Introduction

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While States traditionally could resolve their problems by adopting legislation and other domestic measures, they are increasingly facing the fact that finding solutions to a given problem is beyond their national control. Current examples of such a development include international trade, security issues, the protection of the environment, cultural exchange and the protection of human rights.

This development has also changed the character of international law. In the 1960s, Wolfgang Friedmann had argued that international law had moved away from a 'law of coexistence' towards a 'law of co-operation'.[1] This means that States no longer are concerned only with the preservation of their sovereignty from international interference, but more and more engage in positive co-operation through treaties and international organizations. As of today, it might even be possible to refer to an emerging international 'constitutionalism'. This concept refers to the increased significance of international institutions, which apply checks and balances comparable to those known from domestic law.[2]

The significance of treaties

Notwithstanding this development, treaties remain the most important instrument for regulating international affairs and the intercourse between States. Bruno Simma has accordingly called treaties the 'workhorse' of

[1] Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), pp. 60–2.

[2] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 12 *Leiden Journal of International Law*, forthcoming, with further references.

international law.[3] They may be used for regulating any bilateral or multilateral relationship between States, be it the demarcation of a boundary, the establishment of a customs regime, the protection against climate change or the setting up of an international organization. But, as Simma notes, multilateral treaties are increasingly used to deal with common problems of the whole international community. At the same time, the content of treaties changes from consisting essentially of bilateral obligations (e.g. the two Vienna conventions on diplomatic and consular relations) to containing obligations so interwoven that each obligation has to be performed in relation to all treaty parties (the Nuclear Test Ban Treaty of 1963 being a case at hand). Indeed, treaties may also contain obligations that are not primarily intended to regulate inter-State relations, but aim at a uniform domestic practice that may involve conferring rights on third parties, for example the rights contained in human rights treaties.[4]

Compliance with treaty obligations

The current system of international law experiences an ever-increasing focus on compliance with treaty obligations. The first reason for this concern is obviously that the objectives of a given treaty may already be in jeopardy if any of the States parties does not fulfil its commitments. But breach of the treaty may create a snowball effect in the sense that States may not accept other States as free-riders. They may consequently also suspend or terminate their own treaty obligations, and thereby further reduce the likelihood of achieving the treaty objectives. This development may be of even more importance as treaty obligations become more demanding, in both economic and political terms. The possibility that States may take advantage of the possibility of non-fulfilment of their obligations may even prevent the successful outcome of the negotiations of future treaties. These are some of the essential backdrops for including legal mechanisms to ensure compliance with treaty obligations – which is the focus of this book.

It may of course be asked to what extent there is a need to design treaty mechanisms to promote compliance with the commitments States have previously undertaken voluntarily. Louis Henkin's formulation, that 'almost all nations observe almost all principles of international law and

[3] B. Simma, 'From Bilateralism to Community Interest in International Law' (1994-VI) 250 *Recueil des Cours* 221–384, at 322–3. [4] *Ibid.*, pp. 336–7.

almost all of their obligations almost all of the time', has often been cited.[5] While this may generally be true, it does not provide an answer as to how compliance may be improved in cases where this is crucial to achieve the treaties' very objectives. Thomas M. Franck has argued that the legitimacy of international obligations may exert a significant pull towards compliance.[6] While this is also true, the question arises to what extent such pull may be assisted by specially designed procedural treaty mechanisms.

General international law

International law has traditionally left the enforcement of treaty obligations to individual States parties. As is well known, article 60 of the Vienna Convention on the Law of Treaties allows States to suspend or terminate a treaty if it is violated. This possibility is, however, only open in cases of certain qualified violations constituting a material breach thereof. Individual parties may suspend the treaty in whole or in part if they are 'specially affected' or if the breach by one party 'radically changes the position of every party with respect to the further performance of its obligations under the treaty'. But, if the parties want to act collectively, suspension or termination normally requires unanimous agreement by all other non-defaulting parties. Furthermore, there is little point in suspending or terminating treaties aimed at the protection of collective interests such as the protection of the environment or the reduction of armaments. And, finally, these remedies are not available at all in relation to provisions 'relating to the protection of the human person contained in treaties of a humanitarian character'.

States may also invoke the law of State responsibility and thereby claim reparation for injury and apply counter-measures against a State violating its international obligations. Under the articles on State responsibility adopted by the International Law Commission (ILC) in 2001, the right to request reparations and to use counter-measures is, at the outset, limited to the 'injured' State(s). But the ILC at least seems somewhat to open the possibility for their use also by other concerned States to protect collective

[5] Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979), p. 47.
[6] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p. 25. See also Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

interests.[7] The law of State responsibility, however, provides no generalized normative system by which States parties to a multilateral treaty may act as a collective entity. It is against this background that the book undertakes to analyze selected treaty systems in order to determine whether indeed specific conventions in the field of disarmament, environmental protection and human rights contain an answer to this question.

Treaty mechanisms

While the foremost function of treaties has been to establish the substantive obligations of the parties, they are increasingly used also to design mechanisms to induce compliance with such obligations. This book examines three forms of such mechanisms. First, dispute settlement procedures aimed at solving legal disputes through negotiation, mediation, conciliation, or binding settlement through arbitration or international courts will be examined. Secondly, the book examines non-compliance procedures that have been established to apply a facilitative approach in persuading States to comply with their obligations through 'soft' enforcement, such as 'naming and shaming' or by offering financial and technological assistance. Finally, treaties may open the way for different forms of 'hard' enforcement, *inter alia* in the form of suspension of rights and privileges, or by different forms of sanctions. The book does not purport to provide definitive conclusions on the effectiveness of the relevant treaties, be it in terms of the implementation of relevant obligations or achieving the overall objectives of the treaties. The treaty mechanisms can, however, be seen as reflections of what States parties have considered desirable and realistic in inducing and pressuring States to comply with treaty obligations, and thereby enhancing effectiveness. At least, the mechanisms show what it is politically possible to achieve with co-operation between States parties.

Three fields of international law are examined, namely, human rights, international environmental law, and arms control and disarmament. The reason for choosing these areas is, first, that they are in the forefront of the development of current international law, and constitute those parts of

[7] Draft arts. 42, 48, 49 and 54. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002). On the approach taken by the United Nations General Assembly, see James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959–73.

modern international law where recent trends in law-making and law-enforcement are most obvious. Secondly, the importance – both legally and politically – of these respective fields cannot be understated, given that the protection of the environment, the protection and furtherance of human rights, as well as the issue of arms control, are of vital importance for the very survival of mankind and for securing core rights for individual human beings. Finally, all three fields have common features, since none of them deals with purely bilateral relationships, but rather focus on common interests in the respective field by all States parties to a given treaty.

A comparative approach is also important since individual international legal scholars more and more tend to focus their attention on their respective fields, but have difficulties in considering how these very same issues are being addressed in other areas of international law. This study therefore describes and compares compliance mechanisms within each of the three legal fields, but also between these areas of law by trying to answer the following questions:

- To what extent may common patterns be discerned?
- Are the respective treaty arrangements inspired by other treaties, and are there possible lessons to be learned?
- What is the relationship between treaty law and general international law on treaties and on State responsibility, including the notion of 'self-contained regimes'?[8]
- And, finally, do these treaties reveal more general tendencies in the development of international law?

Dispute settlement procedures

Under article 33 of the United Nations Charter, States shall settle their international disputes by peaceful means, including negotiation, inquiry, mediation, conciliation, arbitration or international courts. While the disputing States retain control over the outcome in negotiations, inquiry, mediation and conciliation, these approaches to dispute settlement involve a gradually increasing role for a third party, be it other States, international

[8] On self-contained regimes, see the Report on the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the International Law Commission, 56th Session, 2004, GAOR Supp. No. 10 (A/59/10), pp. 281–305, at pp. 288–93.

organizations or a conciliation committee. Furthermore, the role of law rather than political considerations becomes more important, the apex being international arbitration or courts, which will resolve the dispute on the basis of international law, unless a different mandate is explicitly given by the parties.

The prime advantages of using international courts and tribunals for dispute settlement are that they represent impartial organs with legal expertise, and have a procedure well suited to resolving legal disputes. They provide binding and final decisions in the form of *res judicata*, and may impose obligations of restitution and payment of reparations for damage suffered. While there has been a steady increase in the number of cases brought before the International Court of Justice, the number of States accepting its compulsory jurisdiction remains at some sixty States out of the current 191 Member States of the United Nations. New international courts have, however, been established in the recent decades, such as the International Tribunal for the Law of the Sea and the Dispute Settlement Body of the World Trade Organization. Such courts may be specially designed for the issue at hand and States may more readily accept their compulsory jurisdiction in a limited field.

In all of the three areas covered by this study, specific arrangements for the settlement of disputes have been developed. First, we find examples of obligations to undertake negotiations or conciliation. While the only examples of special courts established in these fields are regional human rights courts, there are several examples of treaties referring to the use of arbitration or pre-existing international courts. The respective studies examine to what extent the use of dispute settlement mechanisms is compulsory or whether instead it requires the *ad hoc* consent of both disputing parties in each case. It is of particular interest to reveal examples of compulsory binding settlement in the form of arbitration or court procedures.

Furthermore, multilateral treaties raise the question of 'standing' in the sense that it may be a question whether all States may bring a claim before the respective dispute settlement mechanisms, or whether some form of qualified injury is required. For instance, such injury may be more difficult to demonstrate if a State violates its human rights obligations towards its own citizens than if environmental damage is suffered as a result of a breach of an environmental agreement. While individuals have standing before regional human rights courts, the role of individuals in other forms of dispute settlement requires scrutiny (e.g. do individuals have standing or

may they appear as *amicus curiae*, etc.). Similarly, the legal status of non-governmental organizations (NGOs), both in human rights procedures and in international environmental law and arms control, will be analyzed.

If special dispute mechanisms are established, their structure, composition and procedures must also be addressed. These are relevant issues both in relation to conciliation procedures and arbitration, and in relation to existing regional human rights courts.

Finally, the question to what extent such mechanisms are used in cases of disputes is examined. By whom are the mechanisms used (e.g. only by particular groups of States or also by other actors), and what have been the outcomes? If they are not used, what are the reasons: is it the multilateral rather than the bilateral character of the co-operation, the lack of standing, or the character of what is to be protected (human rights, the environment, the prevention of increased armaments)? Should individuals be given a more prominent role also in matters other than human rights? Should this also be the case for NGOs? If the procedures are not extensively used, may dispute settlement procedures serve as *ultima ratio* if other mechanisms have failed?

Non-compliance procedures

A characteristic feature of human rights treaties is supervisory organs consisting of independent experts. Several multilateral environmental agreements have set up non-compliance committees, although usually consisting of representatives of the States parties. Arms control treaties may provide the secretariat and the plenary body with the responsibility to check compliance by the parties.

These developments may be seen as a reflection of the need to supplement or replace dispute settlement procedures with organs possessing a more facilitative quality, consonant with the view of those claiming that a 'managerial approach' rather than an 'enforcement approach' is needed in order to address non-compliance questions.[9] It has furthermore been

[9] On the managerial and enforcement approaches, see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995). The authors claim that '[a] century of experience with international adjudication leads to considerable skepticism about its suitability as an international dispute settlement method and, in particular, as a way of securing compliance with treaties' (p. 205). See further, on the two approaches, Kyle Danish, 'Book Review: The New Sovereignty' (1997) 37 *Virginia Journal of International Law* 789; Harold Hongju Koh, 'Review Essay: Why Do Nations Obey International Law?' (1996–7) 106 *Yale Law Journal* 2599; Kal

argued that the bilateral character of dispute settlement procedures is inherently ill-suited to dealing with multiparty problems, such as the ones dealt with in this book. Treaty organs may also be better designed towards prevention rather than reparation of possible damage caused by non-compliance. Finally, it may be added that there may be a danger that confrontational approaches might undermine the co-operative spirit in ongoing international co-operation under the same treaties.

These may be some of the reasons why non-compliance procedures are established in treaties. An alternative explanation, however, is that States prefer non-compliance procedures because – instead of leaving decisions to a third party in the form of a court or an arbitral tribunal – they allow States more control over the process and its outcome. Furthermore, a decision resulting from a non-compliance procedure is not final in the form of *res judicata*, and may therefore be seen as less intrusive on State sovereignty.

A fundamental requirement for assessing compliance with international obligations is information about relevant facts, be it the emission of relevant polluting substances, the treatment of human beings, or the manufacturing and storage of weapons. States have traditionally been responsible for providing such data through reporting obligations. It is therefore examined to what extent the parties to treaties in the three fields under scrutiny have an obligation to report their implementation of substantive obligations. There may exist, however, a need to supplement State reporting with information provided by other sources, such as monitoring from other States or from international bodies. Such arrangements may be found in treaties on the prevention of torture, certain environmental treaties and arms control.

The establishment of international organs to deal with possible non-compliance issues may serve to disclose or possibly prevent non-compliance, and to develop common approaches to non-compliance issues among States parties. Relevant questions addressed are:

- What are the mandates for compliance bodies, i.e. to what extent may such mechanisms assess both factual and legal questions?

Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations* (London: Sage Publications, 2002), pp. 538–59; and Jutta Brunnée and Stephen J. Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish Yearbook of International Law* 1–14.

- What are the structures, compositions and procedures of such mechanisms as compared to regular dispute settlement mechanisms?
- What are the trigger procedures, i.e. may cases of non-compliance be brought by treaty organs, States, or individuals and non-governmental organizations?
- What are the roles of non-governmental organizations in dealing with non-compliance issues in such treaty bodies?
- What is the legal status of the findings of non-compliance organs, i.e. are they legally binding under international law?
- What is the relationship between non-compliance procedures and dispute settlement? May such procedures be regarded as 'self-contained regimes' in the sense that their existence prevents the applicability of other forms of action against a non-complying State?
- What are the experiences concerning the effectiveness of non-compliance procedures?

It will be of interest to consider whether the differences between the three fields and within each field may be explained by the character of the substantive problem addressed by the respective treaty regime, such as the differences between arms control and human rights, or between torture and other forms of human rights violations. It is, moreover, worthwhile to see whether there are more general developments in the non-compliance procedures, for example to what extent there is a development towards more due process requirements in treaties providing for sanctions against non-complying States. It may also be questioned whether the non-compliance procedures establish a distinct new feature in international law and embody an aspect of its further constitutionalization as well as its legalization.[10]

Enforcement

To the extent that pressure on States is desirable to ensure compliance, one may ask which measures can be effective in an essentially horizontal international legal system. First, it may be asked to what extent compliance

[10] On legalization in international law, see K. W. Abbott *et al.*, 'The Concept of Legalization' (2000) 54 *International Organization* 401–19; M. Kahler, 'The Causes and Consequences of Legalization' (2000) 54 *International Organization* 661–85; R. O. Keohane *et al.*, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457–89; and M. Finnemore and S. J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *International Organization* 743–58.