Introduction

International law scholarship has long been obsessed with trying to explain and predict *why* and *when* states comply with international law.[1] Is it because of pure self-interest,[2] reputation,[3] or domestic pressure groups and internalization,[4] or perhaps explained by a sense of legal obligation or the legitimacy of the norm itself,[5] or rather due to

[1] For a review of the literature on compliance, see Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," in Walter Carlsnaes *et al.* (eds.), *Handbook of International Relations* (London: Sage, 2002), 538; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995); Michael Zurn and Christian Joerges (eds.), *Law and Governance in Postnational Europe: Compliance beyond the Nation-State* (Cambridge: Cambridge University Press, 2005); Oona Hathawa, "Do Human Rights Treaties Make a Difference?" (2002) 111 *Yale LJ* 1935; Ryan Goodman and Derek Jinks, "How To Influence States: Socialization and International Human Rights Law" (2004) 54 *Duke LJ* 621.

[2] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

[3] Andrew Guzman, "International Law: A Compliance Based Theory" (2002), 90 *California LR* 1,823.

[4] Harold Koh, "Why Do Nations Obey International Law?" (1997), 106 *Yale LJ* 2,599; Beth Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs" (2000), 94 *Am Polit Sc R* 819; Claire R. Kelly, "Enmeshment as a Theory of Compliance" (2005), 37 *NYUJ Int L Polit* 303.

[5] Thomas Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990).

bureaucratic networks[6] or the personal psychology of political leaders?[7] This approach has consistently overlooked a logically preceding but no less important question: assuming, for a moment, that the necessary tools are available to induce or even force states to comply – whatever these tools may be, based on one's theory of compliance – how strongly *should* international law be protected? In other words, how strongly *should* states bind themselves to international law? I deliberately use the broader terms "protect" and "bind" as I want them to cover three distinct questions:

1 How easy should it be to create and change international law?
2 Must international law always be specifically performed or should states be given an opportunity to "pay their way out"?
3 In the event states do violate their commitments, what kind of back-up enforcement or sanctions should be imposed?

In recent decades, international law has come to address the full panoply of concerns of the regulatory state, ranging from individual human rights to the domestic regulation of commerce and the environment.[8] Faced with similar expansion and diversity, no single domestic legal

[6] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Manuel Castells, *The Rise of the Network Society* (Oxford: Blackwell, 1996).

[7] William Bradford, "In the Minds of Men: A Theory of Compliance with the Laws of War" (2004), 36 *Arizona St LJ* 1,243, at 1,438 ("much of the variation in compliance is attributable to personality" of government leaders).

[8] See Joseph Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy" (2004), 64 *ZaöRV* 547.

system requires absolute protection, or imposes the same sanctions, for all legal commitments. Constitutions are normally written in stone, while contracts can simply be renegotiated. Where certain statutory obligations can be bought off, others, such as those under criminal law, cannot be transferred as between private individuals. Theft is sanctioned more heavily than breach of contract, and remedies for constitutional violation are more forceful than those for statutory breach. Considering the current state of international law, in contrast, the levels and types of protection or "bindingness" of international law commitments are surprisingly uniform (besides so-called soft law, a set of norms not tackled in this book). Yet, in recent decades, some variations have emerged. The aim of this book is to elaborate a framework of variable protection for international law based on current examples as well as analogies with legal scholarship centered on domestic legal systems. Far from a concession to weakness, variable protection of international law is the logical result of its success and further refinement. Rather than undermining international law, variable protection takes the normativity of international law seriously and calibrates it to achieve maximum welfare and effectiveness at the lowest cost to contractual freedom and legitimacy.[9]

One of the truly attractive features of international law is that, with the drafting of each new treaty, negotiators

[9] As Ernest Young notes: "The point is to take international law seriously as law, by subjecting it to the same sorts of institutional give and take that have characterized our domestic legal arrangements throughout our history" (Ernest Young, "Institutional Settlement in a Globalizing Judicial System" (2005), 54 *Duke LJ* 1,143, at 1,259).

are largely free to design their own type and level of protection as well as corresponding monitoring and/or sanctions regimes to back-up enforcement. It is with this flexibility in mind that one can realistically hope that the framework and proposals in this book can actually be implemented, one treaty at a time.

1

Overview and relevance of the analysis

In domestic law, the central question that this book seeks to answer – how strongly should international law be protected and enforced? – was addressed in the early 1970s in a seminal *Harvard Law Review* article by Guido Calabresi and Douglas Melamed.[1] Much like Hohfeld sixty years before them,[2] Calabresi and Melamed warned against indiscriminate use of the term legal "right." Yet, whereas Hohfeld distinguished between rights (corresponding to a duty), privileges, powers and immunities, Calabresi and Melamed referred to a broad pool of legal "entitlements." In their view, all of law can be seen as rules for the ownership and exchange (forcible or voluntary) of entitlements. They used the term "entitlements" instead of "rights" as the very purpose of their analysis was to discern different types of legal rights based on the degree of legal protection that they enjoy. As the common usage of the term "right" often corresponds to just one type of entitlement (namely those protected by a so-called property rule), the broader term of entitlements was needed

[1] Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972), *85 Harvard LR* 1,089.

[2] See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 *Yale LJ 16*, and 26 *Yale LJ* (1917) 710.

to avoid confusion and to encapsulate not just one but all types of entitlements.[3]

Calabresi and Melamed provided a three-step scale of protection for domestic legal entitlements. In their view, a first group of entitlements is best protected as "inalienable," that is, not to be changed or transferred at all, not even if the entitlement's holder agrees. A second group is best protected as "property" or under a property rule, that is, it can be changed or taken, but only with the consent of the entitlement's holder. Optimal protection of a third group of entitlements is a so-called "liability rule," that is, the entitlement can be taken by anyone subject only to the obligation to pay full compensation for it.

The idea of protecting entitlements under a mere liability rule, pursuant to a take-and-pay principle, is reflected in the broader theory of "efficient breach." This theory, derived from the broader law and economics approach, holds that when the net cost of compliance is higher than the net cost of breach, breach must be tolerated, even promoted, as it serves the social function of maximizing overall welfare. If, in this scenario, the victim of breach is fully compensated, breach is, moreover, said to be Pareto desirable: while the violating

[3] More specifically, using the term "entitlements" enables the introduction of liability rules, as under a liability rule (say, a pollution tax) I do not have a legal "right" to clean air (which corresponds to a duty not to pollute), only a legal "entitlement" to clean air which anyone can take away for as long as compensation (i.e., the pollution tax) is paid. Thus, my legal entitlement to clean air does not correspond to a duty not to pollute; but rather to a duty to pay a tax in case one pollutes. Put differently, rather than a duty not to pollute, companies then have a right to pollute for as long as they pay the pollution tax.

party increases its welfare, the victim is made whole. In other words, the taker of the entitlement values it more than its current holder; hence, even after compensating the holder, the taker – and with it overall welfare – is still better off. Therefore, transfer is socially desirable and must be promoted even without the consent of the current entitlement holder. To have a property right, in contrast, is to have an entitlement that is in some important way shielded from such felicific or wealth-maximizing social functions.[4] Ronald Dworkin captured the vital importance of property rule protection when he coined the phrase "rights trump utility."[5] In other words, the idea of protecting entitlements as property (you cannot just take my car and leave behind the money for me to buy a new one, even if you think you value my car more than I do) corresponds to the market-based idea that property, individual rights and contractual freedom – not state intervention – are the best way to increase overall welfare. Property protection is, if you wish, the world of free trade, Adam Smith's invisible hand, a reflection of liberal capitalism. Protecting entitlements as inalienable or under a liability rule, in contrast, corresponds to market intervention by the state or some higher authority either by preventing entitlement holders to sell their entitlement (inalienability) or by letting the state or other people take or expropriate entitlements subject only to compensation in

[4] Michael Krauss, "Property Rules vs. Liability Rules," in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics* (Cheltenham: Edward Elgar, 1999).

[5] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1975).

pursuit of overall welfare (liability rule). Whereas property protection reflects liberal capitalism, both inalienability and liability protection reflect social interventionism.[6]

The objective of this book is to apply the Calabresi and Melamed analysis, including the theory of efficient breach and the contrasting approaches of market-based exchange versus collective intervention, not to entitlements derived from *domestic* law but to entitlements accorded under *international* law. In other words, if a treaty allocates an "entitlement"[7] to free trade, to non-discrimination or to be free from certain environmental harm or human rights abuse, what is the best way to protect this entitlement? Should it be made "inalienable" or protected only as "property" or, rather, should it benefit from the weaker form of "liability" protection? In addition, if the cost of compliance outweighs the cost of breach – including the cost of fully compensating all victims – should a country be permitted to violate international law on the ground that breach is then efficient, even Pareto desirable? Is international law founded on market-based exchanges of entitlements (property rules) or does it, or should it, also include collective interventions that transcend

[6] For an indication that inalienability goes against traditional capitalism, see one of Ronald Reagan's favorite lines in election speeches: "Government exists to protect us from each other. Where government has gone beyond its limits is in deciding to protect us from ourselves": quoted in Alan Greenspan, *The Age of Turbulence* (New York: Penguin, 2007), at 87. Protecting "us from ourselves" is exactly what happens under inalienability, namely: even the entitlement holder herself cannot agree to transfer the entitlement.

[7] See *supra* note 3 on the distinction between entitlements and rights.

state-to-state bargaining and consent, in pursuit of overall welfare (liability rules) or so as to protect states from themselves (inalienability)? Do these models, which originate in domestic law, find application in international law? Must they be adapted or do they even become completely inappropriate? Descriptively, how does international law currently protect entitlements? Does this current level of protection accord to the predictions under the Calabresi and Melamed model? Does it conform to the theory of efficient breach?

These are the questions addressed in this book. They worry as much about *over*-protection of international law as about *under*-protection of international law. For a system long plagued by claims of irrelevance, such inquiry has understandably been somewhat of a taboo. Why worry about optimal protection, let alone over-protection, if international law is generally perceived as weak? Why nitpick over remedies if, in most cases, there is no compulsory dispute settlement system to establish breach in the first place? In recent years, however, the conventional wisdom that international law is weak has been seriously contested. The creation in 1994 of the World Trade Organization (WTO) and its compulsory dispute settlement system is often referred to as a major advance in the legalization of international affairs.[8] In a recent book,

[8] John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edn (Cambridge, Mass.: MIT Press, 1997), at 110; Judith Goldstein *et al.*, "Introduction: Legalization and World Politics" (2001), 54 *IO* 385, at 389 (referring to a victory for trade "legalists" over trade "pragmatists"). For a discussion on the evolution of law and politics in the world trading system: Joost Pauwelyn, "The Transformation of World Trade" (2005), 104 *Michigan LR* 1.

Professors Robert Scott and Paul Stephan, referring to the establishment of international criminal tribunals, investment and intellectual property rights protection with compulsory arbitration, European economic and human rights integration, and domestic civil litigation involving international law, go as far as concluding that

> [i]nternational law has become hard law, with its own Leviathan . . . The trend is clearly away from impotence. International law, because of the growth of formal enforcement, has become a real force with direct and material consequences for a wide range of actors.[9]

International law can, therefore, increasingly afford the luxury of asking itself: how strongly *should* entitlements be protected?[10] Harder international law is not necessarily better international law. In the Kyoto Protocol, for example, reductions in harmful emissions were not protected by an outright prohibition to

[9] Robert Scott and Paul Stephan, *The Limits of Leviathan* (Cambridge: Cambridge University Press, 2006), at 11 and 14. Scott and Stephan define "formal enforcement" as enforcement with private standing and a tribunal empowered to impose direct sanctions (at 367).

[10] See, in support, Andrew Guzman, "The Design of International Agreements" (2005), 16 *EJIL* 612; and Kal Raustiala, "Form and Substance in International Agreements" (2005), 99 *AJIL* 541. Even if one holds the view (further contested below in chapter 6) that international law continues to be weak – for example, because it lacks central enforcement – so that finer distinctions in normativity are irrelevant, the questions addressed in this book at least raise an interesting thought experiment. Imagine, for a moment, that you do have all necessary instruments in hand to force states to comply with their international commitments (whatever these instruments may be): how far would you go, and what criteria would guide you?