

Michigan Journal of International Law

Volume 19 | Issue 2

1998

Why Nations Behave

Jose E. Alvarez

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Jose E. Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303 (1998).

Available at: <https://repository.law.umich.edu/mjil/vol19/iss2/1>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

FOREWORD

WHY NATIONS BEHAVE

Jose E. Alvarez*

It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.¹

—Louis Henkin

The idea for this symposium on “implementation, compliance and effectiveness” grew out of the 1997 annual meeting of the American Society of International Law (ASIL), devoted to that theme. As one of the co-chairs of that meeting, I suggested to the student editors of this journal that they solicit articles on a topic that has seized the attention of researchers within international law as well as in seemingly unrelated fields. As Professor Thomas Franck has indicated in a recent well-received book, an ever increasing number of scholars are going beyond well-worn debates about whether international law is truly “law” to undertake “post-ontological” inquiries appropriate to the new “maturity” of the international legal system.² As the 1997 ASIL annual meeting demonstrated and, as further confirmed by the contributions selected by the student editors for this volume, today the question of *why* international norms secure compliance seems to be as popular as more traditional descriptions of *how* nations behave, and, at least to some, is a more relevant line of inquiry than “outdated” debates over *whether* nations behave.³ Compliance inquiries seem particularly germane at a time when more and more individuals, from academics to journalists, contend that the ever increasing waves of “effective” international regulation, often involving matters previously ceded to the internal “domestic jurisdiction” of states, portend the “demise” or even the “end” of “sovereignty” (at least as traditionally conceived).⁴

* Professor of Law, University of Michigan School of Law. J.D., Harvard Law School (1981); A.B., Oxford University (1979); A.B., Harvard University (1977).

1. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

2. See THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 5–6 (1995).

3. For a summary of the perennial debates between realists and liberal internationalists on this last question, see Harold H. Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2608–17 (1997).

4. For examples of the burgeoning recent literature among even “traditional” international lawyers on the continued value of the term “sovereignty,” see Louis Henkin,

The new multidisciplinary empirical and theoretical work on "implication, compliance and effectiveness" remains, to a considerable extent, at the definitional stage; the question of what is the "proper" way of parsing these issues is still very much debated.⁵ The symposium title here, like the theme for the 1997 ASIL meeting, draws from the terminology used by two pioneers in the new wave of compliance studies, Harold Jacobson, a professor of political science, and Edith Brown Weiss, a professor of international law.⁶ In their work (within international environmental law), Professors Jacobson and Weiss systematically examine what they consider to be three related but analytically distinct phenomena. For them, *implementation* is concerned with the methods by which States transform international obligations into acceptable rules within their domestic legal systems. Implementation may take many forms, including caselaw or executive orders giving effect to what in the United States would be called a "self-executing" treaty or different types of legislative enactments intended to give effect to other sources of international obligations. States may

International Law: Politics, Values, Functions, 216 RECUEIL DES COURS 13, 24–25 (1990); John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANS. L. 157 (1997); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANS. L. 7 (1997); Christoph Schreuer, *The Waning of the Sovereign State: Toward a New Paradigm of International Law?*, 4 EUR. J. INT'L L. 447 (1993). The literature on the topic within political science is as voluminous. See, e.g., Mark W. Zacker, *The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 58 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992). As within international law, there is considerable debate among political scientists with respect to whether current developments represent the "erosion" of the continued "resilience" of States. Compare Zacker, *supra*, with Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, in *GLOBAL CHANGES AND THEORETICAL CHALLENGES* (Ernst-Otto Czempiel & James N. Rosenau eds., 1989).

5. Definitional difficulties are at least partly due to the many disciplines involved. See Koh, *supra* note 3, at 2603 n. 13. For one political scientist's survey of eight distinct approaches that purport to explain the "choice to comply," see Peter Haas, *Why Comply or Some Hypotheses in Search of an Analyst*, in *INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS* (Edith Brown Weiss ed., 1997) [hereinafter *INTERNATIONAL COMPLIANCE*]. For a simpler distillation, reducing much of the literature to two distinct optics ("instrumentalist" versus "normative") allegedly characteristic of political science and law respectively, and attempting to reconcile the two, see Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997).

6. See Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995) [hereinafter Jacobson & Weiss, *STRENGTHENING COMPLIANCE*]. See also *COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS* (Edith B. Weiss and Harold K. Jacobson eds., 1996).

prefer, often for domestic constitutional reasons, one form of transformation over another and may experiment with different types of measures over time. *Compliance* looks beyond such measures to whether States actually abide by their procedural and substantive international obligations, regardless of what the "black letter" of their domestic laws formally indicate. Compliance may occur without implementing legislation. On the other hand, a State may not be "in compliance" with international law even with implementing legislation in place. Queries directed at *effectiveness* go beyond those looking at implementation or compliance to determine whether an international norm, whatever its source in domestic or international law, achieves its policy objective. Effectiveness studies evaluate whether the goals of those who craft the norms are fulfilled, asking whether, for example, at the end of the day, environmental treaties improve the environment, arms control measures decrease (or at least stabilize) armaments levels, or human rights regimes actually protect individuals from governmental abuse.

As Jacobson and Weiss make clear in their work, the point of addressing these issues is not ivory tower description. Particularly for international lawyers involved in such work, hopes for generalizable prescriptions inspire the quest for the determinants of implementation, compliance and effectiveness. For the most part, these studies are quixotic searches for "recipe books:" tools that are more or less effective either generally or with respect to particular issues or types of problems. The new compliance scholars are hoping to identify which characteristics of the actors involved in an activity, the international environment, or the instrument involved (such as a treaty) have an impact on the likelihood that any international norm will be given effect. They are attempting to discover the impact on implementation or compliance of the numbers of actors involved, the involvement of multinational corporations or NGOs, or the degree of concentration of the activity being regulated within certain countries. They also are trying to examine the impact of the perceived equity of a treaty's intended results, or of its other characteristics, such as pedigree, origins, or textual precision. They want to know whether the availability of sanctions, of an institution, or of dispute settlement matters and if so, how. Ultimately they would like to demonstrate convincingly not only *why* Henkin is right but to suggest ways to replicate the law's successes in areas heretofore resistant to effective law-making or law-enforcement. At the same time, most of the new students of compliance, at least within law, share certain normative values, including the belief that more effective international regulation is better than less, and not a

few of them contend as well that effective international regulation is positively related to the rise of "liberal" (democratic) states.⁷

The new compliance scholars recognize that the "why" question has not been totally ignored in the past.⁸ Much of the work of many international lawyers in the UN era has attempted to show how international law is created and enforced. Long before Louis Henkin gave voice to what many international lawyers believe as an article of faith, the real world effects of treaties, custom, or other sources of international law have been a central preoccupation for international lawyers as well as for those who have seen international lawyers' aspirations as a blight on the making of optimal foreign policy.⁹ As readers of many of the contributions to this volume will see, there is much in the current "compliance" literature that is reminiscent of traditional international law scholarship, including work that never purported to be about "compliance" as such. Thus, many of the doctrinal analyses by the "father of UN studies," Louis B. Sohn, address a central issue that continues to preoccupy several of the authors in this volume: how to use international institutions to achieve, at least within a limited field, governance without government. Much of Sohn's work—including his 1994 book on the evolution of the UN's treatment of South Africa,¹⁰ his numerous descriptions of how organizations engage in constitutional interpretation,¹¹ or his ground-breaking sets of teaching materials¹²—are

7. Advocates of "liberal" compliance share a close affinity with advocates of the "liberal peace," including those who have created a "Kantian revival" within the fields of international law and international relations. See, e.g., Andrew Hurrell, *Kant and the Kantian Paradigm in International Relations*, 16 REV. INT'L STUD. 183 (1990); Ulrick Petersman, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1996/97); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993) [hereinafter Slaughter, *Europe Before the Court*]; Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

8. Indeed, Henkin himself addressed, albeit briefly, the "why" question posed in this essay's title. See HENKIN, *supra* note 1, at 49–68.

9. Compare GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960) with GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900–1950*, 95–103 (1984). In the past, the "compliance" issue was frequently discussed in the guise of debates over whether international norms were efficacious enough to be considered worthy of the term "law." For an example of the debate's real world significance, compare Robert H. Bork, *The Limits of "International Law"*, 18 THE NAT'L INTEREST 3 (1989/90) with Judge Robert H. Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

10. See LOUIS B. SOHN, *RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA* (1994).

11. See Louis B. Sohn, *Interpreting the Law*, in UNITED NATIONS LEGAL ORDER 169 (Oscar Schachter & Christopher C. Joyner eds., 1995).

12. See LOUIS B. SOHN, *CASES ON UN LAW* (2d ed. 1967).

case examples of the "international legal process" at work or, in the language of Yale School enthusiasts, are nicely documented international "incidents."¹³

Indeed, the first generation of post-UN international law scholars were "present at the creation" of the United Nations and other international organizations because they foresaw these institutions' potential for giving effect to, as well as promulgating, the international rule of law. Careful readers of their early analyses know that their authors recognized the potential significance of, for example, the new international secretariats who would set the agenda and prepare initial drafts, entice some States to comply through the provision of carrots or threaten others through non-coercive sticks, or help establish or solidify bureaucratic alliances of transnational elites, often within a profession with a common outlook.¹⁴ Astute students of international organizations recognized long ago that the work of even extremely specialized bodies tends to incrementally expand, through "functional spillover," to permit regulation of other matters, such that, for example, GATT panels begin dealing with rules governing the environment or financial lenders begin considering human rights.¹⁵ Further, Sohn's work, like the work of others of his generation, illustrates many times over how evolving constitutional interpretation within an international organization helps construct the identifies of relevant actors and permits the self-constitution of international society—an insight that new self-styled "constructivists" are now rediscovering with considerable fanfare.¹⁶

So what is "new and improved" about the new work on implementation, compliance and effectiveness? Recent scholarship puts on the table, as the central focus of inquiry, issues that were only incidentally addressed in much prior work. Today's compliance literature pays closer attention to what drives relevant actors, including private multinational

13. See ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* (1968); *INTERNATIONAL INCIDENTS* (W. Michael Reisman & Andrew R. Willard eds., 1988); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L L.* 1 (1959). For a description of the impact of these works, and the two U.S. "schools" of international law of which they were part, see Koh, *supra* note 3, at 2617-24.

14. Compare SOHN, *supra* note 12, with Ronald Mitchell, *Compliance Theory: An Overview*, in *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* 1 (James Cameron et al. eds., 1996).

15. For recent work involving "spillover" effects, see Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *INT'L ORG.* 41, 55 (1993); Benedict Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 *Y.B. INT'L L.* 1 (1995).

16. See, e.g., Alexander Wendt, *Constructing International Politics*, 20 *INT'L SECURITY* 71 (1995); Alexander Wendt, *Collective Identity Formation and the International State*, 88 *AM. POL. SCI. REV.* 384 (1994).

corporations, non-governmental organizations, and governments, to "give effect" to international law. Some of the new compliance scholars ask directly whether the impact of law lies within the realm of unconscious habit, as opposed to calibrated, conscious self-interested decision, or internalized (perhaps even moralistic) obedience.¹⁷ More than ever before, there is a concerted effort to determine, and even sometimes to measure empirically, whether economic sanctions or other "coercive" methods are essential or of greater efficacy, as many assume, or whether less confrontational, more "managerialist" approaches, such as information exchange or financial inducements, are more effective.¹⁸

The resulting scholarship has given new life to old inquiries. Hoary doctrinal analyses regarding the sources of international law, for example, are being revived by renewed consideration of whether international actors comply with different sources of international obligations at different rates. Thus, a new project by ASIL, initially supported by the National Science Foundation and involving a number of prominent scholars, examines the hypothesis that under some circumstances international actors, including States, comply with legally nonbinding instruments (whether designated as "soft law" or merely as "political obligations") at least as well as they do with binding obligations duly recognized by Article 38 of the Statute of the International Court of Justice.¹⁹ Much of the new scholarship renews the vitality of international organization as a field of study within international law since a basic line of analysis concerns the potential impact of institutionalization. Further, at a time of increased specialization within a field with proliferating sub-specialties and a decline in scholars of a generalist persuasion,²⁰ these "compliance" studies contain a refreshingly eclectic mix of examples from distinct substantive fields, posing issues across increasingly irrelevant private/public divides; indeed, at least some of the new work seeks to identify generalizable propositions irrespective of whether one is addressing, for example, access to markets or arms control.²¹

17. Thus, Professor Harold Koh indicates that he is interested in the distinction between four types of relationships between norms and conduct: "coincidence," "conformity," "compliance," and "obedience." Koh, *supra* note 3, at 2599 n. 3.

18. For one survey of "carrot" as opposed to "stick" approaches, see generally, Mitchell, *supra* note 14.

19. See INTERNATIONAL COMPLIANCE, *supra* note 5.

20. Indeed, Thomas Franck, undoubtedly one of the few remaining generalists in the field, has suggested that international law 'has entered the stage of the "practitioner-specialist." Franck, *supra* note 2, at 4.

21. For attempts to apply "compliance" insights across distinct sub-specialties within international law, see ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY:

At the same time, the new compliance scholarship has developed a new vocabulary, much of it drawn from law and economics (especially game theory). The “managerial” school typifies much of the new work and is a necessary point of departure for all the contributions to this volume. To managerialists like Antonia and Abram Chayes, sovereignty today consists of status, which they define essentially as “membership in reasonably good standing in the regimes that make up the substance of international life.”²² Under the Chayeses’ neo-functional view of international law, States are driven to comply with the edicts of these regimes, often connected to UN system organizations, out of enlightened self-interest and through non-coercive tools such as reporting, verification, and monitoring requirements more often than through the use of military or economic sanctions. To managerialists, the very existence of international bureaucracies whose *raison d’être* are the treaty regimes they supervise helps make compliance with international law possible and likely. Drawing from the work of disciplines other than law, including political scientists who study the impact of “epistemic communities” of technocrats (from free traders to whalers),²³ Chayes and Chayes identify how international organizations help resolve the characteristic problems that, in their view, most often undermine compliance with international law. According to their view, organizations provide discursive forums to resolve the ambiguity or indeterminacy of norms, grant technical assistance to help States willing but unable to comply, and offer standing mechanisms that permit legal norms to adjust and adapt to changing conditions and circumstances. For these authors, as for Louis Henkin, the willful flouting of legal obligations are the exception (not the rule) and the “managerial” techniques that characterize international organizations are the tools that most often effectuate compliance.²⁴

COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); INTERNATIONAL COMPLIANCE, *supra* note 5.

22. As noted by Chayes and Chayes:

To be a player, the state must submit to the pressures that international regulations impose The need to be an accepted member in this complex web of international arrangements is itself the critical factor in ensuring acceptable compliance with regulatory agreements. . . . Sovereignty . . . is status—the vindication of the state’s existence as a member of the international system. In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.

CHAYES & CHAYES, *supra* note 21, at 27.

23. See generally *Power, and International Policy Coordination*, 46 INT’L ORG. (1992) (special issue devoted to studies of epistemic communities in distinct international settings).

24. Thus, the Chayeses indicate that “it is no coincidence that the regimes with the most impressive compliance strategies—ILO, IMF, OECD, GATT/WTO—are operated by sub-

Other subscribers to the managerial school, like Professor Kenneth Abbott, have focused even more directly on the role of international organizations and have stressed that these institutions are not the mere passive agents of states or the mere repositories of cooperation but are instruments for the rational maximization of preferences, that is, agents producing collective goods, collaborating in prisoner's dilemmas, or resolving coordination problems. Analogizing to private transactions, Abbott identifies the various roles some organizations have assumed, including as "trustee" for the holding of assets (as in connection with Iraqi oil revenue), as "allocator" of scarce resources among claimants (as the UN Compensation Commission), or as "arbiter" through everything from formalized adjudicative fora to the "good offices" function of the UN Secretary-General. Abbott judges international organizations from the standpoint of economic efficiency and, in a surprise to critics of international bureaucracy, praises them for permitting greater centralization, raising the price of defection by lengthening the shadow of the future, stabilizing expectations, reducing transaction costs, and increasing transparency. Further, Abbott argues that the resort to an international organization (as for the use of force or for conditioned development assistance) legitimizes what would be troublesome if pursued by one state or a group of states, thereby fulfilling the same intermediary "laundering" mechanism that "independent" organizations often assume within domestic legal systems.²⁵

* * *

David S. Ardia's contribution here, addressing the inadequacies with respect to existing treaty regimes to protect the marine environment and proposing a new International Marine Monitoring and Coordination Agency, is heir to the legacy of "traditional" scholars like Louis Sohn. Indeed, Ardia emulates the style (and optimism) of Sohn's reformist agenda.²⁶ As Ardia's article suggests, much of the new compliance work dovetails nicely with prior international law scholarship. On the other hand, Ardia's contribution here is also heir to the new "managerialist" school of compliance studies, epitomized by the Chayeses' conception of the "new sovereignty." Ardia's analysis of environmental problems

stantial, well-staffed, and, for the most part, well functioning international organizations." CHAYES & CHAYES, *supra* note 21, at 271.

25. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Kenneth W. Abbott, *Formal Organizations and International Politics*, (Oct. 1996) (working draft on file with author).

26. For a recent discussion, see Louis B. Sohn, *Important Improvements in the Functioning of the Principal Organs of the United Nations That Can be Made without Charter Revision*, 91 AM. J. INT'L L. 652 (1997).

reflects managerialist assumptions concerning the role of normative rhetoric; his recommendations are premised on an assumption that effective international rule-making requires appeals to States' long and short term interests and rests on a serious attempt to make the norms relevant to such interests, including States' concerns for their reputations. Like Abbott, Ardia argues that success here depends on using institutions, at both the national and international level, to provide information and to link such information with multifarious threats to enforce.²⁷

Natasha A. Affolder's contribution to this volume, which deals with the use of anonymous witnesses in the course of criminal trials within the ad hoc international criminal tribunal for the former Yugoslavia, addresses how an institutionalized dispute settler strives to achieve a legitimate conclusion with respect to a difficult evidentiary issue that, at least to some extent, pits international lawyers from common law countries against their continental counterparts. Her contribution, which ties institutional legitimacy to the use of pedigreed traditional sources of international law, is an apt illustration of the continued vitality of venerable debates about the role of such sources (and of precedent) in international tribunals. It reminds us that the effectiveness and rate of compliance with both national and international judicial decisions continues to hold a particular (if predictable) fascination for "compliance" analysts within international law²⁸—as does study of the "integrative" potential of judicial action.²⁹ In fact, thanks in part to the perceived success of the European Court of Justice and other international tribunals, a model of compliance premised on the significance of "liberal" concepts of the judicial role has emerged,³⁰ along with an ambitious theoretical construct for "effective" supranational adjudication generally.³¹ Others, including Professor Thomas Franck, have attempted to describe more generally how international dispute settlers increase perceptions of fairness or

27. Cf. Keohane, *supra* note 5, at 495–501.

28. See, e.g., COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS (M.K. Butlerman & M. Kuijer eds., 1996); INTERNATIONAL LAW DECISION IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 327–71 (John H. Jackson et al. eds., 3d ed. 1995); *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POL. (1995–96).

29. See, e.g., Joseph Weiler, *The Transformation of Europe*, 100 YALE L. J. 2409 (1991) (describing how a handful of judges in Luxembourg, working quietly and steadily, transformed a treaty into a constitution and an international organ into a constitutional court).

30. See, e.g., Slaughter, *Europe Before the Court*, *supra* note 7.

31. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

legitimacy.³² While Affolder does not undertake such general conclusions, her work here, part of a growing number of scholarly critiques of procedural aspects of the new ad hoc international criminal tribunals at The Hague and in Arusha, Tanzania,³³ is grounded in the proposition that international trials, no less than domestic ones, need to be seen as “fair” by both litigants and outside observers if their verdicts are to prove effective.

Christopher Joyner’s contribution to this volume, which examines the role of “soft law” in the Antarctic treaty regime, is part of a growing wave of new work dealing with the impact and nature of “soft” international legal norms, as well as the complex interplay/continuum between “hard” and “soft” obligations.³⁴ Like much of the new scholarship, Joyner takes for granted that the three-fold traditional sources of international law no longer provide an accurate sense of the sources of current international obligations, or more significantly, of the process by which international obligations develop and solidify. Like Frederic Kirgis’s recent compilation of “law-making processes” used in UN specialized agencies or Jonathan Charney’s enumeration of the many techniques now prevalent for the making of “universal international law,”³⁵ Joyner’s contribution illustrates modern processes for international law-making, albeit within a relatively discrete regime involving only a few international actors. Joyner’s analysis of the incipient years of an international regime that has not yet become institutionalized, as through the creation of permanent secretariat or other organs, is also likely to be of interest to historians of

32. See FRANCK, *supra* note 2; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

33. See Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 *DUKE J. COMP. & INT’L L.* 519 (1997); Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 *AM. J. INT’L L.* 235 (1996); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *DUKE J. COMP. & INT’L L.* 349 (1997); Daniel D. Natanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 *CRIM. L. F.* 507 (1994); Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 *DENV. J. INT’L L. & POL’Y* 305 (1997).

34. See INTERNATIONAL COMPLIANCE, *supra* note 5. *But see* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AM. J. INT’L L.* 413 (1983) (disparaging the tendency to examine international law along a spectrum of binding force, from “hard” to “soft”).

35. Frederic L. Kirgis, *Specialized Law-Making Processes*, in UNITED NATIONS LEGAL ORDER (Oscar Schachter & Christopher Joyner eds., 1995); Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT’L L.* 529 (1993). *See also* Oscar Schachter, *United Nations Law*, 88 *AM. J. INT’L L.* 1 (1994) (canvassing the wide range of UN law).

institutionalization in other contexts³⁶ and is an apt illustration of the determinative role played by technological developments in the evolution of international regulation.³⁷ Joyner also reminds us that effectiveness need not be synonymous with costly bureaucratization.³⁸

Kenneth J. Vandavelde's article in this volume takes a historical look at north/south and east/west perspectives with respect to foreign investment. Vandavelde implicitly refutes the proposition that we live in an exceptional epoch at the "end of history," where we can afford to act on the premise that global capital has permanently won the day. His piece, which urges legal reforms in the name of securing "sustainable" investment regimes amenable to both exporters and importers of capital, acknowledges that the all too brief post-Cold War enthusiasm for Western-styled democratic governance, capitalism and privatization (if it ever truly existed at the global level) has given way to contentious notions of nationalism, fundamentalism, cultural relativism, and varying concepts of "democracy." As does Benedict Kingsbury's general tour d'horizon with respect to compliance studies that is also a part of this volume, Vandavelde's article implies that the new "liberal" theorists and neo-Kantians who are intent on extrapolating from the integrative model of the European Union (EU) and its court will need to deflect criticism that they are merely 'neoimperialists' seeking to export European values to the 'neocolonized.' Both Vandavelde's and Kingsbury's pieces implicitly warn that realities have begun to intrude on the plausible lessons that can be drawn from regional systems for integration, and that the prospects for increased European integration are now in doubt, as are the prospects for expansion of the NAFTA to the rest of the Americas. Internationalists, they suggest, including liberal theorists, may have been overly hasty in relegating the concept of "sovereignty" to the dustbin of history since, after all, most international

36. Within international law, this would include students of GATT developments prior to the emergence of the WTO or the Conference on Security and Cooperation in Europe's (CSCE) evolution into the Organization for Security and Cooperation in Europe (OSCE).

37. For an interesting attempt to explain international regulation in a discrete area that has also been dramatically affected by rapid technological change, see Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 *CARDOZO L. REV.* 925 (1996) (applying public choice constructs to the Basel Accords and to insider trading regulation).

38. This is true as well of much of Jacobson's and Weiss' work dealing with environmental regimes. See Jacobson & Weiss, *STRENGTHENING COMPLIANCE*, *supra* note 6. It also characterizes a central insight in the work of other authors, including political scientists like Ronald Mitchell. See Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 *INT'L ORG.* 425 (1994) (concluding that treaty restrictions on allowable maritime discharges are less effective than preventive measures that limit permissible tanker equipment, thereby suggesting that some international regimes are efficacious because their mechanisms for compliance are decentralized).

regimes, including the EU, remain institutions for the maintenance of "sovereignty" (however "new") rather than its eclipse.

Vandavelde and Kingsbury also imply that the much touted "liberal" peace remains in doubt. Whether or not liberal democracies have or have not failed to make war on each other as some assert, no one denies that democracies, even in their all too brief existence in the sweep of human history, have waged brutal internal wars and wars by proxy.³⁹ The alleged connection between "liberal" states (variously and not always consistently defined) and "effective" international organization and compliance remains to be demonstrated. It remains unproven that treaties concluded among liberal democracies endure longer, are more likely to reflect "mutual trust," or are more "specific" or "detailed" and less ambiguous, or are accompanied by better enforcement through more effective international organizations and the use of domestic courts.⁴⁰ It is not even clear why the last should be seen as an inevitable characteristic of a more effective treaty. Counter examples can be found for all these propositions, along with plausible explanations. It is not clear that "liberal" governments are more likely to take a "monist" position with respect to international law (whatever that phrase might be taken to mean) or that the greater openness of democratic societies facilitates and does not actually hamper compliance with international agreements.⁴¹ Further, as even some of the liberal theorists acknowledge, the supposed cause and effect relationship between "democratic governance" and compliance with international law remains fuzzy. Is the argument premised on the idea that global economic liberalization promotes political liberalization (which in turn promotes international law compliance)? If so, what do we do with counter-examples? Moreover, those who propose grandiose new intergovernmental regimes today need to address the resentments prompted by the regimes that currently exist, even within rich nations of the north, never mind between north and south. As the history of foreign investment surveyed by Vandavelde suggests, States of the south are likely to require much more in the way of demonstrable proof of likely benefits and many more guarantees against likely abuse before they willingly cede fundamental decisions determinative of their political future to new organizations that are likely to be dominated, like the old, by the north.

39. As U.S. Gallup polls on the eve of the Gulf War suggest, even democratic polities can be "propagandized" to extol war-making.

40. Cf. Slaughter, *Europe Before the Court*, *supra* note 7, at 532.

41. Cf. Jacobson & Weiss, STRENGTHENING COMPLIANCE, *supra* note 6, at 142 (noting that democratization does not inevitably lead to improved compliance).

At the same time, Vandavelde shares with other contributors here, namely Affolder, Ardia, and Joyner, a confidence in international law's continuing power to facilitate discourse and elicit voluntary compliance through non-coercive methods.

Professor George Downs' contribution to this volume evinces no such confidence but instead targets "managerial" premises and conclusions. Downs' fundamental critique of "cooperation," along with Benedict Kingsbury's more jurisprudential survey of the diverse premises of those now engaged in the study of compliance, are apt reminders of the formidable hurdles the new compliance scholars face. Both of these contributions suggest that the new students of compliance, despite optimistic prognostications,⁴² cannot afford to presume that international actors behave.

Downs' contribution here, when joined with his other work elsewhere, is a powerful challenge to lawyers' faith that the treaties and other texts they help draft make a difference to the real world behavior of relevant actors (and especially of powerful states).⁴³ Nor are Downs' critiques likely to find a receptive audience only within a relatively narrow set of neorealist political scientists; in the wake of the "new world disorder" of ethnic nationalisms and renewed genocides, Downs' skepticism is likely to be widely shared. Downs' critiques inspire questions about Henkin's threefold hedge ("almost all") concealed in the quotation cited at the outset of this foreword. Does confidence in international law's overall efficacy duck fundamental questions about the particular? Elsewhere, Downs has suggested that those international obligations most likely to be disregarded tend to be those of the greatest import (including norms against mass violations of human rights).⁴⁴ Downs' contribution here serves notice that the "post-ontological" age may not yet be nigh.

Kingsbury situates Downs' neorealist critique within a rich tapestry of other approaches. His is an attempt to suggest the complexities of what has been unduly simplified as simply the study of "correspondence of behavior with legal rules." Kingsbury has a number of agendas, including to indicate the need for shared understandings as to underlying theories of law, to illustrate the value of interdisciplinary work by political

42. See Koh, *supra* note 3, at 2599 n. 2 (arguing that broad empirical work "seems largely to have confirmed" Henkin's "hedged but optimistic description"). See also FRANCK, *supra* note 2, at 6, 9 (suggesting that international lawyers need no longer defend their field's existence).

43. See George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

44. Cf. Downs et. al, *supra* note 43. Notably, the leading "managerialist" tract, by Chayes and Chayes, scarcely mentions human rights concerns.

scientists and lawyers, to critique a purely “instrumentalist” account of international norms, to suggest the artificiality of an exclusive focus on the behavior of States, and to indicate the need to complement the study of what goes on in the international realm with awareness of what goes on within nation states. Kingsbury’s article also shows that those who examine compliance issues are likely to face criticism even from internationalists who believe that international rules “matter” but who also believe that the current vogue for quasi-scientific examination of the determinants of implementation, compliance, or effectiveness, especially when it aspires to empirical testing of the causal relevance of identified sources of international obligations at particular moments in time, may be fruitless. He reminds us that especially for those for whom the international process is best understood as itself constitutive of the identity of states and of relevant actors’ interests, attempts to test the “effectiveness” of law or states’ “compliance” with law, if grounded in assumptions of rational, unitary actors acting on the basis of exogenously determined preferences, are of doubtful value.⁴⁵

More generally, Kingsbury’s demonstration that the seemingly unproblematic concept of “compliance” contains problematic and competing conceptions of law suggests that scholars of implementation, compliance, and effectiveness cannot escape fundamental challenges all international lawyers face. It is possible that studies of effectiveness may conclude that, contrary to the hopes of internationalists, international fora or domestic procedures based on international sources of obligation are sometimes counterproductive—if, for example, international criminal proceedings before international tribunals prove less conducive to national reconciliation than alternatives (including blanket amnesties or truth and reconciliation commissions established under domestic authority) or if multilateral conventions’ lowest common denominator “solutions” prove less efficacious than a hegemon’s concerted efforts to enforce extraterritorially its own domestic law to the same ends. The attempt to construct a “recipe book” for effective international regulation may, contrary to hopes of earnest internationalists, reveal that “top-down” regulatory models premised on the primacy of international rules may not always work well. In addition, as Oscar Schachter has suggested, the attempt to make international law more effective or to elicit more compliance may only prompt renewed challenges to international regulation from both the “left” and the “right”—from those who demand more accountable forms of regulation involving

45. See Wendt, *supra* note 16. As George Downs’ contribution in this volume suggests, however, the constructivist perspective, which bears considerable affinity to the “transformationalist challenge” that he addresses, also challenges neorealist tenets.

greater respect for participatory democracy and are more attuned to local community sentiments and from those libertarians who demand less governmental interference with the market at any level.⁴⁶ Those who examine compliance issues are also likely to have to face the bemused contempt of the postmoderns. It may do no good to convince people that international law is "efficacious law" to the extent law, domestic or international, is seen as merely politics by other means.⁴⁷

Alternatively, it may be that the current vogue for examining compliance will only serve to repackage issues long familiar to students of international law. At the end of the day, it may be that the new scholarship will only tell us what many of us thought we already knew: namely, that there is an "transnational legal process" that works in direct and indirect ways on a variety of actors, domestic and international, through a variety of fora, political as well as legal.⁴⁸

The formidable nature of the challenges faced by the new compliance scholars is, however, a tribute to the centrality of the issues they seek to address. Given the significance of the quest, it is to be hoped that the current enthusiasm for examining implementation, compliance and effectiveness will endure. Whatever the fate of the genre as a whole, the individual articles selected by the student editors of this journal for this volume deserve to be read, in any case, for the light that they shed on why nations behave.

46. See Schachter, *supra* note 4, at 21–22. As Schachter indicates, international lawyers have not yet emerged with a recipe for international law-making that gives effect to emerging notions of "international civil society" apart from recourse to the traditional role of the nation-state. *Id.* at 14–15 & 22. See also Martti Koskenniemi, *The Wonderful Artificiality of States*, 88 PROC. AM. SOCIETY INT'L L. 22, 28–29 (1995). For a critique of NGO's that seems relevant in this respect, see Peter J. Spiro, *The Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 3 CARDOZO L. REV. 957 (1996). For an examination of the resurgence of "sovereignty" concerns, including federal/state issues, within the context of the new WTO, see Jackson, *supra* note 4. For a challenge to both neo-realists and international lawyers who pin their hopes on international institutions, see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT. ORG. 513 (1997).

47. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L. J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L. J. 81 (1991); Symposium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. (1996–97).

48. For a preliminary attempt to define a new conception of the "transactional legal process" that is distinguishable from both the New Haven School of Policy Science or the Harvard "international legal process" school of Chayes, Ehrlich, and Lowenfeld see Koh, *supra* note 3, at 2618–24 & 2645–58. See also Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).