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1

Introduction

—Well what would you do if you were the king? asked the prince.

—I would do absolutely nothing

—And who then would govern?

—The Laws!

—FRANÇOIS QUESNAY TO THE DAUPHIN, CITED IN BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS*

Aerial drones, humanitarian intervention, cyberattacks, torture. The big debates in world politics today are inseparable from international law. Controversy over what is and is not legal is standard fare in international conflicts, and commitment to rule of law is presumed a marker of good governance. Rule following is said to lead naturally to more desirable collective outcomes.

This *legalization* of global affairs is widely viewed as a progressive advance on earlier conditions. No longer must self-interest, coercion, and power politics dominate decision making. Now the rule of law is cited as the remedy for human rights abuses, domestic dictatorship, international war, and other problems.¹ For instance, as Anne-Marie Slaughter says, it is “far better to resolve boundary

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issues in the South China Sea multilaterally by agreed-upon rules of the game than unilaterally by the strongest nation.”² Along with scholars, governments, activists, and nongovernmental organizations (NGOs) routinely emphasize the significance of international law and urge states and nonstate actors alike to conform to its requirements. The United Nations recently established a bureau to promote and coordinate its rule-of-law activities internally and around the world.³ The Pentagon opened its Office for Rule of Law and International Humanitarian Policy in 2010. In these efforts, the rule of law appears as a charmed concept, outside politics, without doubters and without critics. Keally McBride says it is treated “as a largely uncontested self-evident good.”⁴ As Quesnay said to the dauphin, let the laws themselves rule. Yet the politics of the international rule of law are not so simple and are rarely investigated directly.⁵

In this book, I look at how the concept is used in world politics and to what ends. My goal is to better understand the power and politics of international law.⁶ I show that international law is properly seen not as a set of rules external to and constraining of state power but rather as a social practice in which states and others engage. They put the political power of international law to work in the pursuit of their goals and interests.

Governments use international law to explain and justify their choices. This is both constraining and permissive. On the one hand, states must fit their preferences into legal forms. On the other hand, they are empowered when they can show their choices to be lawful. Thus international law makes it easier for states to do some things (those that can be presented as lawful) and harder to do others (those that appear to be unlawful).

The legalization of politics is permissive even as it imposes limits. States strive to fit their policies into the categories of international law, showing themselves to be compliant with their obligations. But in doing so, they appear to depoliticize their choices. Compliance with the law becomes the marker for acceptable

policy, masking the substantive politics of the situation and the law itself.

This is not to say that law never limits state power. It can be a source of individual emancipation and a bulwark of human rights. Beth Simmons reflects this conventional view when she says, “It is precisely because of their potential power to constrain that treaty commitments are contentious in domestic and international politics.”⁷ But it is not necessarily so. Against the “enchanted” view of law as naturally progressive and protective against state power, I suggest we adopt a more empirical attitude in which law’s normative valence is a question for investigation rather than assumed in advance. Drawing on several case studies, I will argue that attention to the actual content of international law as well as its application and interpretation demands new conclusions about law’s political implications. We cannot get away with assumptions of inherently superior, apolitical rule following.

In part this is because the rules themselves mutate according to political exigency. If law were above politics, it would be easy to distinguish between the legality and illegality of foreign policy choices. But, in the cases I examine, international law does a notably poor job of differentiating compliance from violation. For instance, despite decades of debates, it remains unclear just what kinds of force may be justified under the laws of self-defense. Even the general parameters of self-defense have changed over the years with shifting circumstances—specifically, as powerful states come to need or desire new legitimations for new forms of war in relation to new forms of threat.⁸ In other words, the contents of the law change through its use. I also find that international law is often much more successful at constituting and legitimating government policies than at positively distinguishing between compliance and noncompliance. The international rule of law is thus a permissive regime as much as a constraining one, and its relationship to power is more complicated than standard assumptions acknowledge.

The International Rule of Law and Its Politics

In 1908, Lassa Oppenheim looked forward to the day that historians would declare the “ultimate victory of international law over international anarchy.”⁹ According to many liberal internationalists, the international rule of law brings us closer to that day. G. John Ikenberry says we live in a “rules-based international order.”¹⁰ John H. Jackson, the eminent international trade lawyer and scholar, takes this view to the extreme when he says, “To a large degree the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, to a rule-oriented approach.”¹¹ It is a good thing, too, according to President Dwight David Eisenhower. Faced with the threat of nuclear proliferation, Eisenhower propounded the liberal perspective in which law is an *alternative* to power: “In a very real sense the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.”¹² Compliance with law is equated with political order, stability, and peaceful settlement of disputes, while failures to abide by the rule of law are said to provide the raw materials for innumerable international crises.

In this account, law is a counterpoint to power. Obligation to comply with law binds governments acting internationally in much the same way law binds individuals within states. Through law, governments escape a global Lockean state of nature: agents recognize their weakness and the dangers of anarchy and so consent to limits on their absolute freedom, thereby establishing a political system that better serves their individual and collective needs.¹³

The domestic model of law and legal obligation, however, does not translate well to the international realm. The conventional account of international law, based in this model, both overstates and understates the power of the rule of law in international affairs. It overstates because states do not automatically and unproblematically comply with international law, as individuals generally

do with respect to domestic law. Governments frequently break, ignore, avoid, and redefine their international legal obligations. Thus, as many have noted, the regulative capacity of international law is weak.¹⁴ Moreover, many of the most important rules of international law permit fundamentally conflicting interpretations. As a result, it may not be possible to identify clearly what compliance means in order to assess rule following versus rule breaking.

At the same time, the conventional view understates the power of international law because it begins with the assumption that the power of law rests in its capacity to limit strong actors. If law can't constrain the powerful, it is said, then it is probably not doing its job.¹⁵ But the focus on constraint is misplaced. It rests on a narrow conception of law and legalization along with an unrealistic ideal-type view of law's relation to politics. Law has power to constrain, but it also has powers to authorize, permit, and constitute actions. Legal realists of various types and constructivists in international relations (IR) emphasize these powers.¹⁶ As I show in the following chapters, the instrumental use of law to legitimize state policy is ubiquitous.¹⁷ For instance, law is used in public diplomacy to explain and frame competing policy choices, and as such, offers resources states rely on.¹⁸ In this sense, international law is pervasive and even foundational in global affairs. It shapes the context in which governments operate and provides the raw materials with which foreign policy is pursued.

In practice, international rules provoke two kinds of interpretation, which complicates their meaning. Participants in international law interpret rules in order to provide an account of what actions are allowed or forbidden, and they interpret the case at hand in order to know how it fits with those rules. It is therefore hard to establish clean boundaries among states, their interests, and the meaning of international rules. These processes are also open to nonstate actors, and while I do not focus on them here, it is apparent that much of the politics of international law happens in a broader public domain, beyond formal state or legal settings.

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For example, the NGO Sea Shepherd says it is enforcing the International Convention on the Regulation of Whaling when it interrupts Japanese whale hunting in the southern ocean.¹⁹ Similarly, the Institute for Development and Justice in Haiti, a US NGO, claims its efforts to gain compensation for cholera victims in Haiti are authorized by the Status of Forces Agreement between the United Nations and Haitian government.²⁰ The various parties to international law, whether states or otherwise, are constantly rewriting the rules as a function of their deployment.

Scope and Goals of the Book

The idea that state behavior should be consistent with international law is deeply rooted in international law and politics, both in practice and scholarship. This demand for compliance constitutes the ideology of the rule of law and carries important consequences for the conduct of international affairs.²¹ Among these is the political legitimation that comes from being seen as compliant with international law. This is attractive to states. On the flip side, international actors can undermine others' power by showing that they are violating the law. What I've sketched here is a political understanding of law by which I mean the recognition that law produces both winners and losers. States and rules are mutually implicating, law and politics inseparable. This leads away from the conventional view in at least three ways.

First, my understanding avoids much of the debate about the "true" meaning of international legal rules. This is a major concern among theorists and observers of international law. The ability to differentiate compliance and noncompliance is often taken to be the hallmark of a well-functioning legal system; the rule of law itself is usually said to require that actors be able to distinguish what is legal from what is not, and international law is frequently faulted for its inadequacy on this point, particularly for the lack of a judicial branch with automatic jurisdiction over interstate disputes. To remedy this apparent problem, scholars and others invest in codification, the "rational design" of international institutions,

and other projects that aim to clarify the meaning of existing laws or institute better ones.²² Relatedly, much social science scholarship on international law asks whether the law induces states to change their behavior, from noncompliance to compliance.²³ This is consistent with the tradition of positivism as a research method: positivists look for the causal impact of an independent variable (international law) on a dependent variable (state behavior). Both positivist social science and rational design require that the law be separate from and prior to the behavior it governs.

In the chapters that follow, a stable notion of compliance is elusive, at least with respect to a large subset of important international legal obligations. So there can be no comparison between law and practice. Contestation over the meaning and application of law is endemic to law's political uses and effects. Indeed, compliance may be a political rather than legal artifact—the thing being contested as opposed to an external standard that can be applied to behavior. To assess an actor's compliance with international law involves more than reading formal sources of law. It also entails the rendering of political judgment about what policies deserve to be endorsed. Put another way, international law cannot be separated from state practice, and state practice does not exist independent of the legal explanations, justifications, and rationalizations that governments give for it. Debates about the true meaning of international rules therefore are bound to be inconclusive. If we are to understand what international law is and is used for, we need a research methodology attentive to the mutual constitution of states and rules.

Second, I depart from conventional readings of international law by highlighting the dialectical relationship between state policies and international rules. It is not just that the meaning of international law shifts under the influence of state practice. The relationship between state interests and international rules is bidirectional and mutually constituting. Governments rely on international law to construct their foreign policies and in so doing contribute to remaking those rules. State practice is jurisgenerative of international law: it creates the resources that constitute it.

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For instance, the debate over whether the US drone program is legal or not depends on how states have in the past given meaning to various legal categories and concepts, including interstate war, the Geneva Conventions and other instruments, the legal personality of nonstate actors, and command responsibility.

When states use the legal resources of the international system to explain or justify their actions, they change how those resources are understood for purposes of future cases and thereby refashion the law in ways that influence policy choices.²⁴ Thus the categories of “lawful” and “unlawful” are closely related to states’ interests, desires, and past and present choices. The distinction between legality and illegality, on which positivist accounts of international law rest, is both an output of state practice and an input to it.

This point has substantive and methodological implications. Substantively, it means that we should not treat states’ references to international law as easy rhetoric or cheap talk. To do so overlooks the investment in law and legal language: states feel pressure to frame their actions as rule abiding and consistent with their legal obligations. When they do so, they can reap political benefits. Couching actions in law is not the same as complying with law, but this does not mean that compliance is irrelevant. My point is that what it means to comply, to act consistently with one’s obligations, is the currency of contestation in the politics of international law.

Scholars have recognized international law’s susceptibility to manipulation but often draw from this overly narrow conclusions. For instance Stephen Krasner shows that leaders use the rules of state sovereignty to strengthen their claims on power but argues that this instrumental manipulation signals the weakness of those rules.²⁵ Yet we might instead say that there is productive power in the rhetorical use of these rules. Openness to this possibility is the beginning of inquiry into how such power works and what it yields.

From the standpoint of methodology, the mutual constitution of states and rules means the two cannot be isolated and treated

as distinct variables. State interests are not independent of the legal resources in the international system, and legal resources are not independent of state interests. To understand how international law works, then, we must employ new research approaches attentive to its use rather than ideal theories of what law is.

The third novel contribution of this book follows from the previous two. By bringing together political power and international law, I address some of the problems that arise when they are kept apart. This forced separation conditions international politics—and the study thereof—in at least three important ways. First, under the regime of separation, states are asked to prioritize between their self-interests and the communal position, where the former is unstructured by law and the latter is law defined.²⁶ Second, IR theory then divides between realists—who a priori expect the nonlaw position to prevail—and liberals—who believe that well-crafted law suits the mutual interests of states and may therefore hold sway in certain circumstances.²⁷ Finally, separation tends to elevate law's standing because law is thought to closely model morality and foster collective progress, while power and politics are associated with coercion, disorder, and unilateralism.²⁸

This book shows that international law and international power cannot be separated, and in doing so, rejects the assumed opposition between the two. Where scholars in the liberal tradition celebrate international law for its capacity to protect human welfare against state power, I argue that lawfulness confers political legitimacy and may or may not limit states' power and flexibility. Law itself has no preference for human welfare. The legalization of international politics may reduce coercion and destruction, and it may strengthen states' ability to make war or deploy drones.

This malleability reflects the sources of international rules and patterns of rule following. Rules are constructed through negotiation among motivated actors seeking to shape the legal landscape to suit their interests. Powerful actors presumably have more success in these negotiations than do weaker ones. Once rules are in place, agents try to bring them to bear on disputes and policies in

ways that, again, suit their interests. Here, too, state power is in play. Strong states can more easily shoulder the costs of international rule breaking than can weaker states, as the United States showed in the Iraq invasion of 2003. And when strong states break rules, their choices may be taken as evidence of a change in the rules. Rule breaking by weak states is less likely to have such effect.²⁹

Accepting that international law is a function of political power does not mean adopting the perspective of IR realists. To see why, we must get a handle on just what realists believe. For some IR scholars, anyone attentive to differences in the use of power is a realist.³⁰ This is misleading. Realism does not have a monopoly on the study of international power politics; indeed, most approaches to IR, from realist to constructivist to Marxist to critical theory and more, are interested in power.

What distinguishes IR realism is its particularly narrow conceptualization of power in terms of military and industrial capacity.³¹ Thus realism's characteristic concern with comparative access to military hardware. For realists, fighting capacity is distinct from, and more important than, power found in law, morals, ideas, concepts, or identities. By contrast, other approaches see these as sources or expressions of power. For instance, Benno Teschke, arguing for a wider conception of power, sees state sovereignty itself as a function of the power of international capital and demands of the capital-controlling class.³² Charlotte Epstein examines power mobilized in the 1970s through the rising antiwhaling discourse, which had profound consequences for the legal regime of the International Whaling Commission.³³ Andrew Guzman sees reputation as a form of power among states, a kind of currency with its own economy. The desire to cultivate a good reputation induces states to take certain actions and refrain from others even when they perceive benefits from acting differently.³⁴

In all these cases, international law is at once a potential constraint on the power of states, a tool with which states can increase their power over others, and a by-product of some actors' power. It is thoroughly implicated in power politics. In sum, that interna-

tional law is politically useful does not demonstrate the triumph of realist “Machiavellian parochialists.”³⁵

The usefulness of international law is acknowledged in the concept of *lawfare*, the strategy or tactic of using international law to pursue goals.³⁶ The term has come to be associated with *abuse*: in an unwelcome development, weak states illegitimately use international law to constrain the strong.³⁷ But it is a mistake to identify lawfare as an aberration or solely a weapon of the weak. Lawfare is better seen as the typical condition of international law. Indeed, law is more likely to serve as a tool of the strong than of the weak, since it is the strong who have the greatest influence over the design of international rules and the greatest capacity to both deploy and evade them. This is evident in US liberal internationalists’ enthusiasm for international law. Many see international institutions and law as protecting US interests and hope that other states will accede to the existing rules rather than attempt to rewrite them.³⁸

The chapters that follow explore these themes in detail. I show that states remake international law as they use it to pursue their interests. Those states are simultaneously bound and empowered. Practice, legality, and state interests are mutually implicated, and the international rule of law is the institution that emerges from their repeated interaction. Indeed, the strategic use of international law *is* international law.

The International Rule of Law in Practice: Cases and Chapters

The conventional perspective on the international rule of law is Lockean: law amounts to “externally imposed obligatory constraints”—freestanding rules and institutions that exercise authority over states.³⁹ In chapters 2 and 3, I explain my alternative view. I then document it in chapters 4 through 6, focusing on cases demonstrating law’s capacity to enable, permit, and constitute state action.

Chapter 2 looks at the domestic rule of law and its uneasy translation to international politics. The central claim is this: the domestic rule of law is in effect when there exists a set of stable public laws binding in theory and practice on both citizens and the state. As Rosa Brooks puts it, “At root it’s pretty simple. The rule of law requires that governments follow transparent, universally applicable, and clearly defined laws and procedures.”⁴⁰ From this broad notion come disagreements about the content and nature of the rules and their effects.

There are two main lines of debate in existing literature on the domestic rule of law. The first asks whether individual human rights and collective social welfare are effects of the rule of law or constitutive of it. This produces a distinction between formalist and substantive theories of the rule of law. The second debate involves how the rule *of* law can be distinguished from rule *by* law, in which the state uses the framework of law instrumentally to legitimate and reinforce its domination.

Three claims about the rule of law are constant across these debates: that rules should be public and stable, that rules should apply to the government as well as the citizens, and that the rules should be applied equally across cases. None of these translates easily to the realm of international law. I therefore argue that domestic rule of law provides an unsuitable model for an international equivalent.

Drawing on legal realism and practice theory in IR, chapter 3 presents an account of the international rule of law that reflects the particular dynamics of international politics. On this reading, the international rule of law is a social practice that states and others engage in when they provide legal reasons and justifications for their actions. The goal may be either political legitimation for oneself or delegitimation of adversaries. This sort of use of international law both relies on and reinforces the idea that states should act lawfully rather than unlawfully. The priority of lawfulness is taken for granted.

The approach I outline in chapter 3 helps to make sense of international law's contribution to contemporary disputes and crises. In chapters 4, 5, and 6, I examine the relationship between international law and war, torture, and drones. Each is a highly legalized corner of international politics. Governments expend considerable effort to present their positions as consistent with international law and characterize their opponents as violators. International legal instruments, from the Charter of the United Nations to multilateral treaties, largely provide the terms of debate. Despite—or perhaps because of—this high degree of legalization, what constitutes compliance with international law is contested and perhaps unresolvable.

In the disputes I examine, all players profess their commitment to the rule of law and their intent to fulfill specific international legal obligations. But the distinction between legality and illegality in these cases is more political construction than legal fact. Determination of lawfulness follows use of international law rather than preceding it.⁴¹ Moreover, in each dispute the protagonists provide legal interpretations motivated by the desire to legitimize their actions through law. Thus the teleology of their legal reasoning points toward their own interest, and state practice shapes the content of international law toward the preferences of strong states.

The meanings of key legal terms in these disputes are neither self-evident nor matters of consensus. In the course of the disputes themselves, the legal terms are interpreted by various parties, always in ways that are informed by their interests. To explore this, I follow methods similar to those Bernard Harcourt, Helen Kinsella, and others use to study category distinctions in other settings. In *The Illusion of Free Markets*, Harcourt looks at the social construction of the divide between free markets and government regulation.⁴² Kinsella, in *The Image before the Weapon*, focuses on the differentiation of civilians and combatants in the laws of war.⁴³ As with legality and illegality, these distinctions are made instead

of found. They rely, as Kinsella says, on “an established rather than an inherent contrast,” yet they carry significant political consequences in the world.⁴⁴

To see the difference between established and inherent contrast, consider the US use of drones in war against terrorists and other kinds of enemies. Is it legal? The conventional approach to international law suggests that US policy makers should consult written conventions to determine under what circumstances the use of drones is legal, then decide whether the current circumstances suit that definition, and finally make a choice informed by this consultation.⁴⁵ They may decide to cross the line into illegality; the standard model does not predict that they will comply with the law, only that the law will help organize foreign policy choices into legal and illegal options.

Missing from this process is the connection between law and politics, and therefore the controversy inherent in the matter. The legality of today’s drone warfare is controversial because it is not clear which legal resources are relevant to the practice and because the choice of resources is inseparable from one’s position on the desirability of the activity itself.

When we take stock of the underlying legal questions, it becomes clear that the answers have significant political implications. Are drones like conventional aircraft bombers and so governed by preexisting rules concerning the dropping of bombs in times of war? If so, the questions relevant to legality include the belligerent status of the United States and the state where the drone is operating; the *jus in bello* rules of proportionality, distinction, and necessity; and more. Then there is the further question of whether the current situation is a war in the international legal sense, and if so, between whom? Or are drone killings more like political assassinations? In that case, the laws of war are irrelevant. Do the people targeted for killing by drones share a corporate identity with the people who organized the 9/11 attacks? If they do, then killing them may represent a lawful use of force in self-defense under the UN Charter and the Authorization for Use of Military

Force in US law.⁴⁶ Do due process rules apply? Do the targeted individuals have rights, and if so, of what kind and in which jurisdiction?

Deciding whether the United States is complying with international law requires answering these questions and more, but the choice of questions themselves is a matter of political determination. So the legality of the conduct can be assessed only after rounds of political interpretation. Policy makers, scholars, and military officials are equally at sea when it comes to understanding how to apply international law to drones, with the result that the generic policy commitment to comply with international law has little content.

Despite this, US officials have sought a legal framing in which drone killings appear lawful. This suggests politics at work: the politics of international law require that the United States provide a legal defense of its drone policy even where there exists no coherent body of law to appeal to. And the outcome of this political work, so far, indicates law's permissiveness. Choices about which law is relevant are motivated by the consequences they generate for the legality of the policy itself: critics of the drone program ask legal questions that lead to a finding of illegality, while drone enthusiasts ask legal questions that produce the opposite result.

It is tempting to assume that the ambiguity surrounding the legality of drone-based killing—and the exploitation of that ambiguity—is a function of drones' novelty. But the problem is not that drones are a new technology. The political utility of legal justification is not limited to novel policy questions. The political productivity of law exists by virtue of legalization itself—in the fact that legal resources are used to legitimate and delegitimize political conditions or decisions.⁴⁷ This is true whether or not the contested behavior is well established.

To illustrate this, chapter 4 examines a classical area of international law: the use of force by states. The ban on war is often cited as the centerpiece of the modern international legal-political

system and used to distinguish the contemporary age from earlier, less legalized periods.⁴⁸ Liberal convention sees the ban on war as a legal constraint on states' political choices; states seeking to uphold the international rule of law are advised to refrain from using force against other states.

But this understanding is flawed. The UN Charter outlaws some kinds of war and permits others, such as those undertaken in self-defense. I show that the Charter is a mechanism by which law sorts the motivations for war into lawful (self-defense) and unlawful (all others) categories. It thereby creates a framework to legitimate wars and reduce their political costs. The Charter is not antiwar: it is explicitly permissive of war so long as the claimed motive is self-defense.

Chapter 4 also charts how the law has changed since 1945 in response to changing state practice. In particular, the understanding of what is permitted and forbidden by the self-defense exemption contained in Articles 2(4) and 51 of the Charter has shifted. As the perceived dangers in the international system have changed, states have changed the rules so that they can use force without leaving the confines of legal behavior. The definition of legal use of force thus internalizes states' interests in two distinct ways: first, because states are permitted to use force in response to perceived threats originating in other states; second, because post-1945 interpretative practice has removed the limits of time and space implied in Article 51 of the Charter. The ban on war after 1945 has produced a legalized version of the nineteenth-century rationale for war: *raison d'état* supported by legal justifications.

Chapter 5 explores the legality of latter-day weapons—specifically, nuclear arms and lethal drones—to consider the potential for voids in the coverage of international law. When technological or other developments enable previously inconceivable kinds of warfare, states face open legal questions. Recent debates over the legality of US drones illustrate this, as do earlier debates about the legality of nuclear arms. The weapons arise in a kind of legal vacuum, empty of specific regulation. Drawing on these examples, I

consider the power of the international rule of law in situations where there may be no law.

With respect to nuclear weapons, the International Court of Justice decided that despite there being no directly applicable laws, use is nonetheless governed by international law. Rules designed for other weapons are relevant, as is a general principle that in the end, international law must defend states' rights to protect their national security as they see fit. These two sets of resources—general principles and analogies to other laws—are also important in legal debates over drones today: the lawfulness of drones as instruments of war is inferred from the legality of what are said to be analogous weapons from earlier times, and the needs of the state are internalized in legality debates through the mechanism of self-defense. The perception of threat justifies the legality of the military action, in a self-fulfilling circle of interiorization.

These debates reveal the inescapability of international law: it fills legal dead zones, as if under the influence of a horror vacui. Even a new policy, one for which treaties and custom have not yet been created, is seen as already structured by international law. The prelegalization condition, which presumably exists before law is written and on which much of the legalization literature in IR depends, does not exist. Law-free policy space is impossible.

The legal status of torture is the subject of chapter 6, where I examine the implications of an international ban on torture that coexists with a nontrivial level of torture in practice. This is not simply a case of torture law being violated. There is wide, perhaps-unanimous, agreement that torture is prohibited by international law, and the legitimacy of the ban is rarely contested. The rule is established most directly by the Geneva Conventions and 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT), but it is also widely held that torture is outlawed under *jus cogens* norms intrinsic in the international system.⁴⁹

Despite this, many governments engage in practices that seem clearly prohibited by laws against torture. Much of this behavior

comes with detailed defense of its legality. Thus the politics of torture generally address questions of what constitutes torture, not concerns over the ban itself. The connection between law and behavior does not fit neatly into categories of compliance and violation, and the politics overflow the bounds of these positivist legal containers. For example, the US government in the 2000s encased its use of torture in an extensive legal framework drawn from international sources including the CAT. International lawyers, largely unconvinced, disputed the contention that US torture was lawful.⁵⁰ But the fact that the US government attempted to justify its behavior using legal resources designed to forbid torture speaks to the political power of international law. Such efforts illustrate what Scott Veitch calls law's capacity to define "irresponsibility"—that is, law can define an actor as not responsible for the harms it has caused.⁵¹ This is precisely how Bush administration used antitorture law: to demonstrate that its actions were not subject to the rules. Officials sought a zone of legally protected irresponsibility. They used international law against torture as tools to legalize torture.

Each of the cases detailed in this book shows different aspects of the relationship between international law and world politics, but all serve the same goal: to illuminate the international rule of law as it actually exists. On the basis of this history, I conclude in chapter 7 that the international rule of law is a structure of political authority. It creates a hierarchy in international affairs in which legal obligations are superior and governments are subordinate. The structure depends on and is reinforced by the widespread practice of legal justification by states. Within that structure, international law is at once constraining, empowering, and constituting of the foreign policies of governments. I use the language of "empire" to describe this structure. It is a centralized and hierarchical system that unites its subjects under a single political authority, the empire of international legalism.

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