

WHY STATES COMPLY WITH DECISIONS OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS: A REVIEW OF THE PRINCIPAL THEORIES AND PERSPECTIVES*

Abstract

As the legalisation of international politics gain momentum through growing adoption of multilateral treaties and proliferation of intergovernmental institutions especially administrative and judicial mechanisms for the protection of human rights, one area of focus for scholars ought to be the incentives for states to comply with the norms and standards set by these many bodies. This paper takes the reader down memory lane by reviewing the various theories and perspectives of leading scholars on why states comply with international law with particular focus in the concluding part on why states comply with decisions of international human rights bodies. The paper concludes that while most scholars generally agree that state compliance is driven by instrumental or normative considerations or both, it remains largely contested which of these broad theories account for most acts of compliance by state actors. The paper argues the need for further research specific to each international and regional human rights system as the factors that drive states towards compliance differ from state to state and region to region.

Keywords: *Theories, State Compliance, International Law, Human Rights Tribunals*

1. Introduction

International law compliance is generally acknowledged as one of the fastest growing sub-fields of international legal scholarship. However, not many realise that human rights judgment compliance is gradually gaining momentum as the fastest growing sub-division of international law compliance.¹ The interest in why states comply with international law may be as old as international law itself. In fact, some scholars have claimed that state compliance may be relied upon as a primary test of the adequacy of international law.² Oette, for example, argues that compliance and enforcement constitute ‘a litmus test for the effectiveness of the international human rights system.’³ Using compliance as a test of the effectiveness of international law and judgments of international human rights tribunals (IHRTs) implies that without a theory of international law compliance, it is impossible to assess the effectiveness of international law and IHRTs. Effectiveness, for this purpose, is defined as the extent or degree to which international law induces the desired change at the domestic level.⁴ Notwithstanding its importance to the enforcement of international norms, the weight of state compliance as the ultimate goal of international law has been criticized. Howse and Teitel, for example, argued that too much focus on compliance ‘obfuscates the character of international legal normativity’, and the concept of compliance, especially viewed as rule observance, is inadequate for understanding how international law has normative effects.⁵ The need to reach beyond the compliance optic,

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¹ R Howse & R Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 174 *New York University Public Law and Legal Theory Working Papers*, p.2. For an annotated bibliography of the major works on compliance with international law, see WC Bradford, ‘International Legal Compliance: An Annotated Bibliography’ (2004) 30 *North Carolina Journal of International Law and Commercial Regulation*, pp.379-423.

² See, for instance, AT Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90 *California Law Review*, p.1826; OA Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’ (2005) *The University of Chicago Law Review*, p.473; S Baradaran, M Findley, D Nielson & JC Sharman, ‘Does International Law Matter?’ (2013) 97 *Minnesota Law Review*, p.743.

³ L Oette, ‘Bringing the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Body’ (2010) 16 *Interights Bulletin*, p.51.

⁴ See R Murray & D Long, *The Implementation of the Findings of the African Commission on Human and Peoples’ Rights* (Cambridge: Cambridge University Press, 2015) p.29; K Raustiala, ‘Compliance and Effectiveness in International Regulatory Cooperation’ (2000) 32 *Case Western Reserve Journal of International Law*, pp.393-394.

⁵ R Howse & R Teitel (n. 1) p.2.

but without abandoning it, has also been articulated by many scholars.⁶ Okafor, for instance, argues that the compliance-focused frame of reference is inadequate as a way of understanding fully the worth or value of international legal system, and that state compliance does not exhaust the totality of ways decisions of legal norms can matter fundamentally, or have significant effects at the domestic level.⁷ Despite these criticisms, it is widely agreed amongst scholars that the subject of state compliance is crucial for understanding why international law matter and why states often comply with judgments of international tribunals. Identifying the mechanisms that facilitate state compliance with international law and particularly judgments of IHRTs will help compliance partnerships to channel their resources appropriately to produce optimal results.

Theories of compliance with international law may be divided into two broad perspectives, namely instrumental and normative perspectives.⁸ These theoretical perspectives are also sometimes referred to as rational choice theory and constructivism, respectively.⁹ On the one hand, rational choice theorists see compliance as the result of rational cost-benefit calculations, driven by states' self-interests. In other words, states comply with international law based on materialist or strategic reasons. Constructivist theorists on the other hand treat states as 'social entities',¹⁰ and argue that states comply with international law because of normative considerations such as 'repeated interactions, argumentation and exposure to norms.'¹¹ Specific approaches to the rational choice theory include realism, institutionalism, liberalism, reputational and enforcement theory.¹² Each of these theories does not operate in isolation of others.¹³ They are, to use the words of Koh 'complementary conceptual lenses to give a richer explanation of why compliance with international law does, or does not, occur in particular cases.'¹⁴ Put differently as David Moore has done 'no one theory has a corner on the explanation for compliance'.¹⁵ In addition to the two main approaches, there is a relatively new approach which combines elements of the rational choice model with constructivist perspective. Bates describes the new approach as 'sophisticated constructivism'.¹⁶ Other scholars simply

⁶ See C Rodríguez-Garavito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in M Langford, C Rodríguez-Garavito & J Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press, 2017) pp.79-108; R Howse & R Teitel (n. 1) 2; R Murray & D Long (n. 4) pp.69 - 86; VO Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria: Pretoria University Law Press, 2016) pp.1-331; HS Adjolohoun, 'Giving Effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence', Unpublished LLD Thesis, University of Pretoria 2013, pp.264-317; FN Kabata, 'Impact of International Human Rights Monitoring Mechanisms in Kenya', Unpublished LLD Thesis, University of Pretoria (2015).

⁷ OC Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) pp.33&285.

⁸ For a comprehensive annotated bibliography of the most relevant literature on compliance with international law, see WC Bradford (n. 1) pp.379-423; D Kapiszewski & MM Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38 (4) *Law & Social Inquiry*, p.819.

⁹ ES Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory' (2015) 25 *European Journal of International Law*, p.1170.

¹⁰ A Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4 *Journal of International Law and International Relations*, p.155.

¹¹ As above.

¹² See generally, OR Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in JN Rosenau & E-O Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992) p.160; OR Young, *Compliance and Public Authority: A Theory with International Applications* (Baltimore: Johns Hopkins University Press, 1979); L Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979).

¹³ TE Sainati, 'Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts' (2016) 49 *Vanderbilt Journal of Transnational Law*, p.215.

¹⁴ HH Koh, 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal*, p.1406.

¹⁵ DH Moore, 'Signaling Theory of Human Rights Compliance' (2003) 97 *Northwestern University Law Review*, p.881.

¹⁶ ES Bates (n. 9) p.1181.

refer to it as the hybrid approach or modern constructivism.¹⁷ Based on the three main approaches to international law compliance, human rights judgment compliance scholars have generated a number of perspectives on why states comply with decisions of IHRTs. Below is a review of the dominant theories and perspectives.

2. Rational Choice Approaches

The central argument of all rational choice approaches, also referred to as ‘rationalism’, is that material incentives, hegemonic power, sanctions and self-interests are the primary drivers of states’ compliance with international law.¹⁸ Proponents of this theoretical model believe that the state, like an individual, is driven principally by its self-interest.¹⁹ Decisions of a state to comply with human rights judgments are egoistic actions, taken to advance the material self-interest of the state as may be determined by individuals who represent the state.²⁰ Based on this, rational choice theorists believe states comply with international law only when compliance will give the state some material benefits at the time of compliance or in the near future. In other words, states comply with international including decision of HRTs based on materialist and strategic considerations. This implies that states have no altruistic intent for complying with international law.²¹ If a state stands to gain more by complying, then it would comply; but if it would gain less by complying, then it would not comply.²²

This theoretic perspective comes in different shades depending on what aspect of self-interest the proponents are focusing on. Realists have focused on hegemonic powers while institutionalists focused on state cooperation. Enforcement theorists have emphasised sanctions and other coercive measures while a handful of instrumental theorists have stressed reputational concerns as the primary incentive for compliance with international law. Below is an overview of some of the variants of the rational choice model.

Realist theory

Realist theorists argue that the international system is anarchy.²³ States are the ‘sole relevant actors’, and that international law and politics depend on the maximization of the self-interests of states.²⁴ The central argument of the realists is that states do not comply with international law for the sake of the law but because of what they stand to gain. The roles of individuals, sub-state actors and international institutions are usually taken for granted. International law is seen simply as a means of pursuing power by hegemonic states. For realist scholars, compliance with international law depends on power. Powerful states are less likely to comply with international law, unless the content of international law serves their interest.²⁵ While norms may influence the cost-benefit estimates of states, realists argue that norms do not have independent cause

¹⁷ See VO Ayeni, ‘State Compliance with Reparation Orders of Regional and Sub-Regional Human Rights Tribunals in Five African States’, Unpublished LLD Thesis, University of Pretoria, South Africa (2018) p.146.

¹⁸ Bates (n. 9) p.1170; VO Ayeni, ‘Introduction and Preliminary Overview of Findings’ in VO Ayeni, *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria: Pretoria University Law Press, 2016), p.3.

¹⁹For a general discussion of the rational choice model, see RO Keohane, ‘International Relations and International Law: Two Optics’ (1997) 38 *Harvard International Law Journal*, p.495.

²⁰ See PH Huang, ‘International Environmental Law and Emotional Rational Choice’ (2002) 31 *Journal of Legal Studies*, pp.241-243.

²¹As above.

²² See JL Goldsmith & EA Posner, ‘A Theory of Customary International Law’ (1999) 66 *University of Chicago Law Review*, pp.1114-15.

²³ As above.

²⁴ HJ Morgenthau, *Politics Amongst Nations: The Struggle for Power and Peace* (New York: Alfred A Knopf, 1978), pp.27-35; HJ Morgenthau, ‘Positivism, Functionalism, and International Law’ (1940) 34 *American Journal of International Law*, p.269.

²⁵ S Hoffman, *The Role of International Organization: Limits and Possibilities* (1956) 364.

effects on state actions.²⁶ International law thus is an epiphenomenon.²⁷ Realism has developed along two theoretical variants: classical and structural realism. The central idea in classical realism is that international law exists because powerful states benefit from their existence.²⁸ Less powerful states comply with international law simply because they are required to do so by the more powerful states. Classical realism thus construes hegemonic power as the magic wand that pull states towards compliance with international law. Developments in the 1970s and 1980s have shifted the focus of realist theorists from hegemonic power to a more nuanced explanation.²⁹ This new approach to realism, also called neorealism or structural realism, argues that compliance with international law is the result of convergence of state interests with rules of international law.³⁰

Like classical realism, proponents of neorealism believe the state is a unitary actor but disagree with the exclusive focus on power relations as the ultimate predictor of compliance with international law.³¹ In place of power relations, neorealist scholars argue that states comply with international law whenever it is in their interest to do so.³² Convergence of state interest with legal rules is the reason states comply with international law.³³ Neorealist scholars construe the international environment as one of anarchy, thus rejecting the role of international institutions in bringing about compliance with international law.³⁴ The realist idea that international law is epiphenomenal and irrelevant has been severely criticised. Critics have asked why states devote so much resources into the negotiation of international treaties if those treaties have no constraining effect on state behaviour. It has also been asked why states alleged of violation of international law would expend human and material resources to prove its innocence if international law does not command compliance, as the realist scholars have argued.³⁵

Institutional theory

The institutionalists believe states are rational actors that act on the basis of self-interests.³⁶ They also believe the international system is anarchical and that power relations play a significant role in determining who does and who does not comply with international law.³⁷ They however differ from the realist theorists in that they believe cooperation is possible, and that membership of various international institutions shapes how states perceive their self-interests.³⁸ Institutionalism takes international institutions very seriously.³⁹ Proponents of the theory believe rules and norms developed by international institutions or 'regimes' could alter the process of decision making in a state, thereby creating incentives for compliance with international law.⁴⁰ Through international cooperation, states give up short term goals to reap long term benefits'.⁴¹ International law is complied with by states because it is in the interest of states to do so within the framework of international cooperation. Certain outcomes, such as securing development assistance, negotiating trade

²⁶ BA Simmons, 'Compliance with International Agreements' (1998) 1 *Annual Review of Political Science*, p.80.

²⁷ See OA Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal*, p.1945; AT Guzman (n. 2) p.1837.

²⁸ HJ Morgenthau (n. 24).

²⁹ For an explanation of some of these developments, see OA Hathaway (n. 27) p.1945.

³⁰ See JL Goldsmith & EA Posner (n. 22) p.1114.

³¹ OA Hathaway (n. 27) p.1945.

³² See JL Goldsmith & EA Posner (n. 22) pp.1114-1115.

³³ As above.

³⁴ OA Hathaway (n. 27) p.1946.

³⁵ OA Hathaway (n. 27) pp.1946-1947.

³⁶ See J Goldsmith, 'Sovereignty, International Relations Theory, and International Law' (2000) 52 *Stanford Law Review*, pp.962-63.

³⁷ OA Hathaway (n. 27) pp.1946.

³⁸ As above.

³⁹ OA Hathaway (n. 27) pp.1948.

⁴⁰ As above.

⁴¹ OA Hathaway (n. 27) pp.1948.

relations with other countries, addressing climate change, promoting environmental protectionism, and other transnational issue areas, may be achieved only through cooperation with other states. According to institutionalist theorists, the desire to realise these outcomes may provide necessary incentives for states not only to pursue international cooperation but also to comply with international law.

The liberal theory

Liberalism shifts attention from balance of power as the ultimate determinant of state behaviour in the international system. For liberal scholars, compliance depends on domestic politics, and they focus more on domestic political processes and domestic actors.⁴² Unlike realist and institutionalist scholars, liberal theorists do not see the state as a unitary entity; rather they argue that domestic politics by the various domestic actors determine whether or not a state would comply with an international norm. Thus, according to liberal scholars, the political nomenclature of states or the regime type in place in a particular state may influence the state's compliance decisions.⁴³ One obvious consequence of the premise is that democracies are assumed more likely to honour their international obligations and comply with international law than authoritarian regimes.⁴⁴ Liberal theorists like Moravcsik and Slaughter believe the distinction between liberal and non-liberal states is the primary predictor of how states behave in the international system.⁴⁵ Consequently, they argue that liberal states are likely to comply with international law than non-liberal states because liberal states habitually operate in what they called a 'zone of law'.⁴⁶ Helfer and Slaughter have adopted similar argument in relation to the effectiveness of supranational tribunals.⁴⁷ They argued that one of the distinctive features of the European Court of Human Rights system that account for its success is the near democratic homogeneity of member states of the Council of Europe.⁴⁸ They argue further that liberal democratic states are more likely to comply with judgments of supranational tribunals than illiberal and authoritarian governments.⁴⁹ For instance, they may lose the support of significant domestic constituencies should they fail to comply with their international obligations. The argument of liberal theorists therefore is that governments that are committed to rule of law and separation of powers have more incentives to comply with international human rights judgments.⁵⁰

3. Constructivism

Constructivism is based on identity formation through the process of social construction. The main argument of constructivist scholars is that the various elements advanced by rationalist theorists, such as 'military power, trade relations, international institutions, or domestic preferences' are objective facts that derive their real meaning from social construction.⁵¹ In other words, state identities, belief, values and norms are socially constructed.⁵² Constructivism emphasises the role of non-state actors, legal rules and norms in constituting

⁴² See A-M Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1994) 4 *Transnational Law and Contemporary Problems* pp.397 - 400; A Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) *International Organisation* p.513.

⁴³ See PR Trimble, 'International Law, World Order, and Critical Legal Studies' (1990) 42 *Stanford Law Review* p.842.

⁴⁴ OA Hathaway, 'The Cost of Commitment' (2003) *John M Olin Center for Studies in Law, Economics, and Public Policy Working Papers Series No 273*, pp.14-17; E Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* pp.184-190.

⁴⁵ See Moravcsik (n. 42) 513; A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* p.503.

⁴⁶ As above.

⁴⁷ LR Helfer & A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* p.335-336.

⁴⁸ As above.

⁴⁹ Helfer & Slaughter (n. 47) p.333.

⁵⁰ Helfer & Slaughter (n. 47) pp.331-335.

⁵¹ Slaughter (n. 42).

⁵² FN Kabata (n. 6) p.305; Slaughter (n 42 above); HH Koh 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal*, pp.2633-2634.

how states interact and shaping national identities.⁵³ Unlike the rational actor approaches which argue that states create legal rules and norms, constructivist scholars maintain that, rules and norms ‘constitute’ state identity and the functioning of the international system.⁵⁴ It is because of the emphasis of constructivist scholars on identity, beliefs that the constructivist theories are regarded as ideational.⁵⁵ Like rationalism, constructivism has many individual strands or theories. Some of the main theories under constructivism are reviewed below.

Legitimacy and fairness model

One of the earliest theoretical explanations for why states comply with international law came from Thomas Franck who argue that legitimacy is what makes states comply with international law.⁵⁶ Hurd, like Franck, also proposed a theory of legitimacy.⁵⁷ According to Franck, legitimacy is an element of a law or law making institution that exerts compliance pull on those the rule is addressed.⁵⁸ Franck identifies four properties of a legitimate rule, namely ‘determinacy, symbolic validation, coherence and adherence’.⁵⁹ In a subsequent attempt, Franck developed a theory of fairness wherein he argues that in addition to legitimacy, the perception whether a rule or a system of rules is fair encourages voluntary compliance.⁶⁰ Franck argue that the right question to ask is not whether nations comply with international law but whether international law is fair.⁶¹ This latter question is central to understanding compliance with international law because rules that states consider unfair exerts little or no compliance pull.⁶² Thus within the framework of the fairness model, it is not the threat of sanctions or cost benefit calculations that generate compliance with international law but the perception that the rules are fair ‘substantively’ and ‘procedurally’.⁶³

Managerial model

Another normative theory of compliance, based on a ‘managerial model’, was proposed by Chayes and Chayes.⁶⁴ They argue that non-compliance is an endemic problem rather than a deliberate decision based on cost-benefit calculation.⁶⁵ As a result, Chayes and Chayes contend that non-compliance is due to ambiguity and indeterminacy of treaty language, lack of capacity, and the temporal dimension of the obligations imposed by treaties.⁶⁶ Why then do states comply with international law? Chayes and Chayes argued that states generally have a propensity to comply with international law. They advanced three arguments to justify their claim: the first argument is efficiency.⁶⁷ Compliance reduces transaction costs by removing the need to continuously recalculate the costs and benefits of every policy decision.⁶⁸ The second reason for compliance, according to Chayes and Chayes, is interest. Treaty obligations sometimes embody the interests of states that are parties to it. Thus, commitment, compliance and state interests are not always unrelated.⁶⁹ Finally, they

⁵³ As above.

⁵⁴ Koh ‘Why do nations obey international law?’ (n. 52) p.2634.

⁵⁵ Slaughter (n. 42).

⁵⁶ T Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p.24.

⁵⁷ I Hurd, ‘Legitimacy and Authority in International Politics’ (1999) 53 *International Organization*, p. 381.

⁵⁸ Franck (n. 56).

⁵⁹ As above. See generally M Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2005) pp.13-140.

⁶⁰ Franck (n. 56).

⁶¹ Franck (n. 56) p.7.

⁶² TM Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* p. 712.

⁶³ Franck (n. 56) 7.

⁶⁴ A Chayes & AH Chayes, ‘On Compliance’ (1993) 47 *International Organization*, p.204.

⁶⁵ As above.

⁶⁶ A Chayes & AH Chayes (n.64) p.204.

⁶⁷ A Chayes & AH Chayes (n.64) pp.178-179.

⁶⁸ As above.

⁶⁹ A Chayes & AH Chayes (n.64) p.179.

contend that compliance occur because international law generates normative obligations.⁷⁰ A fundamental principle of international law is *pacta sunt servanda* (treaties must be obeyed).⁷¹ They argued that this principle is well ingrained in the common understanding of international law so much that it may be a sufficient basis for compliance by states with or without the threat of sanctions or cost-benefit calculations.⁷²

The managerial approach relies largely on cooperative problem-solving.⁷³ According to its proponents, ‘sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.’⁷⁴ In other words, sanctions are typically too costly politically and economically, and thus ineffective. In order to improve state’s compliance with international law, Chayes and Chayes proposed that the ‘enforcement model’, in which compliance is achieved through coercion and sanctions, must be replaced with a ‘managerial model’. The managerial model involves the use of ‘iterative process of justificatory discourse’ similar to Jurgen Habermas’ theories of communicative action and public spheres.⁷⁵ Chayes and Chayes also identified four instruments of active management, namely ‘transparency, reporting and data collection, verification and monitoring, dispute settlement, and strategic reviews and assessment.’⁷⁶ These mechanisms exert persuasive force on states, and it is this persuasion that is central to compliance with international law.⁷⁷

Transnational legal process theory

The transnational legal process (TLP) theory is a relatively recent addition to the constructivist perspective.⁷⁸ The theory was developed Harold Koh.⁷⁹ Koh agreed with Franck and the Chayeses that the pathway to greater ‘enforcement’ of international law is through voluntary obedience and not through coercion or sanctions. Koh however disagree with Franck and Chayes and Changes on the mechanism that triggers voluntary compliance by states. He argues that ‘transnational legal process’ (TLP) is vital to understanding why nations behave the way they do.⁸⁰ Koh defined TLP as ‘the theory and practice of how public and private actors – nations-states, international organisations, and private individuals – interact in a variety of public and private, domestic and international. The transnational legal process is a three-part process of *interaction, interpretation, and internalization*.⁸¹ In this process, international law is interpreted through the interactions of transnational actors, and then internalized into the legal system at the domestic level.⁸² Koh distinguished between three types of internalisation: legal, social and political internalisation.⁸³ Political internalisation occurs when political elites accepts an international norm.⁸⁴ When these norms are incorporated into domestic legal instruments whether legislative, administrative or judicial, this constitutes

⁷⁰ A Chayes & AH Chayes (n.64) p.185.

⁷¹ Vienna Convention on the Law of Treaties, art 26.

⁷² A Chayes & AH Chayes (n. 64) p.185.

⁷³ A Chayes & AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (London: Harvard University Press, 1995), p.3.

⁷⁴ A Chayes & AH Chayes *The new sovereignty* (n. 73) pp. 32 - 33.

⁷⁵ See J Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* transW Rehg (1996).

⁷⁶ A Chayes & AH Chayes *The new sovereignty* (n. 73) p.135.

⁷⁷ See also OA Hathaway (n. 27) p.1957.

⁷⁸ Hathaway referred to it as ‘the most recent addition to the normative theoretical framework’. See OA Hathaway (n. 27) p.1960.

⁷⁹ HH Koh, ‘The 1994 Roscoe Pound Lecture: Transnational Legal Process’ (1996) 75 *Nebraska Law Review*, p.181 (HH Koh ‘Transnational Legal Process’); HH Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 *Houston Law Review*, p.626 (HH Koh ‘Bringing International Law Home’); HH Koh ‘How is International Human Rights Law Enforced?’ (n. 14) p.1398.

⁸⁰ HH Koh ‘Transnational Legal Process’ (n. 79) p.181.

⁸¹ HH Koh ‘Transnational Legal Process’ (n. 79) pp. 203 - 205; HH Koh ‘Bringing International Law Home’ (n. 79) p.626.

⁸² HH Koh ‘Bringing International Law Home’ (n. 79) p.626.

⁸³ HH Koh ‘Bringing International Law Home’ (n. 79) p.642.

⁸⁴ VO Ayeni (n. 6) p.11; HH Koh ‘Bringing International Law Home’ (n. 79) p.642.

legal internalisation. Social internalisation occurs when norms of international law have acquired public legitimacy, and widespread support and adherence.⁸⁵

The process of legal, political and social internalisation does not occur in a vacuum. Koh identified six actors or transnational agents that help bring home norms of international law: transnational norms entrepreneur, norm sponsors at national level, transnational activist networks, interpretive communities, bureaucratic communities and issue linkages.⁸⁶ Koh also identified at least five mechanisms which may be involved in TLP, namely coercion, self-interest, rule-legitimacy, communitarian impulse, and internalization.⁸⁷ Koh's argument is that these five mechanisms correspond to the five theories of compliance with international law – realism, rationalism, liberalism, communitarianism, and constructivism.⁸⁸ For Koh, the reasons for non-compliance include vagueness of norms, toothless mechanisms, weak regimes, and lack of economic interest and political will.⁸⁹

4. Hybrid models

More recent approaches to the domestic effects of human rights instruments tend to integrate the instrumental, rational choice perspectives with the normative, constructivist model. This new approach is described in some studies as modern or sophisticated constructivism.⁹⁰ Below is an overview of some of the major theories under the hybrid model.

Spiral model of human rights change

Risse, Ropp and Sikkink in 2009 proposed a spiral model of human rights change.⁹¹ The spiral model was built on previous works on 'principled issue', 'transnational advocacy networks', and the 'boomerang effect'.⁹² The boomerang effect describes the process whereby domestic opposition groups including civil society organisations bypass the state and reach out directly to transnational advocacy networks. The transnational advocacy networks in turn mount pressure on donor agencies and powerful states to pressurize the norm violating state to comply with human rights norms.⁹³ Under the rubric of the spiral model, Risse, Ropp and Sikkink identified three kinds of socialisation processes or causal mechanisms – instrumental adaptation, argumentation, and institutionalisation. They argue that the socialisation process usually begins with instrumental adaptation, followed by argumentation or persuasion, and much later, institutionalisation or habitualization.⁹⁴

Domestic politics theory

Simmons proposed a 'domestic politics' theory of compliance. According to Simmons, 'treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights

⁸⁵ As above.

⁸⁶ HH Koh 'Bringing International Law Home' (n. 79) pp.647-655.

⁸⁷ HH Koh 'Bringing International Law Home' (n. 79) p.634.

⁸⁸ HH Koh 'Bringing International Law Home' (n. 79) p.635.

⁸⁹ See HH Koh 'How is International Human Rights Law Enforced' (n. 14) p.1398.

⁹⁰ E Bates (n.9) p.1181.

⁹¹ T Risse, SC Ropp & K Sikkink, 'The Socialisation of International Human Rights Norms into Domestic Practices: Introduction' in T Risse, SC Ropp & K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), pp.19-20; T Risse & SC Ropp, 'Introduction and Overview' in T Risse, SC Ropp & K Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013), p.5.

⁹² See M Finnemore & K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization*, p.892.

⁹³ As above.

⁹⁴ T Risse, SC Ropp & K Sikkink *The power of human rights* (n. 91) pp.12 & 13.

preferences that were not empowered to the same extent in the absence of the treaties.⁹⁵ She identified three mechanisms or channels through which treaties may have effects in domestic politics: setting the national agenda, inspiring and facilitating litigations, and galvanizing popular social or political mobilization.⁹⁶ She argues that treaties though they have significant effect, they do not have the same effects everywhere, and that international human rights system will have its greatest impact in transitioning regimes.⁹⁷ This is because in stable democracies, citizens have the means to employ social mobilization but the motive is usually absent. In stable autocracies, on the other hand, citizens have the motive to use international human rights treaties to demand change, but they generally lack the means to do so.⁹⁸ The domestic politics theory has also been advanced by scholars such as Hillebrecht,⁹⁹ Goodman and Jinks,¹⁰⁰ Alter¹⁰¹ and Hafner-Burton.¹⁰² This body of scholarships all construe compliance with human rights treaties as a function of domestic political processes. Another important theme common to all domestic politics theories is the integration of rational choice perspectives with normative explanations. In discussing how member states of the Council of Europe respond to adverse decisions of the European Court of Human Rights, Von Staden argued that states demonstrate a normative sense of obligation to comply while at the same time exploring various instrumental and cost-saving possibilities to comply as little as possible.¹⁰³

5. Point of views based on specific study of judgments of IHRTs

Relying on the three principal approaches to international law compliance, scholars specialised in human rights judgment compliance have suggested a ton of factors that explain why states comply with decisions of IHRTs. Each of the factors usually is traceable one way or another to the three principal theories. The difference however is that rather than argue that state compliance is mono-causal, human rights judgment compliance scholars like the proponents of the hybrid approaches to international law compliance, tend to argue that state compliance is multi-causal. In other words, no singular phenomenon is sufficient to explain state compliance in every case. Helfer and Slaughter, for example, proposed a checklist of thirteen factors that improve effectiveness of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).¹⁰⁴ They discussed the 13 factors under three categories.¹⁰⁵ The first set of factors are those within the control of state parties that set up the tribunal. These include the composition of the tribunal, its case load and fact finding capability, and the perceived legal status of the treaty the tribunal is required to interpret.¹⁰⁶ The second set of factors are those within the tribunal's control such as the quality of its legal reasoning, neutrality and autonomy from political interests, judicial cross-fertilization and dialogue, incrementalism and acceptance of dissenting opinions.¹⁰⁷ The third set of factors are those beyond the control of state parties the tribunal. These include the nature of violation alleged, presence of autonomous domestic institutions who are committed to the rule of law, and relative cultural and political homogeneity of states subject to the

⁹⁵ BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009) p.25.

⁹⁶ BA Simmons (n. 95) pp.4&19.

⁹⁷ BA Simmons (n. 95) pp.16-17.

⁹⁸ As above.

⁹⁹ C Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014).

¹⁰⁰ R Goodman & D Jinks, *Socialising States: Protecting Human Rights through International Law* (Oxford: Oxford University Press, 2013).

¹⁰¹ K Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics' (2011) 12 *Cambridge Yearbook of European Legal Studies*, p.1.

¹⁰² E Hafner-Burton, *Making human rights a reality* (2013).

¹⁰³ A von Staden, 'Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights' *SSRN eLibrary* 6 February 2012.

¹⁰⁴ LR Helfer & A-M Slaughter (n. 47) pp.298-337.

¹⁰⁵ LR Helfer & A-M Slaughter (n. 47) pp.298-336.

¹⁰⁶ LR Helfer & A-M Slaughter (n. 47) pp.300-304.

¹⁰⁷ LR Helfer & A-M Slaughter (n. 47) pp.307-327.

tribunal.¹⁰⁸ Helfer and Slaughter believe the single most important factor that accounts for the success of the ECtHR is the strong domestic traditions of rule of law and liberal democracy among states that are members of the Council of Europe.¹⁰⁹ Similar sentiments have been shared by other scholars and jurists.¹¹⁰

Hillebrecht identifies the nature of violation involved in the case, type of obligation imposed by a ruling, the level of executive constraint in the state concerned, the GDP per capital of the state, the number of treaty ratified by the state concerned, and overall level of democracy as factors that may determine whether or not a state would comply with ruling of HRTs¹¹¹ Hillebrecht however singles out executive constraint as the most statistically significant factor that drives compliance.¹¹² Her empirical results also demonstrate that only domestic institutions matter for compliance. The type of obligations imposed on states by a ruling and GDP per capital of states have little or no statistical effect on compliance.¹¹³ Louw identified sound and substantial reasoning, clarity of reparation orders, nature of violations found, type of obligations imposed on states, nature of remedies formulated by HRTs, the degree of domestic and international mobilization around the case, the type political system in place in the states concerned, and follow up activities by domestic NGOs and HRTs.¹¹⁴ In addition to the factors identified by Louw above, Viljoen and Louw also identified certain factors inherent in the institutional architecture of the African Commission which cause states not to comply with the Commission's decisions. These factors include the recommendatory character of the decisions of the Commission, the Commission's perceived legitimacy deficit, and the fact that the political bodies within the AU demonstrate general lack of commitment to human rights.¹¹⁵ Viljoen and Louw however noted that these inherent factors do not account for the variation in compliance between the cases or among states.¹¹⁶ Significantly, Viljoen and Louw found that the two factors most likely to influence compliance outcomes are: the presence of stable, open and democratic system of government in the state concerned, and the involvement of NGOs in submitting and following up of cases.¹¹⁷

In his analysis of compliance with nine human rights decisions of the ECCJ, Adjolohoun identified the political environment of the case and the nature of the remedy as the two most important compliance factors.¹¹⁸ In addition to these two primary compliance factors, Adjolohoun identified other compliance factors such as the low cost remedies imposed by ECCJ, and the application of international pressure on states.¹¹⁹ A paper by Alter, Helfer and McAllister has made similar contributions to the understanding of factors that could make decisions of the ECCJ to very effective.¹²⁰ Recently, Murray and Long highlighted the following as factors that influence states to comply with the decisions of HRTs, particularly the African

¹⁰⁸ LR Helfer & A-M Slaughter (n. 47) pp.328-335.

¹⁰⁹ As above.

¹¹⁰ See HG Schermers, 'International Human Rights in the European Community and in the Nations of Central and Eastern Europe: An Overview' (1993) 8 *Connecticut Journal of International Law*, pp.313-319. Judge Rudolf Bernhardt of the ECtHR also attributed the success of the ECtHR to what he called 'the considerable measures of homogeneity among European states'. See R Bernhardt, 'Commentary: The European System' (1987) 2 *Connecticut Journal of International Law*, pp.299-300.

¹¹¹ C Hillebrecht (n. 99) p.41-65.

¹¹² As above.

¹¹³ C Hillebrecht (n. 99) pp.60-61.

¹¹⁴ L Louw, 'An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights' Unpublished LLD Thesis, University of Pretoria, 2005, pp.311-327.

¹¹⁵ F Viljoen & L Louw, 'State Compliance with the Recommendations of the African Commission on Human and People's Rights, 1994 - 2004' (2007) 101 *American Journal of International Law* p.12.

¹¹⁶ As above.

¹¹⁷ F Viljoen, 'The African Human Rights Systems and Domestic Enforcement' in M Langford, C Rodriguez-Garavito & J Rossi (n.6).

¹¹⁸ H Adjolohoun (n. 6) pp.321-323.

¹¹⁹ As above.

¹²⁰ KJ Alter, LR Helfer & JR McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law*, pp.737-779.

Commission: the legal or moral authority of the HRT, the quality of its finding, the process of arriving at the decision, and the added value of the decision to existing human rights standard.¹²¹ The authors argued that both legal and political factors are responsible for compliance. Importantly, the authors noted that the dichotomy between binding and non-binding decisions is not a decisive factor in determining compliance.¹²²

A three-year study was undertaken between 2015 and 2018 to investigate the status of compliance with pertinent decisions of the IHRTs in selected African states. The study focused on the broad issues of state compliance, factors influencing compliance with reparation orders of regional and sub-regional tribunals and the influence or impact of such reparation orders in the selected African states. Based on the data generated by the study with the possible circumstances inducing compliance, specific to the selected countries, Ayeni identifies five primary factors facilitating human rights judgment compliance in the selected states. The first factor identified is some commitment to compliance by states which may be demonstrated at the supra-national, national or the sub-national level. Other factors identified by Ayeni include: (i) issuance of low-cost, specific and limited remedies by the HRT; (ii) the existence of free, stable and democratic system of governance in the state required to implement the decision; (iii) the effectiveness of follow up by the HRTs and NGOs; and (iv) political transition or regime change subsequent to the decision. Of these five factors, the study singles out 'commitment to compliance' as the most important factor predictive or indicative of compliance in the selected African states.

6. Conclusion

Despite the avalanche of theories, international legal scholarship still lacks a satisfactory theory of compliance with international law.¹²³ The problem, as previously noted, is that none of the theories have adequately addressed why there is variation in the pattern of state compliance with decisions of HRTs across cases, over time and even across HRTs. Also, the theories are far from providing practical guides on the specific actions HRTs need to take to ensure states comply with their decisions. While it is mostly agreed among scholars that coercion, persuasion and acculturation are the causal pathways to state compliance,¹²⁴ it is still unclear which of these mechanisms takes the lead in pulling states towards compliance. Most scholars also tend to agree that state compliance is underpinned by either normative considerations or instrumental rationale,¹²⁵ yet it is not clear which of the two approaches accounts for most acts of compliance by states. The consensus among scholars tends to be that multiple factors, ranging from enforcement, management and domestic politics, are responsible for state compliance,¹²⁶ yet it is not clear which of these broad factors is the best predictor of state compliance. Without a coherent theory of compliance and practical guidelines on why states comply with HRTs' decisions, scholars may be unable to provide useful policy advice to HRTs and state actors. It must be noted that the range of factors that induce state compliance with international law and specifically decisions of IHRTs vary from state to state and region to region. Thus, specific studies should be encouraged on the dynamics of state compliance in each of the regional human rights systems, especially in Africa where such study is relatively a rarity. While findings in relation to the European and the Inter-American human rights systems may provide useful insights for Africa, for instance, they should not substitute for specific studies on factors that enhance state compliance with international law, particularly decisions of HRTs, in Africa.

¹²¹ R Murray & D Long (n. 4) pp.10-26.

¹²² R Murray & D Long (n. 4) pp.24-25.

¹²³ See AT Guzman (n. 2) p.1826.

¹²⁴ See R Goodman & D Jinks (n. 100) pp.1-256.

¹²⁵ See generally AT Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2010) p.1. For the normative or constructivist theory, see JT Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43 *International Studies Quarterly*, pp.83-114.

¹²⁶ See D Kapiszewski & MM Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38 *Law & Social Inquiry*, pp.803-835; D Hawkins & W Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010 - 2011) 6 *Journal of International law and international relations*, pp.57-75.