



Padjajaran Journal of International Law

ISSN: 2549-2152, EISSN: 2549-1296

Volume 1, Number 1, January 2017

Article history: submitted 26-09-2016, edited 10-10-2016, published 12-01-2017

BOOK REVIEW

Title : **How International law Work
A Rational Choice Theory**
Author : **Andrew T Guzman**
Publisher : **Oxford University Press**
Original Published : **December 7, 2007**
Book Reviewer : **Mursal Maulana***



Does international law affect state behavior?. Why would states pay any attention to international law in the absence of coercive enforcement mechanism?. What do we mean when we say international law is “binding”, given that states can almost always to violate it?. These intriguing and philosophical questions raised by the author to make sure that we had grasped at least one answer. If not, we were failed to understand the nature of international law. These question also remains us about traditional debate between proponent and opponent of international law such as Hobbes, Spinoza and Austin. But, in the 21st Century we are not debating or neglecting the existence of international law anymore.

Written by Andrew T. Guzman who is recently serving as dean of The University of Southern California Gould School of Law (USC Gould), this book develops a persuasive explanation of why and when international law works by using rational choice perspective. Although previously there are some authors focusing their study on this topic such as

Professor Abraham Chayes and Antonia Handler Chayes in their book *“The New Sovereignty: Compliance with International Regulatory Agreement”* which uses managerial approach in describing the compliance of international law and Professor Thomas Franck in his book *“Fairness in International Law and Institution”* which explains why states comply with international law by introducing fairness approach, this book offers better perspective in understanding international law in contemporary development by proposing *“Rational Choice Theory”*. The theory then is developed into *“Three Rs of Compliance”* (Reputation, Reciprocity and Retaliation). The book tries to explain how international law is able to affect state behavior despite a lack of coercive enforcement mechanism.

This book consists of six chapters. In the **first chapter** as introduction, the author gives brief overview on how international law can change state behaviors by analyzing some case studies. The cases are divided both when states complied with international law (by or

* Student Pasca Sarjana at Faculty of Law Universitas Padjadjaran, Jl. Banda No. 42 Bandung, mursal.maulana@ymail.com, S.H. (Universitas Syah Kuala).

international court decision treaty mechanism) and when states disobeyed international law (by withdrawal from a treaty regime). The former cases can be seen in the WTO Dispute Settlement Mechanism where states prefer resolving their trade disputes on Dispute Settlement Body, The existence of International Court of Justice as judicial body, Regional Court such as European Court Human Rights (ECHR), Biological Weapon Convention, Free Trade Agreement among United State, Canada and Mexico (NAFTA) and Helsinki Final Act (Soft Law) respectively promote cooperation and compliance of international law. The latter is depicted in "**Jose Ernesto Medellin Case**". This case related to the rights of foreigner under Vienna Convention on Consular Relation (VCCR) to be informed upon their arrest to their consular official. Because United States had denied Medellin rights, Mexico government sued United States to International Court of Justice then ICJ ruled that United States had violated its obligation under VCCR and ordered to review its domestic legal proceedings. Instead of implemented ICJ Ruling, there was a different point of view (conflict) between President Bush and United States' Supreme Court in responding ICJ decision. In the one hand, Supreme Court prefer neglecting ICJ decision by referring to previous case on Sanchez Llamas Case ruled that ICJ decisions are just entitled as "**Respectful Consideration**" (not binding on U.S Court) and in the other hands, President Bush was ordering the states to followed instruction of ICJ. Unfortunately, in 2005 United States announced its withdrawal to VCCR's Optional Protocol, depriving the ICJ jurisdiction over future disputes. Based on both cases mentioned above the author then in the next chapters tries to explain how international work by using rational choice theory.

Before moving to the next chapter, the author explains the methodology and scope of his book. The book adopts rational choice assumptions as methodology. By doing so, states are assumed to be rational, self-interest, and able to identify and pursue their interests. States do not concern themselves with the welfare of other states but instead seek to maximize their own gain or payoff. States also are unaffected by legitimacy of rule of law, past consent to a rule or decision maker influence. Because it starts with a set of assumptions, rather than observation about state behavior, the analysis using in this book is primarily a theoretical approach only although there some examples that will be used as illustrations. This book related to compliance with international law and cooperation in international affair. The book focuses on international law and more specifically on the conventional source of international law such as treaties, customary international law and it also examines soft law such as resolution of the UN General Assembly and other international norms.

Second chapter of this book focuses on The Three Rs Compliance (reputation, reciprocity and retaliation) to explain rational choice theory. The main objectives of this chapter are to demonstrate how international legal obligation might influence state behavior and how this theory can be applied in the various areas and sources of international law. In this case, the author divides games in which state play into two categories (state relatively easy and difficult to cooperate), but the latter game that the theory is apply throughout of the book. **Reputation** is defined as judgments about an actor's past behavior used to predict future behavior. In this sense the author confines reputation's definition only in the

context of state's reputation for compliance with international law rather than other types of reputation. If states breach international law, they will suffer reputational sanction. When states face two options (to comply or violate) other states will assess this decision. If a state tends to comply, it will be awarded a good reputation. Conversely, if a state tends to violate its international obligation, it will have a bad reputation for compliance. Like reputation, **Reciprocity** will often be taken by a state in response to a violation by withdrawing their own compliance with international agreements because once a violation takes place the agreement ceases to serve their interest. In a bilateral context, reciprocity can be used as a powerful compliance-enhancing tool (remedy). **Retaliation**, in contrast, describes actions that are costly to the retaliating state and intended to punish the violating party. Retaliatory actions might include such as economic, diplomatic or even military sanctions.

In a multilateral context, the author concludes that although reciprocity is unlikely to prove an effective tool to sustain compliance, sometimes reciprocity is regarded as a useful tool to encourage compliance. This can be seen in the WTO system, for example when WTO adjudicatory bodies concluded that the European Community had violated its obligation with respect to importation of beef artificial growth hormones, they granted the United States and Canada the right to suspend certain trade obligations they had toward Europe. In contrast with reciprocity, retaliation can often serve as an enforcement device. For example, in the ICCPR, if Russia is tempted to violate its commitment, Russia will suffer retaliatory sanctions, such as a ban of exports from other states.

In the third chapter, this book focuses on the nature of reputation as part of rational choice theory in a comprehensive manner. This chapter begins by asking how reputation is acquired and lost. Before explaining this question, the author defines reputation as judgments about an actor's past behavior used to predict future behavior. But in the context of international law, reputation is related to a state's behavior as a main actor/subject or more precisely related to a state's reputation for compliance with international law. There are some reasons why states comply with international law such as domestic politics in the state and the value of future opportunities to cooperate. The nature of reputation itself can be seen when there is a large number of interactions among states. When a state has breached an obligation, the state will suffer a reputational loss and so the state's partner no longer has reason to believe promises of future cooperation. In this case, reputation may work better in a multilateral setting than in bilateral ones because the reputational consequences of a violation will be more severe in a multilateral context.

Returning to the main question on how reputation is gained and lost, the value of reputation will not be the same for every state or in every issue area. In some circumstances the matter of reputation is not easy to be determined. But, the key point here is when reputation is gained and more valuable, states therefore become more willing to comply with an international legal commitment. Principally, every observing state has a different way to measure another state's reputation, for example the United States may have a different reputation in Canada, Argentina, Russia and Syria.

Another question raised in this chapter is how reputation can be gauged (good or bad reputation)?. The simple answer is if a state chooses to comply, it receives total payoff that consist of the non-reputational plus the reputational payoff. If on the other hand, the state violates legal rules it will lost its reputations. In deciding how to act, the state compares the total payoff in the event of violation to what it would receive should it comply. Violation is only tempting to the state if the non-reputational from violation is larger than the non-reputational payoff from compliance.

In the **fourth chapter**, this book tries to develop rational choice theory into international agreements, or in other word this chapter pays more attention on theoretical approach than the empirical one. By doing so, the author analyzes some aspects of international agreements. For instance, the problem of enforcement of treaties by considering not only dispute resolution and enforcement tool but also the monitoring mechanism and other tools to encourage compliance. The author in this chapter doesn't circumscribes what kind of agreement they will use. It can be bilateral or multilateral treaties, binding and less formal treaties or soft law. The key point that the author remarks here is although states have many objectives when they make an agreement, rational states are able to assess the value of any particular agreement, and select the available agreement maximizing that payoff. All the choices states make when they negotiate an agreement are part of the effort to get the greatest possible benefits.

Related to soft law, the author explains that although soft law contains less commitment than treaties, sometimes states are going to

switch their commitment by entering into soft law agreements when substantive and formal provisions of treaties appears more stringent and consequently it increases the cost of state behavior. The author emphasizes that soft law is not and should not be considered something apart from other form of international law. It should instead be recognized as one option. Another important feature in this chapter discusses more specific provision on the law of treaty "that so-called reservation" (section 2, article 19-23 VCLT 1969). Like any other author focusing on the law of treaty, the author also explain some aspect of reservation such as permitting and prohibition reservation and the nature of reservation that differs from escape and exit clause.

In the **fifth chapter**, the author explores in comprehensive manner and dive much deeper into the topic of CIL (customary international law) by raising the question how the theory of compliance is able to make sense of CIL?. Although treaties and soft law are relatively easy to be applied in the theory of compliance through exchange of promises, pledge of reputational capital, establish reciprocal commitment and identify in which retaliatory action may be taken, CIL also has these rational choice force to protect their reputation, to treat reciprocal non-compliance and to retaliate other states. As part of one important source of international law, in this chapter the author gives clear definition of CIL both as traditional source of international law and as the basis for obligation undergirding the entire legal system. The former definition is strictly doctrinal by using two part of doctrinal test providing by article 38 of The Statue of the ICJ which defines CIL as "international custom, as evidence of a general practice accepted of law". The first

element is “general practice”, then this term is classified by Mochtar Kusumaadmadja (The Father of International Law from Indonesia) as “Formal Source”. The Second element is “*Opinio Juris* (legal obligation)” or Mochtar called it as “Psychological Source”. Furthermore the author also restates that although treaties have taken over some areas of law that were formerly governed exclusively by custom, CIL continues to play a role in such critical area of law as state responsibility, state immunity, jurisdiction, foreign direct investment, and human right. The later defines CIL as the rule that must be obeyed such as the rule of treaties, one of the most famous example of CIL in this definition is “*Pacta Sunt Servenda*”.

In the **sixth chapter**, the author reveals the transformation development of international law by stating that “international law is undergoing a transformation from the discipline focused on practice and doctrine into theory and social science methodology”. One of the theory in question is what the author offered in this book, “The Rational Choice Theory” relying on three ways (Reputation, Reciprocal and Retaliation/The Three Rs) a violation can generate costs for a state. Each of the Three Rs can increase the cost of violation and, therefore promote cooperation. There are at least five conclusions containing in this chapter. First, Reciprocal on-compliance will raise if the violating state is unable to credibly promise compliance in the future. Second, A rational state will not use retaliation as a remedy unless doing so helps it to develop reputational for punishing

violators or helps it end an ongoing violation. Third, there are some challenges in applying non-compliance reciprocity as a remedy in multilateral agreement such as in human rights and environmental agreements because it will often fail to promote coordination. Conversely, in applying retaliation as a remedy will often be more effective at promoting cooperation. It can be seen both in UN Charter and NATO, Article 25 UN Charter states that “each member states will accept and carry the decision of The Security Council” and more obviously can be observed in the article 5 NATO stating that “each members agrees to assist the party or parties so attack by taking forthwith an action that deems necessarily (individually or collective) including the use armed force to restore and maintain the security of North Atlantic area. In contrasts to reciprocity and retaliation, reputation can work better in multilateral agreement because compliance with international law improves a state’s reputation. Fourth, All agreement, whether treaties or not affect state behavior through the same mechanism but they have different spectrum in hierarchy of international law rules with the treaty is most likely to affect state behavior followed by soft law, customary international law and norms respectively. In addition, the author also states that relative to other norms, customary international law binds a state thoroughly although treaty represents the strongest form of international legal commitment.