In the famous passage from his *Leviathan*, Thomas Hobbes expressed this point of view:

- “Where there is no common power, there is no law.”

This skepticism is never far from the surface in debates about international law. As Jack Goldsmith and Eric Posner note,

- “international law has long been burdened with the charge that it is not really law.”
In Western historiography, modern international law is usually traced to the early seventeenth century when the modern sovereign state began to emerge from the maelstrom of the Thirty Years War and the Peace of Westphalia (1648).

Reacting in part to the horrors of that conflict, Hugo Grotius (1583–1645), sometimes referred to as the father of international law, devised a system of rules specifying acceptable and unacceptable behavior in war.

Though there was no overarching government, he argued that sovereign states still formed a society or community in which regular interactions took place within the framework of rules and norms of behavior.
More ambitiously, Grotius argued that states were bound to obey a higher moral code even in the absence of higher political authority. But where did this code come from?

One possible source was God (or religious texts).

Perhaps because he lived through the Thirty Years War and the devastation of religious conflict, Grotius preferred a more secular foundation.

He argued that human reason allows us to devise a code of moral conduct necessary for the preservation of a civilized community of states. Though he accepted the existence and legitimacy of sovereign states, Grotius provided a vision of a more humane international order in which shared moral values could tame the excesses witnessed during the Thirty Years War. For Grotius there was no necessary contradiction between state sovereignty and international law.
THE DEBATE OVER INTERNATIONAL LAW

- The debate over international law focuses primarily on its impact and significance, not on its existence.

- Some remain skeptical that international law offers much of a constraint on state behavior. At the margins and on some relatively insignificant issues international law may influence states, but power and interests usually trump law and justice in international politics on the big issues.

- Others have a more favorable view, claiming that international law provides not only direct constraints on state behavior, but shapes and embodies the norms that influence how states think about the world and their role in it.
WHAT IS INTERNATIONAL LAW?

- Though definitions of international law vary, most characterize it as “the customs, norms, principles, rules and other legal relations among states and other international personalities that establish binding obligations” or the “body of rules which binds states and other agents in world politics with one another.”

- Historically, international law has focused on states—that is, how states were supposed to behave vis-à-vis other states. The preceding definitions of international law make some allowance for “other” agents, largely because international law has gradually moved beyond a sole focus on states.

- Human rights, for example, are increasingly part of international law. This area of international law involves rules about how states should behave vis-à-vis their own citizens.
WHERE DOES INTERNATIONAL LAW COME FROM?

- Article 38 of the Statute of the International Court of Justice identifies four (or five, depending on how one counts) sources of international law. In order of declining significance these are:

1. **International conventions**, whether general or particular, establishing rules expressly recognized by consenting parties.

2. **International custom**, as evidence of a general practice accepted as law.

3. **The general principles of law** recognized by civilized nations.

4. **Judicial decisions and the teachings of the most highly qualified publicists of the various nations.**
TREATIES & CONVENTIONS

- **Treaties and conventions** are formal documents specifying behaviors that states agree to engage in or refrain from.

- Some treaties, such as nuclear arms control agreements signed by the United States and Soviet Union during the Cold War, are **bilateral** (i.e., involving only two nations), whereas others, such as the Nuclear Non-Proliferation Treaty (1968), are **multilateral**, i.e., involve virtually all nations.

- But whether a treaty involves two or two hundred nations, it obligates signatories to abide by its terms.

- **Treaties** in international law are the equivalent of **contracts** in domestic law. Thus, when we say that a state has violated international law, this assertion is usually accompanied by a reference to the specific treaty or convention whose terms have been violated.
The fact that most international legal obligations derive from treaties and conventions automatically indicates one of the major differences between domestic and international law.

Domestic laws are usually binding on everyone. If a state legislature decides to impose a speed limit, it applies to all regardless of any individual’s approval. Laws are not circulated among citizens for signatures. We do not get to choose which laws apply to us.

In international law, nations are only obligated to abide by those treaties and conventions they consent to. E. H. Carr explains that “a treaty, whatever its scope and content, lacks the essential quality of law: it is not automatically and unconditionally applicable to all members of the community whether they assent to it or not.” Thus, international law relies on voluntary consent to a much greater degree than domestic law.
CUSTOMARY LAW

- Not all international law is codified in written documents.

- Practices and norms that states have come to adopt and routinely abide by form an unwritten body of **customary law** that does not require explicit consent like treaties: Consent is inferred from behavior.

- Sometimes customary rules find their way into actual agreements, but not always. Many laws regarding the **conduct of diplomacy**, such as diplomatic immunity, began as customs that evolved gradually over time. It was only with the Vienna Conventions on Diplomatic (1961) and Consular Relations (1963) that these norms acquired the status of written law.
CUSTOMARY LAW
A FEW MORE EXAMPLES

- The prohibition on slavery and the slave trade was part of international customary law before the formal Slavery Convention of 1926.

- Until recently, the issue of how far off shore a nation’s sovereignty extended was also a matter of customary law. The limit used to be three miles because this was about as far as a cannon could reach, though it was eventually extended to twelve miles and was codified in the UN Convention on the Law of the Sea (1982).

- The same convention contained another example of the codifying of custom. In the early 1950s, several South American countries claimed exclusive fishing rights out to 200 miles, which was viewed at the time as violating freedom of the seas beyond the 12-mile limit. In subsequent years, other nations, including the United States, followed suit. The 1982 convention recognized this new norm by specifying a 200-mile exclusive economic zone (EEC).
CUSTOMARY LAW
& GENOCIDE

- Though customary international law is often more difficult to identify than treaty-based law, in exceptional cases it can be more powerful because it may apply universally, irrespective of state consent. One of such cases is the example of genocide.

- Though there is an international convention against genocide, it is possible to argue that genocide is also a violation of customary law.

- As a result, “two states may not conclude a treaty reciprocally granting themselves the right to commit genocide against a selected group.” The rule against genocide may be one of those “rules of custom that are so significant … that the international community will not suffer states to ‘contract’ out of them by treaty.”

- Even those not party to the genocide convention are bound by the customary prohibition.
Though custom should not be overlooked as a source of international law, it remains very difficult to know when a norm has entered the realm of customary international law.

How many states, one might wonder, must abide by the norm and for how long before it can confidently be classified as a law?

It is even harder to gauge when an international custom has reached a level where it becomes binding on all states even if they claim not to accept it, as would be the case with genocide and slavery.

Even experts in international law have no clear answer: “How these particular rules of ‘super-custom’ (norms of behavior binding on all states) are designated and achieve the exceptionally high level of international consensus they require is a bit of mystery,” Shimko alludes.

Mystery or politics? Ask yourself.
THE WEAKNESS OF INTERNATIONAL LAW

- Those who question the value of international law make several basic arguments:

  - First, international law is a contradictory and vague mass of agreements and norms that offers few clear guidelines.
  
  - Second, even if we could specify the contents of international law, the absence of an effective legal system severely limits its impact.
  
  - Third, to the extent that international law does influence state behavior, it is on issues of relatively minor importance. When it comes to the most pressing issues of international politics involving the great powers, security and war and peace, international law gives way to power and national interests.
Since 1945 more than 40,000 international treaties, agreements, and conventions have been signed throughout the world. It would be unrealistic to expect all of these agreements to be perfectly consistent with one another (indeed, it is not unheard of for the same treaty to contain seemingly contradictory provisions). This lack of consistency sometimes makes it very difficult to even know what a nation’s treaty obligations are.

Of course, this is also a problem domestically. However, the problem is much greater at the international level for two reasons:

- first, the decentralized nature of laws (not only treaties but also nebulous customary law) increases the likelihood of conflicts; and
- second, the lack of an authoritative legal system makes the resolution of these conflicts problematic.
Hans Morgenthau explains what frequently happens when negotiating international agreements:
“In order to find a common basis on which all those different national interests can meet in harmony, rules of international law embodied in general treaties must often be vague and ambiguous, allowing all the signatories to read the recognition of their own national interests into the legal text agreed upon.”

As with conflicts of laws, vagueness and ambiguity are not unknown in domestic laws either. Lawmakers often adopt vague wording to get the votes needed to pass legislation.

This is one of the reasons that courts in a country frequently have to interpret domestic laws—if the laws were crystal clear in the first place, interpretation would not be necessary. And to repeat a point that should not need repeating, there is no judiciary to do the same at the international level.
Contradictory and vague laws create dilemmas for even the disinterested observer. For those with a vested interest, there is much room for self-serving uses (or abuses) of international law.

With references to the right treaties and a generous interpretation of ambiguous wording, critics charge, almost any action can be supported with a plausible legal justification.

Foreign ministries in all countries, including the U.S. State Department, employ staffs of very smart lawyers to do just that. The number of times they have been unable to do so can be counted on a few fingers.

Nations rarely alter their behavior to conform to international law. It is more likely that nations will twist international law so that it conforms to their behavior.
In order for a legal system to work properly, it must enjoy compulsory jurisdiction.

**compulsory jurisdiction** - When legal bodies can force parties to appear before them and be bound by their final decisions. Domestic legal systems usually enjoy compulsory jurisdiction, whereas international legal bodies do not.

Domestic legal systems are effective because “the jurisdiction of national courts is compulsory. Any person cited before a court must enter an appearance or lose his case by default; and the decision of the court is binding on all concerned.” Individuals charged with crimes cannot opt out of the process.
INTERNATIONAL COURT OF JUSTICE (ICJ)

- Among existing international courts, the International Court of Justice (ICJ), also known as the World Court, headquartered in The Hague, Netherlands, is the most important. The ICJ is the judicial branch of the United Nations.

- Any state can bring a case when it feels its rights under international law have been violated. The ICJ, however, is not a terribly busy court—between 1946 through the end of the 1980s, the court heard fewer than ten cases in each decade. The U.S. Supreme Court hears more cases in just two or three years than the ICJ has heard in almost fifty.

- Nonetheless, the ICJ provides something that at least gives the appearance of an international legal system.

- The decisions of the ICJ are enforced by the U.N. Security Council unless a member of the Council uses its veto power.
The problem is that nothing compels states to attend trials or abide by the court’s verdict.

The Statute of the International Court of Justice (the treaty creating the ICJ) contains an optional clause allowing states to choose whether to be subject to the compulsory jurisdiction of the ICJ.

Less than one-third of states have accepted the compulsory jurisdiction of the ICJ by signing the optional clause. Even nations that sign the optional clause can specify conditions under which they will not automatically recognize the court’s jurisdiction.

When the United States signed the optional clause in 1946, it stipulated reservations so broad as to totally negate the principle of compulsory jurisdiction.
THE U.S. SUED AT THE INTERNATIONAL COURT OF JUSTICE (ICJ)

- During the 1980s, the Reagan administration pursued a controversial policy of aiding anticommunist rebels fighting to overthrow the Marxist Sandinista government of Nicaragua. In addition to providing money and arms to the “contra” rebels, the United States also mined harbors within Nicaragua’s territorial waters.

- In 1984, Nicaragua asked the ICJ to determine whether U.S. actions violated international law. The United States first challenged the ICJ’s jurisdiction over the matter. The ICJ rejected this challenge and heard the case, issuing a preliminary opinion ordering the United States to cease its mining of Nicaraguan harbors. The United States ignored the order and removed itself from the entire process in January 1985.

- In 1986, the ICJ ruled in support of Nicaragua, declaring the United States in violation of international law. The United States ignored the court’s ruling. When Nicaragua brought the matter before the United Nations Security Council to have sanctions imposed, the United States exercised its veto.
RUSSIA SUED AT THE INTERNATIONAL COURT OF JUSTICE (ICJ)

- In September 2008 Georgia requested an emergency ruling from the ICJ against Russia’s military actions in disputed Georgian territory.

- In April 2011 the court dismissed Georgia’s complaint. But even if Georgia had prevailed, any sanctions would have had to be imposed by the UN Security Council. Because Russia enjoys a veto, the likelihood that this would have happened is minimal.

- To those skeptical of the value of international law, this is perhaps its most critical weakness, because “no legal system can be effective in limiting the activities of its subjects without compulsory jurisdiction over their disputes.”

- Shimko claims that “the general problem and inherent weakness of the ICJ is the enduring principle of state sovereignty.” Is it state sovereignty, or uneven power of member states of the U.N., or both?
In addition to compulsory jurisdiction, a clear judicial hierarchy is another essential element of an effective legal system. Such a hierarchy requires the existence of lower and higher courts with a definite line of authority. Higher courts fulfill several functions:

- First, parties unsatisfied with lower court decisions can sometimes appeal to higher courts.
- Second, when lower courts issue contradictory rulings, higher courts decide which ruling prevails.
- Third, the highest courts, such as the Supreme Court in the United States, establish precedents, or interpretations of laws that lower courts are bound to obey.

The international legal system does not have an effective legal hierarchy. The ICJ does not stand over national courts in the same way that the U.S. Supreme Court does over district or state courts.
Historically, realists have been most **skeptical about the value of international law.**

It is easy to understand why. Realists typically emphasize the fundamental difference between domestic and international politics, namely **the absence of a central political authority on the global level.** This is the “first fact” of international politics for realists.

To the extent that criticisms of international law stress the absence of institutions to create and enforce laws, they reflect this basic realist tendency to see the international realm as distinct from the domestic realm.

Realists would also agree that “**the fundamental difficulty of subjecting states to the rule of law is the fact that states possess power.**”

It is not just that international law will be pushed aside when critical national interests are at stake, but that international law should be ignored if it conflicts with fundamental national interests, realists believe.
At an even deeper level, realists (and, interestingly, Marxists) argue that international laws and norms are themselves reflections of power.

International law does not just appear out of nowhere. It originates in concrete social-political settings in which power and resources are unequally distributed. The norms and rules that prevail in any society are likely to be consistent with the interests of those with the power to create and enforce them.

Most contemporary international law originated in Europe beginning in the 1600s and developed over the course of the last four hundred years. “Most developing countries were under alien rule during the formative period of international law, and therefore played no part in shaping that law.”

As a result, it would be naïve to assume that international law has not been influenced by the particular values and interests of European societies.
As stated earlier, Marxists also argue that international laws and norms are themselves reflections of power.

“Law has the inclination to serve primarily the interests of the powerful. ‘European’ international law, the traditional law of nations, is no exception to this rule.”

Such principles as freedom of the seas and the protection of private property no doubt serve the interests of those with the power to use the seas and possess the property.

According to Lenin, law (domestic and international) is but the “formulation, the registration of power relations ... and expression of the will of the ruling class.”

On this issue at least, realists would agree with Lenin.
CRITICISM OF REALIST VIEWS

- There are essentially three arguments advanced by those who see international law as a powerful constraint on state behavior. These defenders of the international law are predominantly liberals.

- 1. **selective focus** - critics of international law tend to exaggerate its shortcomings by focusing on a handful of spectacular failures and attacking an unrealistic, almost straw-man, vision of what international law can accomplish.

- 2. **voluntary acceptance** - nations almost always abide by international law for many of the same reasons people abide by domestic laws even in the absence of a government.

- 3. **underestimation of IL** - critics tend to underestimate how powerful international laws and norms can be in altering and shaping state behavior.
Extreme criticisms of international law as a worthless sham often highlight some of its more spectacular failures, and there are plenty to choose from. A favorite example from the 1920s is the Kellogg-Briand Pact (1928), or the “General Treaty for the Renunciation of War,” which was signed by sixty-five states, including Italy and Japan.

The pact obliged signatories to renounce war as an instrument of policy and to settle their disputes peacefully. Though many at the time realized the treaty for what it was—an unenforceable statement of moral aspirations—others actually believed that it could transform international politics.

Although the attempt to abolish war by treaty appears silly in retrospect, the failure of the Kellogg-Briand Pact provides a good basis to begin understanding what international law realistically can and cannot accomplish.
NATURAL VS. POSITIVE LAW TRADITIONS

- A natural law approach is driven by a moral analysis, whereas a positivist approach rests on a behavioral analysis.

- natural law tradition - A tradition that holds that universal moral principles should form the basis for laws. Usually contrasted with the positive law tradition.

- positive law tradition - A tradition that holds that laws need to take into account the ways in which people (and states) actually behave. Attempts to rigidly translate moral principles into law without regard for the realities of human behavior are unlikely to be very successful.

- Within the natural law tradition, the logic of Kellogg-Briand was simple: if war was wrong, it should be illegal, case closed.
We are fortunate, for example, that laws against murder are consistent with both moral absolutes and actual behavior.

One of the earliest positivists, Niccolo Machiavelli (1469–1527) warned of the dangers of excessive moralism: “The gulf between how one should live and one does live is so wide that a man who neglects what is actually done for what should be done learns the hard way to self-destruction.”

From a positivist perspective, the purpose of law is not to radically alter most people’s behavior, but rather to punish and alter the behavior of the handful of people who are inclined not to follow these norms.
TYPES OF COMPLIANCES & IMMUNITY TO LAW

- **identitive compliance** - The fact that people and nations usually abide with laws not out of fear of punishment but because the laws embody norms that are viewed as right.

- **utilitarian compliance** - When people or states abide by laws because they think it is in their interests to do so.

- **diplomatic immunity** - The principle that nations cannot try and punish diplomats of other nations who violate their domestic laws. This is an example of an international law that emerged first through custom but was eventually codified in treaties.
**REPRISAL**

- **reprisal** - An act that is normally a violation of international law but that is permitted as a response to another nation’s violation of international law.

- **collective reprisal** - Under international law, the ability or obligation for all states to punish those who violate international law (as opposed to only those states whose rights were violated).
Though they agree that self-interest is a powerful motive for state compliance with international law, **liberals are more likely to interpret state behavior as resulting from ethical and moral considerations**, what we have termed **identitive compliance**.

Remember that liberals view people as essentially rational, reasonable, ethical, and moral beings. Because states are collections of people, state behavior reflects many of the same traits. This perspective provides a much more optimistic vision of the potential of international law.

There is a realization that international law cannot completely ignore the realities of **power politics**. But utopian idealism does not have to be replaced with dismissive cynicism. Even if international law cannot bring world peace, it can significantly ameliorate the imperatives of power politics, liberals believe.
National interest is not something nations discover like scientists discovering the laws of physics. It is not an objective fact; national interest is a subjective and variable social construction.

“Two centuries ago it was acceptable to wage war with hired foreign mercenaries; now it is not. Killing and enslaving the inhabitants of conquered countries, a common if brutal practice in Thucydides’ day, would make a state a total outlaw today. Wars to acquire territory, normal enough in the seventeenth century, are increasingly regarded as unacceptable.”

What do you think of these claims by constructivists?