

A Law and Economics Approach to Problem of International Human Right Law

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<p>Afer World War II, many international human rights treaties have been ratified. Although an expectation that international human rights law makes world better to protect human rights, there are still vast human rights violations in various countries. From the gap between expectation to international human rights law and reality of human rights violations, the purpose of this thesis is to point out the problem of international human rights law and not only to point out the problem but also to suggest a coherent and logical explanation. To achieve the goal, this thesis investigates three questions: what is the better way to understand international law?, why do states comply with international law?, and what is the problem of international human rights law?.</p> <p>The first, this paper argues and represents that law and economics approach can be the better way to understand international law and can be a useful methodology to research international law. Despite of some concerns from misunderstanding of law and economics approach, law and economics can give insights to study international law, using economic theories such as price theory, transaction cost economics, game theory.</p> <p>The second, this paper shows the reason why states comply with international law. Although there are previous studies that explain compliance with international law, the studies have limitations to suggest a coherent and logical explain. By law and economics analysis, the key for states' compliance is the three Rs of compliance: reciprocity, retaliation, and reputation. The three Rs makes and raises cost for states' non-compliance with international law. Therefore, through the three Rs, international law can work as self-enforcing mechanism and can induce states to comply with international law.</p> <p>The third, this paper point out problems of international human rights. This paper argues that international human rights law has different character or concept compared with other international laws such as WTO law and law of war. International human rights law is not based on reciprocal character as contract model but based on moral foundation that makes consent between states as declarations of existing moral norms. Because this different character, the three Rs as the key for compliance cannot work well. Only reputation little works. Moreover, there are no strong enforcement mechanisms in international human rights regimes. Although there are some enforcement mechanisms in international human rights system, they have limitations to induce states to comply with international human rights law and do not impose costs for states' non-compliance.</p> <p>In conclusion, from law and economics approach, international human rights law as self-enforcing mechanism cannot satisfy the conditions for compliance of international law: reciprocity, retaliation, and reputation. Moreover, there are not strong and effective enforcement mechanisms to assure compliance in international human rights treaties. Therefore, current international human rights law cannot fully induce and facilitate states to comply with international human rights obligations.</p>			
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List of Abbreviation

American Convention on Human Rights (ACHR)

Central Intelligence Agency (CIA)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Convention on the Rights of the Child (CRC)

European Convention on Human Rights (ECHR)

European Union (EU)

General Agreement on Tariffs and Trade (GATT)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESC)

International Court of Justice (ICJ)

International Non Governmental Organisations (INGOs)

Non-Governmental Organisations (NGOs)

UN High Commissioner for Human Rights (OHCHR)

United States Senate Select Committee on Intelligence (SSCI)

Universal Declaration of Human Rights (UDHR)

United States (US)

World Trade Organization (WTO)

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Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Report (1996) 21.

Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) 15.

Austria v. Italy, Application No. 788/60, European Commission of Human Rights, Decision (11 January 1961).

The Effects of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Series A No. 2, Inter-American Court of Human Rights, Advisory Opinion OC-2/82 (24 September 1982).

Table of Treaties

International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 03 January 1976, 993 UNTS 3.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, in force 03 September 1981, 1249 UNTS 13.

Convention on the Rights of the Child, 20 November 1989, in force 02 September 1990, 1577 UNTS 3.

European Convention on Human Rights, 04 November 1950, in force 03 September 1953, 213 UNTS 221.

American Convention on Human Rights, 21 November 1969, in force 18 July 1978, 1144 UNTS 123.

Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 UNTS 331

Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401.

Convention for the Unification of certain rules relating to international carriage by air, 12 October 1929, in force 13 February 1933, 137 LNTS 11.

Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, in force 4 November 2003, 2242 UNTS 309.

Convention on International Civil Aviation, 7 December 1944, in force 4 April 1947, 15 UNTS 295.

Convention on Offences and Certain Other Acts Committed On Board Aircraft, 14 September 1963, in force 4 December 1969, 704 UNTS 219.

Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, in force 14 October 1971, 860 UNTS 105.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, in force 26 January 1973, 974 UNTS 177.

Table of Other Documents

Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

General Comment No.24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).

I. Introduction

Since the end of World War II, more than twenty of international human rights treaties have been signed by most countries. As Louis Henkin wrote, the present age may be seen as ‘the Age of Rights’.¹ It is expected that international human rights treaties affect member states to respect human rights and make differences in the protection of human rights. This expectation is based on an assumption implied by many human rights scholars and advocates that international human rights standards can lead states to protect such values in the domestic arena.² Indeed, human rights scholars suggest that ‘once states adopt the rhetoric of human rights and begin to move toward norm compliance, there is no turning back’.³ Ultimately, the human rights movement expects that human rights norms established in international law will build a better world.⁴

However, at the present time, it can be easily heard from the global news media that widespread breaches of international human rights remain, even though most states have joined the various international human rights treaty regimes. For example, in 2011, ‘The Economist’ published two articles⁵ about China’s political and economic changes after its membership of the World Trade Organization (WTO). The first article’s title is ‘China’s economy and the WTO: All Change’, and the second is ‘Chinese politics and the WTO: No Change’. As the articles’ names imply, the Chinese economy has significantly changed and China has achieved impressive outcomes in terms of economic development. Through the joining WTO system and compliance with WTO law, China has opened its economic system and also tried to modify its national economic regulations in order to adjust to international standards that WTO required. Cooperating with other states within WTO system and Complying with WTO law, China could achieve the economic development and could successfully participate in international economic order. However, the second article argued that despite these substantial economic changes, Chinese politics had not

¹ Louis Henkin, *The Age of Rights* (Columbia University Press, 1990)

² Andrew T. Guzman and Katerina Linos, ‘Human Rights Backsliding’, 102 *California Law Review* (2014) 603-654, at 605.

³ Eran Shor, ‘Conflict, Terrorism, and the Socialization of Human Rights Norms: The Spiral Model Revisited’, 55 *Social Problems* (2008) 117-138, at 118.

⁴ David Rieff, ‘The Precarious Triumph of Human Rights’, *New York Times Magazine*, 8 Aug 1999, <<http://www.nytimes.com/1999/08/08/magazine/the-precious-triumph-of-human-rights.html?pagewanted=3>> (visited 11 Dec 2014)

⁵ ‘China’s economy and the WTO: All change’, *The Economists*, Dec 10th 2011; Chinese politics and the WTO: No change, *The Economists*, Dec 10th 2011.

changed to the same extent. In other words, although China's power and impact on the world has significantly increased, China is still one of the major human rights-violation countries. China's power and economic impact resulted in joining WTO system and economic growth and development. Although China could obtain the results by trying to comply with WTO law and international standards, this compliance with international law do not lead to protect international human rights values and standards that international human rights law requires. Moreover, according to the Report on Torture by United States Senate Select Committee on Intelligence (SSCI), even the United States (US) – which is widely considered to be one of the most democratic countries – used the Central Intelligence Agency (CIA)'s Detention and Interrogation Program for various forms of torture on detainees between 2001 and 2009.⁶ In addition, human rights violations are not only seen in the cases of China and US but more widely in many other countries in the world. Many countries, including liberal democratic countries in the West, offered assistance to the US effort. From recent human rights records⁷, in 2011, 93 countries used torture 'frequently', 65 countries 'occasionally', and just 34 countries 'not at all'.⁸

Henkin, in his book *How Nations Behave*, argued that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.⁹ If Henkin's finding is right and is the case, however, international human rights obligations seem to be different from other international legal obligations because of the vast human rights violations in various countries. Now is the time to evaluate international human rights law. It is important to evaluate the effectiveness and limits of international human rights treaties in order to understand this gap between the expectations associated with international human rights law and the realities of how these norms function. The reality of human rights violations has lead to questions about the problems of international human rights law and why states violate international human rights obligations but generally not other international law such as 'WTO law'¹⁰ and 'law of war'¹¹. To

⁶ For more detail, See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,

<<http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>> (visited 30 Dec 2014); The Guardian, 'CIA torture report', <<http://www.theguardian.com/us-news/cia-torture-report>> (visited 28 Dec 2014)

⁷ David L. Cingranelli, David L. Richards, and K. Chad Clay, CIRI Human Rights Documentation, <<http://www.humanrightsdata.com/>> (visited 5 Jan 2015)

⁸ Eric A. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014), at 3.

⁹ Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press, 1979), at 47.

¹⁰ See Alan O Sykes, 'When is International Law Useful?' (2013). New York University Law and Economics Working Papers, Paper 348, <http://lsr.nellco.org/nyu_lewp/348> (visited 20 April 2015), at 14-17.

understand this phenomenon, one should study states' behaviour, especially compliance, concerning international law, including customary international law and international treaties because compliance is one of the most central questions in international law.¹² Without an understanding of the connection between international law and state actions, one cannot hope to provide useful policy advice with respect to international law.

From the research background, this paper asks the main question that 'what the problem of international human rights law is'. Why international human rights law does not fully induce states to comply with their human rights obligations? What is the reason why states do not seem to comply with international human rights law even though they relatively comply with other international laws? Are there any differences between other international laws and international human rights law? To answer this main question, it is needed to know the reason 'why states comply with international law'. To analyse international human rights law and states' behaviours and to compare compliance with international human rights law to other international laws, the answer of the question 'why states comply with international law' is very important. Moreover, not only to discover or show the problem of international human rights but also to suggest theoretically coherent and logical explanation, this paper will represent a law and economics approach as an answer the question 'what the better way to understand international law and international legal issues is'. To understand international law and states' behaviours, a law and economics approach can be better way or method rather than other methods of or approaches to international law. However, a law and economics does not commonly accepted by international legal scholars and is generally misunderstood by them. Therefore, this paper will suggest the usefulness of law and economics approach to international law. Overall, this paper will explore the answers to three questions in order to solve the main question: 'what is the better way to understand and study international law and international legal issues?', 'why do states comply with international law?', and 'what is the problem of international human rights law?'

To achieve the goal to answer the central research questions and to discover the

¹¹ See Eric Posner, 'Human Rights, the Laws of War, and Reciprocity' (2010), John M. Olin Law & Economics Working Paper No. 537, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693974> (visited 5 December 2014)

¹² See Harold H. Koh, 'Why Do Nations Obey International Law?', 106 *The Yale Law Journal*(1997) 2599-2659, at 2599-2601.

connection between international law and state behaviour, this paper will investigate the problem of international human rights law, using a law and economics approach to international law. After the brief introduction, part II will introduce the law and economics approach to international law. In this part, the possibilities and benefits of applying an economic analysis to international law will be presented. In part III, this paper will answer the question of why states comply with international law. Compliance theories from international legal scholars and international relations scholars will be reviewed and criticised because these theories cannot suggest coherent and logical answer for the question and have limits to explain states' compliance. After this review, the paper explains the connection between international law and states' behaviour using a law and economics approach. Part IV will identify the problem of international human rights law, providing an answer for the question of why international human rights law cannot fully induce states to comply, and clarifying differences between international human rights law and other international laws. In this part, the paper will examine universal human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT). The paper will not, however, cover regional human rights treaties such as The European Convention on Human Rights (ECHR) and The American Convention on Human Rights (ACHR) which have relatively more effective enforcement mechanisms. Moreover, the analysis will be supported by empirical results that have been released from important previous researches. Finally, part V will conclude the thesis.

II. Law and Economics Approach to International Law

Law and economics has been developed in various areas of legal studies; beyond anti-trust law and economic law, law and economics has recently applied to contract law, tort law, criminal law, and constitutional law. On the other hand, law and economics has much less impact on research or study international law. Even though there are an increasing number of studies that use law and economics to research international law, its influence in international legal study is still limited because international legal scholars lack or misunderstand economic theories. However, likewise other areas of law, law and economics can expand understanding international law and international legal issues. Moreover, based on the broader understanding, law and economics can suggest better

solutions or international legal policies to international society. In this part, under the question ‘what the better way to understand international law and international legal issues is’, this paper will argue that law and economics is feasible and persuasive methodology of international law. First, this part will explain what law and economics is. Second, it will be explained that how economic theories are applied to international law with some instances. Moreover, in the second sub-part, this paper will discuss ‘why international lawyers have avoided law and economics’.

1. What Is Law and Economics?

The law and economics movement has been considered to be an influential legal methodology whose influence is arguably continuing to expand. In the introduction to the third edition of his book, Richard Posner wrote that ‘perhaps the most important development in legal thought in the last quarter century has been the application of economics to an ever increasing range of legal fields’.¹³ Moreover, Bruce Ackerman has also represented law and economics to be ‘the most important development in legal scholarship of the twentieth century’.¹⁴ This important interdisciplinary approach was already predicted by Oliver Wendell Holmes, who said that ‘for the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics’.¹⁵

Law and economics, known as ‘economic analysis of law’, is a methodology that uses (micro) economic theory and method in order to analyse making, enforcement, and effect of law. Economics is based on the rational choice theory. The rational choice theory is a tool for understanding and modelling social and economic behaviour. In the theory, rational choice means that under conditions of scarcity, individual actors rationally behave to maximise their preferences. Law and economics uses this economic tool to understand the ability of law to affect rational behaviour to maximise their interests inside and outside of the market. In other words, economics offers a scientific theory to analyse legal institutions’ impact on human behaviour. Law and Economics shares two core pursuits in economics as a social science. One is a modelling that is based on theory and is source of prediction and hypotheses. The other is an empirical testing that validates and supports the modelling. As

¹³ Richard A. Posner, *Economic Analysis of Law* (3th edn, Little Brown and Company, 1986), at xix.

¹⁴ Quoted in Robert D. Cooter and Thomas Ulen, *Law and Economics* (4th edn, Addison Wesley, 2004), at 3.

¹⁵ Oliver Wendell Holmes, *The Path of the Law*, *10 Harvard Law Review* (1897) 457-478, at 469.

Posner said in the foreword in *Essays in Law and Economics*,

To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.¹⁶

Law and economics make possible legal study as science. In addition, economics allows useful normative standard to assess role and effect of law and policy. Through economics, one can foresee whether law and policy can achieve its goal efficiently.¹⁷ In law and economics, thus, economic concepts including price theory, transaction cost, game theory, and public choice theory are used ‘to explain the effects of laws, to assess which legal rules are economically efficient, and to predict which legal rules will be promulgated’.¹⁸

1.1 Price Theory

Price theory is a starting point and basic tool in economic models, especially neoclassical economics.¹⁹ Price theory is based on the assumption that rational actors behave to maximize their preferences.²⁰ In other words, if all things are equal, people favour cheaper goods and services, ‘as well as more efficient means of achieving their nonconsumption goal’.²¹ Price theory is the basis for a cost-benefit analysis: in order to

¹⁶ Quoted in Cooter and Ulen, *Law and Economics*, supra note 14, at 2.

¹⁷ See Cooter and Ulen, *Law and Economics*, supra note 14, at 4-5.

¹⁸ David Friedman, ‘law and economics’, in Steven N. Durlauf and Lawrence E. Blume (eds), *The New Palgrave: A Dictionary of Economics* (8 vols, Palgrave Macmillan, 1987), Vol 2, at 144.

¹⁹ Joel P. Trachtman, *The Economic Structure of International Law* (Harvard University Press, 2008), at 4; Jeffrey L. Dunoff and Joel P. Trachtman, ‘The Law and Economics of Humanitarian Law Violations in Internal Conflict’, 93 *American Journal of International Law* (1999), 394-409 at 396.

²⁰ Dunoff and Trachtman, ‘The Law and Economics’, supra note 19, at 396.

²¹ Trachtman, *The Economic Structure*, supra note 19, at 4

achieve one's preferences, people seek to maximize benefits and minimize costs.²² Economists have developed methods using price theory even in a non-monetisable market that cannot be converted into money²³: measuring benefits and costs is not necessarily monetised and monetisable.²⁴

Price theory also investigates whether supply and demand will be in stable equilibrium. There are two criterion generated from the equilibrium. The first is Pareto efficiency and the second is Kaldor-Hicks efficiency. Pareto efficiency analysis examines whether equilibrium that makes one person better off exists without making anyone worse off. Kaldor-Hicks analysis, known as potential Pareto efficiency, is a question of whether one person's 'better off' is much more than anyone's 'worse off'.²⁵ The second analysis, Kaldor-Hicks analysis, is importantly equated to cost-benefit analysis.²⁶ By using the two criteria, legal institutions can be evaluated. Under the Pareto criterion, if a law makes one better off without making anyone else worse off, the law can be desirable. Under the Kaldor-Hicks criterion, even though a law make loser worse off, if the law make winners better off much more than the losers lose, the law is desirable.²⁷

1.2 Transaction Cost Economics

Transaction cost economics is based on the Coase theorem²⁸ that if people could negotiate or contract with one another without cost, they would always achieve a Pareto efficient goal without government or other outside intervention.²⁹ According to the Coase theorem, if transaction costs could be zero, negotiation and contract between individuals can generate efficient results, regardless of whether a law grants property rights to whomever.³⁰ Conversely, if transaction costs exist, property rights that increase asset specificity and certainty can play significant role to reduce transaction costs and to facilitate to establish contracts. Based on rational choice, if transaction costs are higher

²² Ibid., at 5

²³ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396.

²⁴ Trachtman, *The Economic Structure*, supra note 19, at 5

²⁵ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396.

²⁶ Ibid.

²⁷ Eric A. Posner and Alan O. Sykes, *Economic foundations of International Law* (The Belknap Press of Harvard University Press, 2013), at 13.

²⁸ For more detail, see Ronald. H. Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics*(1960) 1-44; 'The Nature of the Firm', 4 *Economica*(1937) 386-405.

²⁹ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396.

³⁰ Cooter and Ulen, *Law and Economics*, supra note 14, at 89.

than the expected benefits from the transaction, the transaction or negotiation will be difficult to establish.³¹ Therefore, in the case that there are high transaction costs, to achieve a Pareto efficient goal which makes efficient allocation of resources depends on how property rights are determined by law. In fact, as transaction costs always exist, the insight from the Coase theorem does not mean that government should never intervene.³² On the contrary, legal systems can reduce transaction costs and support negotiation for the transaction.³³ Transaction cost economics refines price theory ‘by including consideration of, for example, the cost of identifying potential transactors, negotiating agreement, and enforcing agreement’.³⁴ Thus, under transaction cost economics, one can understand why actors cannot make agreements even though they can benefit from the establishment of a clear rule,³⁵ and how to establish legal systems in order to improve efficiency in transactions.³⁶

1.3 Game Theory

Game theory is an economic modelling for analysis of strategic interactions between players. The strategic interactions are situations in which one player’s decision based on rational choice partly or entirely depends on decisions by others.³⁷ The law frequently confronts these situations. These situations are similar to games in which players must act according to a strategy. A strategy is an intention for acting that reacts to the acting of others. In other words, game theory deals with a strategic behaviour. To analyse strategic situations, game theory uses the ‘Prisoner’s Dilemma’. In this situation, although players can maximize their individual benefit by cooperating with each other, the players fail to cooperate.³⁸ Game theory can explain some cases in which even though players can expect legal rules or institutions that make the all players obtain maximising benefits as a shared goal between them, the players might consequently fail to achieve the goal because their strategic actions depend on other player’s decisions or actions.³⁹ Thus, game theory will

³¹ 김성원, ‘법경제학 국제법 방법론에 관한 연구’, 33 *Hanyang Law Review* (2011) 65-84 at 71

³² Dunoff and Trachtman, ‘The Law and Economics’, supra note 19, at 396.

³³ Cooter and Ulen, *Law and Economics*, supra note 14, at 97.

³⁴ Dunoff and Trachtman, ‘The Law and Economics’, supra note 19, at 396.

³⁵ Ibid.

³⁶ Cooter and Ulen, *Law and Economics*, supra note 14, at 96.

³⁷ Dunoff and Trachtman, ‘The Law and Economics’, supra note 19, at 396.

³⁸ For more detail, see C. Goetz, *Law and Economics: Cases and Materials* (West Publishing Company, 1984), at 5-11.

³⁹ 김성원, ‘법경제학 국제법 방법론에 관한 연구’, supra note 31, at 72.

improve the understanding of some legal rules and institutions.⁴⁰

1.4 Public Choice Theory

Public choice theory uses economic tools for dealing with decision making outside of markets.⁴¹ Public choice theory is commonly based on an assumption that politicians, bureaucrats, and other government actors are rationally self-interested. The politicians and bureaucrats are attracted to maximize their own interests rather than those of the greater populace, in the same way as actors generally behave in the private area. The self-interests of the decision makers are assumed to be their personal power, wealth and political support.⁴² This assumption can give useful insight to test hypotheses regarding the government actor's behaviour on behalf of their government.⁴³ Through the assumption about behaviour of politicians and bureaucrats, public choice theory can indicate that 'law is traded for political support, money, power, and other things that politicians and bureaucrats demand'.⁴⁴ Thus, public choice theory considers the legislation process as a microeconomic system and treats law as goods provided to the 'highest bidders'.⁴⁵

2. Why Law and Economics Approach to International Law?

Law and economics can be applied to various area of international law. Law and economics methodology can suggest solutions and policies to interpretation of international law, compliance with international law, process of making international treaties through international organisations, and efficiency of international organisations. Despite of the benefits of law and economics approach to international law, many international lawyers have still not considered law and economics as possible methodology of international law. There may be many explains for the reasons. But, based on research by Jeffrey Dunoff and Joel Trachtman, this paper will present three important reasons: concern of methodology, concern of political bias, and concern of positivism. However, these concerns are generated from insufficient understanding or misunderstanding of law

⁴⁰ Cooter and Ulen, *Law and Economics*, supra note 14, at 38.

⁴¹ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396.

⁴² Trachtman, *The Economic Structure*, supra note 19, at 19; Jonathan R. Macey and Enrico Colombatto, 'A Public Choice Model of International Economic Cooperation and the Decline of the Nation State', 18 *CARDOZO LAW REVIEW* (1996) 925-956, at 929.

⁴³ Trachtman, *The Economic Structure*, supra note 19, at 19.

⁴⁴ Macey and Colombatto, 'A Public Choice Model', supra note 42, at 929.

⁴⁵ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396.

and economics.

2.1 Why Have International Lawyers Avoided Law and Economics?

2.1.1 Concern of Methodology

Dunoff and Trachtman as international legal scholars mentioned that '[m]any of us are uncomfortable with economics'. They represent two reasons. One is that international legal scholars distrust economic theory and methodologies which are non-normative, positive, and empirical analysis of social phenomenon, and they therefore think that economic analysis is difficult to be a part of legal methodologies to study or research for laws as normative.⁴⁶ Another is that there are some difficulties to use economic tools or methodologies. 'Complex graphs, charts and multivariable equations may deter those trained in the law from employing economic analysis.'⁴⁷

However, the tools are not necessarily required for economic analysis of law. The complex mathematical analysis that economists use is a small part of the whole economic analysis and can give little insights on the international legal issues. In other words, many relevant issues for international legal scholars do not require high mathematical skills.⁴⁸ Moreover, modern law and economics approach is applied by new institutional economics. The new institutional economics tries to incorporate 'neoclassical economics' with institutional analysis, using transaction costs, game theory, public choice and positive political economy beyond price theory in neoclassical economics. Because institutions between different systems or countries are important, a main tool of this approach is comparison. This comparative institutional analysis is already broadly accepted by international lawyers even though they criticize the law and economics approach.⁴⁹

2.1.2 Concern of Political Bias

In addition to being difficult to access, many critics of economic analysis relate to the matter of political neutrality. They argue that the analysis inherently has political biases.

⁴⁶ Jeffrey L. Dunoff and Joel P. Trachtman, 'Economic Analysis of International Law', 24 *The Yale Journal of International Law* (1999) 1-59, at 7; 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 30, at 73.

⁴⁷ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 7

⁴⁸ Ibid; 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 31, at 74.

⁴⁹ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 7-8.

Critics consider that economists commit to ‘laissez-faire’ economics policy, cooperate either with the liberal or conservative political side, and reject government interventions. In the same way, critics of economic analysis reject the attitude to prioritize the values of the market in which economic values are maximised rather than other important values. In other words, an economic analysis does not appreciate or measure incommensurable social values and ‘subordinates those values to economic values’.⁵⁰

However, these critics do not also undermine trying to apply an economic approach to international law. Dunoff and Trachtman argue that the criticisms are based on a misunderstanding of how economics relates to the market. The critics think economic analysis blindly objects to government intervention and unconditionally ‘believes in’ the market.⁵¹ But in fact the economic methodologies do not have a bias against government regulation or in preference of the market. On the contrary, the methodologies adopt a neutral attitude to government intervention and autonomy of the market under rational choice and efficiency.⁵² Moreover, the approach admits the possible validity of government processes and takes in account the main questions of institutions including the market.⁵³ Regarding the critic of economics as ignorant of non-monetised values, this is also misunderstanding, as law and economics does not ignore non-monetary values. In the process of governing, politics is the leading mechanism to choose values. There are many non-monetised values that are still worthy of expression. A law and economics approach does not object to the choice of values through the political process, nor to a priority of the political over the economic.⁵⁴

2.1.3 Concern of Positivism

The last criticism is about the positivism of economic analysis. Although the border between positive and normative economics is unclear, an essential principle of law and economics is its positivism. The positivism emphasizes on empiricism and analysing the world as it is, compared with normative perspective as it should be. Dunoff and Trachtman say that ‘international lawyers have long done battle with a brand of international legal theory that is called “positivist”’. According to them, because international lawyers have

⁵⁰ Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 8.

⁵¹ Ibid.

⁵² 김성원, ‘법경제학 국제법 방법론에 관한 연구’, supra note 31, at 74

⁵³ Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 8-9.

⁵⁴ Ibid, at 9.

struggled and disputed with ‘positivist’ international legal theory, the critics of international legal positivism naturally do not see value in applying law and economics approach to international issues.⁵⁵ Furthermore, the critics argue that law and economics methodologies based on positive economics have advantages to analyse a law as it is, but have limitations to suggest an alternative to problematic laws and institutions. In other words, law and economics is a useful tool to analyse efficacy of ‘*lex lata*’, but is difficult to present ‘*lex ferenda*’.⁵⁶

As other criticisms of law and economics, however, critics of ‘positivism’ economic analysis arise from misunderstanding. Dunoff and Trachtman assert that the critics of positivism confuse the positivism of economic analysis with other forms of positivism. Historically, international legal scholars confronted the Westphalian positivist view, and the Westphalian positivist view was often associated with a realist perspective on international relations. That is why many international legal scholars reject the Westphalian positivist model. However, positivism in law and economics has a different meaning from Westphalian positivism linked with realism. Positivism of law and economics is based on methodological individualism, compared with a state-centric approach in Westphalian positivism. This methodological individualism emphasises individual choice as ‘individual sovereignty’ compared with state sovereignty in the Westphalian positivism. Methodological individualism can more easily stress issues for cooperation and/or conflict. Therefore, the positivism of law and economics tends to underline the treaties and institutions that international legal scholars are interested in.⁵⁷ Moreover, this positivism can analyse power and efficiency of international agreements and of international organisations, and this positive analysis can also present the problems of international agreements and international organisations. Based upon a positive analysis, one can find or seek a solution to improve international agreements and international organisations. Eventually, a law and economics approach can be a starting point to discuss for ‘*lex ferenda*’, contrary to the arguments of critics.⁵⁸

2.2 Applying Law and Economics to International Law

⁵⁵ Ibid, at 10.

⁵⁶ 김성원, ‘법경제학 국제법 방법론에 관한 연구’, *supra* note 31, at 74

⁵⁷ Dunoff and Trachtman, ‘Economic Analysis of’, *supra* note 46, at 10-11.

⁵⁸ 김성원, ‘법경제학 국제법 방법론에 관한 연구’, *supra* note 31, at 74

Beyond the concerns, law and economics can be applied and be useful tool for analysing international legal issues, using price theory, efficient breach hypothesis, transaction cost, game theory, and public choice theory. In this part, in order to show or make application of each economic theory more clear, explanations are separated. However, economic theories are not applied alone but together and supplement each other in order to analyse international law. For example, price theory suggests the basis for cost-benefit analysis and theory of efficient breach. Transaction economics that supplement price theory give insights for the real world as incomplete market. Under the insights from the theories, game theory can give explanations states' strategic behaviours in a international circumstance as a game.

2.2.1 Price Theory

A law and economics approach gives some insights for interpreting treaties by applying market price in a complete competitive market. The approach considers treaties made between states or resolutions in international organisations as market price. In other words, considering international conferences for making treaties or councils of international organisations for resolutions as markets in which information for supply and demand is exchanged, the approach recognises that treaties or resolutions in the meeting or conferences are market prices concluded between states and, therefore, those preferences of parties achieves 'Pareto Efficiency'. This market-based approach, of course, has a market failure problem, and a law and economics approach does not exclude the possibility of market failure in which the Pareto Efficiency is not achieved.⁵⁹ Despite the possibility of market failure, however, if the treaties or resolutions are considered as maximising preferences between parties, a law and economics approach theoretically underlies the priority of a text-based interpretation to the treaties or resolutions.⁶⁰ Therefore, law and economics emphasises the text-based interpretation even though the approach is purportedly an efficiency-based interpretation.

Text-based interpretation upholds the contracts by the parties to the treaty, and such contracts are presumptively efficient when the markets for contracts of treaties or resolutions are well functioning. Text-based interpretation supported by such a market

⁵⁹ See, e.g., Richard O. Zerbe, *Economic Efficiency in Law and Economics* (Edward Elgar Publishing 2001), at 167-174.

⁶⁰ 김성원, '법경제학 국제법 방법론에 관한 연구', *supra* note 31, at 75.

approach for determination of preferences is possible to be more respected than a court's analogical interpretation. Furthermore, the priority of text-based interpretation stimulates additional transactions because 'if authoritative interpreters respect the original texts, states will be encouraged to enter into treaties'.⁶¹ Ultimately, from a law and economics approach, the analogical interpretation based on 'judicial activism' by courts is undesirable where there is no direct rule for application to an issue.

In advisory opinion on legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) recognised and considered an importance of priority or necessity of text-based interpretation supported by a market price perspective from law and economics.⁶² In the advisory opinion, the ICJ concluded that 'there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons'⁶³, and 'there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such'.⁶⁴ This conclusion has been criticised by many international lawyers and, especially, the *non liquet* of ICJ was thought to be a central problem.⁶⁵ However, according to the law and economics approach, a solution based on 'judicial activism' for overcoming *non liquet* is undesirable.⁶⁶ Moreover, in that case, an argument that nuclear weapons should be treated as poisoned weapons has been advanced. In the argument, nuclear weapons would be prohibited under 'the Second Hague Declaration of 29 July 1899', 'Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907' and 'the Geneva Protocol of 17 June 1925'.⁶⁷ In response to that argument, the ICJ observed that the regulations do not define 'poison or poisoned weapons' and that different interpretations exist on the issue. In addition, the ICJ argued that the term was understood by state practice, and the practice is clear that 'nuclear weapon' was not treated as a 'poisoned weapon' by the parties. Accordingly, the ICJ

⁶¹ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 399.

⁶² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Report (1996) 21.

⁶³ Ibid, at para. 105(2) A.

⁶⁴ Ibid, at para. 105(2) B.

⁶⁵ Timothy L.H. McCormack, 'A non liquet on nuclear weapons - The ICJ avoids the application of general principles of international humanitarian law', 316 *International Review of the Red Cross*(1997) 76. In this article, McCormack argues that the ICJ failed a process to apply general principle of international law to the issue.

⁶⁶ 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 31, at 75.

⁶⁷ Advisory Opinion, supra note 60, at para. 54.

rejected the argument.⁶⁸ Therefore, the conclusion of the ICJ in this opinion is one example which underlies the necessity or priority of a text-based interpretation that the law and economics approach emphasise.

2.2.2 Efficient Breach Hypothesis

Law and economics can predict the degree of compliance with international law, using price theory and cost-benefit analysis. From this perspective, compliance depends on the price of breach. If the price of a breach is relatively high, compliance will be expected. To be calculated, the price of breach needs both the measure of damages and institutions to oblige the payment of damages. With this simple tool, law and economics approaches can assess the relative binding force of international treaties and, when the need for enhanced compliance exists, can suggest modifications of treaty structures in order to enhance their binding force.⁶⁹ From this approach, where an international agreement has no sanctions or unfixed sanctions, an expectation for a high level of compliance with the international agreement is irrational. Thus, comparing benefit from compliance with cost from breaching of international agreements, a law and economics approach gives insight to evaluate or estimate a degree of compliance with international agreements and to find solutions for improving international regulation.⁷⁰

In such a way, law and economics uses the theory of efficient breach in domestic contract context for analysing compliance or binding force of international agreements.⁷¹ The theory of efficient breach is that ‘where breach of contract is more efficient than performance, the law ought to facilitate breach in such circumstances’.⁷² Although contracting parties, courts, and the drafters of contract law strive, there will be circumstances that compliance will cost more than benefit but will not be justified by any provisions and principle rule of contract law. In these circumstances, if the one party prefers to compensate another party for the lost value of compliance rather than comply

⁶⁸ Ibid, at para. 55-56.

⁶⁹ Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 31.

⁷⁰ 김성원, ‘법경제학 국제법 방법론에 관한 연구’, supra note 31, at 76.

⁷¹ For more detail, See Barry E. Alder, ‘Efficient Breach Theory Through the Looking Glass’, 83 *New York University Law Review* (2008) 1679-1725; Eric A. Posner and Alan O. Sykes, ‘Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues’, 110 *Michigan Law Review* (2011) 243-294.

⁷² Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 31.

with the contract, breach is efficient.⁷³ In other words, where cost of compliance with a contract is higher than benefit of compliance that parties can expect, the efficient breach is realised. The theory of efficient breach is the most influential theory from law and economics⁷⁴, and the theory is accepted in contract laws in most countries.⁷⁵

From a normative perspective, however, some international legal scholars give a sceptical response to the concept of efficient breach.⁷⁶ They argue that if the idea/theory of efficient breach is accepted, the treaty regime will be weakened, and one cannot therefore expect states to comply with international treaties sincerely. Traditionally, the belief that a treaty will be obeyed, the principle called *pacta sunt servanda*, has been thought as the most important doctrine in international legal thought. If efficient breach is encouraged by state's immediate or short-term interest, the fundamental rule of *pacta sunt servanda* will be undermined, and as a result, it will be more difficult to make sustained cooperation between states through treaty regime.⁷⁷

The same objection is not only raised in the international context but also in the domestic context. Because the belief that contracts will be obeyed is a fundamental rule, contracts are important. However, if under certain circumstance the possibility of breach is predicted and liability is clear, the problem of theory of efficient breach will be overcome, and the efficient breach can be useful under such circumstances. Under circumstance where there are effective dispute settlements and obvious remedies to damages that can be easily monetised are guaranteed, the theory of efficient breach gives an insight to facilitate state's entry into contract.⁷⁸ The General Agreement on Tariffs and Trade (GATT)/WTO escape clause is a suitable example which shows the application of efficient breach to international law.⁷⁹ Under the WTO Dispute Settlement Understanding, in cases where a WTO dispute panel or the Appellate Body concludes that a measure is inconsistent with the GATT, 'it shall recommend that the Member concerned bring the measure into conformity

⁷³ Posner and Sykes, 'Efficient Breach of International Law', supra note 71, at 257-258.

⁷⁴ Trachtman, *The Economic Structure*, supra note 19, at 142.

⁷⁵ 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 31, at 76.

⁷⁶ For more detail, see, Joost Pauwelyn, *Optimal Protection of International Law: Navigating between European Absolutism and American Voluntarism* (Cambridge University Press, 2012)

⁷⁷ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 32.

⁷⁸ Ibid; 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 31, at 77.

⁷⁹ See Alan O. Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations', 58 *University of Chicago Law Review* (1991) 255-306.

with that agreement'.⁸⁰ According to the conclusion by the dispute settlement body, the member state can and should match the measure with the agreement by amending or retracting the inconsistent measure. However, in case where the state compensates damages from the non-complying measure, the measure may be maintained.⁸¹ Consequently, the state may escape from amending or retracting the offending measure by providing compensation or accepting retaliation authorised by the WTO in order to restore 'the balance of negotiated concessions'.⁸² Undoubtedly, it is true that escape from obligation of international treaties should not be utilised as general way to enhance the normative force of treaties.⁸³ However, the above law and economics analysis is useful and valuable in giving insights for inducing more states to enter into treaties and for devising effective dispute settlement procedures.⁸⁴

2.2.3 Transaction Cost Economics

A law and economics approach can explain when and how international contractual arrangement between states can be achieved or fail by using transaction cost economics. The transaction costs which are, for example, the costs of negotiating, arranging, monitoring, and enforcing a contract, significantly affects contractual arrangements. As with domestic contractual arrangements, of course, the development and operation of international agreements may be affected by the transaction costs involved.⁸⁵ Transaction costs are even higher than domestic contractual arrangements due to the complexity, uncertainty, and the number of states in international relations. Thus, to understand international agreements well, one must know not only the benefits from international

⁸⁰ Art. 19(1), Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2. 'The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.' Sykes, 'Protectionism as a "Safeguard"', supra note 79, at note 9.

⁸¹ Art. 22(1), Understanding on Rules and Procedures Governing the Settlement of Disputes, supra note 78.

⁸² Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 33. For problem of efficient breach and opposite argument for the Dispute Settlement Understanding, see John H. Jackson, 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation', 91 *American Journal of International Law*(1997)60-84.

⁸³ This efficient breach is not preferred even though permitted. Art. 22(1), Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁸⁴ 김성원, '법경제학 국제법 방법론에 관한 연구', supra note 31, at 77.

⁸⁵ See William J. Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and The Concept of State Practice', 17 *University of Pennsylvania Journal of International Economic Law* (1996) 995-1068, at1006-1031.

cooperation but also the transaction costs of international agreements.⁸⁶

A law and economics approach can shed substantial light on rules governing the exercise of prescriptive jurisdiction that a state has power to legislate by applying transaction cost economics. Law and economics tries to analogise domestic property to international prescriptive jurisdiction.⁸⁷ Under positive transaction costs, clear property rights can reduce transaction costs and can affect efficiency. As with the clarity of property rights, international legal scholars require clear international legal rules to regulate prescriptive jurisdiction. However, clarity is not always a solution for the problem of property rights. Although clarity is considered to reduce transaction costs, clarity cannot always solve the problem of jurisdiction. Clarity may be useful in circumstances where the initial allocation by property rules is difficult and where there are low transaction costs, allowing reallocation through transactions. On the contrary, if transaction costs are high, clarity is insufficient.⁸⁸ According to Calabresi and Melamed's analysis, while property rules may be preferable for economic efficiency in circumstances where transaction costs are low, liability rules may be appropriate for not only economic efficiency but also distributive results in circumstances in which transaction costs are high.⁸⁹ The WTO dispute resolution system is one example that illustrates this analysis in international society. According to Dunoff and Trachtman, 'The availability of relatively strong dispute resolution under the WTO has served as a magnet to draw in many types of claims that otherwise would have lacked strong institutional contexts.'⁹⁰

In addition, transaction cost economics can analyse international organisation or governance by applying the theory of the firm from the Coase theorem.⁹¹ Coase argued that although corporations generate agency costs, corporations exist because the transaction costs are larger than the agency costs. In other words, the corporations are made in order to avoid some of the transaction costs.⁹² Similarly, states can reduce transaction costs by joining together in international organisations when they need to cooperate for certain goods or ends, such as international security or international trade. As

⁸⁶ See Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 20-24.

⁸⁷ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 22.

⁸⁸ Ibid, at 23-25.

⁸⁹ See Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and inalienability: One View of the Cathedral', 85 *Harvard Law Review* (1972) 1089-1128.

⁹⁰ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 25.

⁹¹ See Ronald H. Coase, 'The Nature of the Firm', supra note 28.

⁹² See Ibid.

Dunoff and Trachtman also noted, ‘This is the story of the institutional development of both the European Union (EU) and the WTO.’⁹³ For example, the EU legal system alleviates a number of monitoring and incomplete contracting problems, establishing a monitoring system and agreements that prescribe relatively broad EU rules. The EU system can play an important role to minimize the transaction costs at the international level through these processes.⁹⁴ Undoubtedly, an international organisation is not the same as a business corporation. However, the methods of analysing a business corporation which uses transaction cost economics can be applied to analyse international organisations and can give useful insights to understand international organisations.⁹⁵

2.2.4 Game Theory

Game theory is particularly well suited to issues of international law and therefore may be a useful tool for international law scholars. Even though there have been relatively few game theory analyses of international law, game theory has accepted states as strategic actors.⁹⁶ Despite the lack of research in applying game theory to international law issues, game theory can suggest an ideal framework for international law issues because game theory models well describe the real international world. Game theory is a setting of positive analysis about strategic behaviour. In a game theory setting, each player’s conduct is affected by the decisions of the other players. This is exactly the same as the international context, in which matters of reciprocal and strategic state behaviour generally arise.⁹⁷ The Prisoner’s Dilemma is the best-known model in which players fail to cooperate. Moreover, game theory has been extended and expanded to various games, such as repeated game settings in which players can recognize prior player’s information and can punish perceived non-cooperative action in subsequent games. The risk of retaliation by each player can frighten the other player from cheating.⁹⁸ Through repeated game models, one can comprehend the factors that might affect a player’s strategy to change and adopt strategic behaviour to deal with other players’ strategies. Thus, game theory both ‘helps to predict what strategies will be used in settings where players do not agree to

⁹³ Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 38.

⁹⁴ Aceves, ‘The economic Analysis of’, supra note 85, at 1018-1022.

⁹⁵ Dunoff and Trachtman, ‘Economic Analysis of’, supra note 46, at 38.

⁹⁶ Ronald A. Cass, ‘Economics and International Law’, 29 *New York University Journal of International Law and Politics* (1997) 473-522, at 504.

⁹⁷ *Ibid*, at 505.

⁹⁸ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 29.

coordinate their actions and suggests steps that can be taken to improve the outcomes for the parties'.⁹⁹

These game theoretical explanations of international law issues can be found in some cases. For example, to maximise the benefit of realizing justice in international society, it is necessary that states voluntarily surrender individuals who violate international criminal law to international criminal court for punishments. However, when states encounter a decision on whether or not to surrender a suspect as their citizen to an international criminal court, they depend on other states' action in the same situation. Generally, states are reluctant to surrender the suspect to international criminal court, which shows that states fail to cooperate to increase the benefit.¹⁰⁰ This non-cooperative game can sometimes be overcome by modifying the game through monitoring and an enforceable agreement. Agreement to universal jurisdiction or an international court with mandatory jurisdiction may help to curb incentives to defect.¹⁰¹

In addition, game theoretic analysis can show the important role of the Vienna Convention on Law of Treaties (VCLT).¹⁰² To reduce transaction costs and incompleteness of contracts resulting from strategic calculation, game theoretic analysis represents a 'default rule' to fill contractual gaps. When communication cost is high and information is incomplete – as is the case in the real international treaty context – states will fail to maximise the potential benefits from exchange. The loss of potential benefits depends on the institutions and rules controlling the transaction. Many provisions of the VCLT Convention are default rules, and these provisions are generally possible to apply to all treaties. As 'contract law' of international law, the VCLT is important for the efficiency of exchange¹⁰³

III. Compliance Theory

As the part II explains, law and economics can be a useful methodology of

⁹⁹ Cass, 'Economics and International Law', supra note 96, at 509.

¹⁰⁰ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 396; 김성원, 법경제학 국제법 방법론에 관한 연구', supra note 31, at 78.

¹⁰¹ Dunoff and Trachtman, 'The Law and Economics', supra note 19, at 404-405.

¹⁰² Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 UNTS 331

¹⁰³ Dunoff and Trachtman, 'Economic Analysis of', supra note 46, at 33-36.

international law. In this part, this paper will investigate the answer to the question ‘why states comply with international law’, using law and economics. It is very important to find the answer in order to show and discover the problem of international human rights law. In other words, the understanding of states’ compliance with international law can provide a key to reveal the matter of international human rights law. If one knows the key conditions under which states comply with and compares the key conditions with circumstance of international human rights regime, the problem of international human rights law and the starting point to improve will be more easily and clearly detected. Moreover, because one of the purposes of this thesis is to present theoretically coherent and logical explanation, this part will suggest law and economics approach to states’ compliance. Although there has been many theory of compliance with international law, these theories have limits to present a coherent and logical explanation. This part will review the previous theories and reveal the limits of the theories.

1. Previous Studies

1.1 International Legal Theories

1.1.1 Managerial Model

Abraham Chayes and Antonia Handler Chayes argue that the ‘enforcement model’ of compliance should be replaced with a ‘managerial model’. Whereas the ‘enforcement model’ represents that compliance is achieved through coercive sanctions, a ‘managerial model’ emphasizes ‘a cooperative, problem solving approach’.¹⁰⁴ After reviewing the various coercive devices, Chayes and Chayes contend that coercive devices are usually not useful to pull states to compliance.¹⁰⁵ The need for coercive measures in order to make states comply with international law reflects ‘an easy but incorrect analogy to domestic legal system’.¹⁰⁶ Moreover, Chayes and Chayes argue that ‘sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used’.¹⁰⁷ Coercive economic or military sanctions for breaching international law cannot be the

¹⁰⁴ Abraham Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995), at 3.

¹⁰⁵ *See Ibid*, at 2-3

¹⁰⁶ *Ibid*, at 3.

¹⁰⁷ *Ibid*, at 32-33.

main instrument of obtaining compliance with international law.¹⁰⁸ This is because the problems of high political or economical costs, and the problem of legitimacy, are raised by a repeated use of sanctions.¹⁰⁹

Chayes and Chayes offer a ‘managerial’ model that states seek to promote compliance not through coercive mechanisms but through a cooperative model of compliance. In the model, compliance depends on interactive processes of justification, discourse, and persuasion.¹¹⁰ Instead of assuming that states’ compliance must be upheld with threats to make international law effective, Chayes and Chayes start with the premise that states have a propensity to comply with their obligations. The premise of states’ propensity to comply with international law is supported by three factors: efficiency, interests, and norms. Government actors can operate by a standard operating procedure that treaties supply. That is why compliance with established treaty norms is efficient. Moreover, a treaty is made by the consent of the treaty parties. As a result, the treaty can also contain the parties’ interests and play an important role in attaining their interests. Parties, therefore, must try to maintain an international agreement’s capacity to fulfil their interests. And, finally, treaties are considered legally binding instruments and generate legal norms. The legal obligations and social norms constrain states.¹¹¹

In the managerial model, non-compliance is caused by ‘ambiguity and indeterminacy of treaty language’, ‘limitation on the capacity of parties to carry out their understanding’, and ‘the temporal dimension of the social and economic changes contemplated by regulatory treaties’.¹¹² Chayes and Chayes, therefore, assert an approach based not on coercion but on ‘management’. This approach posits that international law should be transparent about the requirements of parties’ conduct, should have a dispute settlement mechanism, and should enhance capacity for compliance. These elements can be factors to persuade non-complying countries to comply the international law. Chayes and Chayes claim that ‘[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.’¹¹³ In this view, therefore, this persuasive discourse is

¹⁰⁸ *Ibid*, at 2-3.

¹⁰⁹ *See Ibid*, at 54.

¹¹⁰ *See Ibid*, at 109-111.

¹¹¹ *Ibid*, at 3-9.

¹¹² *Ibid*, at 9-17.

¹¹³ *Ibid*, at 25.

fundamental to compliance of international law.

Although the managerial model offers a very useful analysis of certain types of international treaties, it cannot describe many other types of international agreements. Specifically, it provides a fulfilling explanation of agreements intended to resolve coordination problems, but it does not describe how international law works in other situations.¹¹⁴ In the case of coordination problems, after the parties have agreed to a certain action, none of the parties has an incentive to diverge from the agreement. Accordingly, compliance of the parties is expected even in the lack of enforcement. To explain the compliance in coordination cases, the managerial model can suggest theoretical foundation without coercion.¹¹⁵

In circumstances about the use of international law outside coordination games, however, the managerial model cannot give satisfactory explanations. For compliance, the managerial model stresses that state interests are expressed in consent to treaties. However, the consent-based approach cannot explain why and how an international legal obligation affects state's action. In addition, the managerial model insists that compliance does not result from the fear of sanctions but a legal norm which itself generates compliance pull. But this claim is nothing more than an argument that states comply with international law because it is law.¹¹⁶ Without a theory of *why* norms constrain states' behaviour, the managerial model is not helpful.¹¹⁷ When a state breaches an international treaty because the treaty is contrary to the state's interests, as is true in the real cases of international noncompliance, the managerial model fails to explicate. In cases where a state intentionally violates international law, the state in fact acts in or under potential sanctions from other parties or the broader international community. Consequently, in the absence of sanctions, the breaching state has no incentive to comply with international obligations. As a result, the managerial model is useful for coordination games but an incomplete model of compliance for outside of coordination games.¹¹⁸

¹¹⁴ Andrew T. Guzman, 'A Compliance-Based Theory of International Law', 90 *California Law Review* (2002) 1823-1888, at 1831; For general critique, See George W. Downs, David M. Rocke, and Peter N. Barsoom, 'Is the good news about compliance good news about cooperation?', 50 *International Organization* (1996) 379-406.

¹¹⁵ Guzman, 'A Compliance-Based Theory', supra note 114, at 1831.

¹¹⁶ Ibid, at 1831-1832.

¹¹⁷ Ibid, at 1832; Koh, 'Why Do Nations', supra note 12, at 2640-2641.

¹¹⁸ Guzman, 'A Compliance-Based Theory', supra note 114, at 1832-1833.

1.1.2 Consent-based Theory

International legal scholars traditionally attribute the international obligations to a fundamental doctrine, '*pacta sunt servanda*'. This doctrine requires that international agreements must be performed in good faith.¹¹⁹ While the doctrine is most often mentioned as the basis for the binding nature of formal agreements, some scholars have argued that this doctrine is the foundation of all international legal obligations. The traditional doctrines of international law in relation to obligations generally and treaties particularly are based on the theories of consent.¹²⁰ The consent-based theory begins with an assertion that if a state does not consent, the state will have no obligation.¹²¹ In other words, the consent of a state establishes international legal obligation and causes compliance of international law. Moreover, the consent-based theory raises the statement that states should comply with international law because international law is legally binding.¹²²

However these claims fail to explain compliance fully because the theory presents consent as the foundation of obligation. The theory that states must comply with international law because of their consents cannot overcome 'the double-edged character of that argument'.¹²³ As Smith noted, 'If states bind themselves only by their consent, how can those obligations survive the withdrawal of that consent?'¹²⁴ Moreover, even if assumed to be correct, the theory is not enough to conclude that consent binds a state; that is, the consent-based theory 'confuses a necessary condition for states to be bound with a sufficient condition'.¹²⁵ Consent, by itself, cannot give states an incentive to comply with international law. Eventually, the consent-based theory can explain the phenomenon that states comply with international law, but cannot explain why states comply with international law. Therefore, the theory either 'says nothing about how states will actually behave' or 'is simply assuming compliance without explaining it'.¹²⁶

¹¹⁹ Art. 26, Vienna Convention on the Law of Treaties, *supra* note 102.

¹²⁰ Edwin M. Smith, 'Understanding Dynamic Obligations: Arms Control Agreements', 64 *Southern California Law Review* (1991) 1549-1606, at 1564.

¹²¹ Guzman, 'A Compliance-Based Theory', *supra* note 114, at 1833.

¹²² *Ibid*; Smith, 'Understanding Dynamic Obligations', *supra* note 120, at 1575.

¹²³ Smith, 'Understanding Dynamic Obligations', *supra* note 120, at 1566-1567.

¹²⁴ *Ibid*, at 1567.

¹²⁵ Guzman, 'A Compliance-Based Theory', *supra* note 114, at 1834.

¹²⁶ *Ibid*.

1.1.3 Legitimacy Theory

Thomas Frank has proposed a general theory of international law known as ‘Legitimacy theory’. In the *Fairness in International Law and Institution*, Thomas Frank’s main question is not ‘why do nations comply?’ but ‘is international law fair?’¹²⁷ This is because, in his claims, rules that fail to have their legitimacy have little ‘compliance pull’.¹²⁸ To be legitimate, rules ‘must be arrived at discursively in accordance with what is accepted by the parties as right process’.¹²⁹ In other words, rules must be both substantively and procedurally fair.

Frank argues that four factors determine whether a rule is legitimate and, therefore, whether states comply with it. Where rules exhibit these factors, the rules appear to have a strong compliance pull on states to comply with international obligations. In contrast, where these factors are not present, rules seem to be limited for states to comply with international obligations because states are more tempted to seek short-term self-interest.¹³⁰ The first factor is ‘determinacy’.¹³¹ The ‘determinacy’ indicates the clarity of a rule or norm.¹³² According to Frank, ‘[T]he determinacy of a rule directly affects its legitimacy because in increasing the rule’s transparency, its fairness is made manifest, and thus its compliance pull on members of the international community is increased’.¹³³ The second is ‘symbolic validation’.¹³⁴ As with determinacy, the legitimacy of a rule is examined by its ability to communicate. The communication of authority is symbolic rather than literal. When a signal is used as a cue to extract compliance with a command, the symbolic validation of a rule happens. ‘The cue serves as a surrogate for enunciated reasons for such obedience.’¹³⁵ The third is ‘coherence’.¹³⁶ To be a consistent rule, a rule whatever its content must be applied consistently in every ‘similar’ or ‘applicable’ instance: ‘[A] rule is coherent when like cases are treated alike in application of the rule and when the rule

¹²⁷ Thomas M. Frank, *Fairness in International Law and Institutions* (Clarendon Press, 1995), at 6.

¹²⁸ Thomas M. Frank, ‘Legitimacy in the international system’, 82 *American Journal of International Law* (1988) 705-759.

¹²⁹ Frank, *Fairness in International Law and Institutions*, supra note 127, at 7.

¹³⁰ Frank, ‘Legitimacy in the international system’, supra note 128, at 712.

¹³¹ See Frank, *Fairness in International Law and Institutions*, supra note 127, at 30-34.

¹³² See Frank, ‘Legitimacy in the international system’, supra note 128, at 713-725.

¹³³ Frank, *Fairness in International Law and Institutions*, supra note 127, at 99.

¹³⁴ See *Ibid*, at 34-38.

¹³⁵ Frank, ‘Legitimacy in the international system’, supra note 128, at 725.

¹³⁶ See Frank, *Fairness in International Law and Institutions*, supra note 127, at 38-41.

relates in a principled fashion to other rules of the same system.’¹³⁷ The last is adherence.¹³⁸ Adherence is related to the connection between a rule and the secondary rules used to interpret and apply the ‘primary rules of obligation’. The rule must be closely connected to the ‘secondary rules of process’. ‘Primary rules of obligation that lack adherence to a system of secondary rules of process are mere ad hoc reciprocal arrangements.’¹³⁹

However, the legitimacy theory has a theoretical problem. The theory only explains the phenomenon of the compliance when there is a procedural legitimacy, but cannot explain why states consider that procedural legitimacy to be important. In particular, the theory cannot provide a satisfactory theoretical description in cases where states violate international obligations with which they have complied. If legitimacy is the reason for compliance pull, states will not change their behaviour from compliance to non-compliance under the same international law. Eventually, the theory cannot explain why states should care about legitimacy or why one should expect states to honour international law that has legitimacy while ignoring others. Therefore, the argument that legitimacy of international law can make states comply with the international obligations is just an assertion, ‘rather than the result of a theoretical framework or empirical study’.¹⁴⁰

1.1.4 Transnational Legal Process

‘Transnational legal process’ theory has been developed by Professor Herald Koh.¹⁴¹ As with the ‘managerial model’ and ‘legitimacy theory’, transnational legal process theory is also based on the assumption that states comply with their international obligations not coercively but voluntarily. In contrast to explanations of compliance just at the international level or at the domestic political level, transnational legal process seeks reasons for compliance at a transnational level: ‘interaction, interpretation, and internalization of international norms into domestic legal structures’.¹⁴² Transnational actors incite others to interact, and through those interactions, an interpretation or enunciation of the global norm is applicable to the situation. By the interaction, the one

¹³⁷ Frank, ‘Legitimacy in the international system’, supra note 128, at 741.

¹³⁸ See Frank, *Fairness in International Law and Institutions*, supra note 127, at 41-46.

¹³⁹ Frank, ‘Legitimacy in the international system’, supra note 128, at 752.

¹⁴⁰ Guzman, ‘A Compliance-Based Theory’, supra note 114, at 1835.

¹⁴¹ Harold H. Koh, ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181-207; ‘Why Do Nations’, supra note 12.

¹⁴² Koh, ‘Why Do Nations’, supra note 12, at 2649.

actor pursues not simply to coerce the other actor, ‘but to internalize the new interpretation of the international norm into the other party’s internal normative system.’¹⁴³ Transnational legal process, such an interaction and internalisation, is normative, dynamic, and constitutive. The process generates a legal rule to guide future transnational interactions, and the future interactions will further internalize those norms. Eventually, series of such interactions make norms become internalised, and repeated participation in the process will lead to a reconstitution of the interests and even the identities of the participants in the process.¹⁴⁴

In transnational legal process, the internalisation of norms is caused by and happens to transnational actors. These transnational actors are usually not just policy personnel of the governments involved in the process, but also private norm entrepreneurs and several non-governmental organisations (NGOs). Collectively these individuals and entities form an ‘epistemic community’ to address a legal issue. ‘That community mobilized elite and popular constituencies and provoked a series of interactions.’¹⁴⁵ They generate patterns of activity through which norms are internalised into domestic structures through executive, legislative, and judicial action. By these processes, domestic institutions generate self-reinforcing patterns of compliance.¹⁴⁶ Therefore, in dynamic processes of transnational law, repeated participation leads states to comply with international law, and compliance, in Koh’s words, ‘is not so much the result of externally imposed sanctions so much as internally felt norms’.¹⁴⁷

The claim that domestic legal institutions play a critical role in international law is somewhat correct.¹⁴⁸ However, the claim that internalised international legal norm lead states to comply with international law has a theoretical or empirical problem. For example, it is true that a bureaucracy will often insist on compliance in circumstances that do not serve the state’s immediate interest. One is because the bureaucracy tries to escape or solve prisoners’ dilemmas, trading off unimportant short-term interests for more important medium-term interests. Another is because of agency costs that the bureaucracy incurs as it

¹⁴³ Ibid, at 2646.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid, at 2648.

¹⁴⁶ Ibid.

¹⁴⁷ Herald H. Koh, ‘How is International Human Rights Law Enforced?’, 74 *Indiana Law Journal* (1999) 1397-1417, at 1407.

¹⁴⁸ Guzman, ‘A Compliance-Based Theory’, supra note 114, at 1835.

tries to remain or expand its power about treaty regimes, even though its decision does not serve the state's interests.¹⁴⁹ However, both examples are not the evidence for internalised international legal norms but, ultimately, are based on a cost-benefit analysis. According to the results of Posner's research, there is little evidence for transnational legal process theory in the United States Supreme Court.¹⁵⁰

Moreover, theoretically, there are two problems with transnational legal process theory. First, the question of why or when international legal norms triumph over the opposing self-interest of the state. There is no reason to consider that compliance with international law is the more important for domestic institutions. Second, different domestic institutions that have different institutional interests might have different approaches toward compliance with the same treaty. When domestic institutions differ on compliance issues, transnational legal process theory has trouble explaining state compliance.¹⁵¹ As a result, without an understanding of why domestic institutions internalise international legal norms and why this internalisation lead states to compliance, transnational legal process theory lacks persuasiveness.¹⁵²

1.2 International Relation Theories

1.2.1 Realism

According to classical realism, international law has no effect on state behaviour. The realists are sceptical of international norms, such as the principle of sovereign equality, self-determination, and non-intervention. In this view, a state's behaviour depends exclusively on their geopolitical interests. Realism considers compliance with international law as an accidental phenomenon when the complying state's interest is achieved through international law. Moreover, international law is made and complied with when it serves the interests of hegemony or powerful states, and this is because powerful states coerce other states to accept international law and comply with it. Thus, in this view, international

¹⁴⁹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005), at 104.

¹⁵⁰ See Eric Posner, 'Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations', 12 *Tulsa Journal of Comparative and International Law* (2004) 23-37.

¹⁵¹ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 105-106.

¹⁵² Guzman, 'A Compliance-Based Theory', supra note 114, at 1836.

law is mostly a concomitant phenomenon.¹⁵³

‘Neo-realism’ or ‘structural realism’ has been developed from classical realism. Although neo-realism abandoned a focus exclusively on international power, neo-realism shares a concept of states as unitary actors and as the appropriate unit in international relations, using concepts from game theory and economics. Kenneth Waltz argues that states are ‘unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination’.¹⁵⁴ In this view, compliance with international law exists not because the law is effective, but because there is a coincidence between international law and the self-interest of states in an international society governed by anarchy and state power.¹⁵⁵

Although realism has been dominant in academic and policy after World War II, the realist tradition has difficulties in explaining the real international world, and therefore is theoretically weak. Foremost, realism cannot adequately explain why states spend time, energy, and money on the creation of international treaties and organizations. For example, the Uruguay Round of negotiations for establishing the World Trade Organisation or conferences for United Nations Convention on the Law of the Sea consumed enormous resources by most states in the world.¹⁵⁶ In addition to international agreements, states spend resources in order to affect the customary international law in areas such as international investment law, human rights law, and environmental law¹⁵⁷. From the realists’ argument that international law does not matter, this phenomenon is too difficult to be explained. Moreover, realism cannot describe why states claim that other states violate international law and why the accused states try to deny the allegation. Similarly, the fact that international dispute settlement has operated in many cases to resolve international problems weakens realism’s central claims.¹⁵⁸

1.2.2 Liberalism

¹⁵³ For more detail, see Edward H. Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to the Study of International Relations* (Perennial, 2001); Hans J. Morgenthau, ‘Positivism, Functionalism, and International Law’, 34 *American Journal of International Law* (1940) 260-284.

¹⁵⁴ Kenneth N. Waltz, *Theory of International Politics* (Addison-Wesley, 1979), at 118.

¹⁵⁵ See Joseph M. Grieco, Anarchy and the limits of cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 *International Organization* (1988) 485-507.

¹⁵⁶ Guzman, ‘A Compliance-Based Theory’, supra note 114, at 1837.

¹⁵⁷ Ibid, at 1837-1838.

¹⁵⁸ Ibid, at 1838.

A second international relations theory is liberalism.¹⁵⁹ Liberalism considers that individuals and domestic groups in domestic political processes are the key actors in international relations rather than states. Accordingly, liberalism focuses on the domestic political dynamics at play within the interaction of states. Liberal theorists, such as Andrew Moravcsik and Anne-Marie Slaughter, have argued that understanding domestic processes is essential to understanding a state's behaviour whether or not states comply with international law. Moravcsik asserts that 'Societal ideas, interests, and institutions influence state behaviour by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments'.¹⁶⁰ Moreover, from the perspective of liberalism, compliance depends on whether or not a state is liberal. In addition, Slaughter argues that liberal states tend to resolve disputes with one another in the 'zone of law' than with non-liberal states in the 'zone of politics'.¹⁶¹ To be considered as a liberal state, Slaughter represents that states have a representative government, protect civil and political rights, and have a judicial system dedicated to the rule of law.¹⁶² Consequently, in the liberalism school of thought, compliance with international law results from the degree to which a state's domestic structure is liberal.

However, although the liberals' idea provides a good account of government action, liberalism is obstructed by its own complex model that focuses on the domestic structure and discards the assumption of unitary state actors. In liberalism, an assessment and prediction of compliance depends on an assessment of domestic politics which is characterised by complexity. The relationships and interactions between domestic institutions, and a domestic political situation, are factors which are too complicated to establish a general theory to explain states' compliance with international law.¹⁶³ Thus, the difficulty of this theory is that it uses an overly complex model in order to deduce predictable results about compliance. Ultimately, while liberalism can explain the positive phenomenon of compliance with international law, it cannot function as a general model

¹⁵⁹ See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* (1997) 513-553; Anne-Marie Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992) 1907-1996; Anne-Marie Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995) 503-538

¹⁶⁰ Moravcsik, 'Taking Preferences Seriously', supra note 159, at 513.

¹⁶¹ Burley, 'Law among Liberal States', supra note 159, at 1916-1922.

¹⁶² Slaughter, 'International Law in a World of Liberal States', supra note 159, at 511.

¹⁶³ Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *The Yale Law Journal* (2002) 1935-2042, at 1953.

for state compliance.¹⁶⁴

1.2.3 Institutionalism

The third international relations theory is institutionalism.¹⁶⁵ Institutional scholar begin with ‘a similar model of decentralized state interaction’ in an anarchic world.¹⁶⁶ In common with realism, institutionalism considers that a state is the main actor in the international field and is a rational actor that acts on the basis of its self-interest. However, in contrast to realism, institutionalism sees that international cooperation is possible and thinks that international institutions can facilitate this cooperation.¹⁶⁷ Institutionalism asserts that international institutions can make cooperation between states, reducing transaction costs and raising repetitive interactions.¹⁶⁸ Ultimately, in this view, states comply with international law because it serves a state’s interests and facilitates cooperation between states. However, unlike legal scholars, most international relations scholars do not place international law at the core of the analysis.¹⁶⁹ In addition, institutionalists ‘often misread Coase to the effect that institutions are always good whenever there is “market failure”’.¹⁷⁰

2. Law and Economics Approach to Compliance

A law and economics approach is based on the rational choice theory which is more developed in international politics or relations, and therefore, shares the assumption with the neo-realism and institutionalism that a state is a unitary and rational actor in international field. In a law and economics approach, states behave in order to maximize benefit and avoid cost. However, in contrast to realism, law and economics thinks that international law can affect states’ behaviour. Eventually, a law and economics approach is basically more similar to institutionalism, shared rational choice idea and importance of institutions; though a law and economics approach is focused more on international law rather than other institutions.

¹⁶⁴ Guzman, ‘A Compliance-Based Theory’, *supra* note 114, at 1839.

¹⁶⁵ See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984)

¹⁶⁶ Kenneth W. Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’, 93 *American Journal of International Law* (1999) 361-379, at 365.

¹⁶⁷ Guzman, ‘A Compliance-Based Theory’, *supra* note 114, at 1839-40.

¹⁶⁸ Keohane, *After Hegemony*, *supra* note 165, at 246.

¹⁶⁹ Hathaway, ‘Do Human Rights Treaties’, *supra* note 163, at 1949

¹⁷⁰ Dunoff and Trachtman, ‘The Law and Economics’, *supra* note 19, at 225.

A law and economics approach can recognise and consider the value of factors that liberalism and international legal theories emphasise as causes to influence states' behaviour, although there are different theoretical foundations. Domestic politics and individuals and non-state actors that liberalism concentrates on can be considered as costs or benefits that influence and affect state preferences. Public choice theory, which is considered a part of law and economics and is close to liberalism because it focuses on the domestic political process, can sometimes give insights to understand how political leader's own interests that differ from their citizen affect state behaviour or state preferences. In these circumstances, liberalism may complement the institutionalist model. In addition, in the managerial model, transparency, a dispute settlement mechanism, and enhancing state's capacity are represented as factors that increase states compliance. These factors can reduce transaction costs, as understood by transaction cost economics. Determinacy as a rule's transparency and coherence in Frank's legitimacy model can also be understood to reduce transaction costs. Similarly, law and economics can consider transnational actors' influence on state's compliance in transnational legal process theory as a factor that increases domestic pressure or the costs of non-compliance under a cost-benefit analysis, in spite of the model's theoretical and empirical problems. Thus, though the other theories fail to properly explain compliance on their own, law and economics can consider these factors that other international theories represent under economic theories and, fundamentally, rational choice theory.

2.1 Simple Models of Cooperation

2.1.1 Coincidence of Interest

The first simple model of cooperation between states is 'coincidence of interest'. Goldsmith and Posner represent this model as a pattern of behaviour generated from 'each state acting in its self-interest without any regard to the action of the other state'.¹⁷¹ In this model, each state gain private benefits from a particular action irrespective of the action of the other.¹⁷² Basically, the model is based on a circumstance in which all parties in the game have incentives to comply and no incentives to violate.

Suppose that two countries established a treaty in order to prohibit satellite-based

¹⁷¹ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 12.

¹⁷² *Ibid*, at 27.

weapons. Moreover, the technology to construct the satellite-based weapons system is too immature or underdeveloped to make the weapon system effective, and the cost is high and prohibitive. In this circumstance, even without an obligation of the treaty, neither country would try to develop the satellite-based weapons.

Figure A¹⁷³

		Country 2	
		Comply	Violate
Country 1	Comply	10, 10	6, 8
	Violate	8, 6	4, 4

In Figure A, if both countries violate the obligation of treaty, they obtain worse payoff (4) because they expended resources on the untrustworthy weapon system. Conversely, if both countries comply with the treaty, they can obtain the maximum possible payoff (10). If Country 1 violates and Country 2 complies, Country 1 worse off because of expended resources, and Country 2 also suffers a loss because despite an untrustworthy weapon system, Country 2 does not want its potential enemy to have the weapon. Consequently, compliance is the best strategy for each state in this circumstance, and in other words, regardless of the other country's action, each country obtain maximum possible payoff if it complies with the treaty.¹⁷⁴

2.1.2 Coercion

The second model is 'coercion'. One state or an alliance of states coerces other states to engage in particular actions that serve the interest of the first state or states. For example,

¹⁷³ The first entry in each cell represents the payoff to Country 1 while the second entry represents the payoff to Country 2.

¹⁷⁴ Guzman, 'A Compliance-Based Theory', supra note 114, at 1843.

suppose that a big and powerful state can make threats to punish a particular action, action X, conducted by a small and weak state, and the cost of punishment is insignificant. The weak state has two options to act whether it does action X or not. Then, the powerful state responds by punishing the weak state or not. If the weak state does not conduct the action X, the powerful state will obtain its highest benefits. The weak state can obtain higher benefits if it does not conduct the action X and it can avoid from punishment than if it conducts the action X and is punished. In equilibrium, the weak state does not conduct action X, and the powerful state does not punish the weak state. Thus, the threat of punishment by a powerful state can affect a weak state behaviour and be most credible when the cost of the punishment is low.¹⁷⁵

Under current international law, a treaty by coercion to states or representatives of states by threats or use of force is without effect or void.¹⁷⁶ However, there are some international agreements by coercion. Historically, the 1919 Treaty of Versailles is an obvious example. By the treaty, Germany yielded their power to Allied Countries. As similar to many other peace treaties, the agreement was not entered into voluntarily, and Germany had no other choice and options. The agreement was achieved at coercion of powerful states. Moreover, the Trade and Investment Framework Agreement between US and Afghanistan is less obvious examples. The government of Afghanistan has urgently needed the US support. Because the decision by Afghanistan to enter into the treaty heavily depended on the US, the decision can hardly be considered as free choice.¹⁷⁷ Furthermore, another example as less obvious is the Hay-Bunua-Varilla Treaty of 1903. By this treaty, the US obtained the Panama Canal Zone and the right to construct the Panama Canal. To be similar to Afghanistan, at that time, Panama just declared independence from Colombia, and this is the reason why against Colombia, Panama had great needs the aid and protection by the US. In this coercive circumstance, the treaty ‘granted the US one of the most valuable property rights in the world’.¹⁷⁸

2.1.3 Pure Coordination

The third model is ‘pure coordination’. The pure coordination game is that there are incentives to cooperation between states, but to achieve the cooperation, the states

¹⁷⁵ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 28-29.

¹⁷⁶ Art. 51-52, Vienna Convention on the Law of Treaties, supra note 102.

¹⁷⁷ Guzman, *How International Law Work: A Rational Choice Theory* (Oxford University Press, 2008), at 60.

¹⁷⁸ Ibid.

coordinate their actions.¹⁷⁹ In the pure coordination game, as the coincidence of interest model, states concentrate on their interest. However, unlike the coincidence model, each state's best action depends on the action of the other state.¹⁸⁰

Figure B

		Country 2	
		Action X	Action Y
Country 1	Action X	3, 3	0, 0
	Action Y	0, 0	3, 3

In the game as can be seen in Figure B, if the Country 1 engages in action X, the Country 2 will engage in the action X, and if the Country 2 engages in action Y, the Country 2 will engage in the action Y. Therefore, there are two equilibriums that the two countries engage in same actions: (X, X) and (Y, Y). After the countries coordinate on one action, either action X or Y, neither country has no reason to deviate. However, the main problem of this model is the first action of one country. If the Country 1 does not know the expected action of Country 2, the Country 1 will be difficult to choose action X or Y. Both countries may choose first and following actions randomly, but this pattern makes cooperation difficult and the countries fail to achieve the full benefits from coordination.¹⁸¹

Despite the coordination problem, international law can help the coordination between countries, guiding each country's first action. In the pure coordination game, if two countries make an agreement for their action and let each other know their first action, the countries can more easily coordinate and obtain full benefits from the coordination game. Because the problem of pure coordination game is first action problem, international law

¹⁷⁹ Ibid, at 61.

¹⁸⁰ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 32.

¹⁸¹ Ibid, at 33.

which offer information about each country's preferences and expected actions can be useful. One example is the system of rules and regulations concerning international air travel and air safety.¹⁸² These international agreements try to harmonise a range of standards. The gains from coordination in the rules of air travel are very clear. Because a single flight may cross over various countries, if airplanes in one country follow the one of safety regulations but those in the other country follow another, the cost of air travel might be seriously increased.¹⁸³

Though an international law can help the coordination, however, it does not mean that in pure coordination game, an international law plays a significant role for cooperation or compliance. To solve the coordination problem, the first action problem, states do not have to use formal international law. For example, states could use very simple forms such as a memorandum, an exchange of letters, or a meeting of representatives to elicit information for a preferable action from each other. Because states want to achieve the same benefits at lower cost, states prefer informal or simple forms of international communication to formal international agreements.¹⁸⁴ Moreover, after coordination of the first action between states, the international law has no effect on behaviours of the states. In the coordination game, as can be seen in Figure B, after the countries coordinate on one action, both countries has no reason to deviate. Like coincidence model, the cooperation in the pure coordination game depends on coincidence of states' interest rather than international law. Therefore, in the pure coordination game, although international agreements can help to achieve cooperation, it could only slightly more work than in coincidence of interest and would play insignificant role.

2.1.4 Battle of the Sexes

The fourth model of simple cooperation is another type of coordination game, called as 'Battle of the Sexes' game. As similar to pure coordination game, in battle of the sexes

¹⁸² For examples, The Convention for the Unification of certain rules relating to international carriage by air, 12 October 1929, in force 13 February 1933; The Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, in force 4 November 2003; The Convention on International Civil Aviation, 7 December 1944, in force 4 April 1947; The Convention on Offences and Certain Other Acts Committed On Board Aircraft, , 14 September 1963, in force 4 December 1969; The Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, in force 14 October 1971; The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, in force 26 January 1973.

¹⁸³ Guzman, *How International Law Work*, supra note 177, at 26-27.

¹⁸⁴ See *Ibid*, at 27.

game, both countries have incentives to coordinate their actions rather than not to coordinate, and there are two equilibriums. Moreover, after one of equilibriums is chosen, neither country has no incentive to deviate. However, unlike the pure coordination game, one country might obtain better benefits in the first equilibrium while the other country might obtain better benefits in the second equilibrium. In other words, each country has incentive to coordinate in different equilibriums.¹⁸⁵

Figure C

		Country 2	
		Action X	Action Y
Country 1	Action X	3, 2	0, 0
	Action Y	0, 0	2, 3

In Figure C as battle of sexes game model, there are two different equilibriums: (X, X) and (Y, Y). If Country 1 chooses action X, Country 2 has no better choices than choose action X; if Country 1 chooses action Y, Country 2 has no better choices than choose action Y. However, Country 1 prefers (X, X) equilibrium while Country 2 prefer (Y, Y) equilibrium. Country 1 may be expected to choose action X because of higher payoff than action Y, but Country 1 may also be worried that Country 2 will choose action Y in which situation Country 1's payoff will be worse off as (0) than (3) or (2).¹⁸⁶ Therefore, as similar to pure coordination game, this game model has the problem of first action but little more difficult.

In the same way as pure coordination game, international law can also help coordination between the two countries, but it plays insignificant role in this model too. Though the process of choosing specific equilibrium is sensitive, after one of equilibriums

¹⁸⁵ See Ibid, at 28; Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 33.

¹⁸⁶ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 34.

is chosen, neither country has incentive to defect. Consequently, in battle of sexes game, the coordination problem is to decide specific equilibrium in different preferences between countries, and after choosing the focal point, the countries will adhere their actions not with international law but with each country's interest, maximising their payoff. International law just guides or provides what the focal point would be and help the first coordination in uncertainty. Moreover, although international law can be sometimes used to solve the coordination problems, states can achieve the same result by many other ways. Through NGO, unilateral actions, repeated practice or informal agreements, states can solve the coordination problems.¹⁸⁷ For example, this type of coordination game could be found in the selection of a compatibility standard, such as allocation of radio frequencies, railroad gauges, or television broadcast standards.¹⁸⁸ In addition, Guzman represents one further example, 'the hosting of the Olympic Games'.

States that would like to host the games in a particular year have conflicting interests. If Paris hosts the games, New York will not be able to do so. Cooperation is more difficult than in a pure coordination game, because the United States would like the games to be in New York while France would like them to be in Paris. Until a location is chosen, then, the parties' interests are, to some extent, divergent. Once a host city is chosen, however, neither state has an incentive to defect. If New York is chosen for the Olympics, France is better off sending its athletes to New York than boycotting the games or attempting to stage some competing set of games in Paris.¹⁸⁹

In this case, the International Olympic Committee (IOC) decides the host city and state. Once the decision is determined and announced, no state has an incentive to deviate. However, the IOC is a NGO, and states do not directly control over the IOC. Thus, this case represents that without a formal international law, legal enforcement, or even any action by states, cooperation can be achieved.¹⁹⁰

2.2 Prisoner's Dilemma

In real world, most international issues are more difficult to solve than above

¹⁸⁷ Guzman, *How International Law Work*, supra note 177, at 29.

¹⁸⁸ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 36.

¹⁸⁹ Guzman, *How International Law Work*, supra note 177, at 28-29.

¹⁹⁰ *Ibid*, at 29.

mentioned games. If most international cooperation models were the simple cooperation games, one could observe more cooperation in almost all international issues, and a role of international law is not important and limited. However, most international issues that international laws control over are not explained by the simple models and are more complicated because states' interests are often conflicted. Thus, to understand the real value of international law and its ability to make cooperation, one has to analyse how international law works in the difficult circumstances. If international law can make cooperation in these situations, it means that an international law has a real impact on state behaviour.

Figure D

		Country 2	
		Cooperate	Defect
Country 1	Cooperate	3, 3	1, 4
	Defect	4, 1	2, 2

Figure D show the difficult cooperation model known as prisoner's dilemma. In the classic prisoner's dilemma, the basic assumption is that each player chooses their strategies without the other's strategy because each player is in separated room and cannot communicate mutually, and that the game is one-shot game. Under this assumption, as represented in Figure D, if both countries cooperate, each country gains payoff (3), and the sum is (6). If one country cooperates, but the other defects, the defecting country gain payoff (4) and the cooperating country gain (1), and the sum is (5). If both countries defect, each gain payoff (2), and the sum is (4). In the game, although maximising benefit is cooperation, each country's strategic behaviour will be defection. If Country 1 cooperates, Country 2 can obtain a higher payoff (4) by defecting than (3) by cooperating. If Country 1 defects, Country 2 can again obtain a higher payoff (2) by defecting than (1) by

cooperating. Therefore, Country 2's dominant strategy is defection whatever Country 1 does. Country 1 would identically defect as it tries to evade from the worst situation. As a result, the countries gain worse off (2) by defecting each other than (3) by cooperation.¹⁹¹

In the classic prisoner's dilemma, the result of one-shot game is that both players will choose to defect. Therefore, cooperation will fail. International law cannot affect this outcome and state's behaviour. 'An agreement is simply an exchange of promises.'¹⁹² Without central authority such as courts or polices, this agreement as an exchange of promises has no impact. Under this circumstance, any compliance is generated from not the agreement but other reasons. Because the agreement cannot achieve its goal or purpose, rational states would not be expected to enter into the agreement at all.¹⁹³

2.3 Repeated Prisoner's Dilemma

However, the classic prisoner's dilemma in which international agreements have no impact and states choose to defect lacks to reflect the real international world. There are some additional important differences.¹⁹⁴ First, the countries can contact and communicate with one another. As distinct from classic prisoner's dilemma in which players are separated in other rooms and cannot know other's strategies, international community is open to contact and communicate with each other in order to choose their actions. Second, the prisoner's dilemma that reflects more real world is not a one-shot game. In the real international world, states can repeatedly interact with each other. In the repeated prisoner's dilemma, players can play the game not only one time but over and over again with no fixed time. Third, therefore, it is possible that if one player defects in one round, the other player can respond to the first player by defecting in the next round. Forth, the information of state compliance or defection is often available to know each other. These differences can modify the classic prisoner's dilemma into the distinct type of prisoner's dilemma. While there is no solution for cooperation in classic prisoner's dilemma itself, the modified game can make cooperation, efficient equilibrium through international law.¹⁹⁵

In the repeated prisoner's dilemma game, there are many different strategic choices,

¹⁹¹ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 28-29.

¹⁹² Guzman, *How International Law Work*, supra note 177, at 32.

¹⁹³ *Ibid.*

¹⁹⁴ See Trachtman, *The Economic Structure*, supra note 19, at 83-84; Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 29-30.

¹⁹⁵ Trachtman, *The Economic Structure*, supra note 19, at 84.

such as grim trigger, tit-for-tat, and therefore, the game has multiple equilibriums. These strategies are plausible reactions to defection by others.¹⁹⁶ The first is grim trigger. The grim trigger strategy is that in the repeated prisoner's dilemma game, player 1 begins with cooperation and remains the cooperation until player 2 defect, and if player 2 defects, after the round, the player 1 will defect forever. In the Figure D, assume that Country 1 prefers the grim trigger strategy and Country 2's strategy is defection in every round. Country 2's payoffs are (4), (2), (2), (2)..., because Country 1, in payoffs (1), (2), (2), (2)..., will defect in every next round after the first round. Unless Country 2 does discount the all the future payoffs in comparison with the payoff from defection, Country 2 will not choose the defecting strategy.¹⁹⁷ Although defection by one player can make cooperation failure in all the future rounds, the grim trigger strategy as retaliation could be available to make cooperation.

The second strategy is tit-for-tat which is one of the most discussed strategies in relation to the repeated prisoner's dilemma. The tit-for-tat strategy is that player 1 in the repeated prisoner's dilemma game respond to defection by player 2 with single defection.¹⁹⁸ Assume that player 1 prefer the tit-for-tat strategy and that player 2 want to defect in first round, and after the first round, player 2's behaviour depends on player 1's reaction. If player 1 cooperates in the first round and player 2 defects, player 1 will defect in the second round. If player 2 cooperates in the first round, player 1 will remain to cooperate in the second round and until player 2 defect. The tit-for-tat is forgiving strategy while the grim trigger strategy is not. Thus, although the player 2 defects in the first round, if the player 2 cooperates in the second round, the player 1 will choose cooperation in third round. If the two players choose tit-for-tat, there exists possibility that cooperation fails. Assume that in the first round, both players cooperate, and in the second round, the player 1 remains the cooperation and the player 2 accidently defects. In the third round, player 1 will defect by tit-for-tat strategy, and player 2 will cooperate. In the fourth round, player 1 will change its action from defection to cooperation because player 2 cooperated in the last round, but player 2 will also change its behaviour from cooperation to defection because of player 1's defection in the third round. Thus, after second round in which defection by player 2 was accidently generated, if both players strictly adhere the tit-for-tat strategy,

¹⁹⁶ Ibid.

¹⁹⁷ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 29.

¹⁹⁸ Trachtman, *The Economic Structure*, supra note 19, at 85.

cooperation could be failure. Although the possibility exists in the tit-for-tat strategy, however, the tit-for-tat can be a successful enforcement device. This is because a defection in any round will be encountered defection by others in the subsequent round¹⁹⁹, and because the forgiving feature offers other players incentive to change their behaviour from defection to cooperation in the next round. As a result, the tit-for-tat strategy is possible to make cooperation in the repeated prisoner's dilemma.

Besides those strategies, grim trigger and tit-for-tat, there are many other strategies that make equilibriums of cooperation or defection in the repeated game. Through those examples, 'game theory simply suggests that cooperation is possible as long as the game has no fixed ending... and that the players have low enough discount rates that the current gains from defection do not loom too large in relation to long-term gains from cooperation'.²⁰⁰ Thus, the insight from analysis of the two repeated prisoner's dilemma implies that cooperation between two nation states could be achieved over time.²⁰¹

2.4 Role of international law

In the repeated prisoner's dilemma game which analogies real international issues, international law can play a significant role. To solve the prisoner's dilemmas, states can use international law including customary international laws and international treaties. Firstly, international law can guide and make states to concentrate on particular equilibrium in the environment of multiple equilibriums. Under the circumstance of repeated prisoner's dilemma, 'anything that tends to focus the players' attention on one particular equilibrium, in a way that is commonly recognized, tends to make this the equilibrium that the players will expect and thus actually implement'.²⁰² Therefore, states may make cooperation possible through international law while there is no precise resolution to the multiple equilibriums in the game theory.²⁰³ Secondly, in the repeated prisoner's dilemma, because mutual defection is an important factor, agreements on what constitutes defection and clear rule of the game are also important.²⁰⁴ If there is no clear rule of game and consent to what the defection is, when the defection is occurred, the cost

¹⁹⁹ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 29.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Roger B. Myerson, *Game Theory: Analysis of Conflict* (Harvard University Press, 1991), at 371.

²⁰³ Trachtman, *The Economic Structure*, supra note 19, at 87-88.

²⁰⁴ Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 30.

of dispute or debate what the rule is and whether the action is defection or not is increased. Consequently, international law plays a role to reduce the costs. Thirdly, international law can make close communication between states more easily and make states easy to defect as a punishment.²⁰⁵ States in international agreements can stay on close relationship with each other. In the relationship, because any plans or movements for defection may be opened as public knowledge and as subject of public debate, the actions toward defection can be easy to defect. Moreover, closed or improved communication can make the duration of one round shorter and thus, can reduce the short-term benefits from defection.²⁰⁶

The repeated feature of the interactions between states and the role of international law allowed cooperation to be realised. States consider the value of cooperation ‘not only today and but also in the future’²⁰⁷, and international law can guide and help to make states to cooperate easily. The repeated nature and the role of international law can raise three fundamental costs called as ‘three Rs of compliance’ with international law: reciprocity, retaliation, and reputation. Through these three costs, one can understand how international law works and why states comply with international law.²⁰⁸

2.5 The Three Rs of Compliance

2.5.1 Reciprocity

Reciprocity is responses to defections by other states and will often be operated ‘without the intent to sanction a violator’. As reactions to a violation, states can leave or violate their obligations of international agreement because their interests may not be achieved through the agreement in the circumstance that other states violate. A reciprocal action does not make costs to the reciprocating state. Instead, in new circumstance or information that other states violate, reciprocity is a modification of the defected state's behaviour encouraged by a need to maximize the state's benefits.²⁰⁹ As definition by Keohane, reciprocity as general concept ‘refers to exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Guzman, *How International Law Work*, supra note 177, at 32.

²⁰⁸ Ibid, at 32-33.

²⁰⁹ Ibid, at 33.

way that good is returned for good, and bad for bad'.²¹⁰

Reciprocity is also often considered as a proper measure of behaviour that can make cooperation possible among sovereign states.²¹¹ Reciprocity can be often a successful compliance-enhancing tool in the right circumstances. In the repeated prisoner's dilemma in Figure D as a bilateral context, where reciprocity is well functioned, it is often adequate to produce cooperation in the prisoner's dilemma.

Figure E

		Country 2	
		Comply	Violate
Country 1	Comply	3-T, 3-T	1, 4-t
	Violate	4-t, 1	2, 2

Assume that there is an international treaty between Country 1 and Country 2. Unlike customary international law, treaties entail transaction costs for negotiation, administration, enforcement, monitoring, and modifications or innovations. The transaction costs hinder formation and adherence of the treaties. In Figure E, the transaction costs are generated more from mutual cooperation, (T), than from partial cooperation, (t), so that (T) is bigger than (t).²¹² As the above game theoretic analysis of the repeated prisoner's dilemma, mutual violations and the threats of violations by a reciprocal reaction can make cooperation. The factor that explains the success of the treaty is the fact that Country 1 can forcefully threaten its own violation or withdrawal if Country 2 violates to its international

²¹⁰ Robert O. Keohane, 'Reciprocity in International Relations', 40 *International Organization*(1986) 1-27, at 8.

²¹¹ *Ibid*, at 1.

²¹² Todd Sandler, Treaties: 'Strategic Considerations', 1 *University of Illinois Law Review*(2008) 155-179, at 164.

obligation. ‘Mutual compliance is enforced by a credible threat of non-performance.’²¹³ The threat of termination or mutual violations that make states cannot obtain maximising gains from compliance will be sufficient to encourage states to comply with international agreements unless states deal with the gains from a one-time violation greater than long-term gains from mutual compliance.

2.5.2 Retaliation

Retaliation is a reaction or response of states to violation by others as similar to reciprocity, but unlike reciprocity, retaliation actions raise and impose some costs to the retaliating state.²¹⁴ If a reaction as response to violations is not costly, it will be forms of reciprocal non-compliance.²¹⁵ Despite the costs, the reason why states use retaliatory sanction is that the retaliating state has intention to punish the violating state in order to make the violating state change its behaviour to comply with international obligations, and that states want to give signals to punish violations by others and pressure to future violations.²¹⁶ In these retaliatory sanctions, there are various types. These could be economic sanction, terminating a treaty, and using military force as the most extreme case.²¹⁷ For example, in WTO law, when a state declines to comply with dispute resolution, the complaining state can take the permission to impose trade sanctions.²¹⁸

Figure F

		Country 2	
		Comply	Violate
Country 1	Comply	3-T, 3-T	1-c, 4-t-R
	Violate	4-t-R, 1-c	2, 2

²¹³ Guzman, *How International Law Work*, supra note 177, at 43.

²¹⁴ *Ibid*, at 34.

²¹⁵ *Ibid*, at 47.

²¹⁶ *See Ibid*, at 46-48.

²¹⁷ *Ibid*, at 47.

²¹⁸ Art. 22, Understanding on Rules and Procedures Governing the Settlement of Disputes, supra note 77.

Assume that there is an international treaty generating international obligation between Country 1 and Country 2. In the Figure F, as same in figure E, (T) and (t) mean transaction cost. (T) is bigger than (t). Moreover, because retaliation generates costs not only to violators but also to the retaliating states, in the retaliatory circumstances, both countries could take costs. However, costs for the retaliating states may be less than for violating states. In the Figure F, (R) means costs for violating state by retaliation, and (c) means costs for retaliating state. Therefore, (R) may be higher than (c). If the c is higher than (R), countries will not use retaliatory sanction. Where the retaliatory sanction is possible, unless Country 2 can obtain benefits, $(4-t-R)$ in the figure F, from violation much more than benefits, $(3-T)$, from mutual compliance, the retaliatory sanction will leads Country 2 to comply with international obligation.

2.5.3 Reputation

From definition by Guzman, a state's reputation 'consists of judgments about the state's past behaviour and predictions made about future compliance based on that behaviour'.²¹⁹ Reputation can play a role as a sanction to impose cost on a state when the state loses its reputation because of non-compliance. Reputational sanctions are not intended as punishment. When a state complies with international law, it offers a signal about its volition to respect international legal obligations. Other states can consider the compliance information to decide their own behaviour. On the one hand, if a state tends to comply with international law, the state will make a good reputation. On the other hand, if a state tends to violate its international obligations, the state will have a bad reputation.²²⁰

A good reputation can be changed to future value, making promises more credible and future cooperation easier. If a state that has good reputation by previous compliances, when it pursues to establish cooperative agreements, the state will meet more partners, will be possible to demand more concessions, and will be able to make other partner cooperate or comply with the agreements.²²¹ In the real international world, information for a state that seeks to make cooperative arrangements is limited, and also, a state has limited capability for prediction and calculation of the future payoff and other states' action. Thus, states

²¹⁹ Guzman, *How International Law Work*, supra note 177, at 33.

²²⁰ Ibid.

²²¹ Ibid, at 34.

would depend on reputation of other states that ‘represents a measure of its willingness to comply with its international legal obligations’.²²² Conversely, if a state fails to comply with or violate international legal obligations, it can lose credibility and can have bad reputation. This bad reputation state will be viewed as ‘an unreliable partner’.²²³ Therefore, the state that has bad reputation will be available to make future cooperation difficult and will suffer from loss of benefits from cooperation with other states.

Figure G

		Country 2	
		Comply	Violate
Country 1	Comply	$3-(T-r)+R, 3-(T-r)+R$	$1+R, 4-t-R$
	Violate	$4-t-R, 1+R$	$2-R, 2-R$

If having or improving good reputation can generate value for higher payoffs, and bad reputation can make costs of violation, states will have strong incentive to maintain a good reputation and to try to comply with their international obligations.²²⁴ In the Figure G, assume that there is an international treaty between Country 1 and Country 2. As same as Figure E and F, (T) and (t) mean transaction cost, and (T) is bigger than (t). However, credibility from good reputation can reduce transaction cost by mutual cooperation because if both countries have good reputation, they will reduce transaction costs for negotiation, enforcement, and monitoring. This situation is reflected as (T-r) in Figure G. Reputation benefits or costs can be generated in both cooperation and violation. In the Figure G, (R) means reputation values: (+R) is benefit of reputation and (-R) is loss of reputation. If both Country 1 and Country 2 comply with the international treaty, they will reduce transaction cost (T-r) and obtain more benefits (+R). However, if Country 1 complies, but Country 2

²²² Ibid

²²³ Ibid.

²²⁴ Ibid, at 36.

violates, Country 1 will more benefits from (+R) good reputation by cooperation in spite of obtaining small benefit (1), and Country 2 will generate more costs (-R) from bad reputation by violation in relatively less benefits (4-t). In the case that one country comply and the other country violate, the gap between payoff from violation (4-t-R) and cooperation (1+R) is less than the classic Prisoner's Dilemma. In the examples, Reputation or reputation sanctions can reduce the payoffs from violation and increase payoffs from cooperation, and moreover, can reduce transaction cost from mutual cooperation. As a result, 'reputation may be a powerful force in promoting compliance'.²²⁵

IV. Problems of International Human Rights Treaties

From law and economics approach to states' compliance with international law, the part III suggests that the three Rs are the key to induce states to comply with their international obligations. If the three Rs work well as costs of non-compliance in international human rights law, one can predict states' compliance with international human rights obligations. However, if the three Rs are unworkable, one cannot expect states' compliance with international human rights law. Because international law is self-enforcing system that there is no central enforcement mechanism, without the three Rs, international human rights law does not make states to comply with their human rights obligations unless there is other strong enforcement mechanism.

In this part, this paper will try to answer some questions to problem of international human rights law, especially international human rights treaties. The first question is what the difference between contractual model of international law and international human rights law is. In the difference, the second is whether the three Rs work as costs of non-compliance or not. The third is whether international human rights treaties have other strong enforcement mechanisms or not. Moreover, this theoretical analysis will be supported by empirical results of previous studies.

1. The Concept of International Human Rights Treaties

International law is generally understood as self-enforcing mechanism based on reciprocal character. Especially, International treaties can be traditionally understood as

²²⁵ Trachtman, *The Economic Structure*, supra note 19, at 141.

similar as contracts in domestic legal system. Lord McNair implies that '[i]t is obvious that the treaty as a concept of international law has been mainly indebted in the course of its development to the agreement or contract of private law'.²²⁶ Moreover, Gerhart Niemeyer also argues that '[t]he axiom that contracts are binding obligations has become of paramount importance for the whole of international law, since it has been made the very foundation of its obligatory force'.²²⁷ The contract can be considered as 'an exchange of commitments to the reciprocal advantage of the signing parties'.²²⁸ In addition, according to the VCLT, consent is central element in order to establish or constitute agreements between states.²²⁹ This mutual consent may be relevant to reciprocal character of international treaties. The importance of consent presumes that states pursue their interests primarily and that treaties are expression of mutuality of states' interests.²³⁰ Therefore, the character of contract and importance of consent can make international treaties as self-enforcing mechanism from their reciprocal character for states to pursue their interests in international matter international treaties control without central enforcement mechanism as analogy of repeated prisoner's dilemma game. As Bruno Simma implies²³¹, legal reciprocity is the most important character for self-enforcing mechanism for general international law.

International human rights agreements are quite different from the traditional contractual model and reciprocal character of other international laws. According to Matthew Craven, '[t]he international law of human rights, as a subject, is almost universally understood as a distinct subdisciplines of the broader, more general, and apparently subject-neutral, international law.'²³² International human rights agreements are not

²²⁶ Lord MacNair, *The Law of Treaties* (Oxford University Press, 1961), at 6.

²²⁷ Gerhart Niemeyer, *Law without Force: The Function of Politics in International Law* (2nd edn, Transaction Publishers, 2001), at 12.

²²⁸ Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements', *77 British Yearbook of International Law* (2006) 163-202, at 164.

²²⁹ See Art. 11-15, 48-51, and 54, Vienna Convention on the Law of Treaties, supra note 102.

²³⁰ Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *11 European Journal of International Law* (2000) 489-519, at 502-503.

²³¹ Simma points out that '[r]eciprocity is a basic phenomenon of social interaction and consequently a guiding principle behind the growth an application of law... As long as the international legal order lacks a centralized enforcement machinery..., reciprocity will remain the principal *leitmotiv*, a constructive, mitigating and stabilizing force, the importance of which can hardly be overestimated'. Bruno Simma, 'Reciprocity', in Rudolf Bernhardt (eds), *Encyclopedia of Public International Law* (5 Vols, Elsevier: North-Holland, 2000), Vol. 4, 29-33 at 29-30.

²³² Craven, 'Legal Differentiation', supra note 230, at 492.

exchanges of economic or security interests between states.²³³ For example, General Comment No.24 of the Human Rights Committee notes that international human rights treaties ‘are not a web of inter-state exchanges of mutual obligations... The principle of inter-state reciprocity has no place’.²³⁴ Moreover, according to Simma,

In the case of human rights convention, however, there is simply no contractual *quid pro quo* to withhold. There is, sociologically speaking, no interaction between the parties onto which reciprocity could lock. Reciprocal non-application of a reserved provision by another State Party would not only be absurd but also legally inadmissible... [S]ince every State Party to perform the treaty obligations, a splitting up of such a treaty into pairs of bilateral contractual relations in respect of which the reciprocal alternation of the treaty standard envisaged by the Convention could operate, is impossible.²³⁵

Thus, international human rights agreements are not considered as to be established on contractual and reciprocal basis

Instead, International Human rights treaties may embody particular assumptions and suppositions that require special recognition of pre-existing moral norms on which the treaties are established.²³⁶ In the preamble, ICCPR declares that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and that ‘these rights derive from the inherent dignity of the human person’.²³⁷ The moral principle upholds international human rights agreements rather than reciprocal mechanisms do. When a state signs a human rights agreement, it seems superficially to make reciprocal promises to others not to engage in certain violations. However, the reason why state parties of international human rights agreements comply with their international obligations is not because one state can attain benefits from the other states’ complying – one state’s compliance may not give concrete advantages to others – but because their obligation is

²³³ Brilmayer, ‘From “Contract” to “Pledge”’, supra note 228, at 170.

²³⁴ General Comment No.24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6, para.17.

²³⁵ Bruno Simma, ‘International Human Rights and General International Law: A comparative analysis’, 4 Collected Courses of the Academy of European Law (1995) 153-236, at 181-182.

²³⁶ Ibid; See Craven, ‘Legal Differentiation’, supra note 230, at 492.

²³⁷ In Preamble, International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

based on moral foundations.²³⁸

As a result of the different character, rights and obligations created by human rights treaties are not between states but between a state and its citizens or individuals. In other words, the human rights treaties are made for the protection of the interests of individuals. Most international human rights laws are treaties that are ‘concluded between States in written form and governed by international law’.²³⁹ The form supposes that human rights are expressed in the way of a contractual bargain between states. Consequently, the individuals who are protected by and obtain benefit from the treaties are simply fortuitous beneficiaries. However, the object and purpose of the treaties as to protect or focus on individual or group human rights suppose that ‘the treaties are quasi-constitutional in character’.²⁴⁰ The two elements of ‘form’ and ‘function’ seem to be essentially at odds with one another, and moreover, two elements work in a conflict. Thus, the collided nature of international human rights treaties makes the treaties not to be contractual model of international treaties.²⁴¹

These different characters of international human rights agreements have been noted in various international court or human rights bodies. The first reference to the different character of the agreements occurred in advisory opinion on reservations to the Genocide Convention from ICJ. The court distinguished characters between general international treaties and international humanitarian or human rights treaties. The court stressed the special feature of the Genocide Convention. The court argued that:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own ; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual

²³⁸ See Brilmayer, ‘From “Contract” to “Pledge”’, supra note 228, at 169-171.

²³⁹ Art. 2, Vienna Convention on the Law of Treaties, supra note 102.

²⁴⁰ Craven, ‘Legal Differentiation’, supra note 230, at 493.

²⁴¹ Ibid.

advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.²⁴²

In the opinion, the court considered that the Genocide Convention was established not simply from on sum of each state's interest but on common interest for high purposes that protect certain human groups.

Similarly, in the case of *Austria v. Italy*, the European Commission of Human Rights concluded that:

It follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.²⁴³

In the decision, the commission deemed that the ECHR has an objective character rather than subjective and reciprocal character. In addition, the commission represented that the object and purpose is to protect human rights of individuals. The commission also highlighted the different character of the ECHR.

The Inter-American Court too recognised the special character of human rights treaties in its advisory opinion. The court emphasised the lack of reciprocity in modern human rights treaties and the American convention on Human rights. In the opinion, quoting the decisions of European Commission and ICJ, the court insisted that:

Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against

²⁴² Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) 15, at 23.

²⁴³ *Austria v. Italy*, Application No. 788/60, European Commission of Human Rights, Decision (11 January 1961), at 19.

the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.²⁴⁴

The Inter-American Court declared the non-reciprocal characters of the human rights treaties from traditional treaties by reciprocal exchange of interests between states and different object and purpose of them. Even though the human rights treaties are established on consent by states as classical way, the human rights obligations are separated from the consent.²⁴⁵

2. The Three Rs of Compliance

International Human rights law has different or special character. Especially, international human rights treaties are not based on the traditional contractual and reciprocal features of general international agreements. The contractual and reciprocal character of general international law make the three Rs costs of non-compliance, reciprocity, retaliation, and reputation, work well in the repeated prisoner's dilemma game as analogy of real international issues. However, in international human rights regime, as the three Rs cannot work well as costs or externalities for non-compliance of states because of their different character, non-compliance may be more easily conducted by state parties in the international human rights treaties than general international law.

2.1 Reciprocity

Article 60(1) of the VCLT codifies the general principle of reciprocal actions. In the VCLT, the reciprocity is reflected as suspending compliance and terminating the agreement. The Article 60(1) says that '[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.²⁴⁶ Regarding a multilateral treaty, Article 60(2) suggests

²⁴⁴ *The Effects of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Series A No. 2, Inter-American Court of Human Rights, Advisory Opinion OC-2/82 (24 September 1982), at para 29.

²⁴⁵ Frederic Megret, 'The Nature of International Human Rights Obligations', <<http://ssrn.com/abstract=1472196>> (Visited 20 January 2015), at 7.

²⁴⁶ Art. 60(1), Vienna Convention on the Law of Treaties, supra note 102.

that '[a] material breach of a multilateral treaty by one of the parties entitles', in the subparagraph (a), 'the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it', and in the subparagraph (b), '[a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State'.²⁴⁷ Therefore, according to the Article 60, both in bilateral and multilateral agreements, reciprocal non-compliance and terminating agreement are generally justified.

However, the principle of reciprocity is not applied to international human rights treaties. Article 60(5) of the VCLT provides the exception from Article 60(1). The Article 60(5) says that '[p]aragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.²⁴⁸ In other words, the Article 60(5) means that reciprocal action to a violating party is impossible or not permissible to provisions in treaties for protecting individual rights. The word 'treaties of a humanitarian character' in this provision seem to be applied to international humanitarian treaties; however the general idea of 'relating to the protection of the human person' clearly makes it can be also applied to international human rights treaties.²⁴⁹ Consequently, in accordance with the article 60(5), even though one state breaches a human rights treaty, other party states cannot suspend the obligation or terminate the treaty.

These dual applications, the reciprocal action and the exception in article 60 of VCLT, are natural conclusion because human rights treaties are established on moral foundation rather than interests between states. As contractual model of international law is based on the consents between states as a contract or exchange of states' interests, one state has the rights of reciprocal action to violating state, and by the reciprocity, implementation of the treaty can be assured between states. However, as international human rights treaties stand on the moral foundation, consents for establishing the treaties between states are merely declarations of existing moral values as human rights.²⁵⁰ As a result, the human rights obligations in the treaties are beyond the states' consents and are not affected other states'

²⁴⁷ Art. 60(2), Vienna Convention on the Law of Treaties, *supra* note 102.

²⁴⁸ Art. 60(5), Vienna Convention on the Law of Treaties, *supra* note 102.

²⁴⁹ Megret, 'The Nature of International Human Rights Obligations', *supra* note 245, at 34.

²⁵⁰ *See* Brilmayer, 'From "Contract" to "Pledge"', *supra* note 228, at 171-172.

non-compliance.

However, this exception cannot make reciprocity, one of the three Rs costs, workable. International human rights regime does not raise cost of reciprocity for a state's non-compliance. When a state party in an international human rights treaty violates its human rights obligation as the state mistreats its citizens or individual rights, the other state parties cannot suspend their obligations and terminate the treaty due to the character of the human rights treaty and Article 60 of VCLT. From the game theoretic approach, mutual defections are good motivation or inducement for states to comply with their treaty obligation.²⁵¹ Yet, in international human rights regime, reciprocity as mutual defection is not an effective cost 'because (first) it is unlikely to occur and (second) the violating state would be indifferent to it, in any event'.²⁵²

Even if reciprocity were possible and permissible, it would have insignificant or little impact on most human rights violating states. Goldsmith and Posner represent human rights relationship between two nations, nation A and nation B. They argue that:

A which abuses its citizens and B which does not. A gains nothing if both nations agree to stop abusing citizens. The same is true if both A and B abuse their citizens. They lose something and gain nothing from a mutual agreement to provide greater protection to their citizens.²⁵³

A violating state is indifferent whether other states reciprocate or not because other states' reciprocal action cannot make any costs or benefits to the violating state.²⁵⁴ Ultimately, reciprocity is unworkable and unsuitable cost to make or induce states to comply with international human rights law.

2.2 Retaliation

The second cost of non-compliance is retaliation. Retaliation is distinguished from reciprocity because retaliatory action raises cost for retaliating states. Retaliation can be rather considered as punishments or countermeasures for a violating state to change its

²⁵¹ Brilmayer, 'From "Contract" to "Pledge"', supra note 228, at 185.

²⁵² Ibid, at 186.

²⁵³ Jack L. Goldsmith and Eric A. Posner, 'A Theory of Customary International Law', 66 *The University of Chicago Law Review* (1999) 1113-1177, at 1174.

²⁵⁴ See Ibid, at 187.

behaviour from non-compliance to compliance, such as economic sanction, cut-off in foreign aid, and exclusion from cultural or athletic events.²⁵⁵ The threat of retaliation can often be an enforcement tool, however like reciprocity, it does not work well ‘when the public goods are involved’.²⁵⁶

There are several problems with retaliatory action as a cost for non-compliance of international human rights treaties. The problems are generally caused by the cost of retaliating action. Unlike reciprocity, retaliatory actions generate some costs to the state of imposing sanctions. Because of the sanctioning costs, a rational state will take the action when there are more benefits than costs.²⁵⁷ However, in circumstance of decentralised enforcements in international human rights treaties, there are no particular states that obtain benefits from compliance and also no particular states that suffer from other states’ non-compliance.²⁵⁸ Guzman even argues that ‘in the context of bilateral agreements, one reason to impose the sanctions is to acquire or protect a reputation as a state that punished violators, but this may not be enough’.²⁵⁹ Moreover, in multilateral context, the sanctioning cost makes a collective action problem, known as ‘free-rider problem’. Even if the imposing sanction would be effective, each state has an incentive of free-riding on the benefits from retaliation by others. This is because if one state imposes sanction, the retaliating state will only bear the sanctioning cost, and other states can obtain the benefits of compliance without any cost.²⁶⁰ As a result, states evade the retaliating action, and thus, the international human rights regimes give no or little incentive to party states to retaliate a violating state.

The lack of incentive of imposing sanction by other party states lead to reduce credibility of retaliation. When the credibility that retaliation works as cost of non-compliance is recognised by party states, the cost of retaliation can induce states to comply with the obligations. However, if one state considers that when it violate its obligations of human rights treaties, other states have no incentive to impose sanctions, the state will violate more easily and less costly to its human rights obligations. If it is the case, the cost of retaliation by other states will be reduced, and therefore, retaliation cannot work well as

²⁵⁵ Brilmayer, ‘From “Contract” to “Pledge”’, supra note 228, at 188.

²⁵⁶ Guzman, *How International Law Work*, supra note 177, at 66.

²⁵⁷ *Ibid.*

²⁵⁸ Brilmayer, ‘From “Contract” to “Pledge”’, supra note 228, at 188.

²⁵⁹ Guzman, *How International Law Work*, supra note 177, at 66

²⁶⁰ *Ibid.*, at 66-67.

facilitation and inducement for compliance with international human rights obligations.

2.3 Reputation

The last cost of non-compliance is reputation. As explained above, reciprocity and retaliation is unworkable and unsuitable cost for compliance in international human rights regimes. The reputation can be considered the most attractive enforcement alternative in the institutionalism. Oona Hathaway asserts that:

The institutional model is left, then, with reputation as the primary anchor of compliance for all but those countries for which compliance is costless: States comply with human rights treaties to obtain or maintain a reputation for compliance and hence good international citizenship. In the institutional model, therefore, if countries change their behavior in response to human rights treaties, it is largely because of concern for their reputation.²⁶¹

Moreover, Guzman also claims that in international human rights area that involve public goods, reciprocity and retaliation generally lack credibility and suggests that reputation can relatively offer an incentive to comply with international human rights agreements.²⁶² Guzman represents the reasons that ‘there is no need for coordination, no need for formal adjudication of a dispute... and no need for costly actions by sanctioning states’.²⁶³

Although reputation can be a useful inducement for compliance with international human rights agreements, reputation has some limitations. First, cost of reputation is less raised in cases that it is difficult to detect the violations than in cases that states’ behaviour can easily be observed.²⁶⁴ As the violation of international human rights obligations happen in domestic jurisdiction of an individual member state, many violations are in fact difficult ‘to defect, to observe, and even more difficult to verify’. This circumstance generates higher cost for outside actors to gather, assess, and publicize the information on which strong reputational judgments can be established.²⁶⁵

Second, even though the information can be easily opened to other states, there are

²⁶¹ Hathaway, ‘Do Human Rights Treaties’, supra note 163, at 1952.

²⁶² Guzman, *How International Law Work*, supra note 177, at 67.

²⁶³ Ibid.

²⁶⁴ Beth Simmons, *Mobilizing for Human Rights* (Cambridge University Press, 2009), at 117.

²⁶⁵ Ibid, at 124.

various or multiple reputations that an individual state wants to manage. Generally, a state may be a party in a number of different international regimes such as trade, investment, security, environment, and human rights. In the multiple circumstances, there is no reason why the state has to be more concerned to build up an international reputation in human rights area than others. A violation of human rights obligation by a state does not mean that the state will violate its trade or security obligations, and the human rights violation cannot be directly correlated to other reputations.²⁶⁶ Unless the reputation about compliance of human rights treaties are connected with reputations of other fields, the reputation cost of non-compliance with human rights obligations will not be high enough for a violating state to change its behaviour. Practically, because the reputation cost for human rights is weakly connected to other issue areas, the reputation may give less incentive to state parties in human rights than in trade and security.²⁶⁷ Moreover, when a government that leads state or make a decision is changed by vote or election, reputation is possible to be uncertain whether the new leadership change a policy about compliance of its international obligations or not. As the policy depends on the political philosophy of a government leadership, former government's reputation cannot directly continue in new government. In this case, the reputation cost is also weakly enforceable.

Third, when the reputation is used as a sanction, enforcing the reputational sanction has some problems. Like retaliatory sanctions, the reputational sanction has collective action problem. States may disagree with assessment of degree of one state's violation, and as they may also have different relationships to the violating state, the reputational sanction is difficult to work as unanimous action.²⁶⁸ In addition, some blaming actions in human rights areas are not based on human rights treaties. For example, reports by NGOs, advocacy groups and states are not related to treaty obligation.²⁶⁹ Regardless of treaty ratification, they blame a state's human rights condition. In this case, the blaming action is not the cost of non-compliance with treaty obligation but with moral norms, and therefore, the reputation is whether a state respects moral obligation and is not enforceable cost of legal obligation.

²⁶⁶ See Posner and Sykes, *Economic foundations of International Law*, supra note 27, at 33; see Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 102-103.

²⁶⁷ See, George W. Downs and Michael A. Jones, 'Reputation, Compliance, and International Law', 31 *Journal of Legal Studies* (2002) S95-S114, at S109-S112.

²⁶⁸ See Simmons, *Mobilizing for Human Rights*, supra note 264, at 124.

²⁶⁹ For more detail, see Brilmayer, 'From "Contract" to "Pledge"', supra note 228, at 192-193.

These limitations do not mean that reputational cost cannot work in international human rights treaties. Though there are some limitations, where reciprocity and retaliation are not suitable and workable, reputation may be the only available cost of non-compliance in the three Rs. In these limitations, however, reputation alone may not give strong incentive to induce states to comply with their human rights obligations.

3. Other Enforcement Mechanisms

As above analysis, costs of the three Rs do not work well in international human rights law. Because international human rights law as international law is also self-enforcement legal system, if the costs of three Rs are unworkable, compliances of international human rights obligation by member states are not or little expected. But, if other enforcement mechanisms in international human rights regimes exists and works well to ensure compliance, it is possible for states to comply with their human rights obligations. However, although there are some enforcement mechanisms in UN human rights system, the enforcement mechanisms have limitations to induce and assure compliance as international legal system.

There are three main enforcement mechanisms in UN human rights system. The first is human rights committees. The committees are established by each human rights treaty as treaty-based human rights mechanism, and there are 10 human rights committees in UN human rights treaties. The role of the committees is to ensure states' compliance with the treaties, providing guidance and interpretation to member states and reviewing periodic reports produced by the member states. In the reports, the member states demonstrate that how the human rights treaty is implemented.²⁷⁰ Moreover, some committees have authority to hear individual petitions²⁷¹ or authority to initiate inquiries²⁷² in case that relevant state ratifies the related human rights treaties. In the mechanisms, however, 'the committees do not act as judges or enforcement authorities, but can initiate a dialogue with

²⁷⁰ Posner, *The Twilight of Human Rights Law*, supra note 8, at 40.

²⁷¹ the Human Rights Committee (ICCPR), the Committee on Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED), the Committee on Economic, Social and Cultural Rights (CESCR)

²⁷² the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED), the Committee on Economic, Social and Cultural Rights (ICESCR) and the Committee on the Rights of the Child (CRC)

the country, albeit only if the country cooperates'.²⁷³

As the committees cannot play a significant role in human rights enforcement, the committee systems are not importantly considered by member states. Regarding periodic report, by 2011, merely 16 percent of member states had submitted periodic reports just in time. About 20 percent of member states have never offered the periodic reports under ICCPR, ICESCR, and CAT.²⁷⁴ Moreover, concerning petitions, because the committees have no power to impose sanctions, remedies, or legally binding judgements, individuals suffered from human rights abuses and their advocate do not take seriously to use the committee's petition system. In his book, Posner represent the results of the committee mechanisms that:

The Human Rights Committee – the committee associated with the ICCPR – has received 1,677 petitions since 1976, or about 45 per year. The Committee found violations in 809 cases and received a “satisfactory response” from the country in only 67 of them. The Committee Against Torture – the committee associated with the Convention Against Torture – has heard only 284 petitions since 1990, or only about 12 year. The Committee found violations in 76 cases, and received a “satisfactory response” from the country in 37 of them. Only 26 cases have been brought to the CEDAW committee since 2004. The committee found violations in 13 cases, received a “satisfactory response” in 4, and is engaged in dialogue in the others. Only 50 cases have been brought to the CERD committee since 1988. The committee found violations in 14 cases, and received a satisfactory response in 4.²⁷⁵

Based on these results, Posner argues that the enforcement mechanism of human rights committees could not affect government policy or states' behaviour.²⁷⁶ Consequently, the human rights committee system including periodic reports and petitions do not work well and even do not impose the enough cost of non-compliance, and thus, the enforcement mechanism is not appropriate to induce compliance or to change states' behaviour.

The second system is the UN Council on Human Rights. Like human rights committees,

²⁷³ Posner, *The Twilight of Human Rights Law*, supra note 8, at 41.

²⁷⁴ Ibid, at 42.

²⁷⁵ Ibid, at 42-43.

²⁷⁶ Ibid, at 43.

the council has the authority and the power to monitor the implementation of human rights obligations.²⁷⁷ However, unlike the committees, the council's monitoring action is broader and more general than the committee system because the council is not tied with any particular human rights treaties as charter-based human rights mechanism. As the council is composed of governments rather than experts, its evaluations and resolutions are more easily found in news reports than the human rights committees.

The council is the successor of the UN Commission on Human Rights. In 2006, the UN replaced the commission to the council. However, the monitoring effort was not successful, and many criticisms had been raised with respect to problems of this council. First, many of the commission member states were the serious human rights violators, such as Libya, Saudi Arabia, and Sudan. Second, in consequence, the commission lacked to criticise the worst human rights violation states. Third, most critics of the commission were concentrated on Israel. Fourth, there was a tension between Islamic countries that argued the theory of defamation of religion and the Western countries that rejected this argument. In the critics, after changing structure from the UN Commission on Human rights to UN Human Rights Council, the Council tried to limit the qualification of member states as countries respecting human rights. Despite the efforts, human rights violators still take their position in the council. Moreover, although the council's criticism has been widened, the council still focuses on Israel and pays little attention to other countries that have worse human rights records.²⁷⁸

According to 2009-2010 report card about the UN Human Rights Council by Freedom House, the Council has failed 'to call special sessions or pass resolutions on pressing human rights issues, and to respond to the growing global threat against freedom of association'.²⁷⁹ Regarding the election to the council members, the report notes that the number of countries with strong human rights records has been decreased since the first ballot in 2006.²⁸⁰ Conversely, the number of rights-abusing countries has been increased in the council. 'As a result, the ratio of rights-respecting countries to rights-abusing

²⁷⁷ Ibid, at 40.

²⁷⁸ Ibid, at 44-45.

²⁷⁹ Freedom House, The UN Human Rights Council Report Card: 2009-2010, <https://freedomhouse.org/sites/default/files/inline_images/UNHRC%20Report%202009-2010.pdf> (visited 10 January 2015), at 1.

²⁸⁰ Ibid.

countries has been slowly shifting in the wrong direction.²⁸¹ In addition, the report argues that ‘[t]he Council has issued condemnatory resolutions on only a handful of countries, including a disproportionate number on Israel’, and further, that ‘[t]he Council did not issue a resolution on Iran, despite evidence of massive human rights violations in that country throughout the year, and no resolutions were passed to address ongoing systematic abuses in countries such as Belarus, China, Cuba, Libya, Saudi Arabia, Sudan, and Syria’.²⁸² Overall, the limitations of the UN Commission on Human Rights are still being continued in the council. Therefore, like the Human Rights Committee system, the council is also considered that it lacks substantial effectiveness as enforcement mechanism to change states’ behaviour.

The last in the UN human rights system is the Office of the UN High Commissioner for Human Rights (OHCHR). The OHCHR was established in order to improve coordination between many human rights bodies and to work as leader in the human rights bodies. The OHCHR is a mandate to advance human rights. Moreover, as the secretariat for the Human Rights Council, the OHCHR offers various assistances such as administrative support to the human rights committees, advice about human rights standards for countries, and pressure on other UN organs. However, the OHCHR does not contain any legal authority, and it just work as a political office. Like other UN human rights mechanisms, it is not considered as effective human rights enforcement mechanism, and as a result, ‘[I]ittle has been written about the OHCHR and its role in enforcing human rights law’.²⁸³

In sum, among the three Rs of non-compliance, only reputation cost is little workable and suitable in international human rights regime. Reciprocity and retaliation are unworkable because international human rights laws have different character. Moreover, other enforcement mechanisms such as the Human Rights Committees, the UN Council on Human Rights, and the OHCHR have problems to make states comply with international human rights obligations. In these circumstances, non-compliance is expected to be easily taken by states with little costs, and very small number of compliance would exist in limited conditions.

4. Empirical Studies

²⁸¹ Ibid, at 3.

²⁸² Ibid, at 2.

²⁸³ Posner, *The Twilight of Human Rights Law*, supra note 8, at 47.

From the problems of international human rights law, one can predict that international human rights law has no or little effects on states' behaviour. A state obtains little costs from violating its human rights obligations, and therefore, states' compliance does not depend on international human rights law itself but domestic law and culture.²⁸⁴ For the question of real compliance or relationship between international human rights law and states' behaviour, some scholars have researched to answer the question, using empirical data and a quantitative method.

Linda Camp Keith tested the relationship between ratifications with ICCPR and degree of improvement of human rights. Keith examined human rights data in 178 countries over 18 years from 1976 to 1993.²⁸⁵ Keith argued that the result of testing data implies that there is no significant relationship between ratifications of ICCPR and real states' behaviour. She also suggested that:

Overall, this study suggests that perhaps it may be overly optimistic to expect that being a party to this international covenant. The results are consistent with the assertions that the treaty's implementation mechanisms are too weak and rely too much upon the goodwill of the party state to effect observable change in actual human rights behavior.²⁸⁶

Ultimately, Keith asserted that the ICCPR have no strong effects to change states' behaviour and to improve human rights.

A similar result was released by Oona Hathaway. Hathaway examined data of broader human rights treaties about genocide, torture, fair trial, civil liberty, and women's political equality.²⁸⁷ Like Keith, she also argued that '[a]lthough the ratings of human rights practices of countries that have ratified international human rights treaties are generally better than those of countries that have not, noncompliance with treaty obligations appears to be common'.²⁸⁸ Moreover, according to her analysing data, in some cases, ratification of human rights treaties is connected with worse human rights practices, and these cases

²⁸⁴ Goldsmith and Posner, *The Limits of International Law*, supra note 149, at 120.

²⁸⁵ Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?', 36 *Journal of Peace Research* (1999) 95-118.

²⁸⁶ *Ibid*, at 112.

²⁸⁷ Hathaway, 'Do Human Rights Treaties', supra note 163.

²⁸⁸ *Ibid*, at 1940.

are not infrequently than expected.²⁸⁹ In other words, Hathaway asserted that ratification of human rights treaties has no impact on individual states' human rights practices and even sometimes leads to worse human rights practices. In addition, Hathaway suggested other point that '[f]ully democratic countries that have ratified the universal human rights treaties usually have better human rights ratings, on average, than those that have not'. However, when the group of democratic countries was expanded, the result showed that the democratic countries seem to have no better human rights practices.²⁹⁰

Another research result by Emilie M. Hafner-Burton and Kiyoteru Tsutsui supported the two previous studies. Hafner-Burton and Tsutsui represented two findings. The first is that 'state commitment to the international human rights legal regime does not automatically translate into government respect for human rights'.²⁹¹ Moreover, like Hathaway, they found that the ratification is associated with non-compliance behaviour and worse human rights record. The second is that 'states whose citizens belong to a greater number of International Non Governmental Organisations (INGOs) are more likely to protect the rights of their citizens'.²⁹² Hafner-Burton and Tsutsui suggested that the linkage to global society is more important factor for states to improve human rights practice than international human rights law itself.

Eric Neumayer found some positive evidences that the ratification of human rights treaties is connected with better human rights performances in more democratic countries. Moreover, the ratification becomes more beneficial for countries that more citizens tend to join in INGOs. However, supporting Hathaway's result, his analysis implies that the ratification often leads no difference and can even lead worse practices in non-democratic countries such as in autocratic regimes or in weak civil society. Moreover, Neumayer found only few cases that the ratification of human rights treaties unconditionally impacts on human rights practices in member states. As a result, he asserted that '[i]n most cases, for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, and perhaps pressure governments into

²⁸⁹ Ibid.

²⁹⁰ Ibid, at 2000-2002.

²⁹¹ Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', 110 *American Journal of Sociology* (2005) 1373-1411, at 1395.

²⁹² Ibid, at 1398.

translating the formal promise of better human rights protection into actual reality'.²⁹³

Recent research result by Beth Simmons represented some positive effects of the ratification of human rights treaties. Simmons examined data of 13 treaties or treaty provisions. She represented evidences of human rights improvements connected with the treaty ratification. According to her analysis, the ratification of human rights treaties improves civil rights, such as religious freedom and fair trial, and some of women's rights and reduces death penalty and child labour rate. However, the results are not found in all countries but some countries that are partial democracy and transition countries toward democracy. To be contrary, in stable democracy and stable autocratic countries, the treaty ratification does not have the same effects. Moreover, in stable democracy, the ratification of human rights treaties sometimes is related with worse human rights performances. For example, high rule-of-law countries that have ratified the CAT tend to use more torture than other high rule-of-law countries that have not ratified. In other cases except civil rights, some of women's rights, and some of child's rights, Simmons found no statistical significances.²⁹⁴

Overall, most studies have found no statistical evidence that the ratification of international human rights treaties make states improve human rights practices or respect human rights obligations. On the contrary, some studies represent some evidences that the treaty ratification is correlated with worse human rights practices of authoritarian states. Moreover, democratic states have even widely participated in violation of CAT or using torture. Only a few studies have found little improvements in very limited circumstances. Regarding these human rights reality, Posner insists that 'a small number of treaty provisions may have improved a small number of human rights outcomes in a small number of countries by a small, possibly trivial amount'.²⁹⁵ Consequently, these studies suggest that there is weak evidence that international human rights treaties can make better human rights practices, and one can state that modern human rights treaties have problems to induce states' compliance for better human rights world.

²⁹³ Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', 49 *The Journal of Conflict Resolution* (2005) 925-953, at 950.

²⁹⁴ See Simmons, *Mobilizing for Human Rights*, supra note 264, at 159-348.

²⁹⁵ Posner, *The Twilight of Human Rights Law*, supra note 8, at 78.

V. Conclusion

In modern international society and international relations, international laws have generally played important roles. With the development and expansion of international law, international human rights law have also evolved. The development of international human rights law is very important in modern international society and is considered a victory and achievements of international law. It has been expected that the more international human rights treaties there are and the broader area international human rights laws govern, the better human rights world international human rights laws make and secure. But some facts are found in the real world that these expectations are not achieved through international human rights laws. The value and worth that international human rights law want to ensure have been still infringed.

To know or discover the problem of a gap between expectations of international human rights laws and realities of human rights protections, this paper explores the answer to three questions: ‘what is a better way to understand international law?’, ‘why do states comply with international law?’, and ‘what is the problem of international human rights law?’. The first answer is that a law and economics approach or analysis is a better way to understand and to study international law. Despite of some concerns, law and economics is a very useful tool for international legal researches. The second is that according to law and economics analysis of international law, the key points for understanding states’ compliance with international law is the costs of three Rs: reciprocity, retaliation, and reputation. International law is a self-enforcing mechanism system. In such a system, the costs of three Rs play a significant role to induce and facilitate states to comply with international law. However, as the third answer, in international human rights regime, the costs of three Rs do not work well because of different character of international human rights treaties. The reputation cost only little works, and the reputation cost alone do not generate enough cost of non-compliance. Moreover, there are no strong enforcement mechanisms to make states’ compliance in international human rights treaties. As a result, international human rights law has problem to induce states to comply with international human rights obligations. These theoretical analyses can be supported by many empirical research results. Overall empirical and statistical research results find that there is no significant evidence between international human rights law and human rights improvements.

This thesis does not argue that international human rights law is meaningless or unnecessary. The efforts for protection of human rights through international law have been continued, and it must continue in the future. However, legalism or institutionalisation of international human rights that do not correctly recognize the problem of international human rights law can be wasteful of resources. Moreover, it is impossible to avoid a decrease in the authority of the international human rights law by subsequent non-compliance. Therefore, this thesis points out that such problem of international human rights law and presents a starting point for further discussion for in order to improve protections of human rights through international law.

From the conclusion, this paper suggests the direction of the new research. The first is a study of strong enforcement mechanism in international human rights law. Due to the nature or concept of international human rights law, in order to ensure compliance of states with their human rights obligations, international human rights law must have the strong enforcement mechanisms; detailed discussion for this should be done. The second is an international legal research on human rights and other areas such as relationship between economic development and human rights. According to some studies, economic development can lead to improve human rights. Thus, it is necessary to study of how the economic development and human rights improvement are connected and how international economic cooperation through international economic law assists to improve human rights.

Protection of human rights through international law is very important. It may be the mission of this era for freedom of human being. However, just producing international human rights law and vaguely expecting that international human rights law can save the world are not helpful for protecting human rights. Rather, to recognize the limitations of international human rights law and then to seek out improvements to the problem may be more important for the protection of human rights. To solve human rights violation and to improve human rights through international law, we must have cool heads but warm hearts that means considering justice and human rights and using empirical and logical methods in order to achieve the goals.

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