

## **A Quantum of Solace: Guzman on the Classical Mechanics of International Law**

### **Book Review: Andrew Guzman, How International Law Works. A Rational Choice Theory (2008)**

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A.

Compared to the discipline of international law, scholars of physics are blessed. While the principles of classical mechanics were theorized several centuries ago, quantum theory and the theory of relativity offer supplementary ways for describing how material objects and energy interact where classical mechanics does not provide an explanation. Thus, even in the absence of an all-comprising “world theory”, physicists have a wide array of workable theories at their service. By contrast, the “classical mechanics” of international law, *i.e.* the explanation of the most basic causal relationships between international legal norms and the behaviour of states as the main subjects of international law, are still subject to deep theoretical controversies. International legal doctrine presupposes that international law does have an impact and does not aim at questioning or further explaining this assumption. Traditional legal theories that see the essence of legal normativity in the possibility to trigger mechanisms of physical constraint often come to the conclusion that international law, in the absence of central enforcement mechanisms, is at best a primitive form of law. More recent

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enquiries into international legal theory from very different theoretical angles come to even less uplifting conclusions. Some argue that international legal norms are either entirely devoid of content because of their inherent indeterminacy and therefore prone to be captured by special interests. Others consider international law to be merely epiphenomenal because rational states would only consent to legal norms if, and as long as, they describe a behaviour they would choose anyway because it promises higher payoffs. In particular the latter critique put forward so forcefully by Jack Goldsmith and Eric Posner sent considerable shock waves through the invisible college of international lawyers. This is the background that needs to be kept in mind in order to assess the quantum of solace that Andrew Guzman's new book provides.

## B.

The most important and most telling element of this book is therefore its title: "How international law works" implies first and foremost that international law actually has an impact on the behaviour of those subject to it. Guzman takes this as a starting point, as he sees enough *prima facie* evidence demonstrating the relevance of international law for state behaviour. For example, why would states, presumed to be rational actors, otherwise care so much about the legality of their actions and invest valuable resources into international lawmaking and expensive international law departments? Why would President Bush provoke a conflict with state governments when he ordered them to obey the ICJ's *Avena* judgment, if international law did not matter and if other factors can be excluded? And why would sophisticated actors like NGOs see a solution to numerous griefs of the world in the furthering of international law? Guzman concludes that the burden of proof should be on those who claim that international law does *not* work and ventures on a theory that explains how it might actually work.

He bases his theory on familiar assumptions of rationalist-institutionalist approaches to international law and relations (17). Accordingly, states are presumed to be the dominant actors on the international level and able to pursue their interests rationally. The preferences underlying these interests are relatively stable over time. Complying with international law is not a preference of itself, and the internal structure of states is deemed relatively insignificant for their behaviour on the international level.

The core of Guzman's theory consists in his elaboration of three factors which induce states' compliance with international law: reciprocity, retaliation and reputation ("the Three Rs of compliance"). The main innovative aspect of this proposal is the mechanics surrounding reputation, which Guzman sets out in great detail in the second chapter. Accordingly, reputation plays a central role in the calculation of states whether to enter into an agreement or not. Suppose that a state receives higher payoffs from cooperation in a certain situation and therefore prefers the conclusion of an international legal agreement with other states to this effect. However, there is a risk that other states might defect and sacrifice common long-term benefits for higher individual short-term benefits. In the context of national law, domestic law enforcement reduces this risk of defection. Absent such mechanisms on the international level, states will seek other ways of reducing the risk of defection and only enter into cooperative agreements where this risk appears sufficiently low. In order to appreciate the risk, states need to make estimates. This is where reputation comes in: it is a judgment about a state's past response to international legal obligations used to predict future compliance (73). Reputation is thus a capital which allows states to cooperate and enjoy better long-term collective benefits at the expense of short-term individual benefits.

In some situations, reputation works even better than reciprocity, the costless termination of a state's obligations under international law in response to a violation, or retaliation, the costly enforcement of the rule. This is particularly the case in situations resembling a multilateral iterative prisoner's dilemma where a pure public good is at stake like, *e.g.*, the protection of the environment. Reciprocity has little impact because all states, and not only the violating one, benefit from the cooperative behaviour of the non-violating states that reciprocal action terminates. Retaliation does not work very well either because of free-riding. Goldsmith and Posner therefore simply deny that international law has any impact on state behaviour in these situations. Guzman, however, sees reputation as the main factor for compliance: If a state violates the obligation, negative "reputational payoffs" will accrue automatically, and without cost. The reputational loss will diminish the capacity of the violating state to enter into other agreements, or even to renew the violated agreement provided that other states want to acquire a reputation for taking a hard edge position on non-compliance.

In conclusion, compliance induced by reputational effects have a particularly high impact where the non-reputational payoffs (*i.e.* the payoffs a state faces besides the reputational repercussions of his behaviour) of non-

cooperation are not significantly higher than those of cooperative behaviour. In such situations reputational payoffs might actually tip the scales towards cooperation. However, there are obvious limits to the effects of reputation and thus to the effectiveness of international law when the non-reputational payoffs of defection are fundamentally higher than those of compliance. This explains, *e.g.*, why international law is only of limited use for preventing war. Apart from reputation, retaliation and reciprocity, Guzman sees no other major compliance-inducing factors at work. International adjudication, for example, is considered valuable as a tool for generating and disseminating information about facts and law, but not as a tool of enforcement, since enforcement of the judgment raises the same problems as the enforcement of any other rule of international law.

### C.

After setting out his basic theory and a subsequent detailed elaboration of the concept of reputation in the third chapter, in which he argues, among others, that states have multiple, sector-specific, but interlinked reputations, Guzman extends his theory to international agreements and customary international law, explaining why they exist and how they work. Some of his conclusions deserve to be discussed here in more detail.

Among the highlights of these sections is certainly Guzman's argument that states are not naturally risk averse and refrain from international legal commitments as far as possible, as realism has it. Rather, he argues that states seeking to maximize their benefit will have an interest in entering into international agreements whenever cooperative behaviour promises better long-term benefits. For the risk of entering a treaty is limited to the risk of breaking it, *i.e.* to the reputational or reciprocal, and in rare cases also to the retaliatory consequences of a violation (125).

Another remarkable point is his elaboration of the relationship between the form and substance of international agreements. Guzman argues that rational states do not have a preference for flexible rules, but for reliable commitments (137). The reliability of a commitment depends on trades between formal and substantive elements in the design of international agreements. Accordingly, states might opt for a soft law instrument where it is wholly sufficient to induce cooperation, such as in an easy to resolve coordination game where all that is needed is a focal point (*e.g.* "drive on the right side of the street"). In other cases, they might choose to enhance the effectiveness of a soft law instrument by equipping it with some monitoring mechanism that ensures the correct attribution of

reputational gains and losses which accrue as a consequence of compliance or non-compliance with the instrument. The binding character of a rule is therefore no absolute indicator for the likeliness of states to comply, but just one factor among many others (160, 217). Consequently, a binary distinction between soft law and treaties is not meaningful. The difference between soft and hard law is rather a matter of degree (143). Guzman suggests that states choose their forms of cooperation from a spectre of commitments ranging from non-legal norms to treaties (214). At this point, however, one might ask whether Guzman's theory would not have supported a much more radical approach than the already somewhat conventional spectre theory. The different formal and substantive design elements could be seen as the axes of a multidimensional pattern of instruments. Better than a linear spectre, a multidimensional pattern would explain why, for example, a soft law instrument equipped with certain compliance-inducing formal or substantive features might have a greater impact on the behaviour of states than a "binding" treaty containing mostly indeterminate provisions.

Guzman's reputational theory further leads him to a convincing argument about the scope of agreements aimed at by rational states. Previous scholarship hypothesized that rational states would seek to limit membership in an agreement the more difficult it is to enforce, because reciprocal enforcement works better in a small group of states. Considering that reputation is the main compliance inducing factor, Guzman sees no reason why states would seek to limit membership in this way. Rather, he argues that rational states will seek the inclusion of all states whose cooperation is needed to solve the problem at stake. While I am convinced by the argument that the role of reciprocity is limited, I would, however, like to add the caveat that considerations of compliance and enforcement might indeed play a role in choosing the scope of an agreement: if a limited group of states has the power to force states outside the group to comply with the rules they make, rational states have no reason to open the club to further members. Examples for this kind of hegemonic law-making abound. One might only consider the OECD's recent efforts to dry up tax havens, none of which is an OECD member. The reputational (and, possibly, retaliatory) effects of non-compliance with the rules of the OECD are too strong for non-member states to resist. Thus, the choice of membership in an agreement might be better understood as a function of both the underlying problem and considerations of compliance. This solution would also be in line with Guzman's generally successful strategy of building

theoretical models which contain more than one variable, such as his toolbox approach to form and substance.

Strictly in accordance with his reputational theory of compliance, Guzman also provides a fascinating explanation of customary international law. Accordingly, neither *opinio iuris* nor state practice is decisive for the assumption of a rule of customary international law, but the belief of *other* states (even of one other state) that the state whose behaviour is in question has a legal obligation (195). This suffices for triggering reputational consequences, independent of any more or less fictitious form of consent to the rule which traditional international law doctrine presupposes. Thus, *opinio iuris* (understood as the opinion of *other* states) is clearly the dominant element. State practice has the function of an indicator of *opinio iuris*. This approach solves many problems related to the selection of the relevant state practice, which is made by virtue of the reputational impact of the act in question.

A theory is only as good as it explains the world. The practice test therefore provides the proof of the pudding. Large-scale empirical assessments can hardly be expected, in particular in case of a theoretical model as complex as the one proposed by Guzman. However, throughout the book, Guzman provides numerous practical illustrations ranging from areas of international law as diverse as the environment, human rights and disarmament. The stunning explanations of international legal phenomena provided by these examples equip Guzman's theory with a high degree of plausibility. The theory is able to explain for a large number of diverse international legal rules how they came into existence and why they are complied with or broken. What else could one expect from a good theory?

#### D.

Guzman's book thus presents an impressive, theoretically sound and practically useful theory of international law. How does this theory relate to other theoretical approaches? As the book's cover image, showing four interlocking gearwheels depicting different continents, quite tellingly illustrates, Guzman's theory could indeed be said to represent for the discipline of international law what classical mechanics represent for physics: A comprehensive theory that might soon become part of the routine business of a great number of legal scholars, but whose explanatory value has known limits.

From an internal standpoint, Guzman's theory owes its attractiveness, first, to its parsimonious use of basic assumptions, which nevertheless keep

some distance to realist assumptions. Thus, while it sees states as the principal actors on the international scene, it does not suppose that their principal interest is security. The theory is therefore open-textured enough to accommodate very different concrete situations. Second, the assumptions are not used too rigidly. Rather, Guzman switches gear several times throughout the book and relaxes many of his basic assumptions, such as the stability of states' preferences over time. This leads to quite a complex theoretical engine. Although this makes the application of the theory more complex and ambiguous, it lends it more credibility.

These two factors also make Guzman's book a profound criticism of Goldsmith's and Posner's theory about the limits of international law. Guzman's smartly designed rational choice theory of international law actually helps to explain the role of law in international relations in many situations. This is so valuable compared to some bold theses about international law's irrelevance which carry little empirical support and whose basic assumptions are fragile not least because of their rigidity.

Turning now to the external perspective, those who do not believe in rational choice will be particularly pleased by Guzman's non-hegemonic attitude towards theory. Indeed, the concept of law underlying Guzman's theory is not fundamentally different from other contemporary legal theories such as discourse theory or the theory of social systems, even though they emanate from completely different, and completely irreconcilable theoretical bases. This is by virtue of Guzman's focus on reputation, which in essence means that international law is about the creation and maintenance of expectations towards the behaviour of states (and not only about constraint). Moreover, in the first chapter, in which Guzman positions his approach on the landscape of theories about international law and relations in an excellent and virtuous survey of the state of the art, Guzman shows full awareness of the limits of his theory and of the fact that what he is developing is classical mechanics rather than a "quantum theory" of international relations. Unlike Guzman, constructivism and liberal theory, which might be considered "quantum theories" of international relations, look into the inside of the billiard ball – or, to stick to the scientific metaphor – into the atomic nucleus of the state and theorize about the impact of its internal structure or the formation of its preferences. Guzman justifies his theoretical neglect for these approaches with the unavailability of workable models explaining the interactions on the domestic level that are emphasized in liberal theory, or the generation of preferences through ideas as suggested by constructivist accounts.

However, it might be asked to what extent it would have been desirable to accommodate certain elements that play key roles in constructivist and liberal theories of international law within a rational choice model of international law. For example, the astonishingly marginal attention that Guzman pays to international organizations raises some doubts. In this respect, it stands in opposition to a lot of recent research in law and social sciences that has provided ample illustration of how international organizations change international law-making and law-enforcement. Whether international organizations are considered as mere tools of their member states for the reduction of transaction costs or the use of synergies, as the rationalist-functionalist standard account has it, or whether they are presumed to get a life of their own and trigger dynamics that are different from mere intergovernmental relationships, as constructivist or liberal scholars would do, it might change the constitution, effects and management of reputation significantly. Admittedly, the latter stream of research has not developed rational models for the analysis of causal relationships (which surprises all the less as some of them, in particular constructivists, might not even have an interest in questions of causality). But that would make the challenge of developing such models ever more interesting. And even if in such a model international organizations were eventually considered as billiard balls with fixed, independent interests instead of mere tools of their members, this would probably not amount to a greater oversimplification than the billiard ball concept of states. Nevertheless, this point of criticism does not deprive Guzman's theory of its value for the study of international law, but rather hints at future fields of research.

In conclusion, Guzman's book should be in a position to rehabilitate the damaged reputation of rational choice as a way of theorizing about international law. I am convinced that many members of the "invisible college" will appreciate the quantum of solace provided by Guzman's theory, even those whose principal hope is for the solace of a quantum theory of international law.