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Commitment and compliance
the role of non-binding norms
in the international legal system

edited by Dinah Shelton.

COMMITMENT AND COMPLIANCE

*The Role of Non-Binding Norms
in the International Legal System*

Edited by
DINAH SHELTON

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Foreword

Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System is the culmination of a three-year study project organized by the American Society of International Law with the support of the National Science Foundation and the Ford Foundation. We are grateful for their support for this ground-breaking study that adds an important piece to the growing literature on compliance in the international legal system.

The project was initiated by Professor Edith Brown Weiss of the Georgetown University Law Center during her term as President of the American Society of International Law from 1994 to 1996. It builds on her work with Professor Harold K. Jacobson of the University of Michigan on compliance with international environmental accords which culminated in their edited volume, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998). Professor Weiss guided the early development of what came to be called the 'soft law project' by convening a workshop in May 1996 to identify issues raised by state compliance with non-binding norms and to develop a research agenda for elucidating and analyzing the problem area.

Drawing from this and other discussions, the project managers made several decisions about the direction of the ASIL soft law project including that the project would (1) be collaborative, multidisciplinary, and international; (2) provide a broad legal context within which to position issues of compliance with 'soft law'; and (3) undertake some comparative analyses of the use of soft law and compliance in several topic areas within international law. These decisions reflect the ASIL's strong research tradition of being cross-cutting, multidisciplinary, and international.

Throughout the study, the participants in this project held several meetings to discuss their contributions and the issues under consideration. These meetings were impeccably organized by Sandra Liebel of the ASIL, who also was instrumental in collecting and distributing manuscripts and keeping in touch with all the authors. She and others at Tiller House have been enormously helpful throughout the project. Thanks also to Brian Murray (J.D. 2000, Notre Dame Law School) for his assistance on the manuscript.

Although collaboration is a hallmark of ASIL's research program, the effectiveness and success of any particular project depends greatly on the leadership and guidance provided by the project director, in this instance Professor Dinah Shelton of Notre Dame Law School. And in Professor Shelton, the project found a fine and dedicated director. Contributors to the project probed issues, challenged received wisdom, and pushed the boundary of our knowledge. Working with each contributor and throughout the study,

Professor Shelton remained unflagging in her commitment to produce a volume of thoughtful and inter-related studies on what at times seemed a subject that could not be grasped. The value of this book as a collection of studies reflects her intellectual breadth and editorial skill. The ASIL is grateful to her and to all those who have contributed to this volume for working to deepen our understanding of the complexities of the contemporary international legal system.

CHARLOTTE KU
Executive Director
American Society of International Law
Washington, D.C.
August 1999

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List of Contributors

Richard B. Bilder is Foley & Lardner Emeritus Professor of Law at the University of Wisconsin-Madison. He previously was an attorney in the Office of Legal Adviser at the U.S. Department of State. Professor Bilder has served as a Vice-President of the American Society of International Law, on the Board of Editors of the *American Journal of International Law*, on the Executive Council of the Law of the Sea Institute, as Chair of the International Law Association's Committee on Diplomatic Protection of Persons and Property, on U.S. delegations to international conferences and as an arbitrator in international and domestic disputes.

Laurence Boisson de Chazournes is a professor of international law at the University of Geneva. Between 1995 and 1999 she served as Senior Counsel in the Environment and International Law Unit of the Legal Department at the World Bank.

Douglass Cassel is Director of the Center for International Human Rights of Northwestern University School of Law in Chicago. From 1992 to 1993 he was Legal Adviser to the United Nations Commission on the Truth for El Salvador. He has written extensively on human rights in the Americas, appeared before the Inter-American Commission and the Inter-American Court of Human Rights, and been a consultant to non-governmental organizations, to the United States Mission to the Organization of American States, and to the OAS Secretariat.

Jonathan L. Charney is the Alexander Heard Distinguished Service Professor at the Vanderbilt University School of Law in Nashville, Tennessee. He is Co-editor in Chief of the *American Journal of International Law*, and has served as a member of the Board of Editors of the *Journal* since 1986. He is a member of the Council on Foreign Relations, the American Law Institute, and the Board of Editors of the journal *Ocean Development and International Law*. He has served as a Vice-President of the American Society of International Law and directs the Society's International Maritime Boundary project. He was a member of the United States delegation to the Third United Nations Conference on the Law of the Sea and served as Chief of the Marine Resources Section in the Land and Natural Resources Division of the United States Department of Justice.

Abram Chayes was Felix Frankfurter Professor of Law Emeritus at Harvard Law School. He was a life member of the American Law Institute and has served on the Executive Council of the American Society of International Law. He was a practicing attorney and served as the Legal Adviser of the U.S. Department of State. He participated in numerous international arbitrations and published extensively in the field of international law, especially in the area of arms control, disarmament, and dispute settlement.

Christine Chinkin is professor of international law at the London School of Economics and Political Science. She was previously Dean and Head of Department at the University of Southampton. She is a member of the Board of Editors of the *American Journal of International Law* and has written in areas of human rights, especially the human rights of women, international and domestic dispute resolution, and other aspects of international law.

David S. Gualtieri serves as a trial attorney with the Environment and Natural Resources Division of the United States Department of Justice. Previously he was an associate with Mayer, Brown & Platt and prior to that served as an Energy and Environmental Programs Attorney at Argonne National Laboratory. He also worked as a staff attorney in support of the Chairman of the United Nations Commission of Experts to Investigate Violations of International Humanitarian Law in the Former Yugoslavia. He has written in the areas of weapons control, international criminal law, and environmental regulation. Mr Gualtieri's contribution was written solely in his individual capacity and does not necessarily reflect the views of the United States Department of Justice, Argonne National Laboratory, or any other agency of the United States Government.

Peter M. Haas is a professor of political science at the University of Massachusetts at Amherst. He has published widely on international environmental subjects and on international relations theory. His recent work has focused on the interplay between international institutions and scientific involvement in the creation and enforcement of international regimes addressing transboundary and global environmental risks. He has consulted for the Commission on Global Governance, the United Nations Environment Programme, United States Department of State, United States Environmental Protection Agency, United States National Academy of Sciences, the American Association for the Advancement of Science, and the World Resources Institute.

Christopher C. Joyner is professor of international law in the Government Department at Georgetown University. He has also taught at George Washington University, Dartmouth College, and the University of Virginia, and served as a Senior Research Fellow at the Marine Policy Center, Woods Hole Oceanographic Institution, and at the Institute of Antarctic and Southern Ocean Studies at the University of Tasmania. He has published extensively on Antarctic law and politics.

Barry Kellman teaches at DePaul University College of Law and is co-director of the International Criminal Justice and Weapons Control Center. He chairs the ABA Committee on Law and National Security, is Chair of the Arms Control Section of the American Society of International Law, and also served as Chair of the Committee of Legal Experts on the Chemical Weapons Convention. He has been a consultant to the Defense Nuclear Agency on

issues relating to the legal implementation of the Chemical Weapons Convention and the Strategic Arms Reduction Treaty, and to the Department of Energy on issues relating to verification procedures under the Nuclear Non-Proliferation Treaty. Since 1995, he has participated in the Group of Experts on Regional Security and Arms Control in the Middle East, serving as Chair of the Working Group on Elements of a Weapons of Mass Destruction Free Zone. Professor Kellman has numerous authored articles and book chapters on the laws of armed conflict, Middle East arms control, nuclear non-proliferation, and weapons smuggling.

Alexandre Charles Kiss is Director of Research Emeritus at the French National Center for Scientific Research and is President of the European Council on Environmental Law. He has specialized in international environmental law since the end of the 1960s, authored several books and more than 250 articles in this field. He is a consultant for numerous international institutions and for the French and Hungarian Governments. He is active in numerous environmental associations and serves as a vice-president of the International Institute of Human Rights.

Francis Maupain is former Legal Adviser to the International Labour Organization. He has a LL.M from Harvard Law School and a doctorate in law from the Sorbonne University in Paris. He is widely published in the field of international labor law.

Christopher McCrudden is Reader in Law at Oxford University, a Fellow at Lincoln College, Oxford, and a visiting professor at the University of Michigan Law School. He served as a member of the Standing Advisory Commission on Human Rights between 1984 and 1988 and has been an adviser to the Fair Employment Commission. He testified to the U.S. Congress, House of Representatives, International Relations Committee in March 1995 on economic justice in Northern Ireland.

Mohamed Ali Mekouar is Senior Legal Officer for natural resources and environmental law with the Legal Office of the United Nations Food and Agriculture Organization. He previously was professor at the Faculty of Law of Casablanca where he taught and researched in the field of environmental law. He has been a consultant providing technical assistance on environmental law and natural resources to governments throughout the world. He has lectured widely in Africa, South America, and Europe and published books and articles on natural resources and environmental law.

Mary Ellen O'Connell is an associate professor at The Ohio State University College of Law. She previously was a visiting professor at the University of Cincinnati College of Law, the University of Munich, and the Bologna Center of the Johns Hopkins University School of Advanced International Studies. She has also been a member of the faculties of Indiana University-Bloomington and the George C. Marshall European Center for Security Studies. She has authored books and more than two dozen articles

on international law, especially on the use of force, enforcement of international law, and international environmental law.

Wolfgang H. Reinicke is a Senior Partner and Senior Economist in the Corporate Strategy Group of the World Bank, Director of the U.N. Project on Global Public Policy, and a Nonresident Senior Fellow in the Foreign Policy Studies program at the Brookings Institution in Washington D.C. Dr. Reinicke is a fellow of the World Economic Forum, a member of the Academic Council of the American Institute for Contemporary German Studies, and an advisor to several U.S. and European foundations. Dr. Reinicke previously was a Senior Scholar at the Brookings Institution (1991-98), a strategic management consultant for Roland Berger in Munich, in the operations department at Dresdner Bank in London, and a consultant to the National Academy of Sciences and the U.S. Agency for International Development.

Naomi Roht-Arriaza is a professor of law at the University of California, Hastings College of Law, San Francisco. Professor Arriaza teaches in the areas of domestic and international environmental law, international human rights, and torts. She is an associate editor of the *Yearbook of International Environmental Law* and has written widely on ISO 14000, among other issues. During 1995, she was a Senior Fulbright Scholar in Spain.

Donald R. Rothwell is an associate professor at the Faculty of Law, University of Sydney. His major research interests include constitutional and international law, with a specific focus on federalism, international environmental law, law of the sea, and law of the polar regions. He is widely published in these fields and since 1996 he has been the Editor-in-Chief of the *Asia Pacific Journal of Environmental Law*.

Erika B. Schlager joined the staff of the U.S. Commission on Security and Cooperation in Europe in September 1987 and serves as Counsel for International Law. Her responsibilities include developing Commission policy recommendations to the Department of State; participating in U.S. delegations to OSCE negotiations and specialized OSCE meetings on human rights, democracy-building and the peaceful settlements of disputes; authoring and editing reports and briefing papers on human rights, European institutional development, conflict and crisis management and the International Criminal Tribunal for the Former Yugoslavia; analyzing policy and legal issues relating to the OSCE and the Council of Europe; and lecturing to academic and public policy constituencies, including the U.S. Foreign Service Institute.

Dinah Shelton is professor of international law at the University of Notre Dame Law School. She is director of the doctoral program at the University's Center for Civil and Human Rights and a Fellow of the Kroc Institute for International Peace Studies. She has lectured throughout the United States, Europe, Africa and Asia and is widely published in the field of international law, particularly concerning human rights, international environmental law,

and international institutions. She has served on the Executive Council of the American Society of International Law, the International Institute of Human Rights, and various other international law and human rights associations. She is a contributor to the *Yearbook of International Environmental Law* and a member of the Environmental Law Commission of IUCN. She is a consultant to numerous international organizations and has participated in cases before several international tribunals.

Clare Shine is a British barrister now practicing as a consultant in environmental law and policy in Paris. She has worked for several international organizations, including the CMS, Ramsar and CITES Secretariats, IUCN, European Union, Council of Europe, UNITAR and the U.N. Regional Activity Centre for Specially Protected Areas, and for the French Coastal Areas Conservancy. She is a contributing author to the *Yearbook of International Environmental Law* and a member of the IUCN Commission of Environmental Law.

Beth Simmons is an associate professor of political science at the University of California, Berkeley. She has written and published extensively in the area of international political economy and her recent research focuses on compliance with international law. Her first book, *Who Adjusts? Domestic Sources of Foreign Economic Policy During the Interwar Years*, won the American Political Science Association's 1995 Woodrow Wilson Prize for the best book published in the previous year on government, politics, or international relations. She has recently held fellowship positions at the International Monetary Fund and the United States Institute of Peace.

Richard L. Williamson, Jr. is Associate Dean and Professor of Law at the University of Miami. He was in the United States Foreign Service and later Division Chief of the U.S. Arms Control and Disarmament Agency. He served as an attorney in private practice between 1984 and 1988. He has taught and written extensively on arms control and international environmental law.

Edith Brown Weiss is the Frances Cabell Brown Professor of International Law at Georgetown University Law School. She is past president of the American Society of International Law, a member of the Board of Editors of the American Journal of International Law, and a member of the Council on Foreign Relations and the U.S. National Academy of Sciences. Between 1990 and 1992 she was Associate General Counsel for International Activities in the U.S. Environmental Protection Agency. She was previously an attorney advisor for the U.S. Arms Control and Disarmament Agency. She has lectured and published widely on international environmental law.

David A. Wirth is a professor of law at Boston College, Newton, Massachusetts. He also has taught at Washington and Lee and the University of Virginia law schools. He previously served as senior attorney with the Natural Resources Defense Council and the Office of Legal Advisor, U.S.

Department of State. He has published extensively in the field of international environmental law and international trade law. His work for this volume was supported by a research grant from Boston College Law School and he draws in part on his previously published writings.

Jan Martin Witte is a graduate student at the Johns Hopkins University, School of Advanced International Studies, Washington, D.C. and a Research Associate with the U.N. Vision Project on Global Public Policy Networks. He received a diploma in Political Science from the University of Potsdam. During his studies in Germany he was a scholar of the Friedrich-Ebert Foundation (FES). He specializes in international relations theory and international political economy.

Lyuba Zarsky is Co-director of the Nautilus Institute for Security and Sustainable Development in Berkeley, California and manages the Institute's Globalization and Governance Program. She has written widely on innovative approaches to the environmental and social governance of international markets, especially in Asia, and twice served on the U.S. delegation to meetings of APEC Environment Ministers. Her current research focuses on developing international investment rules which promote sustainable development and new approaches to enhance corporate social accountability.

Abbreviations

APEC	Asia-Pacific Economic Cooperation Forum
ASIL	American Society of International Law
ATCM	Antarctic Treaty Consultative Meeting
ATCP	Antarctic Treaty Consultative Party
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COP	conference of the parties
DFI	direct foreign investment
DNA	designated national authority
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EMS	environmental management standards
FAO	Food and Agriculture Organization
FATF	Financial Action Task Force
GATT	Global Agreement on Tariffs and Trade
GEF	Global Environmental Facility
GFCM	General Fisheries Commission for the Mediterranean
GNP	gross national product
IAEA	International Atomic Energy Agency
I-ATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IGO	intergovernmental organization
ILO	International Labor Organization
IMF	International Monetary Fund
INC	intergovernmental negotiating committee
IPTP	Indo-Pacific Tuna Programme
IRPTC	International Register of Potentially Toxic Chemicals
ISO	International Organization for Standardization
LDC	Lesser developed countries

MTCR	missile technology control regime
MNC	multinational corporations
MOP	meeting of the parties
NAFO	North Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NBILA	non-binding international legal agreement
NEAFC	Northeast Atlantic Fisheries Commission
NGO	non-governmental organization
NIC	newly industrializing countries
NPAFC	North Pacific Anadromous Fish Commission
NPT	Nuclear non-proliferation treaty
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization of Economic Cooperation and Development
OECS	Organization of Eastern Caribbean States
OLDEPESCA	Organization for Latin American Fishing Development
OSCE	Organization for Security and Cooperation in Europe
PIC	prior informed consent
R&D	research and development
REIO	regional economic integration organization
SFDI	Société française de droit internationale
SPAR	South Pacific Albacore Research Working Group
SPC	South Pacific Commission
SPF	South Pacific Forum
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Program
UNEP	United Nations Environment Program
UNGA	United Nations General Assembly
US or USA	United States of America
WECAFC	Western Central Atlantic Fishery Commission
WHO	World Health Organization
WMD	weapons of mass destruction
WTO	World Trade Organization

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Introduction

Law, Non-Law and the Problem of 'Soft Law'

DINAH SHELTON

The studies in this volume concern three interrelated issues: (1) the nature of international law, (2) the role of legally non-binding norms or 'soft law' in the international system, and (3) compliance with international norms. The interaction of the three issues raises questions about law-making and the boundaries of international law in the modern world. The subject of compliance with non-binding norms draws the issues together, being concerned with why states and other international actors choose to conclude non-binding rather than binding normative instruments and whether or to what extent that choice affects their consequent behavior.

Non-binding norms have complex and potentially large impact in the development of international law. Customary law, for example, one of the two main sources of international legal obligation, requires compliance (state practice) not only as a result of the obligation, but as a constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also may be considered a form of state practice.

Considerable recent scholarship on compliance has questioned what motivates governments and other actors to give effect to international law, but few of the studies have concerned compliance with non-binding norms.¹ As discussed below by Peter Haas, many scholars question whether conforming acts result from habit or motivated, self-interested decision. Others ask whether sanctions or other forms of coercion are necessary to achieve compliance or

¹ Several scholars have considered the theoretical legal effect of non-binding norms without examining whether in fact such norms are followed. See e.g. Dupuy, R.J., 'Droit déclaratoire et droit programmatore: de la coutume sauvage à la "soft law"', in SFDI, *L'Elaboration du droit international publique* (1973) 132; Seidel-Hohenveldern, I., 'International Economic "Soft Law"', 1979-II *RCADI* 173; Bothe, M., 'Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?' (1980) XI *Neth. YB Int'l L.* 65; Weil, P., 'Towards Relative Normativity in International Law?' (1983) 77 *Am. J. Int'l L.* 413; Francioni, F., 'International "Soft Law": A Contemporary Assessment', in Lowe, V., and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice, Essays in Honor of Sir Robert Jennings* (1996) 167.

whether managing problems through incentives is more effective.² Managerial approaches suppose that states comply with rules in regulatory regimes out of enlightened self-interest and respond to non-coercive tools such as reporting and monitoring. The existence of international bureaucracies created and driven by treaty regimes they supervise makes compliance possible and likely, helping resolve ambiguity or indeterminacy of norms, assisting regulatory targets to overcome deficits in capacity to comply through technical assistance, and otherwise inducing conforming behavior. International institutions thus are a focal point for maximizing compliance and reducing the likelihood of defection.³

The present introduction sets forth a framework for the present study, beginning with a discussion of the traditional characteristics of international law. It then looks at recent changes in the international system and the difficulties they pose for resolving problems through traditional international law-making, leading to a discussion of the role of law and the rule of law generally, including the importance of compliance. It suggests several hypotheses about the reasons states have recourse to non-binding norms and what may be expected from a study of compliance with them. First, the background and scope of the ASIL project is presented.

A. BACKGROUND AND SCOPE OF THE STUDY

The project to study compliance with international non-binding norms or 'soft law' began with a workshop held on May 8–10, 1996. The workshop brought together participants from several disciplines to identify and explore issues raised by compliance with 'soft law' and to design the elements of a research agenda. In part, the meeting sought to test the hypothesis that countries sometimes comply with non-binding legal instruments as well as they do with binding ones. The term 'soft law' itself seems to contain a normative element leading to expectations of compliance.⁴

The workshop paid particular attention to environmental soft law, due to the recent work of Edith Brown Weiss and Harold Jacobson on compliance with international environmental treaties.⁵ Participants also looked at ques-

² Compare e.g. Downs, G., et al., 'Is the Good News About Compliance Good News About Cooperation' (1996) 50 *Int. Org.* 379, with Chayes, A., and Chayes, A.H., *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) and Young, O., *International Governance: Protecting the Environment in a Stateless Society* (1994).

³ See Abbott, K.W., 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale J. Int'l L.* 335.

⁴ Elements in a possible definition of soft law are addressed in Chapter 1 by Christine Chinkin. Throughout the project, the participants debated the appropriateness of using the term 'soft law', given its ambiguity and questionable correctness as a legal term. The various usages in this volume reflect the unresolved discussions.

⁵ Jacobson, H.K., and Brown Weiss, E., 'Compliance with International Environmental Accords' (1995) 1 *Global Governance* 119.

tions of compliance in other subject areas of international law.⁶ They identified numerous issues as needing study: do states comply with soft law; what factors compel states to comply; do these factors differ depending on whether law is hard or soft; do states respond to soft law in ways that look like responses to hard law? A hypothesis emerged from the workshop that 'soft law' is used more frequently in some fields of international law than others. Some suggested that soft law norms are more frequently utilized in the subject areas of environment and human rights than in trade and arms control.

The project took up the questions raised by the workshop. The initial aim was to study compliance with soft law in general, with a focus on environmental law because soft law has played a particularly important role in that new field. After further reflection, however, a decision was made to compare four subject areas: human rights, environment, arms control, and trade and finance. Each of the fields has particularities that result in different uses for non-binding norms and a different ratio of non-binding norms to 'hard' law. Human rights law has developed over the past fifty years into a broad code of behavior for states and state agents, not only in their relations with other states, but primarily as non-reciprocal, unilateral commitments towards all those within the jurisdiction of the state. Environmental law, in contrast, aims more at regulating non-state behavior: most environmental harm is caused by private entities and not by state agents. Arms control is a classic inter-state issue related to securing international peace and security, requiring regulation of both state and private entities. Trade and finance is perhaps the most varied of the four areas, one where there are examples of a high degree of regulation and others where there is virtually no law. *Quid pro quo* is more easily perceived in the trade and arms control subject areas than in environment and human rights. Consequently, bilateral enforcement is easier in the former and perhaps compliance is easier to measure and to ensure. With incorporation of human rights and environmental concerns into the trade and finance area, and linkage of human rights and security in the OSCE, greater complexity appears.

The limited time and resources available also led to a methodology that confines the project to drawing out relevant factors from specific cases rather than from a broad empirical study. Within each subject area, cases were chosen for analysis on the basis of hypotheses about factors that might influence compliance. Those factors are:

(1) The institutional setting. Soft law has been adopted by global general organizations, global specialized organizations, regional organizations, and private groups. The project participants discussed at length whether or not to include norms adopted by non-state actors. Ultimately it was decided to

⁶ Papers from the workshop have been published by the American Society of International Law as No. 29 in its *Studies in Transnational Legal Policy: International Compliance with Nonbinding Accords* (Weiss, E.B., ed., 1997).

include them because they are usually intended to impact on state behavior or to circumvent state policies. In addition, with increasing globalization, transnational entities that make their own rules prepare and enter into normative instruments that look much the same as state-adopted norms. Our hypothesis was that the participation of the relevant stakeholders in the creation of the norm would lead to greater compliance.

(2) Regional diversity. We sought to examine norms from different regions where there are different levels of economic development and thus varying capacity to comply. In addition cultural differences in attitudes towards informal agreements might affect compliance.

(3) Type of obligation. Some of the cases call for state abstention from action (e.g. not violating human rights) while others demand positive measures (e.g. pesticide labeling). We assumed that costly positive measures would produce less compliance because lack of capacity to comply would become a greater factor.

(4) Generality and specificity. Some of the norms are very general while others (e.g. the driftnet fishing ban) are detailed and specific. We assumed that compliance would be better for specific norms that clearly convey what behavior is expected than with ambiguous or vague norms.

The grouping of the cases by topic is based on the original assumption that subject matter is a factor in use of and compliance with non-binding norms. The study could be re-sorted according to the type of actor adopting the norm or nature of the target group. These may be significant factors, but may themselves depend on the nature of the subject matter.

Throughout the project, participants debated whether binding instruments (law) and non-binding ones (soft law or non-law) are strictly alternative, or whether they are two ends on a continuum from legally binding to complete freedom of action. Recent inclusion of soft law commitments in hard law instruments suggests that both form and content are relevant to the sense of legal obligation. Some soft law instruments may have a specific normative content that is 'harder' than the soft commitments in treaties. Other non-binding instruments may never be intended to have normative effect, but are promotional, serving as a catalyst to further action. This appears to be the case with some of the concluding acts of international conferences. It may be suggested that the interplay of form and substance lead to four possible alternatives:

Table 0.1: Normative Intent

	Form:	Legal instrument	Non-binding instrument
Content:			
	Normative	Law	Commitment
	Promotional	Hortatory language	Freedom of action

Throughout the study, we attempted to distinguish compliance, enforcement, implementation, monitoring, supervision, and effectiveness. **Implementation** of international norms refers to incorporating them in domestic law through legislation, judicial decision, executive decree, or other process. **Compliance** includes implementation, but is broader, concerned with factual matching of state behavior and international norms: 'compliance refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted'.⁷ **Effectiveness** is the question whether the goals of the norm are achieved, and may be independent of compliance. **Norms** includes all rules of conduct, while **standards** refer to the measures of compliance or technical objectives. **Instruments** are the variety of texts in which they are contained. It should be noted that there can be compliance without implementation (not stockpiling chemical and biological weapons) and implementation without compliance (legally, but not in fact, banning trade in endangered species). **Monitoring** and **supervision** refer to the procedures and institutions which are used to assess compliance.

Part I of the study introduces the topic of compliance with soft law by first attempting to define the terms, then presenting an overview of the recent changes that have occurred in international society and the international legal system, focusing on the role of non-binding norms. Part II of the book presents the four subject areas, with the select cases in each one. The limited number of cases means that the conclusions must be tentative. Further studies and evaluations will be needed. Future research could undertake comparative national studies of state compliance, including the issue of the extent to which the autonomy of state agencies and mechanisms serves to diffuse shared understandings. Such studies can help elucidate the nature and meaning of international law in the next century. For the present, consideration of the international legal system as a whole, in its past and present forms, can provide necessary background.

B. THE INTERNATIONAL LEGAL SYSTEM

Scholars and judicial decisions have characterized the international legal system as a system of equal and sovereign nation states whose actions are limited only by rules freely accepted as legally binding.⁸ Brierly defines international law as 'the body of rules and principles of action which are binding upon civilized

⁷ Jacobson, H.K., and Brown Weiss, E., *supra* note 5; Brown Weiss, E., and Jacobson, H.K., *Engaging Countries: Strengthening Compliance with Environmental Accords* (1998).

⁸ See the Case of the S.S. 'Lotus,' 1927 P.C.I.J., ser. A, No. 10, at 18 ('International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims').

states in their relations with one another'.⁹ Traditionally, this state-centered system excluded any role for non-state actors and was based upon a belief in the factual as well as legal independence of states. Obligations were largely bilateral and reciprocal in nature, enforced by self-help. Thus, breach of an obligation by one state could lead to a withdrawal of equivalent benefits by the offended state. The subject-matter of international legal regulation was limited, largely concerned with diplomatic relations, the seas and other international waterways, trade, and extradition.

At the close of World War I, states agreed upon the means to identify binding international obligations for the purpose of resolving their disputes. As formulated in the Statute of the Permanent Court of International Justice, the Court should decide an international dispute primarily through application of international conventions and international custom.¹⁰ This formulation remains in the Statute of the present Court. Although the Statute is directed at the Court, it is the only general text in which states have articulated the authoritative procedures by which they agree to be legally bound to an international norm. Treaties and custom thus must be recognized by scholars and other non-state actors as the means states have chosen to create international legal obligations for themselves. A question posed in this study is whether state behavior in adopting and complying with non-binding instruments evidences acceptance of new modes of law-making not reflected in the Statute of the Court. *Ab initio*, however, we take the view that international law is created through treaty and custom, and thus 'soft law' is not legally binding *per se*.

It has become commonplace to note that the international system has undergone tremendous recent changes. From a community of predominately western states, the global arena now contains more than four times the number of states that existed at the beginning of the last century. In addition, other communities have emerged to play important international roles: inter-governmental organizations, non-governmental organizations, professional associations, transnational corporations, and mixed entities comprised of members of different communities. They both contribute to the making of international norms and increasingly are bound by them.

The subject matter of international concern similarly has expanded, paralleling developments within states where governments have taken on an increasing number of tasks. Subjects once deemed private passed into the public sector and from there into issues of transnational concern. International law now governs human rights, environmental protection, weapons systems, and the use of force. It directly regulates individual conduct through

⁹ Brierly, J., *The Law of Nations* 1 (Waldock, H., 6th edn., 1963).

¹⁰ General principles of law are a third, more rarely used, source of international law, with judicial decisions and teachings of highly qualified publicists providing evidence of the existence of a norm. For the present Court, see Art. 38, Statute of the International Court of Justice.

the development of international criminal law and criminal tribunals. Most of these topics, as well as the expanding management of the commons areas, are regulated through complex multilateral regimes with supervisory organs established to monitor implementation and compliance. Some of the commitments are non-reciprocal in nature, e.g. human rights, where the duties are owed towards those within the territory and jurisdiction of the state and less towards other states-parties to the instrument. In such a system, the traditional method of self-help to induce compliance through withdrawal of benefits is untenable.

Technological change also has made possible communications and travel that place new problems rapidly on the global agenda, including issues of transnational crime and the spread of disease. More information exists and that information is more readily available, creating an awareness of the multiplicity of problems that require international solutions. The relative simplicity of traditional international law necessarily has given way to complex forms, processes, instruments, and norms. Successful or unsuccessful attempts to resolve problems that arise in one subject area cannot always be projected into other subject areas. The needs and approaches of international environmental law, for example the notion of 'common but differentiated responsibilities', may not be appropriate to the human rights field or that of arms control. On the other hand, there has been considerable cross-over, from national law to international law and back (vertical cross-over) as well as from one subject area of international law to another (horizontal cross-over). An example of the latter is state reporting as a supervisory mechanism, which began in the human rights field and has become widespread in instruments concerning environmental protection.

C. THE ROLE OF LAW AND NON-LEGAL APPROACHES TO RESOLVING PROBLEMS

The proposed solutions to problems are not always in the form of law. All human societies strive to maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources. The specific problems that arise in achieving each of these aims differ from one society to another and within every society over time. The threats to order and justice that emerge over time can give rise to a number of responses, of which legal regulation has become perhaps the most prevalent this century. Laws reflect the current needs and recognize the present values of society. As such, legal regulation is almost inevitably responsive; it can rarely anticipate or imagine future problems. Regulation of outer space activities, for example, only became a matter of interest and concern when such activities became possible. Guarantees of a right to privacy were articulated only when the threats to