Participation and Compliance in International Law

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My last letter to Elisabeth, and her—as usual, prompt—response to it dated 25 September 2001, concerned the thoughts that struggle for expression in this article. I do not think she would mind if wider currency were given to what she wrote:

My first reaction to any form of weighting votes is suspicion. No matter how you do it, it will always work out in favour of the rich. Because education, health, “freedom”, international activity, all are linked somehow to wealth, even though it may be difficult to establish a “cause and effect” relationship.

Interestingly enough, Arvid had designed a rather intricate system of weighted voting in his Draft Ocean Space Convention of 1971. The formula was based on population, size of territory, length of coastline, use of ocean resources, and a few other things . . .

I was critical of the scheme at the time. I still suspected that somehow it must favour the rich. I also thought it was too complex to work out in practice . . .

Now, I would also add that it seems to me extremely difficult to design one system for all uses, e.g., don’t you think that ocean organizations would use different criteria from an Outer Space Organization?

All this does not mean that I want to reject your proposal. I think that the pages you sent me are intensely interesting and based on an experience which we have shared. I would be glad to do some work on it . . .

By the way she lived, as by her thought; by her generosity, as by her steadfastness of purpose, Elisabeth inspired, and continues to inspire us all.

DO STATES OBEY INTERNATIONAL LAW?

In an essay in 1997, Professor Harold Honju Koh asked: “Why do Nations Obey International Law?” He offered a tentative response in the course of


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his review of two significant works that had then recently appeared, dealing with the subject of compliance with, or obedience to, rules of international law. Having examined several analyses of rule-generating conduct among States, which place emphasis on the legitimacy of the originating process (and presumably also of the responsive process), as well as the fairness inherent in the distributive outcome, he summarizes the process by which obedience to a rule is brought about, in the following terms:

... such a process can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By doing so, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

Attractive as are these analyses of the compliance process, they seem more related to the formation of rules of customary international law, where disparity of power between a strong "provoker" State and a weak "interpreter" State is likely to speed "internalization" and, ultimately, compliance. It seems less descriptive of the complexities of the multilevel negotiation of rules of international law that takes place at a plenipotentiary conference under the auspices of the United Nations. Whereas there, "internalization" would seem to remain an essential ingredient in the foundation of compliance, a rule formulated as expressing the will of the majority of States at such a conference is less likely to "provoke," in an unwilling minority of the powerful, an "interpretation" that would lead them to "internalize" and eventually to comply with, the rule so formulated. When considering the rules formulated at such conferences and intended to become international law, the observer may well be led to ask a different question: "Do States observe international law?" to which the dissident few might well respond, "But we do not hold such rules to be the law, and so do not need to comply with them." According