

## Coercive Enforcement of International Law

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## Introduction

Questions surrounding the enforcement of international legal rules—whether it exists, how it operates, and how effective it is—have implications for important debates in the fields of international law (IL) and international relations (IR). Legal theorists have pondered for centuries whether the existence of robust enforcement is a necessary condition for international law to be considered “law” in a meaningful sense. Skeptics in both fields argue that the lack of a centralized enforcement mechanism renders international law epiphenomenal to state interests and relative power considerations (Morgenthau 1985; Goldsmith and Posner 2005). This critique has been applied most vehemently to the use of force; critics claim that it is not adequately regulated by international law, or worse, that military interventions are often conducted for political reasons but in the guise of legal enforcement (Glennon 2001; Hoffmann 1961).

Scholars with a more expansive appreciation for international law point to a wider range of incentives to comply, both internal and external to the state, but most nevertheless recognize the importance of enforcement in some form. While Louis Henkin argues that states are motivated by a “culture of compliance” with international law, he also recognizes that “external inducements”—retaliation and sanctions by other states—play a crucial role in promoting compliant behavior (Henkin 1995: 50-51). Mary Ellen O’Connell is equally optimistic about compliance but nevertheless stresses the value of enforcement: “So long as sanctions exist and support widespread law compliance, international law is a legal system worthy of the name” (2008: 369). Because the stakes are so high, theoretically and in the real world of international affairs, it is important to develop an accurate sense of how enforcement operates in the realm of international and how it relates to compliance behavior.

While I begin with a general discussion of enforcement in international law, my primary focus is on *coercive* enforcement, which I define as the actual or threatened imposition of costs on a perceived

violator of international law for the purpose of promoting compliance. The most obvious costs are material, as with economic sanctions or the use of force, but they need not be—states can use purely diplomatic means and can apply various forms of social pressure and shaming to punish violations. It should be noted that coercive enforcement is used to promote compliance in a broad sense; while the action might be intended to reverse or prevent a specific violation, it might also have the more diffuse goals of convincing a violator to comply in the future or deterring third parties from breaking the law. In other words, by demonstrating that there is a price to be paid for noncompliance, punishing a violator might be useful as an act of enforcement even if compliance does not result in the case at hand.<sup>1</sup>

My focus on coercive enforcement points me in the direction of “horizontal” actions of enforcement, where states target other states. I devote less attention to domestic avenues of legal enforcement, an important topic that is covered in the literature and elsewhere in this volume.<sup>2</sup> As a self-help approach to addressing violations of the law, coercive enforcement is a strategic and ultimately political phenomenon.<sup>3</sup> Partly for this reason, it is an ideal subject for those interested in exploring the intersection of IL and IR, with great potential for achieving the conceptual and empirical value-added called for by Dunoff and Pollack (2011) in their introductory chapter. Political scientists and legal scholars have much to learn from each other when it comes to enforcement and, indeed, there is already some useful dialogue between the disciplines.

I seek to take stock of where the literature stands and to identify elements of a “dual agenda” (Slaughter 1993) of enforcement research that spans the two disciplines. The next section discusses the variety of enforcement mechanisms in international law, noting that they are ultimately decentralized in

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<sup>1</sup> For example, when the United States used the WTO’s dispute settlement mechanism to successfully challenge the EU’s import restrictions on genetically modified foods, this was part of a broader strategy to convince developing countries not to impose similar rules (Stewart 2009: 9-10). Nossal (1989) argues that economic sanctions are often used to punish a violator rather than reverse its noncompliance.

<sup>2</sup> There is a substantial literature on the “vertical” enforcement of international law through domestic legal systems. See Koh 1999; Hathaway 2005; Conant, in this volume; and Trachtman, in this volume.

<sup>3</sup> As one legal scholar notes, in light of the marked decentralization of international enforcement, bringing a political and strategic perspective to bear on these questions is especially helpful (Setear 1997: 3-4).

nature and rely on self-help measures taken by states themselves. I then discuss scholarly views on how important a role enforcement plays in international law, including the prominent debate surrounding the “management” and “enforcement” approaches. I argue that this distinction breaks down in practice, both because these tools can be used in tandem and because institutional setting and design are important factors for managing decentralized enforcement. A fourth section considers the incentives to act from the perspective of a potential enforcer, outlining the main obstacles in terms of costs but also the potential and often overlooked benefits to a state willing to take on the responsibility of enforcement. The concluding section presents three overlapping questions that deserve more attention in the literature and that could form the basis of a promising research agenda at the intersection of IR and IL: (1) How does power shape international enforcement? (2) What is the role of non-state actors in promoting enforcement? (3) How can institutional design contribute to effective enforcement?

### **The Decentralized Nature of International Enforcement**

Hans Kelsen (1942) famously described the international legal order as a “primitive” one, lacking a sanctioning authority distinct from the parties involved. This is consistent with the mainstream IR view that the international system is anarchic insofar as it lacks coercive institutions above the level of states (Waltz 1979). That international lacks *centralized* enforcement institutions does not, however, imply that there is no enforcement. As one prominent legal scholar explains, “the absence of these institutions does not mean that international law isn’t really law; rather, it simply means that international law is enforced in a different way” (D’Amato 1987: 24-5). The main mechanisms of enforcement are decentralized ones, based on the actions of states of themselves.

This perspective might seem outdated given the proliferation of international tribunals and other judicial institutions since the end of the Cold War (Oellers-Frahm 2001; Romano 1999; Elsig and

Pauwelyn, in this volume; Goldstone and Smith 2009), some of which possess substantial independence from states (Alter 2008; Voeten, in this volume). This is part of a general trend toward the increased legalization of world politics (Goldstein et al. 2001), including delegation to international organizations (IOs) with sometimes unexpected power (Hawkins et al. 2006; Bradley and Kelley 2008; Barnett and Finnemore 2004). However, supranational enforcement authority is still rare and relatively weak. The International Court of Justice lacks compulsory jurisdiction and is increasingly underutilized for high-stakes cases (Saltzer 2007). Except in cases of self-defense, enforcement via the use of force can be authorized only by the Security Council, a body that resolves disputes based ultimately on political rather than legal considerations (Cronin-Furman 2005: 441) and lacks independent enforcement capacity. The International Criminal Court (ICC) is independent in novel ways but still depends on states to execute arrest warrants, provide evidence, and enforce sentences (Kirsch 2007). Even the WTO's dispute settlement mechanism, notable for its high level of legalization, still must rely on states to conduct the actual enforcement in the form of trade retaliation.

Regional courts have the potential to contribute to more effective supranational adjudication and enforcement, as the European case demonstrates (Helfer and Slaughter 1997). In practice, however, the proliferation of international judicial and quasi-judicial bodies can complicate the legal aspects of compliance and enforcement. To begin with, when international organizations issue recommendations in response to a violation, these recommendations vary in their degree of authority and bindingness and it is not always clear whether they have a justifying effect on subsequent sanctions (Frowein 1987: 69-71). When international tribunals overlap in terms of the legal rules they address, in the absence of a clear division of labor or hierarchy the resulting "diversity in international law" may complicate rather than clarify the interpretation of compliance and enforcement activities and their relationship to legal

norms (Charney 1999: 707; Dupuy 1999: 792).<sup>4</sup> Moreover, when states are able to forum shop among multiple institutions and to invoke different sets of rules to justify their behavior, they are much less constrained and have more room to engage in self-interested action (Drezner 2009; Shaffer and Pollack 2010). For these reasons we should not automatically associate the expansion of global governance institutions in general, and more legalized international courts in particular, with a more hierarchical or rule-oriented enforcement regime for international law.

In the end, as Joyner (1995: 265) notes, “Enforcement measures will continue to be implemented and coordinated principally by individual governments, rather than wielded as instruments of some supranational policy authority.” In other words, most of the relevant enforcement mechanisms in international law are *decentralized* ones, conducted by states themselves and operating according to the logic of self-help. These decentralized actions are nevertheless conducted in the shadow of law and institutions that constrain and facilitate enforcement behavior, a point developed below.

Decentralized or horizontal enforcement comes in a variety of forms. It can be *bilateral*, in the form of retaliation by one state against another which has either violated a bilateral treaty or violated a more general law that primarily affects the one state. These cases are the most common and straightforward, since the state imposing costs has the most at stake and a built-in incentive to act. An aggrieved state can respond by suspending its own performance of treaty obligations, by severing diplomatic ties, by withdrawing aid, by imposing economic sanctions, or by inflicting social costs on the offender through strategies of pressure and shaming (Hafner-Burton 2008b; Donno 2010; Posner 2002). While there are legal rules governing these actions—it is “not ‘lawless’ in the sense that anything goes” (O’Connell 2008: 264)—the relevant law has many grey areas and is subject to abuse, especially when

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<sup>4</sup> It is partly for this reason that my definition of coercive enforcement focuses on a “perceived violation” of international law. Because there are often competing claims of fact and competing interpretations of law, in most cases we lack a single, authoritative determination that a breach has (or has not) taken place. See Brewster 2009: 1139-41; and Elsig and Pauwelyn, in this volume.

it comes to the issue of “countermeasures” and “reprisals” (acts that are normally illegal but which might be rendered legal as a response to a violation of the law).<sup>5</sup>

Enforcement can also be *collective* when a violation affects the international community more broadly (Frowein 1987). Collective enforcement, often authorized by an international organization, can be truly multilateral, when multiple states impose costs on a target together. Examples are the imposition of sanctions on apartheid South Africa, Security Council-approved sanctions against weapons proliferators, most notably Iraq (Damrosch 2002), and the authorization of force against Iraq after its invasion of Kuwait (Thompson 2009a). True collective enforcement is relatively rare in practice, however. Even when a coalition is formed, most sanctions episodes involve one or a small number of leading “senders” who initiate enforcement actions and bear the brunt of the costs (Martin 1992). Similarly, when the Security Council authorizes member states to intervene militarily, often the resulting action is conducted unilaterally or by a small coalition led by a powerful member (Koskenniemi 1996: 461). The “peace enforcement” missions in Haiti (led by the United States), the Ivory Coast (led by France), and East Timor (led by Australia) are examples, as is the recent and more militarized intervention in Libya (led by a small number of NATO countries). The senders of coercion in these cases are theoretically defending the rights of other members of the international community, along with their own.

While bilateral means of enforcement will always play a prominent role in international law, there is no question that collective enforcement is on the rise. The Security Council has become much more active in its enforcement role since the end of the Cold War: while only a handful of Chapter VII resolutions were passed during the entire Cold War, more than 400 hundred have been passed since. This form of collective enforcement has become routine, with more than half of all Council resolutions

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<sup>5</sup> On the law of *countermeasures*, *reprisals* and *sanctions*, and its shortcomings, see White and Abass 2006; Noortmann 2005; and Alland 2002. According to Schachter (1995: 185), “few areas of international law are in need of greater clarification.”

now invoking Chapter VII (Johansson 2009). Many of these resolutions authorize economic sanctions of one form or another, with the result that collective economic sanctions are now a very common form of enforcement (Damrosch et al. 2009: 539-41). The Security Council has begun to use its enforcement power to address an ever expanding range of issues, including humanitarian crises, civil wars and terrorism (Matheson 2006), which has led some critics to complain of over-reaching (Talmon 2005). These UN-based activities have been complemented in recent years by increasingly active regional organizations, like NATO, ECOWAS and the African Union, which sometimes act on their own but often implement UN-based enforcement measures (Coleman 2007). There are more forums than ever for states that wish to enforce collectively and with the backing of an IO rather than rely on traditional bilateral mechanisms.

### **Enforcement versus Management?**

Assessing whether enforcement exists and how it operates is separate from the question of how much it matters. Some scholars argue that a focus on enforcement distracts from other, potentially more important sources of compliant behavior. For those who adopt a norm-based perspective on international law, compliance follows naturally from an internalized sense that rules are legitimate; law exerts its own “compliance pull” (Franck 1990; Koh 1997). Studies of domestic law do indeed find that individuals obey because they view rules as legitimate, not necessarily because they fear punishment (Tyler 2006). In this view of law, violations are deterred more by informal social mechanisms than by government-imposed sanctions (Ellickson 1991).

In the IR field, this perspective is echoed by social constructivist scholars who focus on internalized norms and social pressure as motivations for state behavior (Finnemore and Sikkink 1998; Wendt 1999; Johnston 2001). Empirical studies show that states are indeed sensitive to international norms, even in the competitive realm of security affairs (e.g., Tannenwald 2007), although these

arguments generally are not applied to the influence of *legal* norms per se. An exception is Kelley's (2007) study of the International Criminal Court. She finds that many states refused to sign the bilateral immunity agreements proffered by Washington, which have the effect of undermining the authority of the ICC and the spirit of the Rome Statute, even though doing so was potentially costly.

What norm-based scholars in IL and IR have in common is that they emphasize the legitimacy of law and the sense of obligation that derives from it (Finnemore and Toope 2000). Formal enforcement mechanisms are less important from this perspective because the expectation is that states have a baseline propensity to comply.

Building from this view, Chayes and Chayes (1995) offer a "managerial" theory of compliance with international law. Managerialists, in both IR and IL, maintain that most cases of noncompliance occur not because of intentional cheating but for more benign reasons, such as ambiguity in the rules, a lack of capacity on the part of governments that makes implementation difficult, or delays in adjusting policies to conform with new international rules. The best way to promote compliance is therefore to design more effective regimes and to provide mechanisms for assistance and problem-solving (Stinnett et al. 2011; Chayes and Chayes 1995; Young 1994; Weiss and Jacobson 1998). This approach is often coupled with the observation that an "acceptable" level of compliance—rather than perfect compliance—is sufficient for the smooth functioning of the international legal system (Chayes and Chayes 1993: 197-204; Diehl and Ku 2010: 58-9). The implication of these arguments is that noncompliance should be treated as a problem to be managed and should not be met primarily with coercion or punishment.

Others counter with the view that enforcement is indeed necessary for compliance. Adopting a purely instrumental perspective, they argue that international law and international cooperation generally are not likely to produce significant changes in state behavior without the threat of enforcement to deter noncompliance (Downs, Rocke and Barsoom 1996). As the requirements of

compliance become more onerous, the threat of enforcement must become commensurately more serious. Consistent with this logic, empirical studies have indeed found that “deep” and “complex” cooperation problems—requiring significant change in behavior and incentives to defect—are associated with more robust monitoring and enforcement mechanisms (Koremenos 2007; Downs 1998). Realists agree that enforcement—in the form of a materially costly consequence—is necessary for compliance but doubt that these institutional solutions can induce compliance when it matters most. For important issues, the most likely source of enforcement is powerful states and their ability to punish violators (or reward compliers) (Goldsmith and Posner 2005; Morgenthau 1985). To the extent that international institutions play a role in inducing compliance, they must be backed up by a powerful state (Waltz 1979: 88). What unites the enforcement school is the belief that meaningful compliance is not likely unless violations are met with a consequential cost.

The management and enforcement perspectives both make an important contribution to the compliance debate. There is a tendency, however, to overlook the extent to which these arguments are complementary. Enforcement is indeed an important ingredient for promoting compliance, yet we should not point to the lack of robust, centralized mechanisms of enforcement and conclude that it is therefore absent. Most enforcement is horizontal, as noted in the previous section, and its effectiveness is partly a function of institutions and their design, which can either facilitate or hinder the decentralized sanctioning of violators. Enforcement, in other words, must be managed.

The first component of “managing enforcement” concerns the way in which violations are approached. The enforcement school assumes that violations occur as a result of cheating, whereas managerialists see noncompliance as largely unintentional. This stark dichotomy, which implies very different responses to noncompliance, is less useful in practice. The motivation behind noncompliance is often difficult to discern and, in any case, most instances of noncompliance occur for a combination of reasons. This explains why so many regimes in fact *combine* a management approach to noncompliance

with an enforcement approach. In the ozone regime, the Montreal Protocol establishes a procedure for working with noncompliant parties to develop a “compliance plan,” but the same parties are simultaneously barred from receiving funding from the Global Environment Facility until their compliance plan is approved (Raustiala 2000: 418-20). The most extensive study along these lines is by Jonas Tallberg (2002), who discusses the complex and multi-level compliance system of the EU, which includes elements of both management and enforcement. He argues that these strategies are “complementary and mutually reinforcing” (Tallberg 2002: 610) in the European context and makes a compelling argument that combining them is the best way to induce compliance.

One possibility is that management and enforcement can be combined in a system of “graduated sanctions,” an approach advocated by Elinor Ostrom (1990) for managing common-pool resources. As she notes, it may be optimal to punish a first-time violator with a “modest sanction” at first, to remind him that he is being monitored and to see if this succeeds in inducing compliance. This strategy might help to screen real cheaters, who will continue to break the rules, from unintentional violators (Verdier 2009). It also has the advantage of being less costly to the sanctioners if more modest efforts produce results. In the case of repeated or egregious violations, the punishment can be escalated appropriately.

We see precisely this sort of graduated compliance system in the climate regime. The parties to the Kyoto Protocol established (with the 2001 Marrakesh Accord) a Compliance Committee that is divided into two branches, an enforcement branch and a facilitative branch. “As their names suggest, the facilitative branch aims to provide advice and assistance to Parties in order to promote compliance, whereas the enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments.”<sup>6</sup> If the management efforts of the facilitative branch are unsuccessful, its members can refer the case to their enforcement colleagues. The result is an unusually elaborate

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<sup>6</sup> [http://unfccc.int/kyoto\\_protocol/compliance/items/3024.php](http://unfccc.int/kyoto_protocol/compliance/items/3024.php).

compliance mechanism that relies on a sequenced approach from management to enforcement (Brunnée 2003).

The second component of “managing enforcement” concerns the institutional setting. Notwithstanding the premise that enforcement of international law is fundamentally decentralized, it is often conducted in the “shadow” of relevant institutions. The costs—and thus the likelihood and effectiveness—of enforcement are affected by the design of the rules being defended and by the institutional setting within which coercion takes place.

Some international legal rules are more conducive to enforcement than others. In general, a more legitimate and fair process for creating rules will also produce more defensible rules (Franck 1995), which in turn can be enforced at a lower cost. The design of rules matters a great deal as well. By requiring highly observable behavior, for example, an international agreement makes the detection of violations much easier and thereby facilitates enforcement actions. One example is requiring anti-pollution technologies that are highly visible, rather than regulating the polluting behavior itself (Mitchell 1994; Urpelainen 2010). A lesson here is that many of the same design features that scholars have emphasized for promoting compliance are also virtuous in the event of noncompliance.

The institutional setting of enforcement matters as well. Institutions are a potentially valuable source of information and coordination when it comes to noncompliance and enforcement, even if they lack independent enforcement capacity. First, they provide clarification when rules are ambiguous and resolve conflicts of interpretation (Helfer and Slaughter 2005: 923). Second, by providing transparency and monitoring, institutions help identify behavior as noncompliant (Mitchell 1998; Chayes and Chayes 1995). For example, election monitors from the Organization for Security and Cooperation in Europe supply information that helps to trigger sanctions against norm-violating governments (Donno 2010). Third, institutions help supply information on the motivations of states that interact within and through them, thereby clarifying whether the enforcing state is acting in defense of international rules or more

aggressively (Thompson 2009a). All of these functions increase the probability that noncompliance will be met with enforcement actions.

Of course, not all institutions are equally effective in this regard. In general, highly legalized and independent institutions are viewed more credibly when it comes to clarifying rules, finding facts and endorsing sanctions against a violator (Guzman 2008: 52; Abbott and Snidal 2000: 427; Smith 2000: 138). Nevertheless, we know that even modest centralized information provision by an informal institution can fundamentally alter the cooperative incentives of actors and promote exchange (Milgrom, North and Weingast 1990). Though they are not backed up by enforcement power, the clear statements provided by WTO panel rulings cast a shadow that strengthens the position of those who challenge unfair practices (Busch and Reinhardt 2000). Even international bodies with no judicial authority can promote peer pressure and sanctions simply by publicizing and assessing state behavior (Helfer and Slaughter 2005), an argument made in studies of the UN-based human rights committees (Buergethal 2006) and the WTO's Trade Policy Review Mechanism (Qureshi 1995). The process by which an institution considers responses to noncompliance is also important. For example, UN-authorized sanctions that derive from a legitimate and law-based process are more often effective than sanctions viewed as politically motivated (Joyner 1995: 266).

Enforcement and management cannot be separated in practice. Indeed, even those who downplay the importance of coercive enforcement nevertheless concede that cost-imposing by other states, individually or collectively, is sometimes necessary to promote compliance (Henkin 1995: 50-51; Franck 2002). At the same time, those who emphasize enforcement as a necessary ingredient for compliance tend to overlook the importance of the rules and institutions that define compliance and cast a shadow over any enforcement actions. The viability of enforcement, in other words, is partly a matter of management and design.

## Enforcement Incentives

The decentralized nature of international law implies that it must be largely self-enforcing (Koremenos, Lipson and Snidal 2004; Barrett 2004; Scott and Stephan 2004), either because states have an incentive to comply in the first place or because they have an incentive to impose costs on violators, i.e., to engage in enforcement. While there is a vast and productive literature, spanning the IR and IL fields, on the conditions under which states comply with international law,<sup>7</sup> much less attention has been focused on the incentives of states to supply enforcement. This is surprising since the viability of international law's decentralized system of enforcement depends on these incentives.

Effective enforcement confronts the fundamental problem that enforcement actions are almost always costly to the sender. Guzman (2008: 48), for example, doubts whether retaliatory sanctions can be an effective means of inducing compliance because the costs to the sender are often prohibitive. This matters because, in theory, a potential enforcer will not act if the costs of enforcing are higher than the benefits of inducing compliance by the target (I relax this assumption below). Indeed, under these circumstances the coercive threat should not be credible. This problem is exacerbated in the multilateral context, where free-rider incentives make individual states even less likely to bear the burden of enforcement. While all states stand to gain from compliance—punishment is a public good for the community (Elster 1989: 41)—only those that sanction bear the cost, creating a collective action problem. Elsewhere I refer to this as the “sanctioners’ dilemma” (Thompson 2009b).

While the material costs of engaging in enforcement are an obvious concern for the sender, the potential *political* costs are an equally important consideration. When states engage in coercive actions, perceptions matter; other members of the community (beyond the target) may feel threatened and may ascribe a variety of motives to the behavior. As Hedley Bull (1977: 69) notes, “Because of the low

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<sup>7</sup> For overviews see Raustiala and Slaughter 2002; Simmons 2010; and von Stein 2010. See also von Stein, in this volume.

degree of consensus or solidarity among states, actions which the state committing them sees as self-help or rule-enforcement are frequently not viewed as such by international society at large.” The sender therefore must convince other states that its actions are a form of enforcement in defense of legal rules rather than an aggressive pursuit of more selfish goals. Reaching a consensus on whether enforcement is justified in a given case is problematic because almost every situation is ambiguous in terms of the facts, the law, or both. A state that resorts to self-help enforcement measures can almost always be accused of doing so too quickly—without sufficient resort to negotiation or arbitration—or with disproportionate measures. In some cases, each side can invoke conflicting principles of international law (Noortmann 2005). If rules or behavior are unclear, the target can argue that no violation has taken place (Guzman 2008: 93-100). Finally, states might have different interpretations of how legally binding a rule is, with the sender claiming that enforcement is justified by a violation of hard law and the target claiming that the rules was of a softer variety that should not trigger enforcement. If the sender cannot convince the international community that it is engaged in justified enforcement, other states can respond by imposing a variety of costs, including opposition to the policy itself, reciprocal noncompliance in other shared regimes, and various forms of “soft” balancing such as those imposed on the United States after its 2003 invasion of Iraq (Walt 2005; Thompson 2009a).

The costs of enforcement are not always high, however. If the enforcer is much more powerful than the noncompliant state, the material costs might be insignificant. Multilateral burden sharing, in the form of collective sanctions or a military coalition, can also bring the material costs of coercion down. Some means of enforcement are inherently lower-cost. In particular, an appealing feature of diplomatic responses and strategies of shaming and ostracism is that they entail very low costs for the sender (Rasmussen 1996). Finally, enforcement is less politically fraught when the target has clearly

violated international law. As noted in the previous section, international courts and organizations can help in this regard by clarifying rules, identifying noncompliance, and endorsing enforcement actions.<sup>8</sup>

While the literature tends to emphasize the costs of engaging in enforcement activities, we should also consider more fully the benefits that can accrue to the sender and thereby make enforcement more likely. To begin with, there are indeed times when individual states, usually powerful ones with a stake in maintaining the status quo, have an incentive to unilaterally provide a public good to the international community. As Snidal (1985: 581) notes, “This outcome will be most likely when some single state, the hegemonic power, is sufficiently large relative to the others that it will capture a share of the benefit of the public good larger than the entire cost of providing it.” While this argument is usually applied to the provision of economic and security stability, such stability often includes the enforcement of legal rules.

The possibility that the benefits of compliance will offset the costs of enforcement appears more plausible if we consider the potential long-term benefits of enforcing compliance. What if the game is repeated? Keohane (1984) argues that states obey regime rules because regimes are so difficult to create and replace; thus noncompliance risks dissolving the entire regime and sacrificing the long-term benefits it provides. The same logic can be applied to enforcement. In a repeated game, even where agents change their partners over time and with only modest assumptions about information, “community enforcement” can be sustained. In other words, even agents that care only about their own utility and do not care about a rule for its own sake have an incentive to punish those who violate social rules, for fear that violations will spread and cooperation will break down (Kandori 1992). When a potential enforcer contemplates taking action, it thus takes into account the long-term benefits supplied by the relevant international law, not just the benefits of compliance in the case at hand. Along these

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<sup>8</sup> There is, however, a potential danger for a sender of attempting to reduce its costs too much. Committing to a costly policy, such as self-damaging economic sanctions, can serve as a credible signal that a state is serious and will not back down, thereby increasing its leverage (Damrosch 1994).

lines, a further advantage of enforcement is to signal that the rule in question is worth defending.

Active enforcement is one means by which states can demonstrate their belief in the importance and bindingness of international law (O'Connell 2008: 10).

Another factor to consider is the reputation benefit of sanctioning a law violator. Many of literature's arguments about the reputational incentives to *comply* can be extended to the question of enforcement. States have and value many reputations beyond that for compliance, including a reputation for defending one's interests and for toughness in the face of challengers. Indeed, it might be in an actor's interest to pay the price of confronting even a relatively unthreatening challenger if doing so deters future challengers; this is the logic of the "chain store paradox" in economics (Kreps and Wilson 1982). For example, Alt, Calvert and Humes (1988) argue that a hegemonic state may have an incentive to engage in costly coercive actions as an investment in its reputation for toughness, one that makes coercion cheaper in the future. The power of the reputation logic in the context of enforcement is that, by punishing a violator, a state can at once boost its benevolent reputation, as a defender of international law, and its "less savory" (Keohane 1997: 497) reputation for being tough and assertive. Supplying enforcement is one of the rare cases where these seemingly divergent reputational incentives are not in conflict. Johns (forthcoming) raises the further possibility that states have an incentive to develop a reputation not just for defending their own rights but also for supplying third-party enforcement to other victims. Doing so increases the chance that others will come to their own defense

Given the conventional wisdom that peer enforcement is often prohibitively costly, this review of enforcement incentives paints a surprisingly promising picture for the viability of decentralized enforcement. Even if we maintain relatively narrow assumptions about self-interested behavior, we see that states can indeed be motivated to supply costly enforcement actions. If we assume that states care intrinsically about upholding international law as a system of community norms, the space for peer-to-peer enforcement widens even further. A considerable literature in the social sciences shows that

humans can effectively regulate community norms through third-party punishment under a wide range of conditions. Even when they are not the victims, individuals “are willing to punish others at a cost to themselves to prevent unfair outcomes or to sanction unfair behavior” (Fehr and Fischbacher 2003: 785; see also Sigmund 2007). A crucial implication is that rules that carry normative weight, and especially those embedded in a well-defined social community of states, are more likely to elicit robust decentralized enforcement, though these mechanisms should operate with much less force at the international level.

### **Extending Enforcement Research: Power, Actors and Design**

This overview of enforcement questions and research points to several areas of overlapping interest between IR and IL scholars and suggests some themes that merit further investigation. In this concluding section, I highlight three areas of potentially fruitful research and exchange between the two fields, focusing on the role of power, the importance of non-state actors, and questions of institutional design. Each has both normative and positive implications for our understanding of coercive enforcement in international law.

#### *Power and Enforcement*

Realists have long pointed out that powerful states are doubly advantaged when it comes to the enforcement of international law: they are well positioned to engage in enforcement and to resist enforcement efforts of others. In Morgenthau’s (1985: 312) formulation, the international system of law enforcement “makes it easy for the strong both to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy.” The most dramatic examples are in security affairs, where great powers intervene to protect international law (and their own interests) but are difficult to stop or punish when they violate the law themselves. Glennon (2003) points to the U.S. invasion of Iraq as a recent and prominent example.

While the role of power seems obvious in military-security settings, power and distributive concerns shape enforcement in a variety of issue-areas and sometimes in subtle ways. One impact of globalization has been to create complicated and overlapping regulatory rules and institutions, a setting that allows large states to take advantage of their superior capacity and multiple sources of leverage, both formal and informal (Benvenisti and Downs 2007; Stone 2011), and to forum shop among regimes as a matter of convenience (Shaffer and Pollack 2010: 738). Even when dispute settlement procedures have been established to level the playing field, as in the case of the WTO, weak states often lack the resources and expertise to effectively defend their rights (Kim 2008; Shaffer 2006) and larger economies have a decided advantage when it comes to implementing sanctions and other remedies (Brewster 2009). This suggests a need for more research on whether increased institutionalization does indeed create more rule-oriented rather than power-oriented environments for compliance and enforcement.

The most profound disparities may come well before the enforcement stage, when rules and institutions are being designed in the first place. Large states have used their bargaining power to push for new rules that reflect their interests in areas such as trade, finance and internet governance (Steinberg 2002; Drezner 2007). This allows them subsequently to defend their interests in the guise of innocently enforcing international law. The UN Security Council offers perhaps the best example of how powerful states use their ability to shape rules to promote self-interested enforcement. The United States and the other Permanent Five members have increasingly used Chapter VII resolutions to establish sweeping and legal binding new rules in areas such as terrorism (Resolution 1373) and weapons proliferation (Resolution 1540)—in effect, using the Council’s enforcement authority to legislate (Talmon 2005). Once established, these resolutions can be used to justify a variety of enforcement measures consistent with the goals of the resolution. For example, Resolution 1540 has been used by the United States to justify its ambitious Proliferation Security Initiative, which otherwise involves actions of questionable legality.

These examples remind us that power considerations are never lurking far behind when it comes to the enforcement of international law. IL and IR scholars should continue to explore these issues, and their positive and normative implications, keeping in mind that power is often exercised in indirect and informal ways that are difficult to detect.

### *Domestic and Transnational Actors*

Scholars of IR and IL have focused increased attention on non-state actors, both domestic and transnational, and many of the resulting insights have implications for the question of enforcement. For example, we should expect domestic politics to shape the incentives of a government contemplating enforcement. Just as governments face domestic pressure to comply with international law (Dai 2007), they also face pressure to enforce rules that affect important domestic constituents. What Miles Kahler (2000: 675) refers to as domestic “compliance constituencies” encourage their own government’s compliance but also “encourage imposition of sanctions on other governments that violate legal commitments.” Public opinion can have the same pro-enforcement effect (Whang 2011; Joyner 1995: 265). These factors create a positive political benefit for a sender if it sanctions a noncompliant state.<sup>9</sup>

Non-state actors can also pressure governments directly and thereby perform an enforcement role themselves. Transnational advocacy groups use various strategies to raise the political costs for a government violating international norms (Keck and Sikkink 1998). Domestic actors seeking to pressure their government to comply can also use international legal rules to strengthen their political and legal strategies at home, as Alter (2000) shows in the EU context. This can produce short term victories but also long-term changes. For example, the spread of international human rights law and the advent of the ICC have shifted domestic political and legal debates within countries in a more pro-rights direction (Simmons 2009; McCormak 2008). Incorporating non-state actors into the study of international

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<sup>9</sup> At the same time, of course, domestic politics sometimes contribute to the intransigence of a target state, as in the case of economic sanctions that trigger a “rally ‘round the flag.” In their study of WTO disputes over genetically modified foods, Pollack and Shaffer (2009) show that entrenched political interests and public opinion may prevent compliance or settlement of disputes even when a robust enforcement mechanism is in place.

enforcement is especially important since some issue-areas are governed to a significant degree by networks of private actors rather than by states (Büthe and Mattli 2011). The enforcement question here is whether and how these private actors can develop mechanisms of self-regulation that deter noncompliance.

The study of international enforcement will inevitably move in the direction of two-level analysis and considerations of private authority to understand the many mechanisms and actors involved. An important question for scholars to consider is whether these private actors are complementing the traditional role of states or drawing power away from them. In either case, we should also ask whether the non-state enforcement of international law is more efficient or more desirable from a normative standpoint.

#### *The Design of Law and Institutions*

How can international law and its attendant institutions be designed to more effectively promote enforcement and compliance? Increasing the robustness of international courts and dispute settlement mechanisms is one possibility, but often legalization is not a politically viable strategy due to sovereignty concerns. Existing studies in political science and law show that high levels of legalization may not be necessary if monitoring and compliance institutions are designed to match the problem at hand, to provide credible information that governments lack, or to strategically link issues (Jojarth 2009; Donno 2010; Helfer and Slaughter 2005; Hafner-Burton 2008a; Ostrom 1990). The viability of enforcement may also have more to do with the legitimacy of institutions and underlying rules than with the presence of robust enforcement institutions. Violations of rules that match prevailing social norms trigger a wider variety of sanctions, formal and informal (Posner 2002; Ellickson 1991), and legitimate institutions are more authoritative and less dependent on the threat of punishment to be effective (Dickson, Gordon and Huber 2009; Hurd 2007). This suggests that fairness and impartiality in the production of rules and IO decisions can promote more efficient enforcement.

Well-designed institutions should go beyond traditional tools of statecraft to capture the widest range possible of enforcement actors and mechanisms—public and private, formal and informal. Exploring the optimal mixture of these mechanisms is an important area of research (Scott and Stephan 2006; Brewster, in this volume). Transnational dispute resolution mechanisms—those that give direct access to private parties—are less influenced by state interests and tend to empower a wider range of actors, including NGOs and domestic courts (Keohane, Moravcsik and Slaughter 2000). Hawkins (2008) shows that when international organizations provide access to NGOs, this helps facilitate enforcement of human rights norms. Studies of institutional design should thus focus on the increasing variety of actors and mechanisms that can be leveraged to promote decentralized enforcement.

This discussion suggests a multidisciplinary research agenda that goes beyond the hard law-soft law distinction to ask how international law and institutions can be designed to increase the likelihood of enforcement. Ideally, enforcement should rely on powerful states when they have incentives to provide public goods, but should also rely on other actors to supply a range of enforcement mechanisms when doing so is more efficient or when the influence of powerful states is undesirable from a distributive perspective.

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