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Introduction

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State Compliance with International Human Rights Law:
State-of-the-art, Improvement and Challenges

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INTRODUCTION

Gaëtan Ferrara and Niki Siampakou[*]

> Given the conventional view of international relations and the assumptions of legal positivism, the very term 'international law' is a virtual oxymoron. In the last thirty years scholars disproportionately from the United States have drawn freely from the social sciences to rid themselves of their most intractable and embarrassing problem: The subject of their concern and the theory purporting to account for its existence bear no plausible relation to each other. If the solution is a theory about law yet not law–a theory rejecting Law's narrow construction of law–so be it. They would be social scientists.
>
> Nicholas Greenwood Onuf[1]

I. Presentation of the Project

We are pleased to present this volume entitled "State Compliance with International Human Rights Law: State-of-the-art, Improvement and Challenges" which is the outcome of the homonymous workshop. When Professor Hélène Tigroudja and Professor Ludovic Hennebel proposed us to supervise the organization of a workshop on Compliance Theories in International Human Rights Law, we were aware of the obligations that this would entail, but we never imagined that we would have to face a global pandemic. As the states entered successively into lockdowns, our speakers, scattered around the globe, were prevented from joining us in Aix-en-Provence. Despite the lockdown, we decided to carry out this project. This volume is, therefore, the acts of a workshop initially programmed to take place on 2 April 2020 in Aix-en-Provence but eventually postponed, to be held in the future. Same theme. Same place. Same persons.

The articles in this volume are part of the A*MIDEX INSIDE (International Socialization and Democracy Through International Law) project led by Professor Hélène Tigroudja and Professor Ludovic Hennebel. This project focuses on assessing the compliance of states with universal standards for the protection of human rights. The fundamental postulate of the INSIDE rests on the idea that international law is a tool used to socialize states. The doctrine attempts to identify, by invoking both theories of international relations and those of international law, the ways and effects of such socialization. The intended research to be carried out in the context of the INSIDE project finds its foundations in this framework and is based on a broad empirical field on international human rights law. One of the objectives of the project is to construct

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[1] Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (London: Routledge, 2013) at 72.

analytical tools, including for the purpose of assessing and measuring compliance with states commitments. Many theories and models already exist for understanding the behaviour of states. The articles in this volume have the advantage of applying and criticizing these hypotheses in the light of state behaviour on the topic of international human rights law.

II. Presentation of the Existing Theories

Although the legal scholarship that aims at theorizing why and when states comply with international law has been productive, there is no agreement on one coherent compliance theory.[2] Most international lawyers continue to believe that international law matters, in the sense that it affects or influences the conduct of states.[3] According to Andrew Guzman,

> The absence of a coherent compliance theory may explain why most conventional international law scholarship assumes that there is compliance but fails to ask why. Yet, the failure to understand the compliance decision is troubling because compliance is one of the most central questions in international law. Indeed, the absence of an explanation for why states obey international law in some instances but not others threatens to undermine the very foundations of the discipline.[4]

Understanding why states comply with their international obligations, therefore, appears to be the main way to secure the foundations of public international law.

Compliance theories are usually categorized into two broad categories. There is a rough distinction between those based on rationalism, on the one hand, and constructivism, on the other hand.

A. Rationalist Theories

Rationalists[5] believe that compliance with international law can be explained by the fear of sanctions or the prospect of benefits. The basic model for explaining international relations is based on the theory of rational choice: states act according to their interests (like individuals). The direction of international policies is the result of a comparative cost-benefit calculation of an action. Rationalist scholars take up Thucydides' formula: "The strong do what they can and the weak suffer what they

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2 Andrew T Guzman, "A Compliance Based-Theory of International Law" (2002) 90:6 Cal L Rev 1823 at 1826.

3 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed (New York: Columbia University Press, 1979); Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass: Harvard University Press, 1995).

4 Guzman, *supra* note 2 at 1826.

5 See Robert O Keohane, "Rational Choice Theory and International Law: Insights and Limitations" (2002) 31:1 Part 2 J Leg Studies 307 at 308.

must." The maxim can be applied to international law and it can legitimately be assumed that in international human rights law for instance, in the absence of reciprocity in treaties, financial or strategic sanctions and incentives for the respect of human rights, each State is free to act as it wishes, privileging its interests. Accordingly, the basic assumption of rationalists is to consider that the norms of international law do not explain per se why states respect their commitments. When a State does comply with international law, it is because it serves its interests in the sense that it benefits from it or avoids punishment. Rationalist theories have their roots mainly in economic and political sciences and the study of international relations. They challenge the expectations of the traditional legal scholarship–the constructivist approach–which assumes that international law matters. Of course, within these theories, various doctrinal positions exist taking different perspectives on the questions posed and offer nuanced conclusions. In a fairly classical way, among the rationalist theories, authors of doctrine usually mention the neo-realistic theory, the institutionalist theory, and the liberal theory.

The realist theory[6] considers that states act at least to ensure their own preservation or, at best, to dominate the world. Therefore, international cooperation–which may be useful to preserve security or to ensure power–may work only when it is in the interest of the states concerned. In this perspective, international law may have only a little importance and impact on the states' behaviors. It suggests that if the actions of a state conform with its international obligations, it is the result of a mere coincidence (or the consequences/results of the struggle for power and the balance of power).

The institutionalist theory[7] takes multilateralism seriously, especially intergovernmental institutions, because they allow states to achieve long-term goals through collaboration. In this perspective, respect for international law is explained by a long-term strategy designed to satisfy selfish interests. The state accepts or does not respect international law by considering the cost of direct and indirect sanctions, including in terms of reputation: the higher the cost, the more likely the treaty effect is to be substantial.

The liberal theory[8] attaches greater importance to the dynamics of interest groups and considers that the major players in international relations are individuals

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6 See e.g. Raymond Aron, *Paix et guerre entre les nations* (Paris, Calmann-Lévy, 2004); Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 7th ed (McGraw-Hill, 2005); E H Carr, *La crise de vingt ans 1919-1939 : une introduction à l'étude des relations internationales* (Brussels, University of Brussels, 2015); Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981); Robert O Keohane, ed, *Neorealism and its critics* (New York: Columbia University Press, 1986); Kenneth N Waltz, *Theory of International Politics* (Long Grove, Illinois: Waveland Press, 2010).

7 See e.g. Guzman, *supra* note 2 at 1861; Stephen D Krasner, ed., *International Regimes* (Ithaca N.Y.: Cornell University Press, 1983); Robert. O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, revised ed (Princeton, N.J.: Princeton University Press, 2005).

8 See e.g. Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51:4 Intl Organization 513; Anne-Marie Slaughter, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004); Beth A Simmons, *Mobilizing for Human Rights* (Cambridge: Cambridge University Press, 2009).

and private groups, not states. Therefore, the proponents of the current liberalism consider that the state must be analyzed through its components (state actors, citizens, interest groups) because the behavior of a liberal state depends on the interactions of its components and the power relations of which the state is the receptacle. Consequently, for instance, respect for human rights treaties is explained when it meets the converging interests of internal politics. The main assumption being that liberal states are more inclined to respect the treaties of rights than non-liberal states.

B. Constructivist Theories

Constructivism[9] considers that states obey international law because of the norms. For constructivists, international law structures a set of implicit rules on which meaningful and binding formal agreements are formulated. states create and follow international law because of their moral and social commitment to the ideas embodied in the treaties. Constructivists reject the idea that states obey international law based on instrumental advantages or sanctions of conformity. They believe that interactions of states shape a social structure which has an impact on states' behaviors. In the field of human rights, the constructivists' vision consists of assuming that the ratification of treaties is beneficial because it ensures more effective protection of human rights. In the end, there is little interest in the question of the effects of treaties or of decisions of international bodies, particularly in the field of human rights, in which implementation mechanisms are relatively modest. In the absence of coercive mechanisms, the goodwill of the state is decisive. Constructivists consider that rationalist theories fail to acknowledge a central element: the persuasive power of legitimate legal obligations. Their model is normative. The behavior of states cannot be explained solely by geopolitical or economic calculation, but the importance and weight of ideas must be included in the analysis. Several doctrinal tendencies do exist in that field, including the managerial model theory; the legitimacy theory; and the transnational litigation theory.

The managerial model theory[10] asserts that respect for the norm occurs when the discourse is persuasive. When a state does not respect its commitments, it is because of its incapacity to comply–for technical, institutional or other–or its lack of understanding of the content of obligations (which will be the result of an ambiguous standard), but it is not the mere result of self-interested decisions. It should not be compelled but should be given the means to comply with international law and to persuade it to comply. This model rejects coercive mechanisms in favor of cooperative solutions and persuasion and managing compliance.

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[9] See e.g. Martha Finnemore, *National Interests in International Society* (Ithaca N.Y.: Cornell University Press, 1996); Alexander Wendt, *Social Theory of International Law* (Cambridge: Cambridge University press, 1999); Ryan Goodman & Derek Jinks, Socializing states: *Promoting Human Rights Through International Law* (Oxford: Oxford University Press, 2013); Thomas Risse, Stephen C Ropp & Kathryn Sikkink, dir, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

[10] See e.g. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge Mass.: Harvard University Press, 1995).

The legitimacy theory[11] asserts that persuading a state to conform to international law is a rhetorical exercise conditioned by the legitimacy of the norm, and its fairness (procedural and substantive). Again, it is not the selfish interest of the state that is decisive, but the fairness of the norm. For it to be fair, it must have certain qualities: determinacy, symbolic validation, coherence, and adherence. When a norm gathers these qualities, the theory predicts that it will be more likely to be respected.

The transnational litigation theory[12] is based on the idea that respect for the international norm is the result of its domestication. Here we find the idea that the secret of respecting the international norm is not coercion, but willpower. Transnational actors interact, convene international standards to regulate their interactions, which are then interpreted by the domestic judge, and domesticated, in the sense that they are fully integrated into domestic law (downloaded law). Respect for international standards takes place when and because the norm is domesticated as a result of interactions between transnational actors.

This brief overview of the theories of compliance provided above demonstrates that the doctrine on this topic has been fruitful. Intellectually stimulating, these theories can, nevertheless, be the subject of critique. Among the different critiques which can be addressed, we retain two of them. On the one hand, the aforementioned theories concentrate mainly on the state as an actor of compliance-with some nuances for liberal theory. However, it should not be ignored the role that private actors, such as individuals, groups (especially armed groups), or companies, can play in respect of certain norms, including international human rights law and international humanitarian law. The second critique concerns the pragmatic use of these theories. So far, these theories have not been useful in predicting behaviors or fully explaining them. At best, they provide useful information to understand certain punctual behavior, usually *a posteriori*.

III. Presentation of the Workshop Theme

If the hypotheses of theories in public international law are rich concerning explanations on the foundations of this legal order, they are more cautious in establishing models capable of explaining the reasons of the respect of states for international standards. Therefore, we must turn to the assumptions of the theories of international relations to explore the relationship between the behavior of states and standards, in particular, for what interests us, whether or not they are respected.

The models, theories and hypotheses of international relations are grouped and distinguished in the form of currents, traditions or other doctrines, some of a

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11 See e.g. Thomas M Franck, *The Power of Legitimacy Among States* (New York: Oxford University Press, 1990); Matthew J Lister, "The Legitimating Role of Consent in International Law" (2011) 11:2 Chicago J of Intl L 663.

12 See e.g. Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75:1 Nebraska L. Rev. 181; Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106:8 The Yale LJ 2599.

paradigmatic order and others of an ontological order. Traditionally, it is possible to distinguish realism, institutionalism, liberalism and constructivism. Many other nuances exist within and between these theoretical families because they oppose each other as much as they complement each other, constituting as many different points of view around the same object: the behavior of international actors. This labyrinth of hypotheses was built and enriched by the contribution of jurists, political scientists, sociologists, and other professionals in the study of behavior, which makes it rich, but also complex.

The existence, respect and violation of certain standards are easier to explain than others. Thus, international security and economic legal standards coincide with the eponymous interests of states and are based, politically and legally, on the reciprocity of their execution. A greater mystery surrounds the international human rights law, a set of international standards that states agree to apply nationally, not between them, but with regard to their nationals. What might be the interests of states to apply such standards? The articles in this volume compare hypotheses on the behavior of states with their practices concerning international human rights to refine the theories in the matter and deepen our knowledge on their respective empirical fields.

IV. Presentation of the Articles

The present volume consists of nine articles addressing a wide range of questions on the Workshop's topic. They can be divided into three groups: Compliance Foundations, Ratification Issues, Compliance Models.

In the first part of the present volume, the articles are addressing problems related to the foundations of compliance. In other words, why states comply or not with the international human rights law treaties in which they are parties.

In his contribution, Antal Berkes observes that some fragile states are making serious efforts to enforce their international obligations regarding the protection of human rights. While these states could argue that they cannot exercise effective control over certain parts of their territories to circumvent their international obligations, Mr. Berkes observes the opposite phenomenon. Indeed, to establish the legitimacy of their control over the disputed territories, fragile states would make significant efforts in these territories. The paper uses rational and constructivist theories of compliance to explain the reasons for compliance and non-compliance by fragile states. Antal Berkes' paper argues that none of the dominant compliance theories can provide a satisfying explanation concerning the factors which influence fragile states' compliance with international human rights law. Therefore, he attempts to provide recommendations regarding the best practices to enhance the human rights compliance of territorially fragile states.

Przemyslaw Tacik aims at reconceptualizing the theoretical frameworks that underpin paradigms of the theory of socialization in international and European law. He addresses the example of Hungary and Poland and contrasts it with the reaction of

the European Council, European Court of Human Rights and European Union's institutions in order to track possible consequences for the socialization paradigm. Finally, he tries to reconsider the applicability of the socialization paradigm to the contemporary EU. Mr Tacik's article argues that in order to address this crisis adequately, the blind spots of previous socialization paradigms need to be recognized and overcome.

In a third article, Michel Nkoue intends to clarify the legal debate around the foundations of the compliance of Sub-Saharan African states with international human rights law. The author particularly argues that this compliance resides mainly outside the law. Michel Nkoue offers as a subsidiary basis the influence of Western legal culture and the search for the credibility of these weak states on the international level.

In their contribution, Carmen Montesinos Padilla and Itziar Gómez Fernández put forward that the study of compliance entails particular knowledge of states' constitutional structures. Therefore, they use a critical method to identify the gaps in the various theories of compliance with international obligations through a local perspective. They apply the rational choice and the constructivist models to explore why Spain has widespread compliance with its international commitments. However, they do not aim at explaining the causes of that compliance. Instead, they focus on demonstrating why none of the models can explain the unequal degree of compliance in Spain between the international courts' judgments and the United Nations Committees' resolutions.

In the second part of the present volume, the articles address ratification problems.

Indira Boutier focuses on India's positions on the question of refugees. Despite the big number of refugees on its territory, India has not signed the 1951 *Convention Relating to the Status of Refugees* or the 1967 *Protocol*. According to Mrs. Boutier, there is a paradox in India's position: although its *Constitution* confirms the recognition of the principles of human rights, India is hostile to sign conventions on the question of refugees. Why India has not signed the 1951 *Convention*? Does this denial impact refugees' treatment? Indira Boutier starts her analysis by posing these two questions. Through a historical analysis of India's positions on the question of refugees, Mrs. Boutier argues that in today's international context, understanding the factors which influence states' decisions is of great importance.

In his article, Andrew Friedman observes the strange phenomenon of states which comply with certain standards of international human rights law, without having either ratified or consented to the respective legal instruments. The author highlights the role of international pressure on the behavior of states which manifestly infringe human rights. Based on his analysis, Mr. Friedman's article aims at analyzing how international human rights law may influence decision-making and policy decisions amongst non-state parties to treaties. To do so, the article examines cases in which international law has been of significant influence in state decision-making, although not being binding.

Cristiano D'Orsi examines in his article the attitude of African states towards ratifying human rights treaties, in particular, the 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (better known as the *Maputo Protocol*). More specifically, Cristiano D'Orsi's article considers the impact that the need of applying international standards poses on the sovereign rights of African states to determine the content of their domestic law. In parallel, he examines whether applying these standards has resulted in any progress in the protection of women's rights in Africa. For this purpose, he provides a presentation of the *Maputo Protocol*'s main features and the challenges faced by African states which adopts the *Protocol* using the example of female genital mutilation. He also focuses on the several regional and domestic initiatives for compliance taken by the states concerned. Finally, he provides concluding remarks on the *Maputo Protocol* and general remarks on the position of African states vis-à-vis women's rights. In overall, his work shed light in the behavior of African states on the topic.

In the last part of the volume, the articles are dealing with different models of compliance.

In her article, Başak Etkin opens the way to a deep reflection on the contribution of actors contesting international human rights law's norms in the construction of the normativity. Her paper exploits empirical observations concerning contestation to address its normative implications. She poses the following working hypothesis: there is a threshold contestation, to a certain extent, contestation nourishes normativity as the norm is taken seriously enough to contest, but that beyond the contestation threshold it becomes counterproductive. Her conclusion consists in pointing out that the contestation threshold is a valuable tool for comparing two or more norms at the same stage of implementation.

In the final article of the present volume, Julia Lindner examines the compliance theories on Transnational Advocacy Networks (TAN) in the Mediterranean Sea. Her paper focuses on the period between 2014 and 2020 and poses the following questions: "Do TAN actors contribute to norm compliance regarding the European Union's human rights obligations and international SAR[13]- obligations in the Mediterranean Sea? Subsequently, is the constructivist spiral model useful for analyzing the situation at Europe's southern borders?" Mrs. Lidner looks at the specificities of the spiral model. She analyzes the applicable phases of the model, the strategies used, the actors involved, and questions the effect their activities have on norm compliance, before examining the particularities of the given case and the counter-discourse. Mrs. Lindner's paper argues that although EU member states have been regarded during long-time as high socially vulnerable states, the Mediterranean case illustrates the decrease of their social vulnerability through the denial of human rights vis-à-vis migrants.

The importance of this volume lies in the broad aspect of the articles, addressing several issues and, most importantly, a series of case studies which offer

[13] SAR refers to operations exercised to search and rescue persons or groups in distress or imminent danger.

valuable testimonials of state behavior across the globe. If we must not fall into resignation, the increasingly difficult domestication of human rights in developing countries and their withdrawal into liberal democracies leave little prospect for their universal effectiveness. It is only at the price of an incessant struggle by humanist task forces that human dignity can one day be respected, everywhere and for everyone.

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