and relevance of the Geneva Protocol; in fact, the global reaction to the August 2013 chemical weapons attack on Damascus remains a representation of the widespread acceptance and legitimacy of the Geneva Protocol.

As much as the Protocol’s legitimacy increases its compliance potential, its net neutral effect on material power cannot be forgotten either: considering the fact that nearly all states have the ability to produce chemical weapons, no advantage is lost when all states give them up. Additionally, there is a clause in the Geneva Protocol that states the Protocol “[will] cease to be binding in regard to any enemy states whose armed forces or allies do not observe provisions.”¹⁵ In other words, if an enemy state was to use chemical weapons, your state could respond with chemical weapons and still remain in compliance. Ultimately, this is a mechanism of enforcement as no state prefers chemical weapons to be used on it, so it will not use them in the first place. Thus, the combination of legitimacy and net neutral effect (albeit nuanced), makes the Geneva Protocol the gold standard for international legal structures.

Unlike the Geneva Protocol, the League of Nations lacks both legitimacy and a positive/neutral effect on state power. The ineffectiveness of the League has no better historical champion than the fact that World War II began just nineteen years after the League’s formation.

¹³ "Attacks on Ghouta," Human Rights Watch, <https://www.hrw.org/report/2013/09/10/attacks-ghouta/analysis-alleged-use-chemical-weapons-syria>.

¹⁴ Michael R. Gordon, "U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms," *The New York Times*, September 14, 2013, [Page #], <https://www.nytimes.com/2013/09/15/world/middleeast/syria-talks.html>.

¹⁵ Graham and LaVera, "The 1925," [Page 12].

The League of Nations was unable to achieve its goal of lasting peace because it lacked important legitimizing factors. First, the organization's membership did not represent the balance of power in the international community. Most notably, although Woodrow Wilson and the United States were original proponents for the League of Nations, the Senate did not ratify the treaty, undermining the ability of one of the world's greatest powers to join the League. Moreover, Germany and the USSR, two other great powers in the early twentieth century, were not members either. Consequently, the League lacked the membership of three key decision makers in the international community as members. Aside from the lack of 'power-membership,' unanimous consent was required for almost all League votes, prompting the fifty member states to agree to relatively few policies and initiatives.¹⁶ By this token, the League's inability to make decisions and its small-state membership made it wholly lacking legitimacy on the international stage.

Complying with the League of Nations would have also damaged a state's material power: indeed, an important step in ensuring lasting peace was the disarmament of member states, an initiative that would have only been binding of the small member states, making them vulnerable to the military prowess of the United States and Germany, for example. Similarly, because the League had no mechanisms to enforce disarmament, the League's primary goal was not achieved, furthering its illegitimacy.

The United Nations Conference on the Law of the Sea is not as straightforward as the Geneva Protocol or the League of Nations because it has one of the important factors of effectiveness, but not both. UNCLOS was signed by over 150 UN states in 1982, and went into effect in 1994. The conference standardized previously ambiguous laws regarding where coastal states have economic and military power and where they do not. UNCLOS divides a state's maritime territory into three categories: territorial waters, a contiguous zone, and an exclusive economic zone (EEZ). The EEZ gives states exclusive rights to the natural resources like fish and oil in the seabed within two-hundred miles of their coast.¹⁷ This latter detail has been a source of conflict in recent years, particularly in Southeast Asia, where some EEZs overlap.

¹⁶ Peter Krause, "International Institutions Lecture" (lecture, Boston College, Chestnut Hill, MA, March 12, 2020).

¹⁷ Rebecca Strating, "Maritime Territorialization, UNCLOS and the Timor Sea Dispute," *Contemporary Southeast Asia* 40, no. 1 (April 2018).

China has been violating the EEZ of other states in the South China Sea for over twenty years, and there is no indicating that this posture will change soon. The South China Sea is rich in mineral and oil resources, and China has recently asserted a historic claim to eighty percent of the territory with their “Nine Dash Line.” The basis for this claim is questionable not only because Vietnam, Malaysia, Indonesia, and the Philippines all have claim to this region under UNCLOS, but also because “until the 1940s, China had never claimed sovereignty over the disputed islands in the region and officially staked sovereign claim to the four archipelagos only in 1958.”¹⁸ In 2016, the Philippines took China to the Permanent Court of Arbitration in the Hague to argue this violation of UNCLOS, and not surprisingly, the PCA sided with the Philippines. Nevertheless, it is also not surprising that China stated they would ignore the ruling.

To explain the lack of compliance with UNCLOS, which is quite serious considering that no member of the UN Security Council has ever complied with a UNCLOS-related ruling,¹⁹ we need first look at legitimacy. Perhaps most importantly, the United States is not even a signatory of the Law of the Sea Tribunals, presenting a notable legitimacy issue for UNCLOS.

In this case, the legitimacy and material power considerations are inextricable. Great powers do not comply with (China) or even recognize (United States) UNCLOS because it damages their access to maritime resources. In this case, despite the fact that UNCLOS is championed by the United Nations, an internationally respected organization, it should be considered legitimate, but because great powers are not willing to abide by the law, its effect is undermined. This demonstrates the importance of the connection between material power and legitimacy: one factor alone cannot compel a state to comply.

Though the UN Security Council’s imposition of sanctions on North Korea in 1994 contradicts this Article’s fundamental argument that both compliance factors must be present for a law to be effective, scholars of international relations have asserted that the legitimacy behind the UN Security Council compelled Japan to impose sanctions on North Korea even in spite of the fact that it negatively impacted Japanese material power.²⁰ Economically, Japan was slated to suffer from sanctioning North Korea as (1) many North Koreans living in Japan would return to

¹⁸ Leishangthem Singh, "China's Strategy On The South China Sea Disputes," *World Affairs: The Journal of International Issues* 21, no. 1 (Spring 2017): [Page 81], JSTOR.

¹⁹ Graham Allison, "Heresy to say great powers don't bow to tribunals on Law of the Sea?," *The Straits Times*, July 16, 2016.

²⁰ Hurd, "Legitimacy and Authority," [Page 402].

their country, and (2) Japan would lose North Korea as a partner in trade. In the face of impending economic consequences, the decision to accept sanctions “is a strong sign that Japan accepted the legitimacy of a Security Council decision, even with a medium probability of an adverse outcome.”²¹ This is a victory for international legal compliance, but as much as it places legitimacy at the summit of compliance factors, the UNCLOS example cannot be ignored.

This compliance variation between the UNCLOS and Security Council cases demonstrates that without both legitimacy and a positive/neutral effect on material power, the ultimate outcome of legal compliance remains unsure. Indeed, though both of these institutions are entities of the highly-legitimate UN, differential outcomes prove that legitimacy is not the only requisite factor for compliance. Without both factors of effectiveness present, compliance with the law cannot be guaranteed, which explains the variation in compliance between the UNCLOS and Security Council cases.

Conclusion

The central problem with international legal institutions is that there are more than two-hundred countries in the world, and no law or organization will be seen as legitimate nor benefit the material power of every single state. Nevertheless, there are conditions that heighten the compliance potential of laws, the best of which are evident in the Geneva Protocol and especially its relationship to the Syrian Civil War. This Article’s exploration of UNCLOS and the UN Security Council also demonstrate that both factors must be present to accurately predict the compliance with international law: in both cases, only one factor is present, and thus, two different outcomes arise.

Both arguments from Morgenthau and Kocs oversimplify the complex situations that arise in international politics. Indeed, Morgenthau’s argument that institutions are ineffective because they lack enforcement mechanisms can be applied to the failure of the League of Nations, but does not explain the success of the Geneva Protocol. By the same token, Kocs’s argument that laws must be self-enforced by member states is exemplified by the Geneva Protocol, but does not account for organizations like the League of Nations. These two

²¹ Hurd, "Legitimacy and Authority," [Page 402].

arguments align well with realism and liberalism respectively, but overall, they are not faceted enough to explain the effectiveness of international laws.

This Article's findings can be applied more broadly to international institutions and the unraveling relationship between the United States and World Health Organization. As the United States contributes far more financial resources to the WHO than China, the WHO disproportionately impacts the economic power of the United States as compared to China: it is unsurprising that the President decided to halt WHO funding. In the case of the United States and the WHO, the legitimacy factor is present, but the material power factor is not: while there is a case to be made for not decreasing funding to the WHO during a global pandemic under the conditions of my model, it follows that the United States would not financially support an organization that does not minimally have a neutral effect on its power. To regain support from the United States, the WHO would have to re-classify China as a developed country to increase its monetary contribution, or it would have to decrease the amount that the United States is compelled to give. In either situation, the effect on the material power of China and the United States would find a counterbalance and therefore increase the probability of the United States renewing funding to the WHO.

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