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INTERNATIONAL LAW AND THE DISAGGREGATED STATE

ERIC A. POSNER*

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I. INTRODUCTION

The question why states comply with international law has received increasing attention among legal scholars, political scientists, and other academics interested in law and international relations. This attention is justified, as the United States finds itself increasingly at odds with the international community and enmeshed in international laws that, according to the Bush administration, prevent the United States from acting in its national interest. The government and its defenders argue that the United States should either withdraw from or violate international law that no longer serves American interests;¹ critics worry that the United States is damaging

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1. This view is reflected in a recent Justice Department memo that argued that the President may suspend the Geneva Conventions as they apply to the war in Afghanistan.

international law and will have increasing trouble claiming the right to its protection.²

What determines whether a state decides to violate international law? Scholars divide into two camps. At the risk of caricature, one can describe the “realist” camp as holding that states follow their interests come what may: international law plays no role in states’ policy choices. The opposing “legalist” camp holds that states “internalize” international law, comply with it as a matter of routine, and violate it only in extreme conditions, such as an emergency. Most scholars fall between these two poles, with international law professors closer to the legalist camp and political scientists spread across the spectrum.

Much of the debate concerns what constitutes a state’s “interest.” International law theory, as well as some strains of international relations theory, has traditionally treated states as unitary actors with well-defined interests in security, national wealth, and the like. Under this unitary view, international law can constrain states in the same way that domestic law constrains citizens: by setting up rules and penalizing those who violate them. States and individuals obey the law in order to avoid the sanctions associated with violation. In the unitary state system, sanctions can be applied only in a decentralized fashion because there is no world government, but they may nonetheless be effective. The current debate among scholars who adopt the unitary state model concerns the effectiveness of decentralized enforcement.³ Do states really penalize each other for violating international law, or do they in fact not care enough to impose sanctions? This is an empirical question, but it has proven hard to answer with traditional empirical methodologies.

An alternative methodological strategy is to disaggregate the state and determine whether individuals within the state have in-

See Memorandum from the Office of the Assistant Attorney General, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002). For the contrary view, see Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

2. See, e.g., Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4.

3. See, e.g., George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379 (1996) (skeptical); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 107-09 (1984) (less skeptical); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) (optimistic). For further discussion, see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 83-106 (2005).

centives to cause the state to comply with international law.⁴ States, after all, are fictions: when we say that a state declares war or raises trade barriers, we are using shorthand to refer to decisions made by individuals. It is possible that these individuals—politicians, bureaucrats, judges, and other individuals with the authority to make decisions on behalf of the state—perceive themselves as constrained by their state's international legal obligations or, perhaps, that they perceive themselves as constrained by ordinary voters—voters who believe that the state should comply with international law and are willing to vote out of office decisionmakers who do not share this view.⁵

One hypothesis for why states comply with international law, then, is that the individuals who control state policy perceive advantages from doing so.⁶ We can reframe this hypothesis as follows: states comply with international law just to the extent that the individuals who control them benefit from compliance with international law. By contrast, the unitary state model holds that states comply with international law to the extent that the state itself benefits from complying with international law.

To understand the difference between these two hypotheses, consider the case of sovereign debt. States frequently take on debt, and they usually, though not always, pay their debt. The question is, What determines whether a state pays its debt?

The unitary state hypothesis is that a state pays its debt when it, the "state," has an interest in doing so. One reason a state might pay its debt is that it fears that if it does not, it will not be able to raise money in the future because creditors will not trust it. On the other hand, a state might prefer to use funds for purposes other than meeting its current debt obligation, such as financing a war which, if it lost, would destroy it. Thus, a state pays its debts if the (discounted)

4. In political science, this approach is associated with "liberal theory." See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

5. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (forthcoming 2004) (manuscript available at <http://ssrn.com/abstract=519565>); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195 (2004). Unfortunately, I am unable to address Spiro's interesting arguments because his paper appeared during the publication process of mine.

6. I mean this in the broadest sense: not just that individuals have material incentives to comply with international law, as the economic approach emphasizes, but also the possibility that individuals internalize international law norms, as a sociologist might argue.

benefit from being able to borrow money in the future exceeds the (current) benefit from using funds in the present. Then one might predict, for example, that the default rate on international loans increases during times of crisis such as war.⁷

Disaggregating the state permits richer hypotheses. We might distinguish a state that has stable domestic political institutions from a state that does not. When political leadership changes rapidly, a leader may have a stronger interest in defaulting on debt because he does not expect to hold office (or even be alive) in the future when creditors refuse to lend. Thus, holding other things equal, a state with stable political institutions is less likely to default on debt than a state without such institutions. We can test this prediction by defining a variable for stable political institutions (say, democracy, or constitutional democracy) and determining whether it correlates with debt repayment.

The problem with disaggregating the state is that greater accuracy is purchased at the price of complexity. There are many intra-state actors, and it is unclear which actors influence the decision whether to comply with international law. Further, it is rarely clear whether actors cause a state to comply with international law because they in fact care about international law as opposed to particular policies that happen to coincide with the requirements of international law. Do Treasury Department bureaucrats urge the President and Congress to repay debts in order to comply with international law or in order to ensure that the government can borrow again in the future?

To understand these problems, consider Harold Koh's theory of "transnational legal process."⁸ According to Koh, states comply with international law because they are pressured by internal actors—including bureaucrats, citizens, politicians, and businesses—and external actors—including other states, nongovernmental organizations (NGOs), and international legal institutions. But Koh never explains why these various entities expend resources to force states to

7. For some evidence and economic models, see, for example, James Conklin, *The Theory of Sovereign Debt and Spain Under Philip II*, 106 J. POL. ECON. 483 (1998); and Kenneth M. Kletzer & Brian D. Wright, *Sovereign Debt as Intertemporal Barter*, 90 AM. ECON. REV. 621 (2000).

8. See generally Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626-27 (1998) [hereinafter Koh, *Bringing International Law Home*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-58 (1997) (reviewing CHAYES & CHAYES, *supra* note 5, and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Transnational Legal Process*]. For an application of these ideas, see William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713, 723-28 (1997).

comply with international law. Sometimes, he seems to think that interest alone provides them with an incentive; often, the interest is ideology or “habit” or sympathy. Anne-Marie Slaughter’s theory of networking⁹ is similarly vague. She describes many ways in which nonstate actors forge links with each other, but she does not describe a mechanism by which this activity results in international cooperation. Both authors describe foreign policy decisions in terms of the many individuals and entities that make and influence them—rather than positing, following the unitary state model, a “state” making a decision as though it were a conscious being—but one cannot derive from their discussions any clear predictions about how and when nonstate actors¹⁰ cause compliance with international law or generate other forms of international cooperation.

Complicating the discussion is ambiguity about the dependent variable that concerns the literature. I have so far taken it to be compliance with international law, and that will be the focus of this Article. An alternative view, though, is that formal compliance with positive international law is not what should concern scholars; scholars should focus on international cooperation. Koh does not always mean international law, *per se*, in the traditional positivist sense. Often he means that nonstate interactions generate understandings, or common norms, across states about how states should act; these understandings are then internalized in domestic law, even if they are not formalized as a part of a treaty. Thus, Koh’s point is apparently that one will notice a greater degree of international cooperation if one observes the interaction of nonstate actors than if one looks for formal agreements between states. Similarly, Slaughter’s focus is not so much on nonstate actors forcing states to comply with international law; it is on nonstate actors interacting in such a way that results in greater international cooperation than is required by positive international law. The problem with this argument is that it is extremely difficult to determine what counts as international cooperation other than formal compliance with international law. I will return to this problem at several points in this Article.

This Article discusses the way that nonstate actors may cause states to comply with or violate international law. After a brief discussion of some methodological problems (Part II), I discuss the various individuals and entities that might influence governments’ decisions whether to comply with international law (Part III). The theme of Part III is that none of these individuals and entities has a clear

9. SLAUGHTER, *supra* note 5, at 108-27; *see also* Raustiala, *supra* note 5.

10. By “nonstate actors,” I mean to refer to the standard cast of characters—interest groups, NGOs, politicians, individuals, governmental units, international organizations, and so forth. Thus, the term includes the people who control the state, such as a president or prime minister, because they are individuals rather than the “state” itself.

incentive to pressure governments into complying with international law per se. In some cases, they may want their government to comply with particular treaties, but they often want their government to violate these same treaties when conditions change, and other treaties even when conditions do not change. Part IV discusses some examples that have been cited by supporters of the disaggregated state model and shows that none of these examples provides a basis for a general theory of why states comply with international law. Many of these cases are easily understood under the unitary state approach; others simply have no bearing on compliance with international law.

II. METHODOLOGICAL BACKGROUND

Most international legal scholars believe that states comply with international law as a matter of routine.¹¹ This view holds that when a state is confronted with an international law that blocks a desired action, the state more often than not defers to the law and violates it only in unusual circumstances.

This view has two problems. First, no theory provides an adequate explanation for why states comply with international law. Several theories have been proposed, but none of them has achieved a consensus. Second, the evidence is ambiguous, and more important, given the ambiguity of the theoretical literature, it is not clear what would count as evidence for compliance with international law.

To understand why these problems are important, start with the assumption—which no one would contest—that states sometimes comply with international law but also sometimes violate international law. As a concrete example, suppose that international law says that a state may not send troops across borders with other states (without the other state's permission, but we will leave this and similar qualifications unstated henceforth). Suppose that over a fifty-year period state *X* sends its troops into state *Y*'s territory only once and that state *Y* never sends its troops into *X*'s territory. What could explain this pattern of near compliance by *X* and full compliance by *Y*?

As for *Y*, suppose that *Y* is much weaker than *X*: for example, assume *Y* is Mexico and *X* is the United States. *Y* complies with international law but perhaps only because it fears retaliation from *X* for violating it. It seems likely that *Y* would not have acted differently even if there were no law against sending troops across borders. International law, then, plays no causal role in *Y*'s behavior.

11. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); CHAYES & CHAYES, *supra* note 5, at 3-9.

If *X* is stronger than *Y*, one might be tempted to assume that the law must have prevented *X* from invading *Y* except for the one time, where, perhaps, special circumstances intervened. However, this assumption would be hazardous. *X* might have refrained from invading *Y* because it anticipated retaliation from other states that feared a shift in the balance of power. Weak states such as Belgium survived the chaotic international politics of the nineteenth century because some strong states (for example, Britain) feared that other strong states (for example, Germany and France) would upset the balance of power if they conquered Belgium. Britain guaranteed Belgium's neutrality not because international law respected Belgium's border but because Britain had its own interest in guaranteeing Belgium's neutrality. Britain did not guarantee the neutrality of other states, and those other states (including Poland and China) were frequently invaded.¹²

More important, states often have no interest in invading other states, either because the cost of invasion exceeds the benefits or because they can acquire whatever they want through other means. *X* might not invade *Y* just because of the cost of occupation, which history shows can often be extremely high (Iraq is only the most recent example). To the extent that *X* wants something or someone on *Y*'s territory (such as resources or terrorist suspects), it may be cheaper to buy them (resources), bribe or cajole the state (terrorist suspects), or use force below the level of invasion (kidnapping) than it is to launch a full-scale invasion. In these circumstances, self-interest—with no special deference to the law—may be sufficient to explain various patterns of compliance with the law, from full compliance to no compliance.

These observations do not prove that states *only* obey international law when doing so is consistent with their interests and that, therefore, international law has no causal force whatsoever. But they do show how difficult it is to evaluate the evidence.

To evaluate the evidence in a systematic way, one must develop a test. There are many possibilities, but let me mention just one. Begin with a theory that states act rationally in their national interest, which may be understood as a combination of security, wealth, and similar goods. On this theory, states comply with international law when doing so enhances their security and wealth, but not otherwise. We might predict some compliance, but not full compliance; let's call this level of compliance *C*. If it turns out that observed compliance exceeds *C* by some nontrivial amount, a plausible explanation is that international law plays a causal role in state policy. Otherwise, the baseline theory is more likely to be correct.

12. A.J.P. TAYLOR, *THE STRUGGLE FOR MASTERY IN EUROPE: 1848-1918* (1963).

To return to our example above, our baseline theory might predict that, given their power difference, state *X* would comply with the rule against the use of force 50% of the time, and that state *Y* would comply with the rule 90% of the time. Then if we observed that state *X* complied with the rule 70% of the time and *Y* complied with the rule 95% of time, we would have some evidence that international law plays a causal role. The problem with this kind of test, however, is that quantifying compliance is extremely hard; even in our simple case, a story about *X*'s and *Y*'s interests is unlikely to give us much of a sense of what the baseline compliance rate would be.

Fortunately, the disaggregated state model provides another way of understanding why states comply with international law. Because that model holds that individuals cause states to comply with or violate international law, it suggests that information about individuals will be relevant for answering the compliance question. In particular, we might look at the decisionmakers and ask what causes them to decide whether the state should violate international law. If we find correlations between their choices and factors that are not closely tied to traditional state interests, we may have evidence that states comply with international law routinely, rather than sporadically. This is the focus of the next Part.

III. NONSTATE ACTORS

In this Part, I examine the various national or international non-state actors that may influence a state's compliance with international law. To keep the discussion manageable, I focus on the non-state actors emphasized by the literature. These include courts, government officials, interest groups, NGOs, and citizens. The question is whether there are theoretical and empirical grounds for believing that these actors cause states to comply with international law more often than would be predicted under the unitary state model.

A. Courts

One view of why states comply with international law is that a state complies with a treaty because its courts force it to comply with treaties.¹³ This view is popular but it is puzzling. In the United States, courts do not enforce treaties unless the political branches authorize them to.¹⁴ So courts can play a role only if the treaty in question is either (1) self-executing or (2) non-self-executing but ac-

13. See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. (forthcoming 2005).

14. See *Goldwater v. Carter*, 444 U.S. 996 (1979); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 16 (D.C. Cir. 2002); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 214 (2d ed. 1996). For criticism of this view, see Jinks & Sloss, *supra* note 1.

accompanied by implementing legislation.¹⁵ Thus, the court theory does not apply to the numerous non-self-executing treaties in existence.

But even if we focus on self-executing treaties, it is well understood that the political branches can avoid judicial enforcement of such treaties by passing new legislation—that is, domestic legislation, not a new treaty requiring the consent of the other state—that contradicts the treaty.¹⁶ Thus, if the treaty requires *X*, the state can refrain from *X* simply by passing a statute that permits it to refrain from *X*. Courts cannot force the American government to comply with a treaty for the simple reason that the government has the constitutional authority to withdraw from or violate treaties either through the unilateral action of the President or through the joint action of the President and Congress.¹⁷

The view that courts enforce treaties rests on a misunderstanding of the judicial role. Consider a typical case: a foreign national suspected of a crime is captured by U.S. police, and his government seeks to extradite him. The U.S. government approves of the extradition, but the defendant files a motion opposing the extradition. The court grants the motion on the ground that the extradition would not be permitted under the relevant extradition treaty. The court thus appears to defy the will of the U.S. government; is this not a case of a court “enforcing” a treaty?

15. A self-executing treaty is a treaty that, by its terms, has the force of domestic law. A non-self-executing treaty creates an international legal obligation but no domestic legal obligation. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1987).

16. See *id.* § 115(1)(a). It was precisely this concern that treaties could not bind the government that led Louis Henkin to criticize the last-in-time rule and argue that treaties should prevail over statutes. See HENKIN, *supra* note 11, at 63-64.

17. Confusion about this point is entrenched. Consider, for example, Oona Hathaway's claim that courts can force states to comply with their international legal obligations. She says:

A skeptic may object to this line of reasoning by claiming that it is nonsensical to talk of courts or others “enforcing” a government's international legal commitments because they cannot do so unless the government allows them to do so. If this is true, as Roger Fisher pointed out nearly a half-century ago, then it is equally nonsensical to talk of enforcing much of constitutional law and criminal law. Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961). It is undeniably the case that when a state is the subject of domestic laws, those laws are, in a sense, “unenforceable,” for a sovereign state complies with domestic law only because it agrees to do so. This does not lead us to say, however, that domestic laws that apply to the state and its agents are unenforceable. In a state that observes the rule of law, the government commits to observing legal limits on its actions, and permits enforcement of those limits, with only well-specified exceptions.

Hathaway, *supra* note 13 (manuscript at 26 n.72, on file with author). The analogy to constitutional law is erroneous. The government has the constitutional obligation to comply with domestic laws that are constitutionally authorized; the government has no constitutional obligation to comply with treaties (that is, to refrain from withdrawing from them).

To understand the flaw in this argument, distinguish the “state” and its various agents and instrumentalities, such as courts and prosecutors. The state itself can decide to violate the treaty simply by repudiating it or enacting inconsistent domestic legislation. Typically, the state does these things through the President and Congress. Thus, the state is in no way bound by the treaty. If the President and Congress have not repudiated the treaty, then the court assumes that the treaty remains in force, just as a court assumes that an ordinary statute remains in force until it is repealed. Until the President and Congress speak in the constitutionally approved way, the court assumes that the prosecutor or executive department that supports the foreign government’s motion for extradition is expressing an interpretation of the treaty that is not necessarily the same as that of the President and Congress speaking jointly. For that reason, the court can defy some of the state’s agents without defying the state itself.

A clean example of a court forcing the state to comply with international law would involve different circumstances. Suppose, for example, that the U.S. government (the President or the President and Congress together) announced that it was withdrawing from the UN charter and that a court issued an injunction prohibiting this withdrawal on the grounds that the UN charter does not allow withdrawal. Here, the individuals who are normally thought to control the state’s decision whether to comply with international law are being deprived of that power by the court. If the courts did this, and governments obeyed them, then it would be true that courts force governments to comply with treaties. But courts do not do this.

The confusion about this issue probably results from the failure to distinguish between two phenomena: (1) a state committing itself by entering a treaty and (2) one part of the government committing another part of the government by entering a treaty. I have argued that in the U.S. system, courts do not in any way cause the state to commit itself. Courts do play other functions; for example, they may enable Congress to restrain the President. Put differently, suppose the President wants to commit himself to some other foreign leader, so that he cannot break a promise to increase trade barriers. One way for the President to enhance the credibility of his promise is to enter a treaty involving Senate consent. If he does that, he may make it legally (under domestic law) or politically difficult to break his commitment,¹⁸ but it is not impossible: he merely needs Senate consent

18. On this, see, for example, Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988). Again, it is not clear that there is a legal ban, see *supra* note 14 and accompanying text, but there is likely a political hurdle.

(in our example). So the “state” remains uncommitted even if particular actors within the state are committed.

In some areas of the law, the federal courts have incorporated international law into federal common law. Prize law is the usual example; the federal courts asserted jurisdiction over prize cases and have allowed international prize law to influence the development of federal common law.¹⁹ However, as is always the case with the common law, federal prize law could always be modified or eliminated by statutory law—or even by a declaration by the Executive, according to the Supreme Court.²⁰ So prize law never bound the U.S. government to international law, let alone to any particular treaty.

None of this is to say that courts could not bind the state to treaties if they wanted to. Suppose, as is sometimes proposed, that courts refused to enforce subsequent domestic legislation that contradicts a prior treaty.²¹ If courts did this, the political branches might have some trouble escaping a treaty. Of course, they could still repudiate the treaty; but one could imagine a court preventing that as well, as noted above. Why do courts not do this? No one knows for sure, but the answer is probably that courts want to avoid making complex political judgments about when treaty partners have violated their obligations so that the state is justified in withdrawing from the treaty, and so forth. It is hard to imagine courts taking these steps, for, with the passage of time, as more and more treaties accumulate, the foreign affairs of a state would pass from the hands of the political branches to those of the courts. Courts do not have the legitimacy or the competence to handle the foreign affairs of a state, and it is hard to imagine them acquiring this power.²²

What does the evidence show? Confining ourselves to the U.S. experience for the moment, it is difficult to find a single example of a U.S. court forcing the government to comply with international law against its will. Again, we must be clear about what we mean here. When a court enforces the Alien Tort Statute despite the objections of the executive branch, the court is enforcing Congress’s will against the President.²³ In this example the “government” does not have any clear attitude about international law; it is split. The courts have never prohibited the President from either violating or withdrawing

19. *The Paquete Habana*, 175 U.S. 677, 686-714 (1900).

20. *Id.* at 700.

21. See HENKIN, *supra* note 11, at 63-64.

22. For an early judicial statement, see *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855).

23. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). In the *Sosa* case, the U.S. government was not the defendant because of sovereign immunity; but the United States filed a brief supporting the defendants.

from a treaty;²⁴ nor have they prevented the political branches jointly from either violating or withdrawing from a treaty. And even when there is a President/Congress split, the courts refuse to intervene.²⁵

Anne-Marie Slaughter claims that courts are “constructing a global legal system,”²⁶ and this claim sounds as if it had something to do with forcing states to comply with their international obligations. But she provides little evidence that American courts do this.²⁷ True, judges meet with their foreign counterparts in conferences in the Alps, but that hardly amounts to the creation of a global legal system. Judges also cite foreign courts in dicta sometimes. And judges today, as in the past, must make decisions about whether to enforce foreign judgments against assets under their jurisdiction—sometimes they do and sometimes they do not, depending on their assessment of the quality and fairness of the foreign legal system. It may be that judges influence each other through their interactions, and as a result, to the extent that they have the freedom to do so, they may produce similar rules across legal systems. But none of this is evidence that courts force their own governments to comply with international law.

Nor is it clear that this interaction among judges results in meaningful cooperation between states. Consider two states, *X* and *Y*. Suppose that a plaintiff who is injured in *X* wants to enforce his judgment against the defendant’s assets in *Y*. It is far from clear that a state that permits such enforcement of judgments is more “cooperative” than a state that does not; perhaps, for each state, it is a matter of indifference as long as court fees are paid. But even assuming that states which permit the enforcement of foreign judgments are more cooperative than states that do not, it does not follow that increasing contact among judges results in more such cooperation. Suppose, for example, that during their interactions, judges learn that foreign law is “unfair,” by their lights. As a result, they become *less* willing to enforce foreign judgments.²⁸ Now, this may be good or bad from a nor-

24. There is, however, some debate about the proper interpretation of the Constitution as it relates to this issue. Compare HENKIN, *supra* note 14, at 222, with Jinks & Sloss, *supra* note 1, at 154-64.

25. See sources cited *supra* note 14.

26. SLAUGHTER, *supra* note 5, at 65.

27. See *id.* at 65-103.

28. Slaughter probably has in mind a case in which one state has better law than the other, and judges from the other state, learning about this law, harmonize their own domestic law with it, so that judges from the first state become more willing to enforce judgments from the second state. Maybe this happens; maybe not. But one should note that even if it does, it is not clear that this would count as “cooperation” in a normatively meaningful sense. Perhaps the second state’s “bad” law is suited to local conditions—perhaps limited resources preclude the kind of procedural protections that are routine in the first state—so that changing the law makes the second state worse off, rather than producing joint gains.

mative perspective, but it surely cannot be counted as an enhancement of international cooperation.

The strongest evidence for a judicial role in the enforcement of international law comes from the European experience, where national courts have, in several cases, compelled national governments to comply with European law.²⁹ These events are of considerable interest, but are of limited relevance for international law. Europe is a quasi-confederation and has been undergoing a process of unification for several decades. Economic, commercial, military, and political integration were all underway long before national courts began enforcing European law. The problem for international law is that most states are not integrated in this way, and that is why national courts are not willing to force their own governments to comply with international law.³⁰

B. Government Officials

A second view of why states comply with international law is that government officials “internalize” international law.³¹ We can distinguish two theories. First, government officials fear that if they violate international law, they will suffer sanction. The sanction, in rare cases, might be a formal sanction by an international tribunal or a domestic tribunal enforcing international law; more likely the sanction would be reputational. Second, government officials internalize international law in the sense that they believe that they have a moral duty to comply with international law, just as they have a moral duty to comply with relevant domestic law.

1. External Sanctions

The first theory depends on external sanctions. External sanctions exist, but they are rarely applied. Some examples are discussed below.

Soldiers who commit war crimes face the risk that they will be tried and punished.³² Trying and punishing soldiers for war crimes has a long history; but with rare exceptions, only enemy soldiers are tried for war crimes and, of course, only if they are captured in the first place. Most wars do not end the way World War II ended, with an unconditional surrender and access by the victor to the van-

29. See generally KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001).

30. For further discussion of this argument, see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

31. See, e.g., CHAYES & CHAYES, *supra* note 5, at 112-53.

32. They might also be tried by domestic courts martial or civilian courts; but only if the government decides to enforce international law domestically, which returns us to the first theory.

quished state's territory. In these rare cases, the victor may pursue and capture war criminals.³³ In the usual case, the two sides sign a peace treaty which, among other things, provides for the return of prisoners of war, if there are any. In these cases, war crimes are rarely prosecuted.

In another set of cases, third parties demand that war criminals (or other international criminals) be prosecuted in international tribunals. Examples include the various tribunals established to try the people responsible for crimes in the former Yugoslavia, Rwanda, Sierra Leone, and a few other places.³⁴ However, these tribunals are rare and have tried few people relative to the number who have committed crimes. The establishment of the International Criminal Court may change this, but it is too soon to tell, and there are ample reasons for skepticism—not least being the United States' refusal to participate.³⁵

A final set of cases involves domestic prosecutions of international crimes or domestic civil litigation based on international criminal law. There have been a few attempts to assert domestic jurisdiction over war criminals who have no connection with the state in which the court sits.³⁶ There have been occasional calls for war crimes trials of people like Henry Kissinger.³⁷ And, in the United States, the Alien Tort Statute (ATS) permits aliens to sue people for committing torts against them in violation of international law.³⁸ These cases have not yielded much. None of the domestic prosecutions has succeeded. The ATS suits have resulted in large awards that are almost never paid; so their practical effect is to discourage international criminals from traveling to, and parking assets in, the United States.

All in all, external legal sanctions for violating international law are extremely weak and unlikely to provide rational officials with an incentive to comply with international law. I have not discussed possible reputational sanctions. Because reputational sanctions are im-

33. But as the post-World War II experience shows, eventually other considerations will come into play, and after a few years, the prosecutions will end and prisoners will be released. See MEIRION & SUSIE HARRIES, *SHEATHING THE SWORD: THE DEMILITARISATION OF JAPAN* (1987) (Japan); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1984) (Germany).

34. See FROM NUREMBERG TO THE HAGUE: *THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* (Philippe Sands ed., 2003).

35. See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003).

36. See, e.g., Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES, Oct. 18, 1998, at A1. Belgium's war crimes law, which allowed suits by aliens against aliens, was cut back in deference to American objections. Craig S. Smith, *Belgium Plans to Amend Law on War Crimes*, N.Y. TIMES, June 23, 2003, at A9.

37. See, e.g., CHRISTOPHER HITCHENS, *THE TRIAL OF HENRY KISSINGER* (2001).

38. *E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

posed, if at all, by other people, such as the general public, I will delay this discussion to Part III.E, which deals with this topic.

2. *Internal Sanctions*

Do officials internalize international law? The claim here is that they believe they have a moral duty to comply with international law; if they violate that duty, they will feel guilty.³⁹ To avoid feelings of guilt, officials comply with international law.⁴⁰

We cannot peer into the consciences of individuals, so how would we evaluate this claim? One possibility is to evaluate it on its merits: Do individuals actually have a moral duty to comply with international law? If not, then it is hard to believe that they would feel guilty for violating it. Another possibility is to draw on discussions of why people comply with domestic law. The view that people comply with domestic law out of a sense of moral duty has its adherents, and there have been some efforts to test it.⁴¹ Can the approach taken in the domestic context be applied to international law?

As to the first claim, I have argued elsewhere that states, their leaders, and their officials have no moral obligations to comply with international law.⁴² The argument is, briefly, that international law has none of the traditional sources of moral legitimacy. People may owe allegiance to a domestic government either because they perceive that the government is good or because the government has democratic legitimacy. As there is no international government, people cannot similarly owe allegiance to an international government. There are international laws, but these are negotiated by the various governments, and many of the governments that create international law are viewed as bad—authoritarian, corrupt, or just committed to bad policy. International law is a series of compromises between somewhat better governments, mediocre governments, and bad governments. It is not a reflection of the will or interests of a political community in the way that law created by democratic governments may be.

Some people might argue that government officials have a moral duty to comply with international law because their own government is subject to it. But this argument makes the official's duty to comply derivative of the government's duty to comply. If the government repudiates a treaty, the loyal government official has no duty to try to

39. Or, at least feel guilty when international law itself is fair. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

40. There are many versions of this argument in the literature. A discussion can be found in Goodman & Jinks, *supra* note 5.

41. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

42. See Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

constrain the government and force it to comply with the treaty. A government official's moral duty to his own government cannot be a source of compliance with international law on the part of the government.

Scholars have argued that compliance with domestic law can be explained, in part, by moral duty. One piece of evidence is that compliance rates appear to be higher than what one would predict if people were concerned solely with formal legal sanctions and reputational costs.⁴³ Evidence also suggests that the level of compliance turns on morally relevant factors, such as the perceived fairness or legitimacy of the law, suggesting again that formal legal sanctions and (possibly) reputational sanctions do not fully explain compliance.⁴⁴

In theory, a similar approach could be taken to international law, and it would surely be illuminating.⁴⁵ However, no one has yet tried to test this idea empirically, so it remains in the realm of speculation. In addition, because the effect, if it exists, remains controversial in the domestic setting, where moral duties are stronger, it would be premature to conclude that it exists at the international level as well.

Other theories have been proposed. Koh suggests that bureaucrats operate out of habit, and once habituated into complying with international law, they cannot stop.⁴⁶ But as Koh does not explain how this habituation process operates or how one would prove or disprove his theory of its existence, it is hard to evaluate this argument.

3. *A Note on Bureaucracies*

The literature has made much of the possibility that agencies may care about international law.⁴⁷ This view is compatible with the external sanctions and internal sanctions arguments: bureaucrats may cause a state to comply with international law because they fear external or internal sanctions. There may be other reasons why international law could become part of the mission or culture of an agency. The U.S. State Department, for example, often acts as if its mission were, in part, to ensure that the United States, as well as other countries, comply with international law. And various agencies may care about the enforcement of specific treaties that bear on their domestic functions.

43. For a discussion of the tax compliance literature, see Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000).

44. TYLER, *supra* note 41.

45. *Cf.* FRANCK, *supra* note 39 (providing a discussion of legitimacy theory as an explanation for compliance).

46. Koh, *Transnational Legal Process*, *supra* note 8, at 204.

47. *E.g.*, SLAUGHTER, *supra* note 5; Raustiala, *supra* note 5.

This argument is discussed in greater detail in Part IV.C. For now, it is sufficient to observe that the evidence for this claim, so far, consists of narrative descriptions of agencies from different states interacting with each other. It is not clear what to make of this evidence. Such interagency cooperation may show that “states” are, in some sense, cooperating with each other more than is required by positive international law, but no one disputes that this may happen. Such interagency cooperation may make it easier for governments to cooperate, or it may make it easier for governments to comply with international law. But it also may merely be a result of governments wanting to cooperate with each other, and directing their agencies to implement legal or nonlegal cooperative agreements. Further, even if agencies are acting on their own, it is not clear that in doing so they promote the joint interests of their governments or the states of which they are a part. As is well known in the bureaucracy literature, agencies may develop missions that diverge, slightly or greatly, from the desires of elected officials and the interests of the public. If so, much transborder cooperation between agencies should be classified not as cooperation between states but as a kind of regrettable yet unavoidable friction that results from governments acting, as they must, through bureaucracies.

C. *Interest Groups*

Some authors have argued that interest groups force states to comply with international law.⁴⁸ We can distinguish a few possibilities. Public interest groups might pressure states to comply with international law because they approve of international law in general or particular treaties. However, public interest groups will be discussed in the next section, Part III.D, which focuses on NGOs. This section focuses on the other kind of interest group that takes an interest in international law: the trade group of profit-making businesses.

The most sustained analysis of the role of interest groups in enforcing international law can be found in the international trade literature. I will first discuss some ideas from this literature and then discuss the extent to which they may be applied to international law in general.

International trade law is sometimes conceptualized as resulting from deals between competing interest groups, with the governments acting as mediators. Suppose that state X and state Y both have high trade barriers and do not trade with each other. Each state has two relevant interest groups: import-competers and exporters. Import-

48. See, e.g., Koh, *Bringing International Law Home*, *supra* note 8, at 647-48.

competitors are firms that would lose business if imports were permitted. For example, the steel industry in state *X* enjoys the high level of protection and would lose profits if trade were permitted, because the steel industry in state *Y* is more efficient and transportation costs are low. Exporters are firms that currently do not export, given the high level of protection, but would be able to export, and earn higher profits, if the barriers were reduced. *Y*'s steel industry, thus, is a (potential) exporter.

Trade law provides a device by which the exporters in each state can obtain access to the markets in the other state. State *X*'s exporters pressure the government to enter trade agreements with state *Y*, so that *X*'s exporters may export to *Y*; the price of this right is likely to be granting *Y*'s exporters the right to export to *X*. Once an agreement is reached, the exporters in each state will pressure their governments to comply with the agreement rather than violate it or withdraw from it. Thus, the interest group—the exporting group—forces the state to comply with its international treaty obligation.⁴⁹

There is another factor. Once the states enter the treaty, each state's exporters will become wealthier and each state's import-competitors will become poorer—because foreign trade benefits exporters and hurts import-competitors. As a result, the wealthier exporters will increase the political pressure to comply with the treaty, and compliance is that much more likely to occur.

On the other side, observe that the import-competitors retain their interest in pressuring their government to repudiate or violate the treaty. So the level of compliance with the treaty depends on the balance of power between exporters and import-competitors. When exogenous shocks occur that change the balance of power, then the level of compliance should change accordingly. For example, if a recession hits the import-competitors—resulting in the layoffs of organized, unionized workers, who in turn pressure the government to violate the treaty—the interest group theory would predict that compliance would decline. The key point here is that, in theory, interest groups can both enhance the probability of compliance with a treaty and reduce the probability of compliance; their net empirical effect is unknown.

We can make an analogous argument about non-trade treaties. Consider, for example, an arms control treaty. Imagine a setting in which two states, *A* and *B*, face each other as potential belligerents. We might imagine that in each state there is an interest group—call it the military-industrial complex—that benefits from wars or inter-

49. See KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 30-32 (2002); GENE M. GROSSMAN & ELHANAN HELPMAN, *INTEREST GROUPS AND TRADE POLICY* (2002).

national tension because war and tension increase the demand for weapons. The government balances the interests of this group against the interests of other groups that benefit from peace; the latter groups include ordinary industries. For simplicity, let us distinguish a “war group” and a “peace group” in each state. In a state with a strong war group, the probability that it will go to war in the future is relatively high; otherwise, the probability is relatively low. The war group, unlike the peace group, creates an externality that harms other states. Arms industries make profits only if weapons are used; but when they are used, they destroy people and goods in other states.

Analogous to the trade story, we can imagine that state *A* and state *B* will agree not to go to war—or to go to war less often, or only under special conditions—because *A*'s and *B*'s peace groups will benefit more from the reduction of the probability of war than *A*'s and *B*'s war groups will lose. More precisely: a peace or arms control treaty will, like trade barriers, create an intermediate probability of war, where the marginal benefits of war for the war groups equal the marginal costs to the peace groups. On this view, states with big economies and small military-industrial complexes will agree to more restrictive rules than other states. Perhaps this is an explanation for why the United States endorses an expansive interpretation of self-defense, while European states prefer a narrow interpretation.

This hypothesis shows how interest groups could play a role in creating and sustaining a treaty. However, it does not provide any guidance for developing a general theory of how interest groups may cause states to comply with international law. If the exporters and peace groups will lobby states to comply with trade and peace treaties, there is no reason to believe they have a commitment to international law per se, and they may very well be indifferent to whether the state violates or obeys its other international commitments. Indeed, as we have seen, exporters and peace groups may lobby states to violate treaties that restrict trade and peace. And the import-competers and the war groups may lobby the state to violate international obligations that promote trade and peace. *There is no reason to believe that any interest group believes that international law must be followed simply because it is international law.* In sum, there is no reason to think that interest groups promote general compliance with international law: their effect on compliance is ambiguous.

D. Nongovernmental Organizations (NGOs)

An increasingly popular view holds that international nongovernmental organizations encourage states to comply with interna-

tional law.⁵⁰ NGOs can (1) monitor compliance; (2) publicize noncompliance; and (3) take political action against governments that fail to comply with international law. For example, the International Red Cross monitors compliance with the Geneva Convention. Red Cross officials visit prison camps where POWs are held and issue reports to governments, reports that describe the conditions that are observed. The Red Cross does not usually publicize noncompliance, but instead brings noncompliance to the attention of the government or its military authorities and pressures them to change their practices.⁵¹ Other NGOs rely on publicizing noncompliance as a way of shaming governments into action. Amnesty International, Human Rights Watch, and Freedom House monitor human rights in all countries and issue reports.⁵² Amnesty International frequently sponsors letter-writing campaigns in support of dissidents. NGOs also finance research, lobby for changes in government policy, sponsor conferences, and assist in the drafting of treaties.

There are two problems with the theory that NGOs encourage compliance with international law. The first is simply that NGOs play no role, or a very minor role, in most areas of international law. It is only in the context of human rights law that the NGO theory has surface plausibility; here, the NGOs are numerous, passionate, and well funded from donations by individuals and groups. There are no comparable NGOs that monitor compliance with the law of consular relations. To be sure, there are groups that care about these issues, but they often consist of regulated firms and other entities—in other words, the interest groups that we discussed above.

The second problem is that it is not clear that even the human rights NGOs have much power. They attract the attention of media, raise money, and send staffers to meet with government officials. All of this, as noted above, suggests that they do have *some* power. But—with a partial exception discussed below—there is no systematic evidence that they actually influence states. And, even if they do, one must not forget that the power of the NGOs will be countered by the power of other groups. Military suppliers will lobby governments to

50. See, e.g., CHAYES & CHAYES, *supra* note 5, at 250-70; SLAUGHTER, *supra* note 5, at 190-91; Koh, *Transnational Legal Process*, *supra* note 8, at 207.

51. See International Committee of the Red Cross (ICRC), *Frequently Asked Questions (FAQs) About the ICRC and Its Mandate*, at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/faq?OpenDocument> (last visited Mar. 3, 2005) (addressing why the ICRC does not publish its reports on prison visits). The Red Cross has special status because the Geneva Conventions themselves recognize it as a monitoring body. *Id.*

52. The activities of these organizations are discussed at their websites. See Amnesty International, *About Amnesty International*, at <http://web.amnesty.org/pages/aboutai-index-eng> (last visited Mar. 3, 2005); Human Rights Watch, *About HRW*, at <http://www.hrw.org/about> (last visited Mar. 3, 2005); Freedom House, *Mission Statement & History*, at <http://www.freedomhouse.org/aboutfh/index.htm> (last visited Mar. 3, 2005).

buy weapons that NGOs believe are illegal, for example. And NGOs may find themselves on the opposite side of the same issue.⁵³ The net effect of these forces is ambiguous.

The third problem is that the agendas of the NGOs and the content of international law differ significantly. The NGOs do not try to enforce international human rights law; they try to enforce those aspects of it that converge with their own agendas, and they ignore the rest. Many NGOs vigorously oppose the death penalty, especially the juvenile death penalty, and expend resources documenting its use and urging states to abolish it. For the states that have not ratified treaties prohibiting the death penalty or have done so subject to reservations that preserve their right to impose the death penalty, the NGOs serve as advocates rather than law enforcers.⁵⁴ Similarly, NGOs focus much of their efforts on states that have not ratified human rights laws rather than ensuring that states that have ratified these laws comply with them. Thus, even if NGOs have influence over the behavior of states, it is not clear that they exercise their influence by encouraging states to comply with international law rather than by encouraging states to improve their human rights records generally.

The evidence supports this view rather than the view that NGOs contribute to compliance with international law. This evidence is discussed in Part IV.E.

E. Citizens

A government might also comply with international law because it fears that citizens will withdraw support if it does not. Why would citizens care if their government violates international law? A number of possibilities suggest themselves. First, citizens might believe that the government should comply with international law because international law is good, either for their nation or for the world generally. Second, citizens might take international law compliance as an indicator of their government's trustworthiness, competence, or reliability: a government that does not comply with international law, like a government that does not comply with domestic constitutional rules, may be unreliable even if the policies it chooses are generally unobjectionable.

53. For example, there are NGOs that advocate family planning and the right to abortion and NGOs that oppose abortion rights.

54. Article 1(1) of the Second Optional Protocol to the International Convention on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (ICCPR) bans the death penalty. See G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/Res.44.128 (1991), reprinted in 29 I.L.M. 1464 (1990). Many treaties ban the juvenile death penalty, including the Article 6(5) of the ICCPR and the Convention on the Rights of the Child, art. 37(a), 1577 U.N.T.S. 43, 28 I.L.M. 1448.

American public opinion is largely favorable toward international law. In a 1992 Roper poll, 65% of respondents stated that the United States should comply with International Court of Justice (ICJ) decisions (21% did not know and only 14% disagreed).⁵⁵ And a 2002 Chicago Council on Foreign Relations (CCFR) survey found that 76% of Americans are ready to put American troops at risk “to uphold international law.”⁵⁶ The CCFR survey also found that 88% of Americans favored working through the United Nations to strengthen international laws to fight terrorism.⁵⁷ A report by the Program on International Policy Attitudes found that majorities of the groups surveyed believed that the United States should strengthen various international institutions such as the United Nations.⁵⁸

These data are interesting, but they do not tell us how much Americans pressure elected officials to strengthen international institutions and comply with international law. The CCFR survey found that only 43% of Americans considered “strengthening international law” a “very important” foreign policy goal; it ranked sixteenth out of the twenty policy goals listed—well below combating international terrorism, preventing nuclear proliferation, somewhat below protecting the jobs of American workers, and even below maintaining superior military power and protecting American business interests abroad.⁵⁹ If any of these goals conflict with an international treaty or ICJ decision, elected officials driven by public opinion polls ought to violate international law.

An additional reason for skepticism is the lack of examples where the U.S. government clearly violated international law and was punished by voters or their representatives in Congress for this violation, rather than for the policy itself. Consider, as a useful analogy, the Iran-Contra scandal. This scandal hurt the Reagan administration not because the public believed that the policy was a bad one (though it may have) but because the public believed that the Reagan ad-

55. The results are available online. See PROGRAM ON INT'L POLICY ATTITUDES, AMERICANS ON GLOBALIZATION: A STUDY OF US PUBLIC ATTITUDES n.90 (Mar. 28, 2000), available at <http://www.pipa.org/OnlineReports/Globalization/notes/90.html>. The question asked:

As you may know, there is an organization called the 'World Court' that tries to settle international disputes peacefully among countries that accept its jurisdiction. If the World Court finds that actions by the United States have violated international law, should the U.S. accept the Court's decisions, or should it feel free to ignore the Court's decisions if it disagrees with them?

Id.

56. CHI. COUNCIL ON FOREIGN RELATIONS, AMERICAN PUBLIC OPINION & FOREIGN POLICY 24 fig.3-4 (2002), available at <http://www.worldviews.org/detailreports/usreport.pdf>.

57. *Id.* at 35 fig.4-7.

58. PROGRAM ON INT'L POLICY ATTITUDES, *supra* note 55, available at <http://www.pipa.org/OnlineReports/Globalization/4.html>.

59. CHI. COUNCIL ON FOREIGN RELATIONS, *supra* note 56, at 19 fig.2-2.

ministration violated domestic law. But it is hard to think of an international law version of this scandal, even though we can easily think of cases where the United States violated or weakened international law and leaders suffered no political repercussions. These include NATO's intervention in Kosovo; the American invasions of Grenada⁶⁰ and Panama,⁶¹ and countless World Trade Organization (WTO)/General Agreement on Tariffs and Trade (GATT) violations.⁶²

In sum, Americans—and people elsewhere in the world⁶³—appear to care about international law and think that, all things being equal, governments should try to comply with international law. But it seems doubtful that they care enough about international law to punish governments that violate international law in order to advance other goals—security, national wealth—that citizens care about. Without evidence, it is premature to conclude that public opinion is the key to understanding when and why states comply with international law.

IV. SOME EXAMPLES

In Part III, I provided some theoretical reasons for doubting that nonstate factors cause states to comply with international law; I also discussed the evidence or (more often) the lack of evidence that these factors do have this effect. The discussions of the evidence were necessarily abstract. In this Part, I look at the evidence from a different perspective, focusing on specific incidents in which nonstate factors may have caused states to comply with international law.

Given the infinite number of international incidents, the choice of which ones to discuss is necessarily arbitrary. To avoid charges of selection bias, I have, with one exception, chosen to discuss examples used by proponents of the disaggregated state model. Most of my examples are taken from articles written by Harold Koh, an energetic defender of this model. One example is taken from the work of some political scientists.

60. Richard Bernstein, *U.N. Assembly Adopts Measure "Deeply Deploring" Invasion of Isle*, N.Y. TIMES, Nov. 3, 1983, at A21.

61. Neil A. Lewis, *Scholars Say Arrest of Noriega Has Little Justification in Law*, N.Y. TIMES, Jan. 10, 1990, at A12.

62. For a discussion, see Posner & Yoo, *supra* note 30. Other examples are discussed *infra* at Parts IV.A-B and IV.D.

63. Another survey reported that 80% of Europeans support the use of force to "uphold international law." GERMAN MARSHALL FUND OF THE UNITED STATES, EUROPEAN PUBLIC OPINION & FOREIGN POLICY 20 fig.3-2 (2002), available at <http://www.worldviews.org/detailreports/europeanreport.pdf>. However, I have not found polling data analogous to the American data discussed above, so I have been unable to determine whether Europeans have similar attitudes.

A. *Anti-Ballistic Missile Treaty*

The Anti-Ballistic Missile (ABM) treaty of 1972 prohibited the United States and Russia from, among other things, creating missile defense systems located in outer space.⁶⁴ The treaty reflected the contemporary wisdom that the doctrine of mutually assured destruction kept the peace, and therefore, if one state developed a successful ABM system, it would thenceforth not be deterred from military action against the other state. To prevent being placed at a disadvantage, the other state would either create its own ABM system—contributing to the ruinous arms race—or else be tempted to engage in an anticipatory strike. The ABM treaty seemed to work well: for more than a decade, both sides complied with it.

In the 1980s, the Reagan administration announced the Strategic Defense Initiative (SDI), a project involving the development of exactly the sort of ABM system prohibited by the treaty. The source of the Reagan administration's enthusiasm for SDI remains obscure: it may have been a fantasy of Reagan's, or it may have been a sophisticated effort to ratchet up the arm's race and threaten the Soviet Union by exploiting America's technological superiority in a highly visible way. Critics of SDI argued that the system would not work and would destabilize relations with the USSR; they also argued that SDI would violate the ABM treaty. Nonetheless, the Reagan administration forged ahead with the program.

Koh notes that "had one stopped tracing the process of the dispute in 1987, one might have concluded that the United States had breached the treaty and gotten away with it."⁶⁵ But, he claims, the attempt to violate international law provoked a backlash, and Congress refused to provide funds requested by the administration except for basic research that would not violate the treaty. By 1993 Clinton had declared that the United States would continue to comply with the ABM treaty.⁶⁶ In an article published in 1996, Koh pronounced international law vindicated.⁶⁷ This conclusion turned out to be premature. In 2001 President Bush announced that he would pursue a space-based missile defense system, and he unilaterally withdrew from (or violated, if you prefer) the ABM treaty.⁶⁸

What happened? The simple story is that in the 1970s it was in the joint interest of the United States and the USSR to refrain from building ABM systems. Detente was at its height, and Americans

64. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. 5, 23 U.S.T. 3435, available at <http://www.state.gov/www/global/arms/treaties/abm/abm2.html>.

65. Koh, *Transnational Legal Process*, *supra* note 8, at 195.

66. See *Nullifying a Dangerous Doctrine*, N.Y. TIMES, July 16, 1993, at A14.

67. Koh, *Transnational Legal Process*, *supra* note 8, at 195.

68. See Michael R. Gordon & Steven Lee Myers, *Bush Team Vows to Speed Up Work on Missile Shield*, N.Y. TIMES, Apr. 30, 2001, at A1.

were optimistic that the United States and the USSR could coexist in peace. Then came the invasion of Afghanistan by Soviet forces in 1979, and the chilling of relations in the 1980s. The Reagan administration took an aggressive stance against the Soviets, and a massive increase in military defense was part of this strategy. Wisely or foolishly, so was SDI. However, the Reagan administration was not able to obtain much cooperation from Congress, which funded some research but imposed significant limitations on how the money could be used. For Koh, Congress's reluctance was due to the legal force of the ABM treaty.⁶⁹ But SDI was highly controversial for other reasons. Many scientists doubted its merits, and many strategic thinkers feared that it would destabilize the Cold War equilibrium in a way that greater defense spending would not.⁷⁰ Without a consensus among the foreign policy elite, Reagan could not make headway with SDI. He could, however, preserve it as an option by rejecting Gorbachev's proposals to trade concessions on arms control for a strengthened version of the treaty.

Clinton's support for the ABM treaty is, for Koh, evidence of the power of the law; but the world had changed between Reagan and Clinton. The Soviet Union had ceased to exist, and an expensive space-based ABM system was no longer necessary. The reason for Clinton's decision to comply with the ABM treaty was that there was no longer any need to violate it: the United States would not have built an ABM system in the early 1990s even if the treaty had not existed.⁷¹

But the international scene changed once again. As the 1990s progressed, the new preeminent concern of American foreign policy—with the USSR now gone—was the proliferation of nuclear weapons and ballistic missile technology to rogue states such as North Korea.⁷² As it proved increasingly difficult to prevent the spread of weapons of mass destruction and missile technology, the virtues of an ABM system began to reassert themselves. Indeed, an SDI-style ABM system would likely be more effective, and therefore a more attractive endeavor, against North Korea than against the USSR—as the USSR could have relatively easily developed countermeasures or overwhelmed the system with the sheer quantity of its missiles, and

69. Koh, *Transnational Legal Process*, *supra* note 8, at 195.

70. See Charles L. Glaser & Steve Fetter, *National Missile Defense and the Future of U.S. Nuclear Weapons Policy*, INT'L SECURITY, Summer 2001, at 40.

71. Clinton did not abandon SDI altogether. See William J. Broad, *From Fantasy to Fact: Space-Based Laser Nearly Ready to Fly*, N.Y. TIMES, Dec. 6, 1994, at C1.

72. See John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 902-03 (2001) (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)).

it is not clear that North Korea and other small states and terrorist organizations could do the same.⁷³

So the United States withdrew from the ABM treaty in 2001. This act produced little international reaction, and there has been no evidence that it has had repercussions for the United States.⁷⁴

The ABM story lends itself to a simple interpretation. When the United States and the USSR had a joint interest in limiting their military competition, they did so. When the United States decided that this type of cooperation with the USSR no longer served its interests, it stopped cooperating with the USSR. Domestic pressure to comply with the ABM treaty was due to skepticism about abandoning the doctrine of mutually assured destruction and about the viability of SDI itself. It was not driven by a desire to comply with international law for its own sake.

B. Alvarez-Machain

In 1990, agents working for the U.S. Drug Enforcement Agency (DEA) kidnapped a Mexican doctor on Mexican soil and brought him to the United States, where he was indicted for assisting in the torture and murder of a DEA agent.⁷⁵ The doctor, whose name was Humberto Alvarez-Machain, argued that the illegal kidnapping—in violation of an extradition treaty with Mexico as well as traditional notions of state sovereignty—deprived U.S. courts of jurisdiction, but this defense was rejected by the U.S. Supreme Court in 1992.⁷⁶ Mexico and other nations objected to the Supreme Court's decision.⁷⁷ So did various American politicians and international organizations.⁷⁸ In response to this pressure, the United States agreed not to engage in any more transborder kidnappings of Mexican nationals, and the extradition treaty between the two nations was modified so as to reflect this understanding.⁷⁹ Alvarez-Machain was acquitted of any wrongdoing and subsequently brought a civil suit against his kid-

73. See Stephen J. Hadley, *A Call to Deploy*, WASH. Q., Summer 2000, at 95 (arguing that missile defense can be effective against rogue states). *But see* Glaser & Fetter, *supra* note 70, at 62 (expressing a generally unfavorable attitude toward missile defense, but arguing that it might have a small role for damage limitation purposes).

74. See David E. Sanger & Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. TIMES, Dec. 12, 2001, at A1 (noting muted European/Russian reaction to withdrawal); Michael Wines, *Moscow Miffed over Missile Shield but Others Merely Shrug*, N.Y. TIMES, Dec. 19, 2002, at A18 (describing the indifference of most nations to the shield).

75. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11.

76. *United States v. Alvarez-Machain*, 504 U.S. 655, 657, 670 (1992).

77. Koh, *Transnational Legal Process*, *supra* note 8, at 195.

78. See *id.* at 195-96.

79. *Id.* at 196.

nappers under the Alien Tort Statute.⁸⁰ For Koh, these consequences show once again the power of transnational legal processes.⁸¹

But an alternative explanation is available. The U.S. government knew that kidnapping Alvarez-Machain violated international law, but it also felt that Mexican authorities could not be trusted to indict and prosecute him, and it was frustrated that Mexican drug criminals could operate with impunity. Mexico's fierce reaction took the United States by surprise,⁸² and the United States backed off. The United States needed Mexico's cooperation in the drug war, as well as in a host of other crossborder issues, and crossborder kidnapping was not so valuable—witness the acquittal of Alvarez-Machain, which suggests that the case against him was never strong—that inflaming the Mexican public was a price worth paying to maintain the policy. But in its dealings with states with weaker governments and law enforcement systems, the United States has maintained its policy of crossborder kidnappings as well as assassinations in some instances, despite their questionable international legality.⁸³

“Transnational legal process” played a role in the United States-Mexico dispute only in an uninteresting sense: because states act through governments and because governments are composed of and influenced by individuals, any foreign interaction—whether it involves making, breaking, or complying with international law—will be accompanied by intrastate activities involving individual and group actors. How could it not? But to say this and then trot out those actors—the politicians, transnational norm entrepreneurs, NGOs, international institutions, and all the other characters of the transnational legal menagerie—every time a large state appears to act against interest and comply with international law does not get us any closer to an explanation for why states comply with international law in some cases but not others.

C. Land Mines

Antipersonnel land mines are effective defensive weapons, but they are also highly dangerous to civilians because they remain hidden and operational long after hostilities cease. For this reason, states have tried for a long time to restrict their use, just as they have tried to restrict other weapons and tactics that are particularly

80. He ultimately lost the civil suit. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2769 (2004).

81. See Koh, *Transnational Legal Process*, *supra* note 8, at 195-96.

82. See Tim Golden, *Treaty Talks in Mexico*, N.Y. TIMES, June 17, 1992, at A8; Robert Pear, *Justice Dept. Scrambles to Explain Abduction Plot*, N.Y. TIMES, May 27, 1990, § 1, at 24.

83. For some examples, see RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* (2004).

dangerous to civilians.⁸⁴ After false starts in the 1970s and 1980s, a series of meetings were held in Ottawa, and in 1997 more than one hundred states signed a treaty that banned land mines.⁸⁵ The signatories did not include the main users and producers of land mines—including the United States, Russia, and China⁸⁶—but it is still possible that some of these states will either sign the treaty or express their agreement with it.

Koh's discussion of these events emphasizes the role of NGOs, such as Human Rights Watch; a "transnational issue network"; American politicians who urged the U.S. government to sign the treaty; "transnational norm entrepreneurs" such as Jody Williams, who won the Nobel Prize for her efforts, Bobby Muller, Princess Diana, Pope John Paul II, and the author of the Batman comic strip; and governmental units such as the Pentagon and the State Department.⁸⁷ He argues that "elaborate ad hoc nongovernmental networks, working with smaller governmental powers, can create a treaty norm that pulls through various forms of internalization even the most powerful abstaining nations toward compliance."⁸⁸ However, this is a non sequitur. Although various extragovernmental people and groups influenced the international lawmaking process and may have encouraged some governments to enter a treaty that they would otherwise have ignored, Koh must—to support his thesis about the internalization of international law—provide evidence not about the *formation* of the treaty but about *compliance* with it.

Here, he comes up short. He does not provide evidence that any of the signatories have complied with the treaty in any significant measure. His evidence is limited to the case of the United States—a nonsignatory—and he merely quotes a few government officials who express optimism that the United States will eventually "obey" the treaty as a matter of policy.⁸⁹ However, recently the United States announced that it would *not* sign the treaty.⁹⁰

Have signatory states complied with the land mines treaty; and, if so, because of "transnational legal processes"? This question is difficult to answer.

84. Reflected in the Hague Conventions of 1899 and 1907, and subsequent weapons treaties. See GOLDSMITH & POSNER, *supra* note 3.

85. See International Campaign to Ban Landmines, *The Treaty*, at <http://www.icbl.org/treaty> (last visited Mar. 3, 2005).

86. See International Campaign to Ban Landmines, *Treaty Members*, at <http://www.icbl.org/treaty/members> (last visited Mar. 3, 2005).

87. Koh, *Bringing International Law Home*, *supra* note 8, at 656-57.

88. *Id.* at 662.

89. *Id.* at 662-63.

90. See BBC News, *US Promises 'Safer' Landmines*, at <http://news.bbc.co.uk/2/hi/americas/3491826.stm> (last updated Feb. 27, 2004).

The first problem with answering this question is that the states that depend most heavily on land mines—that is, states that are at war or frequently go to war—refused to sign the treaty. These states include Armenia, Azerbaijan, China, Cuba, Egypt, India, Iran, Iraq, North Korea, South Korea, Kuwait, Libya, Nepal, Pakistan, Russia, Somalia, Syria, the United States, and Vietnam.⁹¹ All of these states are at war, have recently been at war, or are embroiled in disputes that could at any time lead to war. That these states will not ratify the treaty creates the suspicion that the parties that have been willing to enter the treaty consist only of states that lose nothing by complying with it—because they have no domestic land mine industry that profits by exporting land mines and because they have no current or expected security needs that can be met only with a stockpile of land mines.

Indeed, Canada and Belgium, both of which led the campaign against land mines, had decided to abolish their stockpiles of mines before the land mines treaty was signed or ratified. Thus, these countries, and many other countries like them, could comply with the treaty without changing their behavior.

However, several states with security concerns did sign the treaty and appear to have destroyed some or all of their stockpiles. These states include Afghanistan (acceded to the treaty in 2002), which continues to be torn by strife; Albania (ratified in 2000), which is in a dangerous part of the world; Bosnia (ratified in 1998); Croatia (ratified in 1998); and Mozambique (ratified in 1998).⁹² Defenders of the land mines treaty point to the activities of these and similar states as evidence of the treaty's effectiveness.

But there are two problems with this argument. First, one must control for other factors that might cause states to destroy land mines. Many states that ratified the treaty did so at the conclusion of an interstate or civil war. These states—including the Balkan states mentioned above, Angola (ratified in 2002), and Cambodia (ratified in 1997)—likely would have destroyed some or all of their unused land mines stockpile even if they had not entered a treaty. For these states, ratifying the treaty may have been a useful form of public relations, but ratification did not otherwise change their behavior. And other states that have ratified the treaty but still have security con-

91. See International Campaign to Ban Landmines, *Non-State Parties*, at <http://www.icbl.org/treaty/nonsign.php3> (last modified Dec. 22, 2004).

92. For details, see the links to various country reports at International Campaign to Ban Landmines, *Landmine Monitor*, at <http://www.icbl.org/lm/> (last visited Mar. 3, 2005) (providing links to annual country reports from 1999 through 2004); and UN Mine Action Service, *E-Mine: The Electronic Mine Information Network*, at <http://www.mineaction.org/index.cfm> (last visited Mar. 3, 2005) (providing a link to "Country Profiles"). For a pessimistic (but early) report, see Steven Lee Myers, *Diana's Dubious Legacy: Land-Mine Ban Has Trouble Getting Off the Ground*, N.Y. TIMES, Sept. 5, 1999, at D3.

cerns—such as Eritrea (ratified in 2002)—have not complied with all of its provisions. In sum, the jury is out on whether the land mines treaty has had its intended effect.

Second, there is no evidence that any particular state's decision to comply or not can be traced to the activities of nonstate actors. Putting aside the observation that only individuals can make decisions for states, a useful disaggregated state model must say something about which nonstate actors matter and which do not. Such a model would enable us to explain and predict the compliance of some states rather than others. However, no such model does so, and therefore we do not know whether Albania has complied while Eritrea has not because of differences in the behavior of nonstate actors or because of differences in their security situations, which would be captured by a traditional unitary state model. Some international NGOs specialize in monitoring compliance with the land mines treaty, but clearly the existence of international NGOs cannot explain interstate variation in compliance with the treaty.

D. *The American War Against Nicaragua*

In the early 1980s the Reagan administration decided to support a military insurgency in Nicaragua, which at that time was governed by a communist regime backed by the Soviet Union. In addition to providing training, financial support, and weapons to the Contras, as the insurgents were known, the Reagan administration directed the CIA to mine some Nicaraguan harbors, which it did in early 1984.⁹³ When this operation came to light, the Nicaraguan government brought a proceeding against the United States in the International Court of Justice (ICJ). The United States objected to the jurisdiction of the Court, but the Court took the case anyway and held against the United States. The U.S. government rejected the decision and showed no inclination to obey it. Here is how Koh describes subsequent events:

At that point, the Nicaraguans shifted from an international interpretive forum—the World Court—to a *domestic enforcement* forum: the U.S. Congress, where resolutions were introduced terminating future aid to the *Contras* for activities that violated the World Court's ruling. In other words, Congress *internalized* the World Court's ruling into U.S. law. Almost immediately thereafter, the Reagan Administration stopped mining the harbors. In short,

93. For details, see Kenneth Roberts, *Bullying and Bargaining: The United States, Nicaragua, and Conflict Resolution in Central America*, INT'L SECURITY, Fall 1990, at 67. See generally CYNTHIA J. ARNSON, *CROSSROADS: CONGRESS, THE PRESIDENT, AND CENTRAL AMERICA 1976-1993* (2d ed. 1993); HOLLY SKLAR, *WASHINGTON'S WAR ON NICARAGUA* (1988); THOMAS W. WALKER, *NICARAGUA: LIVING IN THE SHADOW OF THE EAGLE 25-75* (4th ed. 2003).

an interaction, interpretation, and internalization of an international norm into domestic law helped force the United States into obedience.⁹⁴

The U.S. government complied with international law because of internal and external political processes.

Koh's claim that the law had causal force can be cashed out in two ways. First, did international law governing state sovereignty cause the Reagan administration to refrain from using force against Nicaragua? Obviously not. The U.S. government ordered the mining of the harbors. To be sure, one could argue that the United States would have acted more aggressively if there had been no international law barring the use of force against foreign states. But there is no evidence for this view either: the United States had routinely used force against Latin American states for a century or more, and the modern use-of-force rules embodied in the UN charter did not affect this longstanding policy. To add to the complexity, the U.S. government's argument that it was acting consistently with international law by honoring its defense commitments to El Salvador and Honduras was not obviously wrong.

Second, did the ICJ judgment cause the U.S. government to stop using force against Nicaragua? Yes, says Koh; the ICJ judgment mobilized domestic and world opinion. But there are several problems with this argument.

Initially, the mining occurred and ended before the ICJ's first ruling (in May 1984) and long before its final ruling (in June 1986).⁹⁵ Thus, the ICJ's ruling did not, at least in a direct sense, end the mining. Although there was no subsequent action by American forces, American public opinion was hostile to military intervention. Indeed, Reagan's Central American policy was unpopular in the United States from the beginning. As early as 1981, the public disapproved of the handling of related events in El Salvador by 32% (disapproving) to 23% (approving), with no polling yet on Nicaragua; in 1982 these figures worsened to 64% to 22%.⁹⁶ The earliest polls on Reagan's Nicaragua policy found that 25% agreed with it and 56% disagreed with it in April 1983, and 24% agreed with it and 65% disagreed with it in August 1983.⁹⁷ These figures stayed roughly the same through the 1980s: approval stayed in the 20% to 30% range,

94. Koh, *Bringing International Law Home*, *supra* note 8, at 645 (footnotes omitted).

95. SKLAR, *supra* note 93, at 165.

96. Kathryn Roth & Richard Sobel, *Chronology of Events and Public Opinion, in PUBLIC OPINION IN U.S. FOREIGN POLICY: THE CONTROVERSY OVER CONTRA AID 21, 22* (Richard Sobel ed., 1993) [hereinafter *PUBLIC OPINION IN U.S. FOREIGN POLICY*].

97. *Id.* at 23. Two other polls that year found that 33% of Americans "approved" of the handling of the Nicaragua situation and 43% to 48% "disapproved" of it. *Id.*

and disapproval stayed in the 40% to 64% range.⁹⁸ Americans did not approve of communist regimes in Latin America, but they also did not approve of American military intervention.⁹⁹ They also opposed Contra aid during the entire period.¹⁰⁰ When its extent became publicly known, the mining operation—whose secrecy was compromised in any event—was no longer sustainable. Public disapproval of Reagan's Nicaragua policy thus preceded the ICJ's judgment. There is no evidence that it was affected by the ICJ's judgment. The low poll numbers did not get any lower in the wake of either of the rulings.

In addition, there is no evidence that the ICJ's judgments affected Reagan's Nicaragua policy through some mechanism other than public opinion. One might have expected Reagan to become more cautious after losing the case. Instead, Reagan's policy became even more aggressive after the ICJ's judgments than before them. Although Reagan bowed to American opinion and stopped mining the harbors, the United States did not offer to remove the mines and refused to pay compensation for damage to vessels.¹⁰¹ Instead, it repudiated the ICJ decision and withdrew from the ICJ's compulsory jurisdiction.¹⁰² Aid to the Contras continued. The Senate approved \$100 million in aid to the Contras shortly *after* the ICJ judgment (the House had already approved the aid prior to the judgment). And although aid to the Contras declined the following year, there is little evidence that the decline was caused by the ICJ judgment or any concerns about international law.¹⁰³ Congress reduced aid to the Con-

98. *Id.* at 24-27.

99. See Richard Sobel, *Public Opinion About U.S. Intervention in Nicaragua: A Polling Introduction*, in PUBLIC OPINION IN U.S. FOREIGN POLICY, *supra* note 96, at 49, 49-56.

100. Richard Sobel, *Public Opinion About U.S. Intervention in Nicaragua: A Polling Addendum*, in PUBLIC OPINION IN U.S. FOREIGN POLICY, *supra* note 96, at 59, 65-66.

101. Arnold H. Lubasch, *Lawsuit Dismissed on Ship that Struck Mine*, N.Y. TIMES, Dec. 12, 1986, at A16.

102. See Bernard Weinraub, *U.S. Limits Its Role at Court in Hague*, N.Y. TIMES, Oct. 8, 1985, at A5.

103. See Richard Sobel, *Contra Aid Fundamentals: Exploring the Intricacies and the Issues*, 110 POL. SCI. Q. 287 (1995). There was some expression of concern in Congress about the ICJ hearing prior to its final decision; Congressman Barnes criticized the Reagan administration for trying to avoid ICJ jurisdiction. But his main concern seemed to have been the administration's refusal to consult with or inform Congress about its plans to mine the harbors. See *The Mining of Nicaraguan Ports and Harbors: Hearing and Markup Before the House Comm. on Foreign Affairs*, 98th Cong. 1-8 (1984); see also *U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcomm. on Human Rights and Int'l Orgs. of the House Comm. on Foreign Affairs*, 99th Cong. (1985). Bills deploring the withdrawal from the ICJ were introduced in the House (with fifty-eight cosponsors) and the Senate (with eight cosponsors) but never voted on. House bill HR 2695, which sought to end support for all international organizations until the administration consented to compulsory jurisdiction in the ICJ, was voted on and defeated twenty-one to seventy-four. See also Weinraub, *supra* note 102 (describing congressional reaction to withdrawal as "subdued").

tras because of concerns about misappropriation of the funds, the Iran-Contra scandal, and new optimism about diplomatic solutions that could be derailed by the insurgency.¹⁰⁴

In sum, the evidence does not support Koh's claim that the ICJ's decision—or international law in general—played a causal role in the American decision to stop mining Nicaraguan harbors.¹⁰⁵

E. Human Rights

Several scholars have argued that international law governing human rights has caused states to “internalize” human rights norms. Lutz and Sikkink's study of the experiences of five countries in Latin America is one of the most careful efforts to document this process.¹⁰⁶

In the early 1970s, Uruguay and Paraguay were both governed by authoritarian governments.¹⁰⁷ Uruguay had signed the International Covenant on Civil and Political Rights (ICCPR); Paraguay had not.¹⁰⁸ NGOs, domestic opposition groups, and other individuals and institutions complained about both governments, which engaged in widespread torture of political opponents, but the rest of the world did not pay much attention.¹⁰⁹ In 1977, President Carter took office after an election campaign in which he promised to pressure authoritarian governments to improve their human rights practices. Carter kept his promise, and the United States threatened to withdraw aid and military assistance from states that were committing human rights abuses. Carter did not distinguish between states that had ratified the ICCPR and states that had not, and both Uruguay and Paraguay bowed to American pressure.¹¹⁰

At roughly the same time, Honduras and Argentina were both governed by authoritarian governments, which also engaged in sys-

104. Sobel, *supra* note 103.

105. The ICJ has never had much influence on the U.S. Just recently, the United States announced that it was withdrawing from the optional protocol that grants the ICJ jurisdiction over disputes arising under the Vienna Convention on Consular Relations. It did so after losing three Vienna Convention cases in a row before the ICJ. It did not comply with the first two judgments, and complied with the last only in the most minimal possible sense. See Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16. Rather than allowing itself to be constrained by the ICJ, the U.S. first ignored its judgments and then formally deprived it of power. Once again, there was no domestic or international outcry. Indeed, there was even support for withdrawal in the mainstream media. See *Defensible Diplomacy*, WASH. POST, Mar. 16, 2005, at A22.

106. See Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000). For a discussion, see GOLDSMITH & POSNER, *supra* note 3, at 135-66.

107. See Lutz & Sikkink, *supra* note 106, at 642.

108. *Id.* at 642-43.

109. See *id.* at 643-45.

110. See *id.* at 644-45. See generally KATHRYN SIKKINK, MIXED SIGNALS: U.S. HUMAN RIGHTS POLICY AND LATIN AMERICA 121-47 (2004) (describing the Carter administration's human rights policies).

tematic human rights abuses, including the practice of making political opponents “disappear.”¹¹¹ Honduras had signed the American Convention on Human Rights; Argentina had not.¹¹² NGOs and domestic opposition groups complained about the governments, but again no one else paid much attention. As in the prior case, both governments eventually abandoned the worst of their practices, in large part because of the pressure of the Carter administration. Again, Carter did not distinguish between states that violated international obligations and states that did not.

The final example involves a comparison of world reaction to a coup in Uruguay in 1973 and a coup in Guatemala in 1993. The world reacted with indifference to the first coup, but foreign countries vigorously protested the coup in 1993.¹¹³ Lutz and Sikkink argue that international legality accounts for the difference in reactions,¹¹⁴ but in fact, Guatemala had no legal obligation to maintain democratic institutions in 1993, no more than Uruguay did in 1973. The difference in world reaction had many explanations—including the wave of democratization in Latin America in the 1980s—but international law was not one of them.

The fact is that there is virtually no evidence that states have internalized international human rights law. Human rights did improve in the 1980s and 1990s, but this was mainly because of rising living standards¹¹⁵ and the end of the Cold War. Empirical studies have found no correlation between ratification of human rights treaties and improvement of human rights practices.¹¹⁶

Lutz and Sikkink, and others like them, point to the activity of NGOs and argue that NGOs and related organizations spread human rights norms from country to country.¹¹⁷ This may be true—though the evidence is exceedingly thin—but whether or not NGOs matter in this way, this says nothing about the propensity of states to comply with international law. The NGOs did not use these strategies only against treaty signatories; they used them against all states that violated human rights. Thus, whatever effect NGOs have had on the human rights practices of states, it has not been tied to international law.

111. See Lutz & Sikkink, *supra* note 106, at 647-48.

112. *Id.* at 648.

113. See *id.* at 652.

114. See *id.* at 653.

115. Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POL. SCI. REV. 853 (1994).

116. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

117. See Lutz & Sikkink, *supra* note 106.

F. *The Kellogg-Briand Pact*

I have so far used examples cited by supporters of the disaggregated state model, but there is no particular reason to limit oneself in this way. As a test of Koh's methodology, let us consider one of the greatest failures of international law and see whether we could tell a story in which transnational legal processes would have predicted the failure.

Of the many international law failures that one could choose from, perhaps the most famous is the Kellogg-Briand Pact of 1928, which outlawed war shortly before the most destructive war in human history and has had no observable impact on the propensity of states to go to war in general.

NGOs played an important role in the creation of that agreement; they included the Bureau International de la Paix, an international organization which won a Nobel Prize for its efforts to coordinate national peace organizations; America's Carnegie Endowment for International Peace, World Peace Foundation, Woodrow Wilson Foundation, and World Alliance for International Friendship through the Churches; Britain's League of Nations Union, which had nearly 500,000 members in 1927; Germany's Friedensgesellschaft, which had 28,000 members; and France's Ligue des Droits de l'Homme, which had 120,000 members.¹¹⁸ Other participating organizations included the War Resisters' International, the Fellowship of Reconciliation, and the Women's International League for Peace and Freedom.¹¹⁹ Many trade unions and political parties also supported the Kellogg-Briand pact. These organizations drew money and membership from people all over the world who were exhausted by war and inspired by Woodrow Wilson's vision of peace.

Countless transnational norm entrepreneurs also participated in the process; these included Nicholas Murray Butler and James Thomson Shotwell of the Carnegie Endowment for International Peace; Salmon O. Levinson, a wealthy businessman who founded the American Committee for the Outlawry of War; Colonel Raymond Robins, a former coal digger who became an effective orator in support of the Kellogg-Briand pact; Jane Addams; John Dewey; and Senator William E. Borah of Idaho.¹²⁰ There were also the diplomats—foremost among them the intelligent but ultimately credulous American secretary of state, Frank Kellogg, and the shrewd French foreign minister, Aristide Briand—and politicians and journalists and nongovernmental units such as the U.S. State Department. We

118. ROBERT H. FERRELL, *PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT* 17-18, 26 (1952).

119. *Id.* at 18.

120. *Id.* at 22-33. Ferrell also discusses many other players. *Id. passim.*

can certainly call this an “ad hoc nongovernmental network”—why not?—and if Koh were right, this network ought to have pulled, “through various forms of internalization[,] even the most powerful abstaining nations toward compliance.”¹²¹ But it did not.

The truth is that the Kellogg-Briand pact was the result of diplomatic maneuvering and the exploitation of naive public opinion.¹²² After the Americans refused to ratify the charter of the League of Nations, the French desperately sought some way to obtain an American security guarantee. They believed, rightly as it turned out, that they would not be secure against a resurgent Germany without an American alliance. After French attempts to obtain a bilateral security treaty were rebuffed by an increasingly isolationist American government, the French sought a more modest, *negative* treaty—an agreement that the United States and France would not go to war with each other, not a guarantee of mutual assistance—so that at least they could be sure that the United States would not go to war against France if France were drawn into a second world war as a result of its mutual defense pacts with Poland, Belgium, and other countries.¹²³ At this point, public opinion was aroused in both countries, and the Americans upped the ante by proposing a *multilateral* peace treaty, a cynical maneuver designed to ensure the United States would not be specifically committed to the defense of France. The Kellogg-Briand pact was the result. It reflected credulous public opinion, not diplomatic realities, and indeed the diplomats protected themselves and their governments by submitting interpretive notes that more or less reduced the pact to an empty shell.

Despite the participation of nonstate actors at all levels, both before its creation and afterwards, the Kellogg-Briand pact had no discernable influence on the decisions of states to go to war. And there is nothing special about the Kellogg-Briand pact. Every international treaty or agreement—big or small, successful or unsuccessful—was created through the efforts of nonstate actors. Thus, their presence cannot tell us anything about whether a treaty is likely to be successful.

V. SOME LESSONS

A. *Methodology Versus Substance*

Koh and others like him make two distinct arguments that they repeatedly fail to distinguish. The first argument is about methodology. Their methodological claim is that states’ decisions to make and

121. Koh, *Bringing International Law Home*, *supra* note 8, at 662.

122. See FERRELL, *supra* note 118.

123. See *id.* at 145.

comply with international law cannot be understood using the unitary state model. The second argument is substantive; it is that non-state actors cause states to make and comply with international law under conditions under which—according to the unitary state model, with its simple conception of the state interest—international law-making and compliance are impossible or unlikely.

These two arguments are analytically distinct: one can easily imagine variations on Koh's view. One might accept the methodological claim—which is akin to rejecting both realism and its rational choice variants—but argue that, in fact, nonstate forces limit the ability of states to enter and comply with international law. Indeed, despite his reputation as a great realist, Morgenthau made an argument along these lines. He argued that international law is more constraining in the eighteenth-century world of the quasi-unitary state—where monarchs, related to other monarchs by blood and sympathy, could treat international relations as an extension of their familial and social relations—than in the twentieth-century world of nationalism, where mass movements held power and had no respect for the people of other nations.¹²⁴ Because the two claims are distinct, I will evaluate them on their own terms.

The methodological claim is superficially attractive. There is no denying that states are fictions and that when a “state” makes a decision, the real decisionmaking is being done by individuals, who are influenced by local as well as international groups. So it seems plausible that the best understanding of international law must come from disaggregating the state. However, it is a common error to think that a more complex and realistic methodology is always better. Too much methodological complexity renders prediction-making impossible.

Initially, to understand why accurate premises are not always necessary, return to the realist view. The realists argued that the unitary state model is appropriate because all states, regardless of their composition, face the same international environment, which is, in essence, a security competition.¹²⁵ The structure of international relations forces states to either adopt a common strategy or cease to exist. The way that states make decisions may be interesting or important, but it is of little help for predicting such things as whether states go to war or comply with international law.

The realist view is not necessarily correct, of course, but not necessarily wrong either. The value of methodologies is always comparative, and therefore we must ask how the methodology of the disaggregated state fares by comparison with the methodology of the uni-

124. Hans J. Morgenthau, *The Twilight of International Morality*, 58 *ETHICS* 79 (1948).

125. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 186-87 (1979).

tary state. The problem with comparison, however, is that so few studies relying on a disaggregated state model have been performed. The best and most careful have been the studies of international trade, but even these are mainly theoretical, and the evidence remains skimpy. As between the disaggregated state model and the unitary state model, then, the jury is out. My hunch is that the disaggregated state model may prove useful for understanding discrete problems of international relations,¹²⁶ but it will never provide a comprehensive theory for why states comply with international law.

I want to turn now to the substantive claim, that nonstate actors cause states to comply with (or make, but I shall henceforth assume this) international law in cases where a unitary model would suggest otherwise. It turns out to be difficult to make this argument because the unitary model itself is ambiguous about the conditions under which states obey international law—or, I should say, there are many different unitary models, and each makes different predictions. Koh's *modus operandi* is to take the most extreme of the unitary models—the kind of severe realism of someone like John Mearsheimer¹²⁷—which seems to predict that states never obey international law except by accident, but this is to load the dice against the unitary model. Then, for Koh, he need only show that states sometimes obey international law, in cases where they have no clear interest in doing so, thus falsifying the unitary model and proving his own. But many unitary models—including the rational choice view—predict compliance with international law, so the mere fact of compliance-against-immediate-interest cannot be proof that nonstate actors matter.¹²⁸

To show that nonstate actors matter, one must offer a theory to show *how* they matter. But neither Koh nor anyone else has provided one.¹²⁹ The disaggregated state model cannot claim that all nonstate actors matter, and matter equally and indifferently. It must be that certain nonstate actors matter and others do not, and then we have the beginnings of a theory. Suppose that actors *A* and *B* matter and *C* and *D* do not; then we can predict that the state complies with in-

126. The democratic peace theory—which holds that democracies are more likely to go to war with authoritarian states than they are with each other or than authoritarian states are with other authoritarian states—is one example. See generally CHARLES LIPSON, *RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE* (2003); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs* (pts. 1 & 2), 12 *PHIL. & PUB. AFF.* 205, 323 (1983); Bruce Russett, *The Fact of Democratic Peace*, in *DEBATING THE DEMOCRATIC PEACE* 58, 58-81 (Michael E. Brown et al. eds., 1996).

127. See JOHN L. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001).

128. See GOLDSMITH & POSNER, *supra* note 3.

129. Koh's contribution is methodological: he stresses the role of nonstate actors. But he does not provide a theory—that is, a model of the behavior of nonstate actors—that provides predictions about when states comply with international law.

ternational law when *A* and *B* are concerned and not when *C* and *D* are concerned. Or, to be more concrete, suppose the theory is that independent courts matter; then we expect that states with independent courts comply with international law more often than states that lack them. One could make similar arguments about any number of things: the existence of civil society, a free press, a strong legal culture, and so forth. But no one has done this hard work, so we remain unenlightened about the role of nonstate actors in determining patterns of compliance with international law.

None of this is to say that disaggregating states is pointless or futile. The biggest problem with the unitary state model is that defining a state "interest" in the abstract, without any reference to the desires of citizens, interest groups, and elected officials, seems fruitless. Some political scientists have assumed that states seek "security" or "relative security," but this assumption cannot be the whole story, as not everything a state does is tied to security. We know that governments pass domestic laws that respond to the concerns of interest groups and citizens, and that these concerns involve issues other than security; why wouldn't foreign policy as well?

In order to define a state's interest for the purpose of analyzing international behavior, then, one must rely on a theory, even if a very rough and ready theory, about how the interests of citizens are translated by the political process into government policy. One might assume, for example, that democratic governments roughly express the preferences of the public at large, while authoritarian governments express the preferences of an elite. Whatever the case, it seems sensible to assume that trade law reflects state interests in advancing the prosperity of exporters and import-competers, human rights law reflects people's altruism, the law of the sea reflects merchant and other commercial interests, and so forth. In general, states seek to maximize the wealth and security of their people (or elites), and this general policy manifests itself in particular trade, human rights, security, and other foreign policies.¹³⁰

All of this is commonplace. But it is one thing to say that (say) interest groups influence the kind of treaties that states enter, and to say that a particular interest group may have an interest in ensuring that the government complies with a (favorable) treaty. It is quite another thing to say that interest group theories suggest that compliance with international law ought to be greater than the level that would be predicted by a model based on a unitary state interest. As I noted above, interest groups may encourage governments to violate international law as well as comply with it, and there is no reason to think that interest group pressures add anything to a state's general

130. See KEOHANE, *supra* note 3.

reputational interest in complying with international law. At least, such a claim would have to rely on a theory about why interest groups tend to promote law compliance rather than law violation, and such a theory has not yet been advanced.

B. *Law Creation Versus Law Enforcement*

International lawyers frequently neglect the crucial distinction between law creation and law compliance. The neglect is sometimes understandable, but it is methodologically sloppy. States create law when they enter treaties; they comply with the law when they comply with treaties rather than violate them. Here the distinction is clear. The picture is murkier with customary international law. Customs evolve in a decentralized fashion: states create them by complying with them. Still, the theoretical distinction remains.

As a methodological matter, this distinction matters. When Koh discusses the success of international law and the role of nonstate actors in state “compliance,” he frequently lumps together the role of nonstate actors in the creation of law and their role in compliance. There are two problems with this maneuver. First, creation is never in doubt when we are talking about compliance: if the law did not exist, we would not reach the question why states do (or do not) comply with it. But Koh frequently talks as if the considerable investment of time and resources by nonstate actors in law creation is evidence that states comply with the law.¹³¹ In fact, it is not evidence that nonstate actors cause states to comply with international law; it is only evidence that they cause states to create international law.

Second, the claim that nonstate actors influence the creation of international law is banal. If nonstate actors did not influence the creation of international law, who would? The “state” is a fiction and cannot cause itself to do anything. Much of the busy activity that Koh describes—all the activity of the transnational norm entrepreneurs, politicians, NGOs, corporations, and governmental units—is irrelevant because much of this busy activity occurs during the law-making process, not afterwards, when it is time to comply. To be sure, there is also activity during the compliance phase, and this activity is relevant; it is just that Koh’s use of the pre-law activity creates an aura of busyness that is misleading.

The work in this area would be much improved if scholars focused on the “why comply” question and not the “why make” question. Once we understand whether and when and why states comply with international law or particular international agreements, we will be bet-

131. For example, see the discussion on land mines *supra* Part IV.C.

ter able to understand why they create international law in the first place. But we are far from that stage of understanding.

C. *Compliance Versus Implementation*

Much of the disaggregated state scholarship fails to distinguish between compliance with international law and implementation of international law. Compliance means that a state curbs its interests to bring its behavior into conformity with the requirement of international law. Implementation refers to the way that the state brings its behavior into conformity with international law. A state that complies with international law may be able to choose many ways of implementing its compliance.

To illustrate, suppose that a state agrees to respect a certain border. To comply with this agreement, the state—that is, its government—must enact certain measures, such as laws forbidding its own citizens to cross the border. These laws could take any number of forms, with different penalties, enforced by different agencies. Suppose, for example, that the government enacts a law that creates a criminal penalty for any citizen who crosses the border without permission from the other government. The law can be enforced only through the participation of prosecutors, judges, defense attorneys, and other nonstate actors.

Koh's view seems to be that all of this implementation activity—the “transnational legal process”—has something to do with compliance. In a sense, this is true. For the state to comply with its agreement to respect the border, it must rely on officials and other individuals. However, Koh's view seems to be stronger: that these officials may cause the state to comply with the border agreement when the government no longer has an interest in doing so.

It is hard to understand why this could be so. The lawyers and courts implement the border agreement only because they are authorized by legislation; if the legislation is repealed, then they will stop implementing the agreement. The blur of busy nonstate actor activity is certainly evidence that implementation is occurring, but it tells us nothing about whether nonstate actors are forcing the state to comply against its interest.

To be sure, it is conceivable that the officials and courts could try to prevent the state from withdrawing from its border agreement. The prosecutors could resign; the courts could declare the withdrawal unconstitutional. But there is no reason to expect these people and institutions to do so; and I have not seen evidence of it.

The same points can be made about the literature on networks. Consider Raustiala's case studies, which show that government agencies cooperate with each other across borders when enforcing se-

curities, antitrust, and environmental laws.¹³² The agencies do this either because of formal treaties or because they see international cooperation as flowing from their domestic mandates—for example, to catch overseas entrepreneurs who defraud American investors. These case studies show that as more international interactions occur among citizens (driven by the decline in transportation and communication costs and a relatively peaceful security situation) and as states rely more heavily on their bureaucracies to regulate conduct, there will be more international cooperation among these bureaucracies. The case studies do not show that states are more likely to comply with international law if they have bureaucracies than if they do not.

Raustiala's theory is the opposite: he argues that bureaucracies do not simply implement cooperative agreements among states; they make cooperation, and thus compliance with international law, easier and more likely. The theory requires one to engage in difficult counterfactual reasoning of the following sort. Imagine two states, *A* and *B*, that have bureaucracies that deal with a relevant international agreement and two states, *C* and *D*, that do not. Raustiala thinks that *A* and *B* are more likely to comply with an international agreement than *C* or *D* are—or, perhaps, that *A* and *B* will enter (and comply with) a more ambitious international agreement than *C* and *D*. The bureaucratic networks disseminate information in a way that fosters compliance; without the bureaucracies, compliance and cooperation are too costly.

At one level, the theory is unobjectionable. States create bureaucracies to implement the law; to the extent that they care about international treaties, they ought to direct their bureaucracies to comply with them. If the bureaucracies do their jobs properly, compliance should be more frequent than it would otherwise be. This is like saying that if two corporations enter a long-term procurement contract, they are more likely to comply with it if they have bureaucracies than if (say) the CEOs try to implement the contracts themselves (whatever that might mean). But Raustiala's goal seems to be more ambitious: to show that the creation of networks below the level of the government should enhance compliance beyond what might otherwise be in the government's interest.¹³³

His three case studies, however, do not provide evidence for this view. They are narrative descriptions of how bureaucracies cooperate. In the area of securities law, the U.S. SEC has persuaded other countries to adopt U.S. securities policies, making it easier for the SEC to enforce American securities law and policy overseas. Other

132. Raustiala, *supra* note 5, at 26-49.

133. *Id.* at 91-92.

countries have benefited from the SEC's expertise in creating and enforcing securities rules.¹³⁴ In the area of competition policy, a similar phenomenon has occurred, except here the world has divided, with some countries clustering around the American system and other countries following the European system.¹³⁵ In the case of environmental law, Raustiala discusses the way that Mexico's environmental regulators benefit from the expertise of the U.S. EPA.¹³⁶ These case studies are ambiguous. They might show the networks constraining their governments; but it is just as plausible that the bureaucracies are following the directions of their governments, which have ordered them to cooperate with each other.

D. International Law Versus International Morality and the Diffusion of Norms

Confusion also arises from the neglect of another distinction, this one between international law and international morality. The neglect of this distinction is interesting as well as confusing; it results in part from a real complexity about international law. Many international law scholars claim that international law is not just positive law—that is, the result of states consenting to certain rules—but is also circumscribed by natural law. There are certain norms—*jus cogens* norms—that states cannot override.¹³⁷ For example, there can be no treaty that authorizes genocide.¹³⁸ Such a treaty would not be valid international law.

Few people deny this view, but this argument is definitional, not substantive. Let IL(P) refer to rules of international law that can be traced exclusively to state consent and that have no independent moral or “natural law” component. Let IL(R) refer to IL(P) supplemented with, and limited by, natural law rules to which states have not consented. IL(P) could permit genocide, for example; IL(R) could not. Old-fashioned positivists believe that IL(P) exhausts international law; most modern international lawyers believe that IL(R) defines the contours of international law.¹³⁹

134. *Id.* at 28-35.

135. *Id.* at 35-43.

136. This is an example of what he calls “capacity-building.” Mexico “wants” to comply with environmental norms—indeed, has its own environmental law that it does not enforce vigorously—but does not have the bureaucratic capacity to do so. The United States helps build up this capacity by supplying expertise and other resources. *See id.* at 79-80.

137. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

138. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, 1996 I.C.J. 595, 616 (July 11).

139. Part of the confusion here comes from disagreement about what counts as a source of law; in part, norms seem to be considered *jus cogens* only because states say they

The question, now, is whether states that “comply with international law,” to the extent that they do, comply with IL(P) or IL(R). Consider our discussion of human rights. The IL(P) thesis predicts that only states that ratify human rights treaties refrain from human rights abuses when those abuses would otherwise be in the states’ interest. The IL(R) thesis suggests that even states that do not ratify human rights treaties will be influenced either by those treaties or perhaps by an emerging “norm” reflected in the behavior of the states that do ratify the treaties.¹⁴⁰ Thus, the IL(R) thesis might predict that as more states ratify and comply with human rights treaties, the pressure on the holdouts increases.

Stated this way, the IL(R) thesis converges with a view held by many sociologically oriented political scientists and law professors. This view is that states imitate each other regardless of what international law says, although the norms of behavior may eventually make their way into international treaties. This thesis, in fact, seems advanced, at least implicitly, by Lutz and Sikkink.¹⁴¹ That may be why they are less interested in whether the states they study formally ratified the human rights treaties than whether their behavior changed over time. Another example comes from Goodman and Jinks, who point to how women’s suffrage spread at an increasing rate after a few states initially adopted it, as though by a kind of contagion effect.¹⁴²

States imitate each other; in particular, new and unsuccessful states imitate successful states. Japan imitated Western political and military models after its isolation was penetrated in the 1850s.¹⁴³ Authoritarian political systems gained popularity after the failure of democracy in Germany, Italy, and France in the 1920s and 1930s.¹⁴⁴ And the democratic and free market policies of Western nations were widely imitated after the collapse of the Soviet Union.¹⁴⁵ In light of these examples, the increasing adoption of human rights values, in-

are or because international organizations say they are; in that sense, positivism seems to be playing a role. But I prefer to avoid these murky waters.

140. An alternative interpretation of IL(R) is that, regardless of what states do, human rights abuses violate international law.

141. See the discussion of their argument *supra* Part IV.E. See also MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1* (Thomas Risse et al. eds., 1999).

142. See Goodman & Jinks, *supra* note 5 (manuscript at 18) (citing Francisco O. Ramirez et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735, 740-41 (1997)).

143. ANDREW GORDON, *A MODERN HISTORY OF JAPAN* 61-76 (2003).

144. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 17-18 (1993).

145. *Id.* at 21-26.

cluding the ratification of human rights treaties, seems like more of the same: citizens and governments imitating successful states.

Whatever its merits, the relationship between this line of thinking and the traditional debates about international law is obscure. One theory might be that treaties play no causal role at all: governments enter treaties in order to show their citizens and the world that they have decided to imitate other states. The treaties are effects, not causes, and if circumstances change—human rights seemed like a great idea yesterday but not today—the treaties will not prevent states from changing their behavior. Another theory, which is more congenial to the literature, is that the treaties and other forms of international law serve as an accelerating force. Once states enter a treaty, events that would otherwise cause them to stop imitating other states no longer have this power. Although this theory might be true, it would be extremely difficult to test it, as one would have to show that a treaty accelerated behavior rather than merely changed it. To my knowledge no study provides such evidence; more commonly, as in the Lutz and Sikkink study, international law fades into the background.

E. Anecdotes Versus Empiricism

Most of the evidence mustered by supporters of the disaggregated state model is anecdotal. Anecdotal evidence can be useful, but it has limited value. Koh's discussions are occasionally suggestive, but they do not provide convincing evidence for his model. And, as his discussions illustrate, the temptation to present anecdotal evidence selectively is hard to resist. Those knowledgeable about the events Koh discusses will find his accounts difficult to reconcile with any dispassionate historical analysis.¹⁴⁶ Evidence can be persuasive only if presented in a systematic way.

This better approach is taken by Sikkink and Lutz, as discussed above. Their method works like this: take two "subjects" (here, states) and compare the activities of one state, which is governed by an international law, with the activities of another state, which is the "control," because it is not governed by the international law. See if activities in the subject state differ, in the way predicted by theory, from the activities of the control state. If so, one has some evidence for the theory. To be sure, there could be standard empirical problems—omitted variables, direction of causation, and the like—but this kind of qualitative test nonetheless remains useful and instruc-

146. Keohane also criticizes Koh for emphasizing successes and neglecting failures. See Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 713 (1998).

tive, especially because the data needed for statistical tests that could correct for the empirical problems are often lacking.

The problem for the disaggregated state model is that however suggestive the anecdotal evidence, the few systematic examinations of the evidence do not support the model. This is not to say that future studies will come to the same conclusion; they might not. The point here is that more such studies need to be done.

VI. CONCLUSION

My purpose has not been to dismiss the disaggregated state model. As a methodological approach, it has much to offer. But it is also highly undeveloped. Most authors who have been influenced by this model have not proposed theories that are specific enough to be tested with any degree of confidence. Koh's theory, for example, is too ambiguous to test: it is impossible to know what would count as evidence against it. He and other authors have identified factors that *might* lead states to comply with international law, but they have not provided evidence that these factors *do* lead states to comply with international law.

It follows that the disaggregated state model, as currently developed, has no particular implications for the question why states comply with international law or with international norms that have not been legalized. The usual argument—which is that if you look at nonstate factors, you will understand why states comply with international law or norms more than realists—is no more plausible than the opposite view, which is that if you look at nonstate factors, you will conclude that states ought to comply with international law less than international legalists think they do. Although some nonstate factors push in favor of compliance and cooperation, others push in favor of violation and conflict. How these factors balance out remains unresolved.