

“How International Law Works: A Rational
Choice Theory”
A Panel Discussion on Professor Andrew
Guzman’s Book

WELCOME

*Louise Gibbons, Editor-in-Chief, Berkeley Journal of
International Law (BJIL)*

My name is Louise Gibbons and I am the Editor-in-Chief of the Berkeley Journal of International Law. Thank you all for coming.

Today, we are having a panel on Professor Andrew Guzman’s book “How International Law Works: A Rational Choice Theory.” Our moderator is Professor Buxbaum of Berkeley Law. We will be publishing the discussion today, as well as a book review written by Harlan Cohen of the University of Georgia, in BJIL’s upcoming issue this spring. I would like to extend a special thanks to the Miller Institute for Global Challenges and Law at Berkeley Law for sponsoring this event as well as to our journal’s book review editor, Kate Apostolova, for planning today’s discussion.

So, with that, I think we will just go ahead and get started and let Professor Buxbaum introduce the panelists. Thanks for coming.

INTRODUCTION

*Professor Richard Buxbaum, University of California, Berkeley
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It’s great that we have such great attendance and why not, with our own Andrew Guzman and Oona Hathaway and from across the bay, Bill Dodge. We don’t really need to introduce Andrew

Guzman. I am not sure that we need to introduce Oona Hathaway either, since you all know her. The main thing I need to say about her is that she has ascended from being at Harvard for her undergraduate degree, to Yale for her law degree where she was an Editor-in-Chief of the Yale Law Journal to her present position in Berkeley. I would call that a steady rise and I don't know what else can happen, Oona.

Her own work, as I am sure you know, has been very much recently on the issue of compliance with treaties, especially in the international human right field, but now broadening into a larger area.

As for Bill Dodge, he is also very active in exactly this field of state compliance with norms of international law. I would like to point out particularly the wonderful case book on transnational business issues that he and others have prepared. He has worked on NAFTA dispute resolution matters as well, and I can commend his paper on the intersection of public and private international law, among his many works, as one of the most recent and most interesting.

So, I think we are ready to go and we will hear from Professor Andrew Guzman first. Let's get started.

DISCUSSION

ANDREW GUZMAN: Thank you, Richard. I also want to thank BJIL for putting this together, Louise and Kate Apostolova who have done all the heavy lifting. I want to thank Oona and Bill for being here. You know, everyone loves to talk about themselves and I am no exception. Talking about my book is the next best thing. They, on the other hand, don't have that advantage. They have to talk about me too.

So, what I want to do is just say a few things about the book and what I was trying to achieve. I am not going to attempt to summarize it, but I am going to try and hit a few highlights. Hopefully, in the conversation that follows and the response to commentaries we will be able to say some provocative things.

Here is where I want to start. Everyone who has ever studied international law at some point has to ask the question, is it really law? A better version of that question is, does it really matter, does it do anything? In a lot of introductory international law courses that question is posed specifically—it is on the syllabus. It is first thing—is international law a law? The root of that question is self-evident and is what provokes a lot of conversation about international law among academics, in the popular press, among practitioners, among diplomats and among politicians -- international law does not have a system or coercive enforcement. It does not have a system whereby if you violate the law persistently somebody will come and either cease you or cease something you own. That is, I think, the most significant feature that distinguishes what we call domestic law from what we call international law.

This question has been interesting to me for a long time because when pushed in the domestic law context, most of us retreat to this coercive enforcement as explaining why things get done. Criminal law, we say, is enforced because eventually someone gets put in jail or there is some other criminal sanction. Business law is enforced because there are courts present to enforce contract, to enforce regulatory measures. We don't have that in the international law context, and international law scholars have always been pretty bad at dealing with this reality. How can international law be taken seriously given that it lacks a coercive enforcement? The answers given, such as: well you never really get tickets for jaywalking and yet you don't deny that jaywalking is law, are very unsatisfying. To be honest, the narrow question of whether international law is law does not interest me very much. The answer to that question is mostly about how one defines law, and I have no great stake in that semantic question. The debate over whether international law affects state behavior, however, interests me a great deal. And if it does, we surely want to know how and why. Only if we understand something about how it influences states can we possibly try to marshal it effectively to do just that—to affect state behavior.

That allows me to say the following: if I am asked to defend the significance of this line of research, which obviously I am not

the only one engaged in—both the commentators here, for example, are engaged in this process, as are many others – I make the case that this line of research goes to the most important questions we face. Think of any problem you care about that cannot be solved without states cooperating with one another. Climate change cannot be solved without that, global poverty cannot be solved, proliferation of nuclear weapons, war, and contagious diseases. All of those really big global problems, require states to interact with one another, and require states to cooperate with one another. If that was not true, they would not be really big problems. The book is an attempt to contribute to the answering of the question of how we get states to work together in productive ways. In this sense, it aspires to help us address the world's biggest problems.

Though I say that the classic response to the question of whether international law is law is to avoid the question, it's not as if this question has never been addressed. Indeed, both the question and proposed answers have been around for a very long time. Relatively recently, however, there has been a shift in methodological approaches in international law. Before the early nineties the conventional approach was different than, at least, the approach any of the three of us would take. The traditional approach was what political scientists today would call constructivist. In addition to adopting a heavily norms-based strategy for explaining the field, the legal literature also tended to be, at least in my view, a little bit conclusory. The heart of the response to questions of why states comply with international law was that states like to comply with international law. That is, they simply have a preference for it. To an economist, that means they have a preference in their utility function for compliance with international law. To others, it is just this notion that states prefer to comply and therefore, if you make something international law, you then create a force for compliance. From that perspective, the fight, for example, about whether something is or is not international law is really important. If we assign it the label law then states want to comply with it. However, I don't find this explanation satisfying at all and this book is, in part, an attempt to think the problem through from a different perspective.

My background is in economics, so my instinct is to approach this not by assuming a preference for compliance, but to try and figure out how it could be that states that are at root selfish, inward looking, and parochial entities nevertheless cooperate. That assumes that they do, in fact, cooperate. There is an empirical question lurking in the book as to whether in fact they cooperate and I don't provide any new evidence that they do. I think they do. I think international law generates cooperation among states, but I do not make any meaningful contribution to that discussion in this book. I take what is called a rational choice approach to the problem, meaning that I assume states are rational unitary actors. I attempt not to look, for example, into the political machinations within the state. I try to keep the state as a single unit. There are good and bad reasons to do that. One of the most common critiques of the book is that it is impossible to say anything knowledgeable about the states if you ignore the fact that they have domestic politics. My response to that is that you can't do good theory that way. You can't do good theory starting off with an attempt to consider every wrinkle in the system. You have to make some kind of simplifying assumptions. This is admittedly a big assumption, but I can't write a theory in which domestic politics matters and in which I can then say intelligent things about international law and states generally. I don't know of anyone who has taken domestic politics and developed a general model that allows them to then speak systematically across international law. So, I work with states as unitary actors. What happens in the book is that I try to remain faithful to this notion of states as unitary actors but sometimes I have to cheat. Every once in a while I say I have to acknowledge that some of the best explanations about what is going on are, in fact, explanations that rely on domestic politics.

Returning to my basic assumptions, I think it is fair to say that they are fairly standard ones. A central aspect of these assumptions is that states are selfish. Cooperation is less likely in a world of selfish states than in a world in which states want to comply with something called international law. But we get cooperation even in this world because of the Three Rs of Compliance that I talk about in my book. These are retaliation, reciprocity and reputation. Everybody seems to think, maybe accurately, that I am all about reputation, that I don't think the others are important. I do think the

others are important, but it is true—the book is mostly about reputation.

The basic idea is very simple and in my more honest moments, I will admit that an undergraduate game theory course will give you everything you need to know in order to write the theory in this book. Not only that, but it has been written before by other people. However, it has never been focused on international law in this way, which is very small step but I will take credit for small steps. Here is the basic idea. States come together and they make promises to each other which we call treaties (though they can be many other things too). But why should I care what another state says? Why should I believe them? The answer is that they have an interest in keeping their promises. This is not because there is anything special about the promises themselves and not because they will get punished if they don't. The reason a states wants to keep a promise is because the next time it wants to make a promise it wants you to believe it. The ability to enter into promises is of great value to the states—look at how often they do it. They do it all the time, including when dealing with hard problems that are not trivial to solve. They don't always succeed but they do want to have some form of credibility when they enter promises. It seems right that different states have different levels of credibility. More accurately, from the perspective of the United States, other states have different levels of credibility. From the perspective of Egypt, same thing, except it won't be the same credibility ranking. It matters whom you make your promise to, as well. Let's put that aside.

So, states want to keep their promises so that they can make future promises and be believed. Why do they want that? Because when they come to you later for another round, and they want to exchange promises again to solve some other problem, if they have a bad reputation for compliance you will either tell them to get lost, or you will say I need more, or you will say I need you to go first before I go. If you have a bad reputation, you can less cheaply and less easily enter into agreements. That is the whole idea and that very simple idea is what drives the results in the book.

The real exercise of the book, what I hope is the real contribution, is that it takes this fairly straightforward perspective and insight and applies it in a fairly systematic way across much of international law. It asks, assuming that the explanation of why states might keep their promises is correct, what the implications are for international law and for how we can use international law to solve problems. One result is that it is possible and not at all difficult to extract a model of international law without coercive enforcement in which states keep their word. You can actually change the behavior of states by having them exchange promises, by having them, let's say, sign a treaty. You can't solve all problems that way, however, as there is a limit to the power of these promises. If I am keeping my promise mostly to keep the value of my future promises, then there is going to be a point at which it is not worth it, a point at which I would rather violate my promise now for whatever benefits I might get even if that means I will have to pay later. There is no claim in the book that it is going to work all the time and in all contexts.

That is our first and important point, and it is an important point because it engages two perspectives that have been at war with each other. One is the perspective that international law does not matter, it does not get anything done, and it is not really useful. The other perspective is a perspective that international law is this force that works and solves problems and is what we should reach for. This book is an attempt to speak to both of those sides. It says to people who claim that international law does not work—well, you can't demonstrate as a theoretical matter that it fails to work. Here is a theory in which it works and you cannot beat my theory. I am using the same assumptions you are, and I am demonstrating that it can work. If you want to say it does not work, you have to do it on empirical grounds. On the other side, I want to speak to people who believe in international law but don't think of it in terms of systematic model or systematic theoretical construct. I want to say that once we take seriously the notion that international law affects state behavior and we come up with a theory that explains it, we are able to derive a lot of results, some of which are consistent with what we think of international law and some of which are not. It produces a set of challenges for the way we think about international law. I will mention two of them.

One is the traditional view of international law, the one you all learned in your international law course, including if you took it from me. It is that international law consists of two things and then a couple of other things that we never talk about. The two things that it really consists of are treaties and customary international law. My claim is that this does not really make any sense. That is, we cannot defend that definition of international law unless our definition is simply that there is this thing called international law that we arbitrarily are going to define as consisting of treaties and customary law. Any definition that is an attempt to have the words international law correspond to a set of rules and norms that have some law-like qualities and that affect the way states behave has to be broader than that. It has to, in particular, include this thing called soft law or at least some version of soft law. Most recently, in a separate article co-authored with Timothy Meyer, I have made a claim that it probably should include judgments from international tribunals as well, judgments that conventionally are not thought of as international law because they are not legally binding on anybody beyond the parties involved in the dispute. So that is one claim: that we have to define international law differently. We don't talk about soft law, we don't talk about how it works, we don't talk about why it exists even though it exists at a very large quantity. In fact, whatever it is that makes countries comply with treaties, whatever international law does to change their behavior, has to apply to soft law just as well. I will give you a quick example. States frequently enter into agreements that they put down in the form of a written text and that they sign. Works exactly like a treaty, except that it is not. That is, the only difference is that the states don't intend it to be a formal treaty; instead, this thing is called soft law. If that agreement matters at all, and I do not know of anybody who will deny that it matters, it has to matter for the same reasons that the treaty matters. That is to say, it has to matter through the Three Rs of Compliance: retaliation, reciprocity and reputation. If that is true, then the only difference between treaties and soft law that one is a stronger version of the other. The treaty is the strong version and the soft law is the weaker version.

The last thing I want to talk about is related, and that is what it means to say that a country is bound by international law. I know what it means to say that I am bound by the tax code. Indeed, in a few weeks, I will know even better than I know now what that means because I will have to pay my taxes. However, if the United States stops engaging in international trade in a manner consistent with the World Trade Organization or if whichever country you think of as a bad-guy country stops complying with its human rights violations or more likely, continues to fail to comply with its human rights obligations, what does it mean to be bound by international law. It can't be that somebody is going to come and punish you, or at least, it cannot be that very often. Our story has to be more complex or at least, different from the domestic law story because we do not have coercive enforcement. If I don't know what it means to be bound by international law, then I don't really know what international law is because the reason we call it international law, at least most of the time, is because we say that countries are bound by it. I think, the answer has to be this: international law is some set of institutions that provide incentives for states to do certain things and not do certain things. A human rights treaty that says you are not supposed to engage in torture, is international law perhaps because it makes it more costly to engage in torture. There are problems with this definition because we would like an international treaty of torture to be international law even if it is a complete failure; we would like to be able to identify it as international law. Nevertheless, it seems to me that the existing definition can't possibly be right. I think we want a definition that says something is international law if it manages to provide incentives for states to behave in a certain way. Then, we start getting a notion of international law and international cooperation that has a lot to do with how we structure the institution and whether or not it does what it is supposed to do.

OONA HATHAWAY: Thank you all for coming. I am happy to see a lot of familiar faces in the audience. It is a pleasure to have a chance to talk about Andrew's new book. Andrew and I have been trading ideas now for many years now, and it is very exciting to see those ideas take book form.

I want to begin by placing this project in the broader scope of international legal scholarship. Many of you are taking my class on transnational law and we have talked about a longstanding divide in the way in which scholars have thought about international law between those who take more instrumental approaches to international law and those who take more normative approaches. Scholars tend to see international law as either purely instrumental—that is, as something states use to achieve certain ends—or as possessing normative power to change expectations of states and thereby change state behavior. Andrew’s work is innovative because it eschews this divide. He approaches international law primarily as an instrumental scholar, using the tools of the rational choice theory. And yet at the same time he uses ideas drawn from the normative approach, particularly through his concept of state reputation.

Let me say a few words about how he does that. Rational choice scholars who have thought about international law have, for the most part, been dismissive of it. Andrew takes the same set of assumptions, including the assumption that the state be conceived as a unitary rational actor, and shows that the traditional rational choice model is much too narrow. That is what this book does. It takes the tools that have generally been used to attack and tear down international law and shows how much has been missing. He demonstrates that there is much more that international law does than traditional rational choice scholars recognize. And he does that through his “three Rs”: retaliation, reciprocity and reputation.

Reputation is a particularly new idea in this context. Scholars have talked a lot about retaliation and reciprocity. But reputation is an idea that has not been much part of the conversation about international law—especially instrumental approaches to international law—until Andrew’s work came along. He brings this idea into the conversation. And he does not simply present it as a general idea, but he actually breaks it down to show how it works in this particular context: how, when and why reputation matters in international law. That is an extraordinarily important contribution to the conversation about international law. Andrew underplays that when he says that it is a relatively small

contribution. In fact, I think it is really an important and significant contribution.

All that said, this won't be much fun unless I offer a few critical remarks, so let me offer a few. First, reputation can become a grab bag: I can't explain it in some other way, it must be reputation. For instance, why did states join the International Criminal Court? There does not seem to be any clear motivation for joining the International Criminal Court from the purely instrumental perspective. What do states really get out of it? Their own members are potentially subject to prosecution; they spend money on this significant body of lawyers and prosecutors who are going to be running around the world looking for violations of international law. There is a lot of cost associated with it, but it is not clear what the benefits are for a purely self-interested rational unitary state. At the very least, it is not nearly as transparent as it might be, for example, in the trade context: if I lower my trade barriers, and you lower your trade barriers in return, it is easier for me to get my goods into your own state. But in international criminal law, it is not entirely obvious what the reciprocal benefits are. One answer, of course, might be reputation. But why reputation? What role exactly is reputation playing here? How can reputation be something more than just the thing that we go to when we can't explain it in some other way? How do we keep the concept narrow enough that it really helps us obtain precise answers and predictions in advance?

A second critique is that the model is quite parsimonious—perhaps too parsimonious. Theories and models necessarily abstract away from the particulars of events. But in that process we are in some danger of losing something important about the real world. In particular, those who come from a human rights perspective would say that this model really misses the fundamental role that norms and expectations about conduct play in shaping state behavior. That is more than just something we call reputation. It is that states actually believe in the fundamental ideas that the treaties incorporate. States—or, more accurately, the people who lead them—actually believe that genocide is something that all states have a responsibility to prevent. In this view, states join the Genocide Convention not just because they

are trying to impress others and improve their reputation, but because the prohibition on genocide is a shared norm of conduct to which they ascribe and that they want to strengthen through the act of joining the Convention. It is the force of the ideas and the norms that is something beyond the self-interested behavior of seeking a stronger reputation and achieving some self-interested benefit from that. There is something more than self-interest at stake here. Can you really pack it all into the concept of reputation? And, if not, is something missing?

A third critique is that the vision of law offered here is very flat. In Andrew's view, law is not anything special. A legal commitment isn't really any different from any other promise that the state might make. If a commitment is not "binding," it does not really matter. What matters is really that a state has made a promise to another, and some reputation attaches to the fact of that promise. Indeed, much of international law is not really "law," in Andrew's view. Law is only law, he says, if there is coercive enforcement behind it—which is frequently not true in international law because most international law binds sovereign states, which either cannot or will not be coerced. But I wonder if Andrew would ascribe to that vision of law in the domestic context. If something that we call a law in the domestic context is not enforced through coercive enforcement, does that mean that it is not really a law? I think not. Does it mean that a sovereign state cannot be bound by a "law"? Again, I think not. Consider the Bill of Rights. The Bill of Rights lays out a set of commitments that are enforced by the state against itself. Individuals can go to court to ask the state to enforce the rights granted to them in the Bill of Rights, but they ultimately must depend on the state for enforcement. If the government were to fail to enforce a right guaranteed in the Bill of Rights, then I don't think that we would say that it is not law. Treaties are not so different: They create legal commitments that are binding on states, and which states are responsible for enforcing against themselves (and against one another, but let's put that to one side). The fact that a state fails to enforce the law does not necessarily make the law any less of a legal commitment. If I am right that a binding legal commitment can exist even in the absence of coercive enforcement against a

sovereign state, then this leads us to ask if there is something special about a *legal* commitment. If there is, then there is something missing in a theory that fails to recognize a difference between a commitment that is legally binding and one that is not.

I will end with these three challenges to Andrew. But I want to reiterate that I believe that this is an extremely important project that has moved the scholarly conversation about international law to a new level. I really appreciate the contribution and the chance to talk about it today. Thank you.

WILLIAM DODGE: Both Andrew and Oona have spoken so far mostly about treaties and other sorts of agreements. I want to speak specifically about customary international law. I am a fan of customary international law. I think that it exists, that nations ought to abide by it, and that at least in some circumstances courts ought to apply it. I am also a fan of Andrew's book. I think it does an excellent job of explaining how international agreements—both treaties and soft law agreements—work. But I am not convinced by Chapter 5 of the book, which tries to explain customary international law using the same rational choice theory.

A little bit of historical context may be helpful. What we are really talking about under the heading of customary international law are rules that bind rulers or nations but are not contained in express agreements like treaties. In the Middle Ages, this law was canon law based on divine revelation and potentially enforceable by the Pope through excommunication. The canon law system broke down after the Protestant Reformation as some kings and princes asserted independence from the Catholic Church. It was replaced by natural law, still based in part on divine revelation but also based (increasingly with the Enlightenment) on what was characterized as “deduction from right reason.” During the nineteenth century, natural law gave way to positivism based on state practice and consent. This is the “traditional” definition of customary international law that is reflected in Article 38 of the ICJ Statute and Section 102 of the Restatement (Third), to which Andrew refers.

Andrew wants to change the definition of customary international law. He would do away with the requirements of state

practice and consent. For him the critical requirement is *opinio juris*, but *opinio juris* based not on a state's own belief that it is bound by a rule of law but on the belief of *other states*. Of course, this begs the question of *why* other states believe that the acting state has a legal obligation. What test or tests are they applying? Andrew rightly points out that there are problems with positivist tests based on consent. He also notes that almost no one subscribes today to theories of natural law (although some customary international law rules like the prohibition against torture could be explained in natural law terms, and some customary international law concepts like *jus cogens* are only comprehensible in such terms). As problematic as these theories may be, however, they do provide an external test of validity for customary international law rules. Without such an external test, Andrew's redefinition of customary international law seems circular.

I am also not convinced that customary law works, as Andrew says it does, through the same mechanisms as treaties—that is to say, the three Rs of reputation, reciprocity, and retaliation. Because customary international law rules bind all nations (except persistent objectors) they are most analogous to the multilateral treaties discussed in Chapter 2. As Andrew notes there, reciprocity generally doesn't work to encourage compliance with multilateral obligations because the withdrawal of cooperation cannot be limited to the violating state. The example Andrew offers for customary law—the treatment of diplomats—seems more the exception than the rule. Retaliation also generally doesn't work for multilateral obligations because retaliation imposes costs on the retaliating party and the retaliating party cannot capture all of the benefits of the retaliation (others may free ride). The example Andrew offers for customary international law is the sanctions imposed on South Africa's apartheid regime. Note first that the U.N. arms embargo was multilateral and mandatory (to avoid the free-rider problem), and second that other economic sanctions also appear to be more the exception than the rule.

This leaves reputation. The question is what benefit having a reputation for complying with customary international law gives a state. Andrew concedes (perhaps too quickly) that a state's reputation for compliance with customary international law is

likely to be separate from its reputation for compliance with agreements. This means that complying with CIL does not make it easier for a state to make credible promises in the future. Instead, he argues that “violations of CIL may . . . impose a reputational cost because other states will be reluctant to rely on compliance from a state that has violated CIL rules in the past.” But how does one state “rely on” another state’s compliance with customary international law? The only example I can think of is immunity—diplomatic, head of state, or foreign sovereign—compliance with which might make one nation more willing to send its representatives, presidents, or warships into another’s territory.

Andrew offers a different foreign sovereign immunity example. Adherence to a restrictive theory of foreign sovereign immunity, he argues, increases “the credibility of the state’s commercial commitments.” But note that it is not other states that are relying here, but *private parties*. And if you think about it, that is true for many other areas of customary international law as well: foreign direct investment (about which Andrew has written brilliantly), state responsibility, even jurisdiction to prescribe. A reputation for complying with customary international law certainly matters in some of these areas, but the opinion that matters is not that of other states but of private parties.

Reputation may well be the best explanation of how customary international law works, but it is not just reputation in the eyes of other states that matters. This may require us to open up the black box of the state (as liberal theory would do) and look at the beliefs of private actors. It also requires an external test or tests for private actors to apply to distinguish customary international law rules from mere norms. But with those adjustments, I think Andrew may well be on the path to explaining how customary international law works.

RICHARD BUXBAUM: Well, we have been treated with excellent example of discourse among academics. I do not mean that negatively since not only I am one, but this is the part of being at a law school that I enjoy. We will now hear the rejoinder followed by student questions. Thank you.

ANDREW GUZMAN: Thanks to both of you. These are great comments. I am going to try and say one thing about each, which allows me to pick on the weakest points that they have made and ignore the strongest ones.

Oona talks about the human rights context and how we explain entry into human rights treaties and whether there is something else going on. One of the things I say in the book, though it is not a central part of the book, is that I think human rights are one of the most interesting areas of international law. This is because I don't think anybody, certainly including myself, has any idea what is going on in human rights in terms of why what is happening is happening. That is, I find it very difficult to tell a coherent, internally consistent story of why states sign human rights treaties. This is not because I start off with the view of states as being self-interested. I actually think it is even true if you don't start off with that position. I find human rights treaties to be quite a puzzle.

More generally, one of the things that I came to see as terribly important as I wrote the book relates to why states enter into international commitments. I do not address this in any detail in the book because I don't have anything particularly intelligent to say about it. The book says: if you are in a treaty, your reason for compliance is explained by these Three Rs of Compliance. I do not offer an explanation of why you would enter into the treaty in the first place. It is clear when there is a bargain—I want something from you, you want something from me, we enter in a treaty. That is fine. But that is not always true and human rights is the best example I know of when it is not true. Norway did not enter into the

Genocide Convention to prevent genocide in Norway. What Norway is getting out of it is not at all clear. It turns out that if you think Norway enters the treaty in the hopes of reducing the likelihood of genocide somewhere else you run into all sorts of problems in thinking through how states behave.

Anyway, there is obviously a trade off in this. If you enter in a treaty that is effective, meaning that limits your choices, that is a real cost. There is a trade off between accepting that cost and getting whatever the treaty offers you. That is a really interesting

dynamic. Suppose you want to address human rights and you seek to use treaties to do so. You want to get countries to sign treaties so that those countries are bound by international law. You want those treaties to bind them as much as possible so as to have the greatest possible effect. But the more you make them binding, meaning the more effective they are, the more difficult it is to get states to sign. So, you have this trade off where there is pressure to reduce the meaning of the treaty to get the states in, but watering down the treaty reduces the appeal of the whole exercise.

The book does not engage this dynamic. I don't think that I argue anywhere that states enter treaties simply to gain reputation. It turns out that trying to do so is a tricky thing because once you are in you have to comply. And if compliance to treaty is easy there is little reputation payoff for compliance. A treaty stipulating that citizens will breathe in oxygen and breathe out carbon dioxide, for example, would have every high rates of compliance. We do not see that treaty. And if simply entering into and complying with a treaty could achieve reputation gains we will see a lot of those treaties.

Returning to the question of human rights, I do not have a lot of answers for why these treaties exist and why they operate the way they do. My only defense is that I do not think that anyone else does either. That is why I think it is such a fascinating area.

As far as customary international law goes, in response to Bill, this is a fair chapter to pick on. It is the chapter I like least in the book. I am pretty persuaded by the first point that Bill was criticizing. I think that customary international law is this corner of international law that is a tremendous amount of fun to kick around and beat up. It is incredibly easy to do; everyone does it and I am no exception. The problem is, I did not find something else. On the beating up side, I think the practice component does not make any sense. It cannot be made consistent with, among other things, the rules that we all believe constitute customary international law. Bill mentioned torture. If there is a ban on torture in a customary international law, it cannot be a necessary requirement to be customary international law that there is widespread state practice. There is too much torture in the world for both of those to be true.

So, you need some other story about what creates customary international law. My claim is that it is all about state attitudes.

There is another explanation out there, part which Oona mentioned, which has something to do with some sort of internal desire among states to not have torture. Even if you can get to a rule of torture being a violation of customary international law that way, I do not see how you can have general practice as a requirement for customary international law. As for reputation driving customary international law, one of the interesting results of this book, at least for me, is that it is really, really hard to persuade myself that customary international law is a powerful force. Bill's comments reflect how I got there and when I tell the story of customary international law in the book it is hard for me then to say that this is really going to influence states in important ways. I do not think it is powerless, and I believe it can solve some problems that are better solved than unsolved. But whether it can really prevent states from engaging in torture, prevent states from engaging in the use of force, prevent states from doing other things that we think reflect customary international law, I find difficult to swallow. And the only upside of that is that almost all the things we care a lot about that we say are customary law, are also treaty-based. Thus, customs are a real puzzle and I hope that I make some contribution in terms of customary international law.

RICHARD BUXBAUM: Thank you very much. We have ten minutes for questions. I am going to resist the privilege of the moderator to ask the first questions and go directly to students. Who would like to bring on questions or comments?

STUDENT: Professor Guzman, can you speak more about you ignoring the importance of domestic politics. It seems to me domestic politics are very important.

ADREW GUZMAN: Let me start with an example -- North Korea. Most of the time when we say why we are worried about North Korea, the answer is that North Korea has nuclear weapons and is incredibly unstable. Though that has a lot to do with the

domestic politics in North Korea, we don't reach first for that. We reach first for this entity called North Korea.

Let's go to a period from the early sixties through well into the eighties for another example. What was the attitude of United States of America towards Latin America? It was that certain kinds of governments would not be tolerated. That was a shared attitude through many American administrations, through economic ups and downs, and through of all kinds of politics in the United States. Thus, there are some big trends that are present in states and that cause their interests to remain fairly consistent over time. So I think, we can speak coherently about broad movements. The book intentionally and necessarily operates at a fairly abstract theoretical level.

STUDENT: Do you talk in your book about how different states have different reputations and they start out with a different reputational starting point.

ANDREW GUZMAN: Yes. It turns out that the word reputation is convenient. It is convenient to say that a state has a reputation, but there are a bunch of ways in which that is inaccurate or at least requires elaboration. For example, the United States has a different reputation with Canada than it has with Iran. When it makes a promise to Canada it is believed in a certain way, when it makes a promise to Iran it might be believed in a different way. State reputation is in part about who the players are. It also turns out that if the United States makes a promise on trade, it might be viewed differently than if it makes a promise in the environment or human rights or something else. Also, the reputation of the United States under Obama is different than under Bush.

Let me again talk about North Korea, which is one of my favorite examples to talk about in the book. North Korea finds itself in a place where at least with respect to most of the world it has precious little reputational capital. If you think states are rational, which is the assumption I make, then it follows that you have to say that they have made that choice. Along the way, they have decided to try and extract short term gains systematically

until now they are where they are. That may or may not have been a good strategy for them but that is where they are. Now, if they wanted to have a better reputation it will be expensive. They have to make a series of promises and keep promises that people are going to expect them to.

RICHARD BUXBAUM: Thank you.