1 The Compliance Debate

IN THE FOLLOWING CHAPTERS, FORMER U.S. STATE DEPARTment Legal Advisers discuss a number of crises during which they were called on to provide legal assistance as the government sought to craft an appropriate and effective response. The question of the degree to which States believe they are obligated to follow international law is a key, but not exclusive, element of the role international law will play in shaping foreign policy. As such, the so-called compliance debate factors significantly into a Legal Adviser's approach and is heavily reflected in the structured conversations with the Legal Advisers in the subsequent chapters. Although each of the Legal Advisers, regardless of their nationality or political party, subscribes to the view that law does matter and there is an obligation by States to comply with international legal obligations, their views are quite varied when it comes to which norms and principles constitute binding law, the interpretation of those binding rules, and the Legal Advisers' obligations when they believe that their government is violating international law. Most importantly, and possibly most interesting, is that the Legal Advisers hold a diverse array of perspectives and have differing opinions as to their role in ensuring proper adherence to international law and their individual approaches to fulfilling that role.

To ensure that the reader is able to follow and appreciate the nuanced approaches of the different Legal Advisers, this chapter briefly reviews the scholarly debate regarding State compliance with international law.

Since the decline of the Roman Empire and the attendant weakening of the Roman Legion at the end of the fourth century AD, no sort of constabulary has existed to implement rules of international law. Subsequently, international rules have been subject to sporadic enforcement through protest and condemnation, reciprocal suspension of rights and benefits, unilateral or multilateral economic and political sanctions, and sometimes through individual or collective use of armed force.

Given the lack of a pervasive mechanism to ensure compliance, scholars and policymakers have pondered whether international law is really binding law. The question has been debated since ancient times and remains one of the most contested questions in international relations. As described below, major historic developments, such as the Peace of Westphalia, the conclusion of World War II, the onset of the Cold War, the proliferation of international institutions in the 1970s and 1980s, the collapse of the Soviet Union in 1989, and the terrorist attacks of September 11, 2001, have each rekindled and reshaped this debate.

This chapter begins by examining the development of the major schools of compliance theory in the context of their historic settings and with reference to the relevant interpretive communities. Although scholars writing on this subject often perceive or present themselves as pure scientists examining the question solely in the abstract, the field is more akin to applied science and the conscious or subconscious agendas of those writing in it are comprehensible only in light of the background events and developments at the time of their publications and an understanding of the audience they are seeking to influence. With this in mind, the second part of this chapter focuses on the contemporary debate, while examining the underlying motivations of the major participants and their perceptions of the community that they are trying to influence with their arguments.

Compliance Theory in Historical Context

The modern age of international law is said to have been inaugurated with the 1648 Peace of Westphalia, which ended the Thirty Years War

by acknowledging the sovereign authority of various European Princes.[1] During the next three hundred years, up until World War II, there were four major schools of thought regarding the obligation to comply with international law.[2] The first was "an Austinian positivistic realist strand," which held that nations never obey international law because it is not really law.[3] The second was a "Hobbesian utilitarian, rationalistic strand," which held that nations sometimes follow international law, but only when it serves their self-interest to do so.[4] The third was a "Kantian liberal strand," which held that nations generally obey international law out of a sense of moral and ethical obligation derived from considerations of natural law and justice.[5] The fourth was a Bentham "processed-based strand," which held that nations are induced to obey from the encouragement and prodding of other nations through a discursive legal process.[6] The modern debate has its roots in these four theoretical approaches.

In the aftermath of World War II, the victorious Allies sought to establish a "new world order," replacing the "loose customary web of state-centric rules" with a rules-based system, built on international conventions and international institutions, such as the United Nations Charter, which created the Security Council, the General Assembly, and the International Court of Justice; the Bretton Woods Agreement, which established the World Bank and International Monetary Fund; and the General Agreement on Tariffs and Trade, which ultimately led to the creation of the World Trade Organization (WTO).[7] The new system reflected a view that international rules would promote Western interests, serve as a bulwark against the Soviet Union, and emphasize values to be marshaled against fascist threats.[8]

Yet, the effectiveness of the new system was immediately undercut by the intense bipolarity of the Cold War. In the 1940s, political science departments at U.S. universities received from the German refugee scholars (such as Hans Morgenthau who is credited with founding the field of international relations in the United States), "an image of international law as Weimar law writ large: formalistic, moralistic, and unable to influence the realities of international life."[9] With fear of communist

expansion pervading the debate, the positivistic, realist strand came to dominate Western scholarly discourse on the nature of international obligation. Thus, one of America's leading postwar international relations theorists, George F. Kennan, attacked the Kantian approach as anathema to American foreign policy interests, saying, "the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints" is an approach that "runs like a red skein through our foreign policy of the last fifty years."[10]

Even during the height of the Cold War, however, international law had its defenders, and within the community of American legal scholars, a new school of thought arose with roots in the Bentham strand, based on notions of legal process. Thus, the writings of Harvard Law professors Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, and Yale Law professors Myres McDougal and Harold Lasswell, hypothesized that compliance with international law could be explained by reference to the process by which these actors interact in a variety of public and private fora.[11] As Abram Chayes, who had himself once served as State Department Legal Adviser, put it, international law may not be determinative in international affairs, but it is relevant and influences foreign policy "first, as a constraint on action; second, as the basis of justification or legitimization for action; and third, as providing organizational structures, procedures, and forums" within which political decisions may be reached.[12] The process approach was later refined by Harvard Law professors Henry Steiner and Detlev Vagts and Yale Law professor Harold Koh, who was appointed State Department Legal Adviser in the Obama Administration in 2009, to include, in addition to States and international organizations, multinational enterprises, nongovernmental organizations (NGOs), and private individuals, which all interact in a variety of domestic and international fora to make, interpret, internalize, and enforce rules of international law.[13]

During the 1970s and 1980s, the legal landscape underwent another major transformation, with the proliferation, growth, and strengthening

of countless international regimes and institutions. Despite the bipolarity of the Cold War, international cooperation had persisted and was facilitated by treaties and organizations providing channels for dispute settlement, requiring States to furnish information regarding compliance, and authorizing retaliatory actions in cases of noncompliance. During this period, international relations scholars developed "regime theory," the study of principles, norms, rules, and decision-making procedures that govern such areas as international peacekeeping and debt management.[14] At heart, the regime theorists were rationalists, viewing compliance with international law as a function of the benefits such compliance provides.

This same period saw a revival of the Kantian philosophical tradition. New York University (NYU) Law professor Thomas Frank sought to answer the question "Why do powerful nations obey powerless rules?" in his path-breaking THE POWER OF LEGITIMACY AMONG NATIONS.[15] Frank's answer: "Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy." According to Frank, it is the legitimacy of the process that "exerts a pull to compliance."

The end of the Cold War and the collapse of the Soviet Union in 1989 had a significant affect on compliance scholarship. With the dismantling of the Berlin Wall, the end of Apartheid in South Africa, the United Nation's defeat of Saddam Hussein in Operation Desert Storm, the 1990s were a period of unparalleled optimism about the prospects of international law and international institutions. At the same time, conflict in failed States, such as Somalia and Haiti, the violent break-up of the former Yugoslavia, and the tribal carnage in Rwanda presented new challenges that severely tested the efficacy of international rules and institutions. Meanwhile, the status of the United States as the "sole remaining superpower" encouraged triumphalism, exceptionalism, and an upsurge of U.S. provincialism and isolationism, as well as a preference to act unilaterally rather than multilaterally.[16] During this decade, scholarly writing about compliance with international law featured four prevailing views.

The first was an "instrumentalist" strand, which, like its predecessors, applied rational choice theory to argue that States only comply with international law when it serves their self-interest to do so. What differentiated modern rationalists such as Robert Keohane,[17] Duncan Snidal,[18] Kenneth Abbott,[19] and John Setear[20] from their realist forerunners was the sophistication of their version of the prisoner's dilemma game, introducing international institutions and transnational actors, disaggregating the State into its component parts, and incorporating notions of long-term interests as well as short-term interests.

The second was a "liberal internationalist" strand, led by the former Dean of Princeton's Woodrow Wilson School, Anne-Marie Slaughter, who posited that compliance depends on whether or not the State can be characterized as "liberal" in identity (e.g., marked by a democratic representative government, guarantees of civil and political rights, and an independent judicial system).[21] Slaughter and other liberal theorists argued that liberal democracies are more likely to comply with international law in their relations with one another, while relations between liberal and "illiberal" States will more likely be conducted without serious deference to international law. Professor Slaughter was appointed Director of Policy Planning at the State Department in 2009.

The third, an outgrowth of Kantian theory, was a "constructivist" strand, which argued that the norms of international law, the values of the international community, and the structure of international society have the power to reshape national interests.[22] According to the constructivists, States obey international rules because a repeated habit of obedience transforms their interests so that they come to value rule compliance. The colloquy with the Legal Advisers that appears in the following chapters provides evidence of a constructivist effect, at least with respect to the State Department Office of the Legal Adviser, which represents an important player within a disaggregated government. As a bureaucratic entity with a long institutional memory that is dominated by civil service lawyers, some of whom worked in the office for decades, "L" and other Foreign Ministry legal offices have internalized

international law and made its compliance part of their bureaucratic identity.

The fourth post–Cold War approach was a refurbishment of the Harvard/Yale "institutionalist approach," as embodied in works by Abram and Antonia Chayes and Harold Koh. In THE NEW SOVEREIGNTY, the Chayeses dismiss the importance of coercive enforcement, pointing out that "sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used."[23] Instead, they offer a "management model" in which compliance is induced through interactive processes of justification, discourse, and persuasion. According to the Chayeses, the impetus for compliance is not so much a nation's fear of sanction as it is fear of diminution of status through loss of reputation. To improve compliance, the Chayeses propose a range of "instruments of active management," such as transparency, reporting and data collection, verification and monitoring, dispute settlement, capacity building, and strategic review and assessment. Harold Koh seeks to add an additional level of sophistication to process theory by explaining how and why States internalize the constraining norms through judicial incorporation, legislative embodiment, and executive acceptance.[24] According to Koh, when a State fails to comply with international law, frictions are created that can negatively affect the conduct of a State's foreign relations and frustrate its foreign policy goals. To avoid such frictions in its continuing interactions, the State will shift over time from a policy of violation to one of grudging compliance to eventual habitual internalized obedience.[25]

The Contemporary Debate

The terrorist attacks of September 11, 2001 and the invasion of Iraq inaugurated the current period of the compliance debate. In the aftermath of 9/11, the United States launched a "preventive war" against Iraq that was widely viewed outside the United States as unjustifiable under international law and then implemented policies regarding the detention and

treatment of suspected terrorists that were criticized as inconsistent with the requirements of international law. Seeking to minimize the impact of international law on the Bush Administration's foreign policy agenda, then Ambassador to the United Nations, John Bolton, said: "It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so – because over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States."[26]

The Bush Administration coined the term "law-fare," and the official National Defense Strategy argued that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."[27] The Administration also persuaded Congress to enact legislation that prohibited U.S. courts from considering international law or jurisprudence in determining the validity of detentions of suspected terrorists at Guantanamo Bay.[28]

It was in this context that Harvard Law Professor Jack Goldsmith, who had served as Assistant Attorney General and head of the Department of Justice's Office of Legal Counsel from October 2003 to June 2004, along with Chicago University Law Professor Eric Posner, published The Limits of International Law, a potentially revolutionary work[29] that seeks to prove that international law is really just "politics" and that it is no more unlawful to contravene a treaty or a rule of customary international law than it would be to disregard a nonbinding letter of intent.[30] In his subsequent 2007 memoir, The Terror Presidency, Goldsmith identifies himself and Posner as "part of a group of conservative intellectuals – dubbed 'new sovereigntists' in *Foreign Affairs* magazine – who were skeptical about the creeping influence of international law on American law."[31]

The Limits of International Law, which is an expanded and more developed version of Posner's 2003 article, *Do States Have a Moral Obligation to Obey International Law?*[32] utilizes economics-based rational choice theory and modeling techniques derived from game

theory, to advance the thesis that neither customary international law nor treaty-based international law have any "exogenous influence on State behavior."[33] In other words, according to Goldsmith and Posner, when States comply with international law it is not because of its moral pull or a preference for abiding with law, but rather solely due to self-interest.[34]

Using a variety of illustrative historical case studies involving international Agreements (e.g., human rights treaties and trade treaties) as well as customary international law (e.g., ambassadorial immunity and free passage of neutral ships), Goldsmith and Posner propound four models that seek to explain away the behavior that legal scholars have termed "compliance" with international law. The first model, "coincidence," proposes that States may act in accordance with international law simply by acting in their own self-interest, with no regard to international rules or the interests of other States. The second model, "coordination," describes instances in which two or more States create and abide by a rule not out of a sense of obligation, but simply because it is convenient. The third model, "cooperation," applies to situations in which States reciprocally refrain from activities that would otherwise be in their short-term self-interest in order to reap larger long-term benefits. The fourth model, "coercion," results when a State with greater power forces a weaker State to engage in acts that benefit the more powerful State.[35]

Based on their rational choice analysis, Goldsmith and Posner conclude that States have no preference for compliance with international law; they are unaffected by the "legitimacy" of a rule of law; past consent to a rule does not generate compliance; and decision makers do not internalize a norm of compliance with international law. States therefore employ international law when it is convenient, are free to ignore it when it is not, and have every right to place their sovereign interests first – indeed democratic States have an obligation to do so when international law threatens to undermine federalism, separation of powers, and domestic sovereignty.[36]

In The Terror Presidency, Goldsmith candidly reveals the underlying normative purpose behind The Limits of International Law. Goldsmith writes: "Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it [believed that it] had no choice."[37]

While Special Counsel to Secretary of Defense Donald Rumsfeld, and later as Assistant Attorney General in charge of the Office of Legal Counsel, Goldsmith saw it as his mission to convince those inside the government that international rules that constrain U.S. power and thus compromise national security are not really binding. Particularly telling in this regard was a 2003 interagency memorandum prepared by Goldsmith, titled "The Judicialization of International Politics," which warns: "In the past quarter century, various nations, NGOs, academics, international organizations, and others in the 'international community' have been busily weaving a web of international laws and judicial institutions that today threatens U.S. Government interests." The memorandum continues: "The U.S. Government has seriously underestimated this threat, and has mistakenly assumed that confronting the threat will worsen it. Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism."[38] Subsequently, Goldsmith advised White House Chief Counsel Alberto Gonzales that "[t]he President can also ignore the law, and act extralegally," citing "honorable precedents, going back to the founding of the nation, of defying legal restrictions in time of crisis."[39]

The Limits of International Law can therefore be understood as Goldsmith's effort to bring this argument to a wider audience, and as such, its core assertions have been criticized as allowing Goldsmith and Posner's policy objectives to taint their methodological approach.[40]