

# Evaluating the Effects of International Law: Next Steps

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A response to 'Beyond Compliance: Rethinking Why International Law Really Matters'  
Robert Howse and Ruti Teitel\*

It is hard to quarrel with the claim that international law scholars should pay attention to all of the effects of international law, and not just to compliance. In this respect, Professors Howse and Teitel are on solid ground. I believe that the (mostly unnamed) authors of compliance studies are aware of this point and have not claimed that compliance is all that matters. But there is a significant irony here. To understand what it is, one must recall some intellectual history.

Howse and Teitel say that 'in most fields of legal study, the question of why, how and to what extent the actors bound by legal rules comply with them has been a secondary, if not marginal, one for scholarly inquiry by jurists' (p. 128). This statement is incorrect. The question of legal compliance has been an obsession in American legal scholarship, one that began in the early part of the 20th century with the legal realist movement, and then after a brief pause gathered momentum in the 1960s. Today, the difference between the 'law on the books' and the 'law in action' is a significant theme in scholarly inquiry, in every field of law (at least in the United States, where the new international law skepticism emerged) except – international law.

The easiest way to understand the new international law skepticism that began in the United States in the late 1990s is as an application of these ideas from domestic legal scholarship to international law scholarship. It may well be, as Howse and Teitel argue, that the focus on compliance is too narrow. I prefer to think that the proper scope of a study depends on the question to be asked. When governments or advocates propose a treaty that has some goal – let's say, the elimination of landmines – the main question they will want to ask is whether the treaty will in fact achieve that goal, which here is the elimination

of landmines. If they can expect signatories not to destroy their landmines, that is certainly an important consideration. They may also care about whether the treaty will have other effects, positive or negative. But when these are hard to predict, as they almost always will be, then it is not surprising that compliance will be foremost among their concerns. For this reason, compliance is a legitimate focus for academics.

But the larger point is that the focus on compliance arose in reaction to the once dominant and still widespread assumption that international law 'on the books' works as advertised. This attitude, exemplified by Louis Henkin's (1979, p. 47) complacent line that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time', echoes the formalist tenets that the legal realists attacked.

The empirical work on international law is in its infancy but some of it – particularly the work on human rights treaties – has blasted holes in the Henkin view. To resuscitate this view, scholars now argue that even if states do not always comply with human rights treaties, those treaties may nonetheless advance the cause of human rights through a range of alternative pathways. Howse and Teitel's argument is a more general version of this confession-and-avoidance claim. Howse and Teitel cite Ryan Goodman and Derek Jinks, who propose a theory that explains how norms could migrate from state to state, but if Howse and Teitel are as serious about empirical work as they claim, they would do well to note that Goodman and Jinks do not supply statistical evidence for their theory. Howse and Teitel also cite a recent book by Beth Simmons. This is also an odd choice. Simmons tests compliance in the narrow sense Howse and Teitel criticize, while merely noting that the effects of treaties can be more general. She does not note that these general effects could be negative as well as positive (Simmons, 2009, p. 365). It should be kept

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in mind that when treaties are created but not complied with, this may breed cynicism about international law and interfere with its development. The next step must be to propose testable hypotheses and conduct empirical studies so that broader claims about the effects of international law can be evaluated.

## References

- Henkin, L. (1979) *How Nations Behave: Law and Foreign Policy*, second edition. New York: Columbia University Press.
- Simmons, B. A. (2009) *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.