



**Volume 4, Number 1**

**2008**

---

**Editors-in-Chief**

Abby Deshman

Mathew Goldstein

**Executive Editor**

Sayran Sulevani

**Senior Editors**

Lianne Cihlar  
Alanna Krolikowski

Josh Cramer  
Nalin Sahni  
Anatoly Vlasov

Emily Graham  
Brian Studniberg

**Senior Associate Editors**

Lauren Lackie  
Tony Navaneelan  
Vinay Sarin

Kawai Leung  
Kate Oja

Andrew Midwood  
Justin Safayeni  
Robyn Switzer

---

**Business Managers**

Nazanin Rassouli  
Amy Hu  
Mark Greenberg

**Administrators**

Candice Telfer  
Marina Abrosimov  
Kim Larsen  
Jess Lahrkamp

**Production Editors**

Dennis Kao  
Chloe Snider

---

**Executive Editorial Board**

Michael Fakhri  
James McKee

Wendy Hicks-Casey  
Umut Özsü  
Cliff Vanderlinden

Paul Martin  
Cathleen Powell

---

**Faculty Advisors**

Steven Bernstein  
Munk Centre for International Studies

Jutta Brunnée  
University of Toronto Faculty of Law

---

### **Associate Editors**

Joanna Vince	Laura Wagner	Maria Golarz
Laura Wagner	Ranjit Singh Khangura	Stephen Oakey
Liam Stockdale	Courtney Hood	Poorvi Chitalkar
Aaron Kreaden	Andrew Weafer	Stuart Rothman
Annie Pyke	Allison Sephton	Hannah Moosa
Troy Dore	Laura Shiner	Cassandra Florio
Melissa Kim	Roopa Rangaswami	Josh Elcombe
Filipp Levin	Inie Park	Soo Hyun Nam
Y.Y. Brandon Chen	Ali Hammoudi	Dan Moore
Joe Heller	Geoff Burt	Hillary Jarvis
Kathryn Beck	Erin Hallock	Heather Keachie
Laura Brittain	Mary Albino	Clea Amundsen
Imtenan Abd-El-Razik	Sarah O'Grady	Tobi Aribido
Ben Kates	Maggie Vandermeulen	Frances Cation
Tina Yang	Rebecca Hamovitch	Corinne Bordman
Shiva Kumar Giri	Harvey Lam	Jennifer Simpson

---

### **Senior Advisory Board**

Kenneth Abbott	Oona Hathaway	Friedrich Kratochwil
Jose Alvarez	Robert Keohane	René Provost
Upendra Baxi	Benedict Kingsbury	Philippe Sand
Michael Byers	Karen Knop	Shirley Scott
Jutta Brunnée	Martti Koskenniemi	Gerry Simpson
Martha Finnemore	Stephen Krasner	Stephen Toope
Thomas Franck		Rob Walker

---



Printed in Canada by Thistle Printing Limited

Cover design by uomo studio

Copyright © 2008. *Journal of International Law & International Relations*. All rights reserved. No part of this book may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems, apart from short passages for use in review, without permission from the Editors-in-Chief. Reproduction of this material without authorization, by any means of duplication whatsoever, is a violation of copyright.

The *Journal of International Law & International Relations* aims to promote critical, informed, and interdisciplinary debate on the intersection of international law and international relations. To this end, the *JILIR* provides a forum for contributions from Canada and abroad on matters of current concern in international affairs in general and on issues of particular interest to Canada. The opinions expressed in the *JILIR* are those of the individual authors, and none of the *JILIR*, its editors, the Faculty of Law or the Munk Centre accept any responsibility for them.

The *Journal of International Law & International Relations* gratefully acknowledges the financial and institutional support of the Faculty of Law and the Munk Centre for International Studies at the University of Toronto.

**Subscriptions:** Each volume of the *JILIR* consists of two issues, published in the Winter and the Spring. The subscription cost is C\$64 per volume (2 issues).

Subscription requests should be sent to:

*The Journal of International Law & International Relations*  
University of Toronto  
84 Queen's Park Crescent  
Toronto, Ontario M5S 2C5  
Canada  
Email: [subscriptions@jilir.org](mailto:subscriptions@jilir.org)

**Online:** The full text of past issues of the *JILIR* is available via Westlaw and Lexis.

**Citation:** (2008) 4(1) J. Int'l L. & Int'l Rel.

© **Journal of International Law & International Relations, 2008**  
**All Rights Reserved. ISSN: 1712-2988**



# Theories of Compliance with International Law and the Challenge of Cultural Difference

ASHER ALKOBY\*

## Table of Contents

<b>I. Introduction</b> .....	<b>151</b>
<b>II. Culture and Intersubjectivity</b> .....	<b>158</b>
<b>III. Why Constructivism: Rational Choice and Culture</b> .....	<b>161</b>
<b>IV. Constructivism and Compliance: Taking Culture Seriously?</b> .....	<b>166</b>
<i>A. Culture, Identity and International Norms</i> .....	166
<i>B. Acculturation and the Presumption of Community</i> .....	169
<i>C. Persuasion and Legitimacy of Norms: Constructivism All the Way Down</i> .....	178
(i) Persuasion and Horizontal Legitimacy .....	179
(ii) Persuasion and Vertical Legitimacy .....	184
<b>V. Conclusion: The Promise of Critical Constructivism</b> .....	<b>192</b>

## I. Introduction

The question of states' compliance with international law (IL) has become one of the central topics of academic research in the field.<sup>1</sup> As more and more areas of social life are being heavily regulated by IL, understanding the connection between law and state action becomes crucial. Explaining why states do or do not comply with IL is important for designing international commitments and improving the effectiveness of international institutions. The study of state behaviour, however, often takes an unduly narrow definition of 'compliance' as its starting point. The traditional view of international lawmaking

---

\* Assistant Professor, Ted Rogers School of Management, Ryerson University. My thanks go to Jutta Brunnée, Antje Wiener, Karen Knop, David Dyzenhaus, Craig Scott and four anonymous reviewers for their comments on previous drafts. I also thank the JILIR staff and editorial board for their assistance and useful suggestions. An earlier version of this article was presented at the New International Law Conference, Oslo, Norway, March 2007.

<sup>1</sup> For a comprehensive annotated bibliography of this literature see W. Bradford, "International Legal Compliance: An Annotated Bibliography" (2005) 30 N.C. J. Int'l L. & Com. Reg. 379.

considered law as a collection of formalized and institutional features, and it is striking to see how this view continues to be explicitly endorsed by leading scholars who have shaped the compliance debate in recent years.<sup>2</sup> These scholars treat the act of contractual obligation as the defining moment when a law comes into being and measure the behaviour of states with reference to that point in time.<sup>3</sup> What these analyses often fail to acknowledge is that, given the nature and reach of IL in the past few decades, these traditional categories must be re-examined. Very often, the formal act of accepting a legal obligation is only a point signalling the beginning of a broad process of lawmaking.<sup>4</sup> Law is thus 'much more about process than about form or product.'<sup>5</sup> There is an increasing number of voices advocating a more expansive view of law and aiming to situate it in a broader social context. Harold Koh's formulation of 'transnational legal process' has been especially influential. International legal obligation is created, he maintains, in a series of continuous repeated interactions in which a legal rule is constructed, interpreted, clarified, internalized, and enforced.<sup>6</sup> Even after binding commitments are made, their clarification, interpretation and implementation is constantly renegotiated and reflected upon in light of changing circumstances, new information, or a deepening consensus among the key actors.

Studying compliance, in turn, increasingly demands a close consideration of social processes, including the necessary economic, political and cultural conditions for the successful implementation of international legal commitments. A particularly pertinent example of

---

<sup>2</sup> See the contributions to J.L. Goldstein *et al.*, eds., *Legalization and World Politics* (Cambridge: MIT Press, 2001).

<sup>3</sup> Notable example for treating *ratification* as the defining moment of lawmaking is the comprehensive studies on compliance with human rights and environmental treaties conducted by O.A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72 U. Chicago L. Rev. 469.

<sup>4</sup> R. Goodman and D. Jinks, "Measuring the Effects of Human Rights Treaties" (2003) 14 E.J.I.L. 171 at 174.

<sup>5</sup> M. Finnemore and S.J. Toope, "Alternatives to "Legalization": Richer Views of Law and Politics" (2001) 55 Int'l Org. 743 at 750.

<sup>6</sup> H.H. Koh, "Transnational Legal Process" (1996) 75 Neb. L. Rev. 181 at 184.

this challenge is the Climate Change Convention.<sup>7</sup> Compliance with this agreement requires more than the domestic incorporation of a set of international rules and regulations. Compliance demands profound changes in political, social and individual patterns of thinking, and entails private consumers' acceptance of decisions that would have direct impact on their daily lives, as well as major changes in productions industries. Such profound changes in values and perceptions are likely to proceed differently across cultures. Another example is the implementation of intellectual property rights norms, requiring a development of what Tom Tyler has termed a 'culture of compliance' whereby people avoid illegal use of copyrighted materials because they internalize the norms prohibiting it.<sup>8</sup> When compliance can only be achieved in this 'wide' and 'deep' sense, governments need more than their publics' support in order to meet their commitments – an active *participation* of the public is a necessary condition for the successful implementation of international commitments.

If the spread of international norms needs to be achieved in both a 'wide' and 'deep' sense, variations in cultural perceptions and diffusions of such norms become particularly relevant. A theory of state compliance with international norms must therefore consider cultural diversity a crucial factor when attempting to build a coherent compliance model. This article examines some of the important conceptual and empirical contributions to the study of compliance in order to ask to what extent existing approaches consider the impact of cultural diversity on state compliance with IL. Much of this scholarship purports to develop models of compliance that claim to have practical utility for institutional design. Cultural diversity, I argue, is a crucial explanatory factor that is often overlooked in the study of international normative change.

---

<sup>7</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849 and the subsequent *Kyoto Protocol to the Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22. For a preliminary discussion of the breadth of the challenge see David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy*, 2d ed. (New York: Foundation Press, 2002) at 589.

<sup>8</sup> T.R. Tyler, "Compliance with Intellectual Property Laws: A Psychological Perspective" (1997) 29 N.Y.U.J. Int'l L. & Pol. 219.

The burgeoning literature on compliance is still in its infancy, but there is a growing interest in building a unified theory among IL scholars that is greatly influenced by international relations (IR) scholarship. International lawyers turn to IR theory for better explanatory models for the evolution of norms and for compliance with them, while IR scholars turn to theories on law for normative models in order to better understand observed behavioural regularities.<sup>9</sup> Coming from one discipline (IL), my foray into the other (IR) is motivated not by an attempt at 'bridging' them or seeing how they may converge but by the need to critically examine the influence of the one (IR) on the other (IL) in light of the recent extensive cross traffic between the two.<sup>10</sup>

Given my interest in the nature of *the process* through which norms are constructed and rule-guided behaviour is then achieved, I define compliance not in co-relational terms (the measured conformity of a behaviour with a norm), but in a causal way (compliance as a *norm driven* behaviour).<sup>11</sup> IR/IL compliance literature identifies three causal mechanisms that lead states to comply with international norms: coercion, persuasion and acculturation (or normative coercion). The first emphasizes the constraining effect of norms, while the latter two are said to have a constitutive effect on actors, namely the power to

---

<sup>9</sup> See S.J. Toope, "Emerging Patterns of Governance and International Law" in M. Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000) 91 at 93.

<sup>10</sup> Some authors argue that the increasing IL/IR collaboration reflects a sense of inferiority among some international lawyers, and that it often results in the narrowing of the disciplinary imagination. They contend that international lawyers typically draw on strands from IR theory that perpetuate existing power configurations by deploying realist IR theories as if they were the only ones available, or by reducing IL to a set of contractual obligations through the deployment of game theory, thereby ignoring the complexity of international lawmaking (see, e.g. J. Klabbers, "The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity" (2005) 1 J. Int'l L. & Int'l Rel. 35). My use of the IR and other literatures, however, is anything but uncritical adoption of theories that downplay the role of law or the complexity of the international lawmaking enterprise. The following discussion, rather than jeopardizing the relative autonomy of IL, seeks insights from a neighbouring discipline that may shed more light on the richness of IL and the meaningful role it could play in global social life.

<sup>11</sup> For a use of the first definition see K. Raustiala and A.M. Slaughter "International Law, International Relations and Compliance" in W. Carlsnaes, T. Risse and B.A. Simmons, eds., *Handbook of International Relations* (London: Sage, 2002) 538 at 539.



alter their identities and preferences. Rational choice theories emphasize *coercion*, positing that norms may influence the behaviour of states by providing benefits for conformity or creating costs for non-conformity.<sup>12</sup> This approach assumes that beyond self-interestedness, only external forces can motivate compliance: norms are not internalized by actors but merely serve to constrain their behaviour. The rationalist model offers a very limited engagement with cultural difference because it fails to treat both the international and the domestic realms as social environments.

Constructivist approaches, on the other hand, treat states as social entities that, in interacting with each other, develop shared understandings regarding what is appropriate, which then give rise to behavioural norms. These norms, in turn, shape the identities of states, which then transform their interests. This growing body of literature is now infusing the debate over the character of the international system with exciting new insights, and the empirical studies that it has generated to date have successfully challenged the materialist assumptions that form the basis of many of the dominant rationalist accounts. The serious contemplation of social action offered by constructivism opens the way to a much-needed consideration of cultural contingency. This article suggests, however, that the particular strand of constructivism that is gaining some followers in the IL community does not fully realize the potential of this approach to meaningfully engage with the challenge of diversity.

Conventional constructivists<sup>13</sup> claim that human agents do not operate in a normative vacuum but in a social environment with 'its

---

<sup>12</sup> See D. Snidal, "Rational Choice and International Relations" in Carlsnaes *et al.*, *ibid.* at 73. For a representative collection of studies in IL see R.O. Keohane, "Rational Choice Theory and International Law: Insights and Limitations" (2002) 31 J. Legal Stud. 307.

<sup>13</sup> A distinction between 'conventional' and 'critical' constructivists will be made in the following discussion, following T. Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23(1) Int'l Security 171. Conventional constructivist analyses are grounded in positivist thinking. What unites them, among other things, is a belief in scientific enquiry and the view that empirical validation or falsification is the hallmark of such enquiry (i.e. at least methodologically, social sciences can be studied in the same way that natural sciences can). Their approach is also objectivist: the view that there is a distinction between facts and values. Objective knowledge of the world is possible despite the fact that observations may be subjective. Critical constructivists, on the other hand, are post-positivists in that they consider observable facts as inseparable from values,

collectively shared systems of meaning (“culture” in a broad sense).<sup>14</sup> The causal mechanism that they emphasize is social sanctioning, which is shown to be an effective tool for inducing compliance with norms. In much empirical work, therefore, a mechanism of *acculturation* is highlighted. This form of normative coercion serves as a collective disapprobation for the breach of norms, which is imposed by the community to which the noncompliant actor belongs. States have a sense of belonging to the international community, and it is their fear of loss of good standing in that community that motivates them to comply. While constructivism is ontologically about the *intersubjective* construction of norms, then, this strand of the literature focuses on the unidirectional diffusion of pre-existing normative structures through means of normative coercion.

More promise lies in another strand of constructivism, which has not gained much currency among IR compliance researchers, let alone IL scholars. Critical constructivism emphasizes the discursive interventions through which norms are constructed, and the meanings that they take on in that process. Discourse ethics, an idea most associated with the work of Jürgen Habermas, is a normative ethics for pluralistic societies which no longer have a single, overarching moral authority. Under this approach, actors engaged in a genuine discourse ought to be motivated and guided by a willingness to be persuaded by the ‘unforced force of the better argument’ which means that ‘agents suspend their own truth claims, respect the claims of others and anticipate that their initial points of departure will be modified in the course of dialogue.’<sup>15</sup> In this view, norms will be complied with when they are constructed, interpreted and implemented in a process of

---

because they are contingent upon human perception. What we see as facts is very much influenced by prior understandings and meanings that are embedded in our local environment and culture. Critical constructivists are also occupied with unmasking power relations in social exchanges, while conventional constructivist remain ‘analytically neutral on the issue of power relations’ (*ibid.* at 185). Critical theory is also self-reflexive in the sense that the knowledge that researcher generates is not neutral but politically and ethically charged (*ibid.* at 184).

<sup>14</sup> T. Risse, “Let’s Argue! Communicative Action in World Politics” (2000) 54 *Int’l Org.* 1 at 5.

<sup>15</sup> A. Linklater, “Citizenship and Sovereignty in the Post-Westphalian State” (1996) 2 *Eur. J. Int’l Rel.* 77 at 86.

mutual persuasion, in keeping with the procedural rules of discursive argumentation. While IR compliance research has begun producing empirical evidence for processes resembling the conditions for discourse ethics identified in critical theorizing, (conventional) constructivists only borrow the sociological aspects of the theory without any reference to its critical and reflexive qualities.

The article begins in section II by proposing a working definition of 'culture' as a lens through which the question of diversity in IL may be examined, and draws parallels between this definition and underlying constructivist assumptions regarding the intersubjectivity of norms. Section III briefly surveys some of the notable attempts by IL and IR scholars to adopt rational-choice compliance models and their disregard for cultural variables. Section IV turns to provide a critical assessment of the constructivist literature, arguing that constructivism's potential to meet the challenge of cultural difference in IL holds great promise, but that the more influential strands of this approach to compliance raise some serious concerns regarding normative grounding as well as theoretical coherency.

The reliance of some conventional constructivists on acculturation, this article argues, assumes a relatively cohesive social environment in which norms operate. Authors who consider this mechanism favourably assume that this condition is met. This assumption, however, is not defended at the normative level, and empirically it infers the existence of a 'global culture' from structural similarities between states while ignoring the agency involved. Indeed, students of 'socialization' face a paradox: the conventional definition of socialization is 'the induction of members into (an existing) society.' If a global 'society' does not exist, what point is there to speak of the ways in which actors may be 'socialized'?

Acculturation may be seen as a useful compliance tool for established societies wishing to regulate the behaviour of its members. Persuasion, on the other hand, is a more attractive tool when a society's creation of norms is part of the process of constituting that society. But the mechanisms through which persuasion works remain underspecified in constructivist literature. Studies have shown how persuasion may work in diplomatic settings, where state representatives are sometimes persuaded to comply with international norms in a process of 'social learning.' But their attempts at examining

the domestic internalization of norms present us with a proposition that puts the coherency of this approach in question: that norms may have a constitutive effect at the international level but an instrumental role domestically. If persuasion only works at the level of state elites, it is not clear how norms come to constitute *state* identity, or how they resonate in its cultural environment. This difficulty is most evident in situations where compliance with international norms must run both 'wide' and 'deep' i.e. addressing a host of domestic actors and involving value-laden norms that are difficult to enforce and therefore must attain a high level of legitimacy in order to become effective. The article concludes that the challenge of cultural difference in the study of normative change in IL can only be met through a reflexive engagement with questions of moral discourse, such as that offered by critical constructivism.

## II. Culture and Intersubjectivity

This article uses the term 'culture' in a broad sense, understanding it as the goals, values and pictures of the world that are made manifest in the speech, norms, and routine practices of a group of people.<sup>16</sup> This definition has been under sustained attack in the past few decades. Critical anthropologists have been renouncing the concept, locating its origins in forms of colonial governance, and arguing that such constructions of cultural identity served the interests of settler and colonial elites.<sup>17</sup> The 'New Stream'<sup>18</sup> of IL scholarship has also been preoccupied with questions of cultural difference and international governance over the past two decades. Scholars have highlighted the continued use and misuse of 'culture' in the practice of IL, arguing that the concept is often employed in the service of dominant actors.<sup>19</sup> The

---

<sup>16</sup> See R.A. Shweder, "Culture: Contemporary Views" in N.J. Smelser and P.B. Baltes, eds., *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam & New York: Elsevier, 2001) 3151 at 3153 (quoting Isaiah Berlin).

<sup>17</sup> Ibid. at 3153-3154.

<sup>18</sup> A term coined in D. Kennedy, "A New Stream of International Legal Scholarship" (1989) 7 *Wis. Int'l L.J.* 1.

<sup>19</sup> See A. Riles, "Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture" (1993) 106 *Harv. L. Rev.* 723. The cultural neutrality of IL is seen by some to be part of the story of colonial subjugation. Colonial rulers developed a

central claim put forward by New Stream scholars is that IL, although assuming an agnostic position toward culture since its inception, *is a culture* in itself – it is an instrument and the refection of European culture, and its attendant lawmaking processes perpetuate its Eurocentric foundations.<sup>20</sup>

While these insights are valuable and have rightly been gaining the increasing attention of the IL audience, the corollary scepticism of the transformative potential of IL may be unwarranted. The rejection of objectivity and recognition of (radical) subjectivity leads some New Stream scholars to speculate ‘an internationalism based on a global politics of identity, a shifting sand of cultural claims and contestations among constructed and overlapping identities about the distribution of resources and the conditions of social life.’<sup>21</sup> This is not a call to accommodate cultural diversity in the existing global governance framework: under this view, ‘the notion of “culture” itself comes under pressure as an alternative to governance.’<sup>22</sup>

This dichotomous view of law and culture considers two options only: the use of existing governance frameworks to manage

---

concept of law that was the antithesis of culture, coded as superstition, irrationality, timeless stasis and organic closed systems. ‘Law,’ on the other hand, represented the inexorable and universal forces of science, progress and rationality. Thus Europeans had ‘law,’ while others had ‘culture.’ R.J. Coombe, “Culture: Anthropology’s Old Vice or International Law’s New Virtue?” (1999) 79 Proc. Am. Soc. Int’l L. 261 at 265.

<sup>20</sup> For a historical perspective see Y. Onuma, “When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective” (2000) 2 J. Hist. Int’l L. 1 (exploring the European origins of modern IL and maintaining that it was one of many normative systems which existed in various regions of the globe). See also A. Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 Soc. & Leg. Stud. 321 (exploring the relationship between IL, colonialism and cultural difference). For an analysis of contemporary practice reflecting Eurocentric bias see D. Otto, “Subalterity and International Law: The problems of Global Community and the Incommensurability of Difference” (1996) 5 Soc. & Leg. Stud. 337. There is also a growing interest among New Stream scholars in the subjectivity of international lawyers, their ‘situationality’ or ‘sensibilities’ and how such biases limit the disciplinary imagination. See O. Korhonen, *International Law Situated: An Analysis of the Lawyer’s Stance Toward Culture, History and Community* (The Hague and London: Kluwer, 2000).

<sup>21</sup> D. Kennedy, “The Disciplines of International Law and Policy” (1999) Leiden 12 J. Int’l L. 9 at 133.

<sup>22</sup> Kennedy, *ibid.* at 69.

differences (an 'objective' law that aims to transcend culture, but actually operates to legitimize the status quo) or the use of identity politics (subjective cultural claims competing against each other outside the governance framework).<sup>23</sup> I consider the constructivist contributions to the compliance debate especially promising in this respect because they invite us to examine the possibility of a third option: the development of *inter*-subjective understandings within the existing governance framework, in a process through which cultural claims may be raised and debated. The following sections of this article consider the extent to which this promise has been fulfilled.

The notion of intersubjectivity that the constructivist agenda has introduced to IL discourse implies an anti-essentialist understanding of culture. Similarly, my interest in cultural diversity lies not in the essentialist view of culture that serves as a basis for criticisms of the strong versions of identity politics.<sup>24</sup> It is not to advocate cultural preservation but to stress the need for a *recognition* of culture's role in the construction of new collectivities. The invocation of cultural specificity should not be done for the purpose of demarcating the boundaries between 'we' and 'others,' but for the production and reproduction of a new 'we' when possible. Thus, to argue, for example, that the cultural distinctiveness of nations ought to be taken seriously is not to affirm each nation's right to seal and guard the content and the boundaries of its identity. Rather, it is to acknowledge that international actors should be allowed to bring their cultural specificity into the critical dialogue, while at the same time insisting that they should recognize the fluidity of their cultural identities.<sup>25</sup> The obvious parallels between this conception of culture

---

<sup>23</sup> One of the earliest expressions of this dichotomy was in M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers Publishing Company, 1989).

<sup>24</sup> Most notably by N. Fraser, "Rethinking Recognition" (2000) 3 *New Left Rev.* 107. The framework that I use draws especially on M. Carrithers, *Why Humans have Cultures: Explaining Anthropology and Social Diversity* (Oxford: Oxford University Press, 1992) and S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

<sup>25</sup> Note that if we accept that cultural identities are fluid, it also means that we cannot assume their necessary congruence with population groups. Thus, while a major concern for what remains largely a state-centric international system is the *national culture*, there is a need to consider other cultural groups as well. Cultural claims may also be raised by

and the constructivist ontology suggest that constructivism is where we may begin theorizing a culturally attuned approach to compliance with international norms. But before turning to the constructivist contributions to the compliance debate, the following section briefly considers some of the notable attempts at building compliance models based on rational-choice theory, where cultural difference appears to play no role.

### III. Why Constructivism: Rational Choice and Culture

IR rationalists highlight the self-interested nature of state actors and suggest that, although actors' understandings of their interests vary, forces external to the state ultimately override any potential influence of internal cultural factors.<sup>26</sup> Rational choice theory considers human action to be driven primarily by the 'logic of consequences.'<sup>27</sup> According to this logic, the actions of individuals, organizations, or states are driven by calculations of interests and measured against prior preferences. Those preferences may be material, altruistic, or a mix of both, but they are prior to political interaction and are stable over time.<sup>28</sup> Simply put, action is viewed as driven by expectations of the

---

sub-state groups in diverse immigration states or post-colonial states, operating at the national or transnational level (e.g. ethnic minorities, indigenous or religious groups, as well as issue-specific advocacy networks). Non-state groups are becoming key players in international lawmaking and their relevance for any study of state compliance is evident. As I argue elsewhere, opening up global discourses to their input may contribute to the successful implementation of international norms, because it gives voice to a broader range of cultural narratives that may not be fully reflected in the inter-state framework. See A. Alkoby, "Globalising A Green Civil Society: In Search of Conceptual Clarity" in G. Winter, ed., *Multilevel Governance of Global Environmental Change* (Cambridge: Cambridge University Press, 2006) 106. To a certain extent, IL discourse is receptive to cultural claims made by non-state entities. See generally B. Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 *Cornell Int'l L.J.* 481. Two kinds of groups are likely to be particularly resistant to intercultural influence: indigenous peoples, whose cultural identity is rooted in ways of life attached to a particular land, and who seek to preserve their unique culture that is often at odds with modernity, and religious fundamentalist groups who reject any possibility of compromise in their firmly held religious beliefs. For a preliminary discussion see Benhabib, *ibid.* at 184-186.

<sup>26</sup> For an overview see Snidal *supra* note 12 at 74.

<sup>27</sup> J.G. March and J.P. Olsen, "The Institutional Dynamics of International Political Orders" (1998) 52 *Int'l Org.* 943 at 949-952.

<sup>28</sup> *Ibid.* at 950-951.

consequences it will have. In the context of IL, a consequential perspective implies that international actors would choose to cooperate by binding themselves to agreements and norms, and comply with such commitments, because of expected gains or benefits. The expected benefit need not be material,<sup>29</sup> but human action is consistently understood in terms of its expected *consequences*.

Many IL and IR scholars, however, believe that state behaviour is more than simply 'consequential,' and posit additional descriptions of actor preferences and beliefs, often concluding that international actors in a wide variety of situations would always value things such as wealth, income, or power over others.<sup>30</sup> In addition to material costs and benefits, it is assumed that reputation is highly valued by international actors.<sup>31</sup> Reputation is defined as the reliability with which a state abides by its international commitments, which determines its value as a partner to future agreements. In this view, reputation is often assumed to have a monetary value: states factor it into their calculation of the material costs and benefits of compliance in any given situation.<sup>32</sup>

---

<sup>29</sup> As Keohane points out, for example, even '[t]he rational environmentalist chooses strategies with the highest expected value of improving environmental outcomes.' Keohane, *supra* note 12 at 309. On the general tendency claim in the study of politics to keep assumptions about human goals and motivations to a minimum see D.P. Green and I. Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven: Yale University Press, 1996) at 18.

<sup>30</sup> On how rationalism came to be associated with materialism in IR theory see J. Fearon and A. Wendt, "Rationalism v. Constructivism: A Skeptical View" in Carlsnaes *et al.*, *supra* note 12, 52 at 58-60.

<sup>31</sup> G.W. Downs and M.A. Jones, "Reputation, Compliance and International Law" (2002) 31 J. Legal Stud. 95 at 96. Oona Hathaway makes a broader claim when arguing that in addition to legal enforcement of the terms of international agreements, the 'collateral consequences' of violating an agreement are also weighed by state leaders before deciding whether to commit and comply. These collateral consequences include the explicit linking of foreign aid, trade, or other benefits to voluntarily joining a treaty, and this increases the pressure for commitment. Whether collateral consequences actually increase the chances for *compliance*, claims Hathaway, depends on whether actors actually monitor and respond to violations. Hathaway, *supra* note 3 at 509.

<sup>32</sup> A. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 Cal. L. Rev. 1823. For others, reputation has social value – which can still be factored into the strategic calculus in the same way that material rewards can. See e.g. P.H. Huang, "International Environmental Law and Emotional Rational Choice" (2002) 31 J. Leg. Stud. 237.



Why, then, do states make frequent references to moral and legal obligations when communicating with each other? Why do they communicate at all? If there is truth to the claim that moral and legal rhetoric may actually be credible and that it may also influence the behaviour of states, then there is a good reason to consider the content of the principles and ideals that are being invoked; to ask to what extent they reflect distinct cultural perspectives on the debated issue; and finally, to consider whether it is possible to bridge the cultural divide and arrive at a shared understanding on the matter. Rationalists, however, believe that international discursive practices can be explained without abandoning the basic assumption that states are self-interested and that culture is inconsequential.<sup>33</sup> Legal or moral rhetoric is usually not credible, they contend, which is not to say that it is useless. International law talk is always 'cheap' in the sense that it may only play a weak role as a signalling device. Thus, for example, a nation that wishes to maintain its reputation as cooperative would engage, out of purely self-interested motivation, in the 'right form of talk'.<sup>34</sup>

In other words, for rational choice theorists, culture has no bearing on international behaviour. The compliance models that this approach has generated pay little heed to the heterogeneity of identities and the uniqueness of cultures. Rational choice theorists would have us believe that strategic behaviour is stable over time and similar across people.<sup>35</sup> A step further is taken in the context of IL, where it is assumed that states (or people across states) operate on the same logic as well. Obviously, the 'thicker' the assumptions regarding human behaviour become, the more difficult it is to reconcile them with the theory's claim to universal validity. That *all* states act according to their calculation of anticipated consequences *all the time*

---

<sup>33</sup> For a recent and one of the most thoughtful statements of this argument see J.L. Goldsmith and E.A. Posner, "Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective" (2002) 31 J. Legal Stud. 115.

<sup>34</sup> *Ibid.* at 124. For more on 'signalling' as an explanatory factor of state compliance see D.H. Moore, "A Signalling Theory of Human Rights Compliance" (2003) 97 Nw. U.L. Rev. 879.

<sup>35</sup> This assumption of homogeneity, Green and Shapiro point out, is justified on grounds of theoretical parsimony (*supra* note 29 at 17).

is difficult enough to establish; that the desired consequences are also necessarily *material* would be doubly hard to defend.

A particular strand of rationalism that is worth pausing over is liberal rationalism. In the context of international politics, rationalists generally do not consider the treatment of states as unitary actors problematic,<sup>36</sup> but this state-centric assumption is now being directly challenged by liberal IR theory.<sup>37</sup> Under this view, 'disaggregating' the state is a necessary conceptual move not just because there is increasing interdependence: it also rests on the normative assumption that the fundamental actors in international politics are individuals and private groups, and that global governance structures should be designed to directly address their needs. The main focus of this theory is the ways in which preference-aggregation takes place domestically and then finds expression at the inter-state level.

This central insight appears to be the beginning of a response to the concerns raised by the present inquiry, regarding the ways in which cultural variance is underrated by students of compliance. The notion of the 'disaggregated state' invites us to peer into the black box erected around the state and develop a contextualized understanding of compliance. It reminds us that state preferences are the aggregation of individual and group preferences, and that if we want to better understand why nations comply with international norms we must investigate the complex interaction of components within the state. In contrast to the universalist, a-cultural explanation of state behaviour offered by rational choice theory, liberal authors emphasize state identity: they suggest that 'how States behave depends on how they are internally constituted.'<sup>38</sup> Much of this scholarship seeks to extend the neo-Kantian premise and show how the relations among liberal democracies have a distinctive quality, which manifests itself not only

---

<sup>36</sup> See Guzman, *supra* note 32; Downs and Jones, *supra* note 31; Huang, *supra* note 32; Goldsmith and Posner, *supra* note 33. But see R. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" (1988) 42 Int'l Org. 427.

<sup>37</sup> I use the term 'liberal theory' here as it is employed, e.g., in these two influential texts: A. Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51 Int'l Org. 513 and A.M. Slaughter, "International Law in a World of Liberal States" (1995) 6 E.J.I.L. 503.

<sup>38</sup> Slaughter, *ibid.* at 537.

in a better compliance record with international treaties, but also in the successful operation of transgovernmental and transjudicial networks among liberal states.<sup>39</sup>

The assertion that 'liberal states behave better' is not uncontroversial, and the soundness of liberal theory as a descriptive account is being increasingly questioned.<sup>40</sup> For present purposes, it is important to point out that while liberal theory offers some crucial insights into the complexity of compliance with IL by considering differentiated state preferences, it remains a rationalist account of compliance. It offers a consequential explanation of individual and state action at both the domestic and the international levels. Under this model, ideas, values, and the cultural identities that they embody do have an effect on state behaviour insofar as they shape state interests, which inform these actors' calculations about whether or not to comply with their international obligations.<sup>41</sup> These values are 'pre-existing' in the sense they are formed at the domestic level, in the process of preference aggregation. It is not argued that values and identities are socially constructed at the domestic level: individuals and groups enter the political exchange with pre-existing preferences, informed by their values and ideals. This methodological individualism instructs that ideas and values are beliefs held by *individuals*, and, by extension, states. The intersubjective quality of ideas, and the possibility that they are a product of shared knowledge, is consistently neglected. Constructivist explanations of state behaviour, to which I turn next, aim to challenge rationalism precisely on this ground.

---

<sup>39</sup> See A.M. Slaughter, "A Typology of Transjudicial Communication" (1995) 29 U. Rich. L. Rev. 99, A. M. Burley and W. Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org. 41, L.R. Helfer and A.M. Slaughter, "Toward a Theory of Effective *Supranational* Adjudication" (1997) 107 Yale L.J. 273.

<sup>40</sup> See e.g. J.E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" (2001) 12 E.J.I.L. 183.

<sup>41</sup> Moravcsik, *supra* note 37 at 540.

#### **IV. Constructivism and Compliance: Taking Culture Seriously?**

##### *A. Culture, Identity and International Norms*

The approaches reviewed so far consider social action to be driven by the 'logic of consequences.' The 'logic of appropriateness,' in contrast, considers human action to be driven by a sense of identity. Individuals do not simply choose their course of action based on a calculation of the anticipated consequences: action evokes an identity or role, and the course of action is chosen by matching the obligation of that identity or role to a specific situation.<sup>42</sup> In other words, behaviour is driven by an actor's social identity, not calculations of material cost and benefit. One would explain one's behaviour by stating, 'this is what I do because this is who I am' rather than 'this is what I do because this is what I want.' Compliance with rules, from this perspective, is achieved when rules are viewed as appropriate, in the sense that acting in accordance with the rules matches the conception of the self. And most importantly, identities of actors and their derivative preferences are not prior to social interaction but constituted by such interaction. The way to influence behaviour is thus to recognize the constitutive nature of rules and identities and exploring the ways in which they may be transformed.<sup>43</sup>

If the identity of each actor determines its course of action, then the differences between identities ought to be considered when attempting to understand patterns of behaviour. The influence of culture is far from negligible in this process, of course. While a group

---

<sup>42</sup> March and Olsen, *supra* note 27 at 951.

<sup>43</sup> Some rationalists agree that these two logics of human action are not mutually exclusive and that each action probably involves elements of both. The relationship between the two logics, under this view, is a hierarchical one. It is only when the consequential logic becomes difficult to follow that the logic of appropriateness assumes its limited role. Very often states are unable to make decisions based on the consequences such decisions would have, because they are not sure which actions would lead to the desired consequences or because there are several possible actions that would lead to equally beneficial consequences. In such cases, culture may determine the chosen course of action. See J. Goldstein and R.O. Keohane, "Ideas and Foreign Policy: An Analytical Framework" in J. Goldstein and R.O. Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993) 3.

could share an identity without constituting a separate culture, culture typically provides the symbolic materials needed to mark the boundaries of identity groups.<sup>44</sup> The assumption that the conduct of states is guided by a sense of identity introduces normative concerns of legitimacy, morality, justice, and ethics to the set of factors influencing compliance with the law. These normative concerns bring us closer to realizing how tremendous the challenge of cultural diversity is for global governance: if what IL ought to achieve is a transformation in the identities of actors, so that they view international norms as matching their conception of the self, then the uniqueness of cultures is a significant (if not insurmountable) barrier to international cooperation.

Constructivists take pains to demonstrate how global normative structures operate in more than a regulative way: they are 'constitutive' in the sense that they constitute, create, or revise the actors and their interests. Examples of studies that illustrate how global norms achieve this include the case of the norm prescribing the creation of science bureaucracies by a number of states,<sup>45</sup> the broad acceptance of the rules governing the conduct of war,<sup>46</sup> the inclusion of distributional concerns in the definition of 'developing' countries propagated by the World Bank,<sup>47</sup> the development of normative taboos on the use of chemical weapons<sup>48</sup> and nuclear weapons,<sup>49</sup> the evolution of norms on humanitarian intervention,<sup>50</sup> and the way in which the

---

<sup>44</sup> See T.K. Fitzgerald, *Metaphors of Identity* (Albany: SUNY Press, 1993) at 190.

<sup>45</sup> M. Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), ch. 2.

<sup>46</sup> *Ibid.*, ch. 3.

<sup>47</sup> *Ibid.*, ch. 4.

<sup>48</sup> R. Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997).

<sup>49</sup> R. Price and N. Tannenwald, "Norms and Deterrence: The Nuclear and Chemical Weapons Taboos" in P.J. Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996) 114.

<sup>50</sup> M. Finnemore, "Constructing Norms of Humanitarian Intervention" in Katzenstein, *ibid.* 139.

global norm of racial equality led states to redefine their interests and adopt sanctions against the Apartheid regime in South Africa.<sup>51</sup>

Two examples of studies by legal scholars influenced by constructivist thinking also demonstrate the constitutive effect of global norms on the identities and interests of states. Brunnée and Toope have shown how the normative framework for sharing freshwater has helped redefine both the identities and the interests of key actors in the Nile Basin, slowly establishing cooperative behavioural patterns.<sup>52</sup> Goodman and Jinks supplement constructivism with organizational-cultural theory to argue that several national security practices of states (including the composition of militaries, arms procurement and production, use of force and the conduct of troops during armed conflicts) are shaped by global structures that are constructed and propagated through global cultural and associational processes.<sup>53</sup>

But if, as constructivists claim, agents and structures are co-constituted, what are the mechanisms by which agents create or change structures? Or in other words, where do global norms come from? More recent work explores the agency side of the equation by attempting to trace the spread of global norms and the role of international actors in their diffusion. IR norms research suggests that there are two elements that contribute to the successful diffusion of norms. The first is the involvement of norms entrepreneurs in the introduction of the norm (by bringing attention to the need for the norm and mobilizing support for it) and the second is the availability of organizational platforms from which entrepreneurs can operate.<sup>54</sup>

---

<sup>51</sup> A. Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995).

<sup>52</sup> J. Brunnée and S.J. Toope, "The Changing Nile Basin Regime: Does Law Matter?" (2002) 43 *Harv. Int'l L. J.* 105.

<sup>53</sup> R. Goodman and D. Jinks, "Toward an Institutional Theory of Sovereignty" (2003) 55 *Stan. L. Rev.* 1749.

<sup>54</sup> See M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *Int'l Org.* 887 at 896. Norm entrepreneurs are groups or individuals, many of whom are motivated by altruism, empathy and ideational commitment. After they manage to persuade a critical number of states to act as 'norm leaders,' it is possible to say that the norm has reached a tipping point (and possibly an agreement is signed), after which a 'norm cascade' begins: an active process of international socialization intended to induce

These studies successfully challenge the assumptions underlying rationalism by showing how changes in behavioural patterns are not so much due to external constraints but the result of socialization.<sup>55</sup> Two distinct processes of social influence are explicated in this literature on international socialization: acculturation and persuasion. Both result in a change in the preferences of actors – and by that they may be distinguished from rationalist models – but the first emphasizes social *sanctioning* while the latter involves social *learning*. Both are said to bring an internalization of norms by actors to the point where they are unquestioned and taken for granted. At the level of theory, constructivists often speak of persuasion as one of the main issues separating their approach from that of rational choice.<sup>56</sup> They describe it as the ‘process by which agent action becomes social structure, ideas become norms, and the subjective becomes intersubjective.’<sup>57</sup> But while many of these studies emphasize persuasion as a superior form of socialization, they often reveal in their findings a process that involves coercive measures of some sort along the way to rule governed behaviour. Other studies, which document instances of persuasion, have thus far focused on horizontal discursive interaction, while neglecting the discursive prospects of vertical interaction.

### *B. Acculturation and the Presumption of Community*

Acculturation is the process by which ‘actors adopt the beliefs and behavioural patterns of the surrounding culture.’<sup>58</sup> They are

---

those who violate what now is a norm to comply with it (*Ibid.* at 898-904). Others have studied norm entrepreneurship by epistemic communities, defined as ‘a group of intellectuals sharing a common causal understanding on a particular subject and who organize to turn this understanding into action strategies.’ E. Adler, *Communitarian International Relation: The Epistemic Foundations of International Relations* (London and New York: Routledge, 2005) 76.

<sup>55</sup> See A. Wendt, “Collective Identity Formation and the International State” (1994) 88 *Am. Pol. Sci. Rev.* 384.

<sup>56</sup> On the centrality of persuasion in constructivist theorizing, see R.A. Payne, “Persuasion, Frames and Norm Construction” (2001) 7 *Eur. J. Int’l Rel.* 37 at 38.

<sup>57</sup> Finnemore and Sikkink, *supra* note 54 at 914.

<sup>58</sup> R. Goodman and D. Jinks, “How to Influence States: Socialization and International Human Rights Norms” (2004) 54 *Duke. L. J.* 621 at 638. The early and most influential

induced to change their behaviour through pressure (imposed by others or by the self) to assimilate. A decision to comply with social norms is based on cost-benefit calculations, but, contrary to the frequent assumption of rational choice theorists, the costs and the benefits are not material. They are the social-psychological costs of non-conformity, and the social-psychological benefits of conforming to group norms and expectations.<sup>59</sup>

The rewards and punishments are 'social' because only groups can provide them. While material costs can be imposed bilaterally, social costs can only be imposed by a group whose approval an actor values.<sup>60</sup> Actors who have prior identification with a group have a desire to maximize their status, honour, and prestige in the group, as well as a desire to avoid loss of status, shaming and humiliation. Therefore, a decision to comply is based on what is viewed as appropriate by the group, rather than what the individual actor considers as appropriate.

While initially states may act against their preferences due to social pressure (or may choose to comply for egoistic motives), the end result is some level of internalization of the norms and a change in the identity and preferences of affected actors.<sup>61</sup> After an actor is fully

---

formulation of this approach is that of Abraham and Antonia Chayes. While emphasizing justificatory discourses, the reason why states ultimately obey the law in this account is their need to remain members in good standing of the international system. See A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard: Harvard University Press, 1995) 28. The term 'acculturation' was introduced to the compliance debate by Goodman and Jinks, *ibid* at 638-642. Other authors describe a similar mechanism and have termed it 'social influence' (A.I. Johnston, "Treating International Institutions as Social Environments" (2001) 45:4 Int'l Stud. Q. 487 at 499), 'social sanctioning' (J. T. Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55 Int'l Org. 553 at 558) or 'strategic social construction' (Sikkink and Finnemore, *supra* note 54 at 910).

<sup>59</sup> Goodman and Jinks, *ibid.* at 640. These costs, they claim, are also not measurable and therefore are not amenable to cost-benefit modeling (*ibid.* at 646).

<sup>60</sup> Johnston, *supra* note 58 at 499.

<sup>61</sup> Goodman and Jinks argue that acculturation is a lower level of socialization, and that it leads to 'incomplete internalization' of norms (*supra* note 58 at 642-644). Their entire model, however, is based on insights from sociological institutionalism, where state identities and interests are seen to be shaped by global norms and scripts in a process of mimicry and identification. See Goodman and Jinks, *supra* note 53, where they outline



inducted into society and adopts its shared standards, the norms assume their 'taken for granted' quality, and what was appropriate for the group becomes appropriate for the individual.

Empirical studies done by conventional constructivists, while stressing the intersubjectivity of norms and persuasion as a compliance-inducing mechanism, often slip into accounts that rely on acculturation. In their seminal study, Keck and Sikkink focus on the involvement of networks of activists in the processes leading to compliance with international norms. They described a 'boomerang effect,' whereby value activists in states that violate human rights, environmental rights, or indigenous rights, reach out to governments in Western countries as well as to the publics within them in order to bring pressure on their home governments from the outside.<sup>62</sup> The techniques they use to rally international support involve making information available to the public and framing the issue in a way that would appeal to distant audiences, i.e. persuasion methods.<sup>63</sup> Once support is achieved, the mode of operation becomes more coercive: these networks of activists, with the help of Western governments, use social pressure as well as material sanctions to bring violating states into compliance with the norms.<sup>64</sup> In a comprehensive study of the diffusion of human rights in 11 countries, Thomas Risse and his colleagues extended this observed pattern temporally and described a five stage 'spiral' model of socialization, consisting of repression by norm-violating states, followed by denial of accusations, tactical concessions, prescriptive status of norms (where violators claim to accept the norm), and finally, rule-consistent behaviour.<sup>65</sup> The dominant mode of interaction during the early stages of the norm cycle, claim Risse *et al.*, is instrumental: leaders of norm violating

---

their theoretical model ('...we stress the ways in which orthodoxy and mimicry shape state identity, interests, and organizational structure.' *Ibid.* at 1753).

<sup>62</sup> M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998) at 12-13.

<sup>63</sup> What they call 'information politics' and 'symbolic politics.' *Ibid.* at 18-23. A similar process is described by Klotz, *supra* note 51.

<sup>64</sup> Keck and Sikkink, *supra* note 62 at 23-25.

<sup>65</sup> T. Risse *et al.*, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) at 17-33.

states are subject to material and social sanctions and compliance occurs without a change of preferences. At a certain point, however, the interaction begins to change and these state leaders begin to rethink their preferences and engage in 'argumentative behaviour.' Overall, however, what drives states to norm conforming behaviour under this model is not a process of persuasion (or social learning) but instrumental rationality. State decision makers only internalize new preferences after an initial softening-up by networks and activists through the use of material and social sanctioning.

It is not entirely accurate to claim that this account is purely rationalist, nor that the resulting norms lack legitimacy for that reason. What Risse *et al.* describe in the initial phases of the socialization process is how the different mechanisms play out, demonstrating how a combination of factors may lead to the optimal rule conforming behaviour – institutionalization. This happens, they argue, when state leaders become rhetorically 'self-entrapped' and what starts out as strategic behavior (a) may later lead to preference change (b).<sup>66</sup> The leap from (a) to (b), however, is underspecified and not properly explained: why and how is it that at some point actors stop using manipulation techniques in their speech acts and start actually believing in what they say?<sup>67</sup> In this sense, the constructivist mantra of mutual constitution of interests and identities is challenged by their own empirical research. What these studies often demonstrate is that the causal mechanism at work during the crucial stages of compliance is coercion rather than persuasion.

Recent contributions on the IL side have made an effort to define in more precise terms the difference between acculturation and persuasion. Goodman and Jinks rightly maintain that acculturation is a distinctive socialization process that is often under-analyzed in the study of international norms. But they go an important step further by

---

<sup>66</sup> For an elaboration on the notion of rhetorical action, see F. Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, the Eastern Enlargement of the European Union" (2001) 55 *Int'l Org.* 47.

<sup>67</sup> On this see J.T. Checkel, "Taking Deliberation Seriously" (2001) ARENA Working Paper WP 01/14, online: <[http://www.arena.uio.no/publications/working-papers2001/papers/wp01\\_14.htm](http://www.arena.uio.no/publications/working-papers2001/papers/wp01_14.htm)> (last visited 8 February 2008). For a similar argument see J. Fearon, "Deliberation as Discussion" In J. Elster, ed., *Deliberative Democracy* (NY: Cambridge University Press, 1998) 44.

claiming that ‘the conditions favorable to acculturation are amenable to manipulation in order to promote behavioural change through institutions.’<sup>68</sup> At least in the area of human rights law, and possibly in other areas of regulation, these authors believe that acculturation is a powerful tool and make recommendations for the ways in which it can be utilized in regime design. They bring evidence across disciplines for the effectiveness of social rewards and punishments in group dynamics (shaming, shunning, back-patting), and explore the conditions under which conformity may be best achieved by using these forms of influence. Briefly, they posit that acculturation may be best achieved under conditions of inclusive membership in international regimes, high level of precision of obligations, and publicizing good and bad practices.

This account, however, neglects the normative implications of acculturation. There appears to be a leap from description (evidence for the spread of global norms and for the effectiveness of acculturation processes) to prescription (viewing acculturation processes favourably and considering the ways in which they may be utilized to improve compliance). There is no discussion of why and when acculturation is normatively desirable. Recall that acculturation only happens when an actor identifies with the relevant reference group. The social and cognitive pressures to conform can only be generated when there exists ‘an intersubjective agreed upon notion of what socially valuable behavior looks like.’<sup>69</sup> And further, ‘[t]he more the audience or reference group is legitimate, that is, the more it consists of actors whose opinions matter, the greater the effect of back-patting and opprobrium.’<sup>70</sup> In other words, as the term ‘acculturation’ implies, this form of social influence assumes a world *culture*, with globally shared standards and commitments. Therefore, the principal concern is singling out governments engaged in violations of (consensual) norms and trying to change their pathological behaviour.

Goodman and Jinks’ assumptions regarding a common world culture draw on the ‘world society’ theory developed by sociological

---

<sup>68</sup> Goodman and Jinks, *supra* note 58 at 654.

<sup>69</sup> Johnston, *supra* note 58 at 501.

<sup>70</sup> *Ibid.*

institutionalists, who use (mostly quantitative) data to map the global diffusion of cultural standards as well as collective understandings and identities.<sup>71</sup> The empirical work done by the world society scholars aims to show how historically, global scripts have been enacted worldwide in processes that result in what is termed 'isomorphic' formal structures and models. Examples include the striking resemblance in state education systems, hospitals, national economic policies, environmental protection frameworks, national security policies, human rights protection, constitutional structures, and so forth.<sup>72</sup> Despite the neutrality of the term 'isomorphism,' there is no doubt that these ideas, models or scripts did not simply float down on nations from nowhere. While this approach is vague on the processes through which homogenization occurs,<sup>73</sup> it is clear that many of these developments are driven by the need for nation states to conform to an ideal of the rationalized bureaucratic state, and that they are essentially an outgrowth of Western culture.<sup>74</sup> To the extent that this approach considers culture to be relevant for international normative change, then, it is the culture of the dominant group and its effect on new members wishing to belong to that group.

Is structural and ideational isomorphism a story of domination then? Goodman and Jinks believe that it is not. They point out that norm adoption does not correlate with economic wealth or development of a country, and that isomorphism occurs regardless of

---

<sup>71</sup> Some of the leading texts are J.W. Meyer and B. Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony" (1977) 83 Am. J. Soc. 340; W.W. Powell and P.J. DiMaggio, eds., *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991); J.W. Meyer *et al.*, "World Society and the Nation State" (1997) 103 Am. J. Soc. 144.

<sup>72</sup> See Goodman and Jinks, *supra* note 53 at 1759-1760 and the references there.

<sup>73</sup> As noted above, Goodman and Jinks hypothesize that the process through which pro-social behaviour can be encouraged is acculturation. That can be achieved through '(1) embedding target actors in an institutionalized social setting and (2) institutionalizing at the group level preferred forms of identity' (*supra* note 58 at 648). However, acculturation assumes an already high level of homogenization as its starting point.

<sup>74</sup> See Finnemore, *supra* note 45 at 21 and on the missing agency aspect in this approach, see S. Tarrow, "Transnational Politics: Contention and Institutions in International Politics" (2001) 4 Ann. Rev. Pol. Sci. 1 at 5-6.

whether there is external political pressure to conform.<sup>75</sup> However, their quick rejection of possibly imbalanced dynamics of norm diffusion is questionable. There are multiple ways in which power is implicated in social relations, global relations included. Mainstream IR and IL scholars, influenced by a realist conception, understand power in a limited way. They define it as the manner in which one state uses its material resources to compel another state to do something it does not want to do. But some are beginning to develop a broader analysis of power which includes 'a consideration of how social structures and processes generate differential social capacities for actors to define and pursue their interests and ideals.'<sup>76</sup> Power is produced not only through compulsion or institutional design, but also structurally and discursively.<sup>77</sup> In other words, relations of power (and resultant differentiated capacities) are not produced only through the exercise of material power. They are also the result of the structure of social relations between states, that is mutually constituted, and through systems of signification and meaning.<sup>78</sup>

---

<sup>75</sup> In a recent critique of Goodman and Jinks' theory of acculturation, Jose Alvarez warns that '[a]n academic theory that stresses that states are driven to *conform* with human rights may exacerbate rather than lessen the charge that Western regimes are vehicles for neocolonialism...' J.E. Alvarez, "Do States Socialize?" (2006) 54 Duke L. J. 961 at 974. In a reply article, Goodman and Jinks reject this charge and maintain that '[b]ecause the strength and direction of acculturation require identifying target actors with the agents of socialization, the abuse of these processes would undermine the trust and social legitimacy that make acculturation possible in the first place.' R. Goodman and D. Jinks, "International Law and State Socialization: Conceptual, Empirical, and Normative Challenges" (2006) 54 Duke L.J. 983 at 998. But their overall conceptual schema, I would argue, is built upon an understanding of legitimacy as unthinking conformity, or willful emulation, rather than a reflexive engagement with the norms in question. Acculturation that is supported by a broad legitimacy basis as a result of a genuine engagement may be seen as a normatively defensible compliance tool. But that is not always the case, of course.

<sup>76</sup> M. Barnett and R. Duvall, "Power in International Politics" (2005) 59 Int'l Org. 39 at 42.

<sup>77</sup> *Ibid*, *passim*.

<sup>78</sup> Discussing the ways in which hegemonic powers maintain their dominance, political geographer Peter Taylor describes (in a chapter tellingly subtitled 'emulation as the sincerest form of flattery') how hegemons define for the world what works and what fails in social behaviour, and how particularistic ideas and values of the hegemon can be projected as being universal in nature. These values are not imposed but wilfully emulated by others: '[H]egemonic power relies on right as much as might. In a very important way hegemonic power goes beyond political and economic leadership to impinge on the social

World society scholars acknowledge the fact that local values and practices are not completely washed away by world culture. They observe a parallel process of 'decoupling' whereby states adopt global norms without effectively implementing them (e.g. creating science bureaucracies regardless of whether they have any science to coordinate, or ratifying human rights treaties without effectively implementing them).<sup>79</sup> But this lack of correlation between form and practice is seen as an advantage rather than an impediment to homogenization. Decoupling helps avoid disruption and conflict and enables states 'to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations.'<sup>80</sup> Over time, however, local systems are fully penetrated by global models, leading to more 'efficient' outcomes.<sup>81</sup> In other words, resistance actually helps to smooth over the transition to world culture by absorbing possible shocks to local institutions. Ultimately, cultural uniqueness is no more than the 'dramatization of the local.'<sup>82</sup> John Meyer, the founder of the world society school, concludes with this remarkable statement:

Uniqueness and identity are thus most legitimately focused on matters of expressive culture: variations in language, dress, food, traditions, landscapes, familial styles and so on. These are precisely the things that in the modern system do not matter...<sup>83</sup>

The disconnect between local circumstances and global models is thus seen as a temporary condition. Global (read: Western) models of what it means to be a state, to be a hospital, to be an army, to be a schooling

---

and cultural spheres of other countries.' P.J. Taylor, *The Way the Modern World Works: World Hegemony to World Impasse* (Chichester: Wiley and Sons, 1996) 119. For a similar analysis in the IR literature see G.J. Ikenberry and C.A. Kupchan, "Socialization and Hegemonic Power" (1990) 44 *Int'l Org.* 283.

<sup>79</sup> See Goodman and Jinks, *supra* note 53 at 1760-1761 and the references there. See also J.W. Meyer, "Globalization: Sources and Effects on National States and Societies" (2000) 15 *Int'l Sociology* 233 at 244-245.

<sup>80</sup> Meyer and Rowan, *supra* note 71 at 357.

<sup>81</sup> See Meyer, *supra* note 79 at 244.

<sup>82</sup> *Ibid.* at 245.

<sup>83</sup> *Ibid.*

system, to be a citizen, as well as principles such as universalism, individualism, and human purpose, are slowly but surely sweeping the planet. What cultural uniqueness is left belongs to the realm of 'heritage' (read: exotic folklore).

'World society' may represent only one strand of thinking that has influenced conventional constructivist scholarship, but the foregoing illustrates how international lawyers, when choosing to turn to other disciplines for a better understanding of international socialization, have adopted a model that stands on shaky normative grounds. Drawing prescriptive propositions from empirical findings of existing commonalities of norms and institutions, as Goodman and Jinks do, is a risky endeavour, because it overlooks the questions of the norms' origins, their interpretation, and their dynamic nature. First, this approach fails to ask where international norms come from and the extent to which relations of domination are implicated in their global diffusion. Second, it builds on the assumption that local cultures do not matter for state behaviour, and so once global norms fully penetrate local institutions they will have equal interpretation across countries. And finally, it assumes that the meaning of international norms is stable over time and that they are in complete congruence. However, norms may 'make countervailing claims on people and mobilize groups with opposing claims'<sup>84</sup> and they may also be in conflict with other, equally legitimate norms. In other words, even norms that are widely accepted by the international community leave 'substantial room for interpretation and contestation, particularly in light of other strong norms in international life.'<sup>85</sup>

Therefore, acculturation, as a measure of normative coercion designed to induce norm conformity, builds on questionable assumptions regarding the sociability of actors in international society. It assumes an already substantial degree of social cohesion (since a legitimate reference group is a condition for this form of social influence), and it takes global norms to be not only consensual but also with a fixed and determinate meaning across time and space. It may be too early to conclude that cultural diversity is decreasing in importance

---

<sup>84</sup> Finnemore, *supra* note 45 at 138.

<sup>85</sup> *Ibid* at 139.

in the age of globalization as posited by world society theory. To the extent that global culture is evolving, the meanings that global norms and practices take within each culture may differ markedly – beyond the expressive form.

These difficulties with the normative grounding of world society theory pose a challenge to all analytically oriented constructivist research programmes, as Adler has argued.<sup>86</sup> While constructivism has developed the analytical tools for measuring causal socialization, it is yet to fully grapple with the questions that normative IR theory has been occupied with for decades, concerning the attainable and desirable social cohesion at the global level. This is not to suggest that the norms that analytic constructivist studies often investigate (and endorse) are not laudable, but that students of compliance must acknowledge where these norms come from and the normative ground for their inclusion in the set of values that ought to be shared by the expanding ‘international society.’ Defining in more precise terms the origins of norms and the preferred image of the international society that ought to share them is not a mere exercise in political theorizing. It would provide a justification for why existing norms ought to spread (rather than only showing implicit sympathy for their diffusion) and in what way, as well as suggest how (and which) new norms may be constructed in the future. This, in turn, has direct bearing on the choice of mechanism for normative change. Sensitivity and respect for diversity, I would like to suggest, may point to one socializing process of international actors rather than another. My point is not that acculturation has no utility at present, but that one must be cautious of overemphasizing it and building a theory of compliance around it, because the constitutive effects of norms can also be expressions of power.

### *C. Persuasion and Legitimacy of Norms: Constructivism All the Way Down*

If the recognition of cultural diversity instructs that the creation, interpretation and application of international norms should preferably take place in a process of social learning, or persuasion, then

---

<sup>86</sup> Adler, *supra* note 54 at 13-14.



it would be useful to consider the empirical evidence for successful processes of social learning found by analytic constructivist studies, as well as the models of compliance built upon them. In what follows, I examine some of these studies and point to the blind spots in the proposed models, arguing that (1) persuasion is not always found where it may conceivably reside and that (2) by accepting the normative priority of persuasion as a compliance tool, these models could improve their theoretical coherency.

(i) Persuasion and Horizontal Legitimacy

Constructivism's emphasis on agency, as noted above, has focused some thought on the 'bottom-up' involvement of activists in the emergence, adoption, and renegotiation of pre-existing global norms. The development of consensual norms through this pathway can be a long process, taking years if not decades.<sup>87</sup> Some analysts, however, seek evidence for persuasion from a 'top-down' perspective as well. State leaders and elite decision makers are not always passive 'norm-takers' who react to the agency of experts or activists, but very often take leadership in the process of norm construction, adoption and application. At that, they are sometimes engaged in social learning.

Several constructivists who elaborate on the notion of persuasion borrow from Habermas' theory of communicative action.<sup>88</sup> Rather than treating international talk as 'cheap,' it is posited that actors may be engaged in deliberation for the purpose of changing the minds of others. Speech can convince people to reconsider their positions and collectively decide which goals are valuable and what role they should play in social life. To say that actors are engaged in

---

<sup>87</sup> As in the case of the norms on racial equality and women's suffrage. See, respectively, Klotz, *supra* note 51, and Finnemore and Sikkink, *supra* note 54 at 895-896.

<sup>88</sup> See Risse, *supra* note 14 and the references there, and also C. Reus-Smith, "The Constitutional Structure of International Society and the Nature of Fundamental Institutions" (1997) 51 *Int'l Org.* 555 at 564-566. But see Johnston, *supra* note 59 at 493-494 (uses communication theory, social psychology, and political socialization, claiming that 'Habermasian approaches are unclear as to what constitutes a "convincing" argument' and that the conditions for communicative action may be too demanding to be operationalized. Jeffery Checkel is also sceptical as to whether Habermas' theory can be tested empirically. J.T. Checkel, "Norms, Institutions and National Identity in Contemporary Europe" (1999) 43 *Int'l Stud. Q.* 83.

deliberative persuasion is to suggest that all participants in the discourse are open to being persuaded by the better argument. In the process of truth seeking, participants advance reasons why a certain behaviour ought to be avoided and another adopted. Once a consensus is reached, these reasons internally motivate the participants to behave appropriately.

Jeffrey Checkel argues that state elites sometimes engage in argumentative persuasion, defined as 'an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behaviour of another person... through the transmission of a message in a context in which the persuadee has some degree of free choice.'<sup>89</sup> In attempting to outline the conditions under which persuasion is likely to occur in international settings, Checkel and others have drawn on literature in social psychology and communication research to suggest that persuasion works better in insulated, in-camera settings, where negotiators can freely exchange ideas and alter their positions without worrying about the possible embarrassment involved in retracting and publicly admitting that they were wrong.<sup>90</sup> This implies that secrecy of negotiations would increase the likelihood that mutual persuasion will take place. The alarming corollary is that transparency and publicity are likely to retard persuasion and should therefore not be encouraged. This conclusion stands at odds with the growing recognition by students of politics and law of the importance of civil society participation in global governance fora.<sup>91</sup> Yet Checkel qualifies

---

<sup>89</sup> Checkel, *supra* note 58 at 562 (quoting Perloff). Checkel demonstrated how a pattern of constitutive compliance was found in the adoption of the Council of Europe's citizenship rights norms in the Ukraine, through an interaction of state officials with regional experts (*Ibid.* at 574-578). Similarly, Thomas Risse, drawing on studies of German unification, suggested that a process of social learning is what brought Soviet leadership to agree to German unification within NATO at the end of the Cold War. Soviet leaders were convinced by the arguments made by German and US officials, through a process of 'true dialogue of mutual persuasion,' among which was the legitimacy of the principle of self-determination. See T. Risse, "The Cold War's Endgame and German Unification (A Review Essay)" (1997) 21 *Int'l Security* 159. See also Risse *supra* note 14 at 23-28.

<sup>90</sup> See Checkel, *ibid.*; Johnston, *supra* note 59 at 496-498.

<sup>91</sup> Some representative examples are D. Bodansky, "The Legitimacy of International Governance: A Challenge for International Environmental Law?" (1999) 93 *Am. J. Int'l L.* 596; R.O. Keohane and J.S. Nye, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" reprinted in R.O. Keohane, *Power and Governance in a Partially Globalized World* (London: Routledge, 2002) 219 (recommending

his findings by arguing that another condition for successful persuasion is that members of the interacting group have a relatively high level of autonomy.<sup>92</sup> Under his model, the more centralized the government, the more likely it is that its leaders can be persuaded to adopt a norm and comply with it. Representatives of decentralized governments (typically liberal democracies), by contrast, would be less receptive to persuasion methods because they have less autonomy: they must represent and be accountable to their constituencies. As a result, their ability to engage in argumentative discourse is limited (they are not free to change their minds without a proper mandate). In other words, social learning, as a means of developing new norms across cultural divides, will be most effective when the deliberating parties are representatives of non-liberal states.

This model has two problematic implications. The first concerns the prospects for persuasion at the international level, or what I term (following Jutta Brunnée) 'horizontal legitimacy.' The second, to which I turn in the following subsection, has to do with potential pathways of domestic norm diffusion, or 'vertical legitimacy.'<sup>93</sup> The first problem is that at the inter-state level, promoting compliance by means of persuasion is claimed to be more likely when the target actors (the 'norm-takers') are leaders of states with centralized governments. Therefore, in multilateral fora the mode of interaction should be more instrumental than deliberative, because they include representatives of decentralized governments who would not be willing (or able) to engage in persuasion. International norms, then, may have a constitutive effect on some actors but not others.

---

increased transparency and participation in the WTO); J. Brunnée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements" (2002) 15 *Leiden J. Int'l L.* 1 (arguing that greater transparency and increased participation of civil society in international environmental law-making processes would promote the public acceptance of these processes as legitimate). See also A. Alkoby, "Global Networks and International Environmental Lawmaking: A Discourse Approach" (2008) 8 *Chicago J. Int'l L.* 377. For an extended review of this literature see A. Alkoby, "Non State Actors and the Legitimacy of International Environmental Law" (2003) 3 *Non State Actors and Int'l L.* 23.

<sup>92</sup> Checkel, *supra* note 58, and also J.T. Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide" (1997) 3 *Eur. J. Int'l Rel.* 473.

<sup>93</sup> See Brunnée, *supra* note 91 at 13-15.

What is likely to take place in such cases is that actors who are open to being persuaded ('norm-takers') would be interacting with 'norm-givers' who are engaged in 'rhetorical action': an attempt to convince others to change their views, beliefs, and preferences in a justificatory discourse, while not prepared to be persuaded themselves.<sup>94</sup> Moreover, the more public the interaction, the more likely it is that parties will turn to strategic bargaining as their main mode of communication.

This account appears to be primarily concerned with 'vertical legitimacy,' that is, the acceptance of international norms by target actors domestically. State leaders who are democratically accountable to their constituencies only comply with norms in response to domestic societal pressure, while leaders of centralized governments engage in freewheeling without worrying about how their decisions will be received at home. But this account overlooks the possibility that horizontal factors may also enhance the legitimacy of norms. The concept of 'horizontal legitimacy' emphasizes the importance of legitimacy for the very existence of law.<sup>95</sup> It requires that the procedures through which norms are adopted adhere to certain requirements, and it treats all those who may be subject to the norms as participants in the lawmaking enterprise. In other words, both law-givers and law-takers are viewed as *law-makers*.<sup>96</sup> Legitimate norms are norms that are produced through 'inclusive law-making processes that expose all relevant actors to the mutual construction of norms and identities.'<sup>97</sup> This proposition suggests that (1) legitimacy is a function of the level of openness to persuasion, and (2) the more inclusive and

---

<sup>94</sup> On rhetorical action see Risse, *supra* note 14 at 8-9. Risse argues that rhetorical action evolves into true reasoning, but the examples he gives are of state leaders with a very high level of autonomy going through this transformation. He does not explain how and whether this could work in the case of democratically accountable leaders.

<sup>95</sup> Brunnée, *supra* note 91 at 41.

<sup>96</sup> For an extended version of this argument see Alkoby, *supra* note 91 at 86-96.

<sup>97</sup> Brunnée, *supra* note 91 at 47. IL scholars are increasingly focusing on the question of horizontal legitimacy and many argue, albeit from different theoretical standpoints, that the *process* through which law is enacted, interpreted and applied is crucial for the legitimacy of norms and to better compliance as a result. See T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990). For a critical discussion see J. Brunnée and S.J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) XIII *Finch YBook Int'l L.* 273.

transparent the process is, the more legitimate the resulting norms will be.

In reference to the model proposed by Checkel, this approach may suggest that the scepticism regarding the sociability of state representatives who are constrained by their principals, and their ability to develop shared norms despite their cultural disposition, is unwarranted. It may simply mean that negotiators should engage in a 'two-level arguing,' where they try to persuade not only their international counterparts but also their constituents that they should change their preferences too.<sup>98</sup> Opening up the international deliberation process to the public, in turn, could have the desirable effect of slowly merging these two levels of discourse, or the horizontal and vertical dimensions of legitimacy.

Checkel may well argue that his business is social science, not normative theorizing, and that rather than taking a theory-driven approach to the study of norms he is more interested in investigating whether and how preference change actually takes place in world politics by using process-tracing methods.<sup>99</sup> To treat all parties as 'law-makers,' then, is to imply that power relationships recede in the background and that the better argument wins. However morally compelling this idea may be, it can rarely be found in the real world.

One must separate two claims here. The first is that persuasion as a mechanism for inducing compliance is nice in theory but it is often found to be empirically false. Note, however, that even conventional constructivists who are strong supporters of a discourse approach to compliance do not consider it to be statement about the empirical world but an ideal type against which situations can be measured.<sup>100</sup> This implies that students of compliance must accept that a social scientific enterprise cannot be but normative, and more

---

<sup>98</sup> See T. Risse, "Global Governance and Communicative Action" (2004) 29 *Government and Opposition* 288 at 312.

<sup>99</sup> See Checkel, *supra* note 58 at 565-567.

<sup>100</sup> See Risse, *supra* note 14 at 16-19. See more on this below in the concluding section.

specifically, they must recognize that deliberation is a normatively infused concept.<sup>101</sup> I will return to this point in the concluding section.

But the second, more difficult challenge for deliberative approaches to the study of norms is that they are underspecified. The mechanisms through which persuasion operates in a deliberative mode are not clear. It is not explained, for example, how one gets from point (a) – the use of manipulative rhetoric with no intention of being persuaded to (b) – an internalization of norms as a result of preference change. This point may well be a valid critique, and so far IL scholars interested in the construction of shared understandings and the persuasiveness of international law have offered illustrative examples, or used case studies where persuasion was inferred from observed policy outcomes rather than discovered through robust social science empirical tools.<sup>102</sup> Political scientists appear to have taken up this challenge and begun debating the ways in which the empirical study of deliberative politics may proceed.<sup>103</sup> This empirical turn is how the IR/IL dialogue on compliance can continue to move in more fruitful directions.

#### (ii) Persuasion and Vertical Legitimacy

The studies of ‘top-down’ persuasion – where norms are constructed at the inter-state level by state elites in a process of argumentative persuasion – explain *why* states commit to (and subsequently comply with) global norms, but they say little about *how* they comply. What does it mean that norms have constitutive effects on agents? Does the process of norm diffusion differ across cultures? Would it not be right

---

<sup>101</sup> On this see M. Neblo, “Thinking through Democracy: Between the Theory and Practice of Deliberative Politics” (2005) 40 *Acta Politica* 169 at 173-174.

<sup>102</sup> For example Brunnée, *supra* note 91; Brunnée and Toope, *supra* note 51; Alkoby, *supra* note 90; and also J. Ellis and A. FitzGerald, “The Precautionary Principle in International Law: Lessons from Fuller’s Internal Morality” (2004) 49 *McGill L.J.* 779. For an extensive theoretical discussion in IR on the possible pathways from one bargaining to arguing and vice versa, see H. Mueller, “Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations” (2004) 10 *Eur. J. Int’l Rel.* 395.

<sup>103</sup> See most recently, Empirical Approaches to Deliberative Democracy, special issue of *Acta Politica* September 2005, especially C. Ulbert and T. Risse “Deliberately Changing the Discourse: What Does Make Arguing Effective?” (2005) 40 *Acta Politica* 351.

to argue that norms receive a different meaning in differing cultural contexts even after the relevant political actors are persuaded to comply with them? Would it be right to argue that some norms may have constitutive effects on some states but not on others?

It is partly a question of who the relevant political actors are. When we speak of horizontal persuasion, we are really talking about individuals – state representatives interacting and constructing global norms.<sup>104</sup> Studies have often emphasized the constitutive effect that norms have on state officials,<sup>105</sup> heads of states,<sup>106</sup> or bureaucrats.<sup>107</sup> In those cases, policy outcomes are in the hands of those individuals and compliance may be virtually achieved once they give their consent to adopt the norm. But very often compliance is a more complex process. While these persuaded individual actors may have every intention to comply with the norms, bringing these norms ‘home’ is not always a matter of individual decision. Compliance may involve more than an executive decision – it could require political, legal and social internalization of the norms domestically. It is then that the question of how norms may influence different actors differently – due to different cultural contexts in which they are received – becomes crucial.<sup>108</sup>

And indeed, scholars increasingly pay attention to the diversity of norm diffusion pathways. They point out that one of the main factors conditioning the impact of international norms domestically is the level of ‘cultural match’: the extent to which the norms introduced resonate with widely held domestic understandings, beliefs and obligations.<sup>109</sup> Cultural match is a matter of degree rather

---

<sup>104</sup> Although others may also become involved in the process of horizontal lawmaking, broadly conceived – various individuals and groups (non-state actors).

<sup>105</sup> Checkel, *supra* notes 58 and 88.

<sup>106</sup> Risse, *supra* note 89.

<sup>107</sup> Finnemore *supra* note 45 at 131-137.

<sup>108</sup> For a rare example for an analysis of the impact of domestic factors on the resonance of EU norms, see A. Wiener and G. Schwellnus, “Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights” Constitutionalism Web-Papers, ConWeb 2/2004, online: <<http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb2-2004.pdf>>.

<sup>109</sup> See Checkel, *supra* notes 89 at 86-87; A.P. Cortell and J.W. Davis, “Understanding the Domestic Impact of International Norms: A Research Agenda” (2000) 2 Int’l Stud. Rev.

than an either/or situation. The norm in question might confront a void about the regulated issue, or a lack of entrenched norms that resist the internalization of the values that the new norm embodies. This typically removes a potential barrier to norm diffusion. The difficulty arises when there exists a negative cultural match, and the norms appear in a contested normative arena. In such cases, norm internalization becomes a real challenge.

Harold Koh, a legal scholar who consciously draws on constructivist insights, argues that this challenge can be met in a 'transnational legal process': 'the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.'<sup>110</sup> He defines transnational law as 'all law which regulates actions or events that transcend national frontiers.'<sup>111</sup> Both interest-based and norm-based approaches to compliance, Koh maintains, fail to provide a sufficiently thick explanation of international obligation, because they do not fully account for the factors inducing compliance that arise from countless interactions between actors transnationally. While sympathetic to the constitutive explanations of compliance, accepting that state identities and interests are socially constructed, he points out that constructivists 'have given little close study to the "transmission belt," whereby norms created by international society infiltrate into *domestic* society.'<sup>112</sup>

Koh is thus interested in *how* nations comply, or the process through which norms acquire their 'taken for granted' quality and compliance becomes habitual. This process takes place, he argues, in three stages that may be separated conceptually: interaction and interpretation, which take place in various domestic and international

---

65 at 73-76; A. Gurowitz, "Mobilizing International Norms: Domestic Actors, Immigrants and the Japanese State" (1999) 3 *World Politics* 413.

<sup>110</sup> Koh, *supra* note 6 at 183-184.

<sup>111</sup> H.H. Koh, "Why Do Nations Obey International Law?" (1997) 106 *Yale L. J.* 2599 at 2626 (following Philip Jessup).

<sup>112</sup> *Ibid.* at 2651 (emphasis in original).



fora, and internalization.<sup>113</sup> Political internalization happens when political elites adopt the norm as a matter of government policy. Legal internalization is the incorporation of norms into the domestic legal system through legislation, adjudication, or executive action. And finally, social internalization takes place when the norm 'acquires so much public legitimacy that there is widespread general obedience to it.'<sup>114</sup>

The workings of social internalization are not fully developed in Koh's model. In the illustrations that he has provided in the series of articles, he describes political and legal interactions leading to internalization in fairly mechanistic terms and the process of state identity change is assumed to have resulted from these repeated interactions. Like in some of the constructivist accounts reviewed earlier, each of his examples demonstrates interactions that were dominated by logic of consequences but then at the endpoint the norm somehow acquired its 'stickiness' and states complied with it because it had been internalized. How this leap takes place, again, is not clear. It is almost as if interaction is viewed as positive in its own right, regardless of what the nature of it is.<sup>115</sup>

On the IR side, Checkel, who was one of the first to identify the missing domestic link in constructivist literature,<sup>116</sup> began exploring

---

<sup>113</sup> *Ibid.* at 2646.

<sup>114</sup> *Ibid.* at 2656.

<sup>115</sup> In *ibid.* at 2655 he writes: "In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests..." How this participation leads to internalization, however, remains underspecified. One of Koh's examples gives a clue as to what he considers to be the casual mechanisms for internalization. The Israeli government's obedience to the Oslo accords under the hawkish leadership of Netanyahu in the late 1990s, argues Koh, can be explained by the following reasons: the accords brought economic benefits to Israel (consequentialism), the democratic liberal character of Israel (liberal theory) as well as the fact that the country is a member of an international society that had strong expectations from it and pressured it to comply (acculturation). The repeated interactions which Koh identifies as transnational legal process served to link these factors together to override the political opposition to the agreement. (*ibid.* at 2651-2654). Persuasion or change of mind, it appears, is not identified as a part of the story of internalization.

<sup>116</sup> See J.T. Checkel, "The Constructivist Turn in IR Theory" (1998) 50 *World Politics* 324.

the causal mechanisms leading to compliance comparatively and has argued (as noted above) that domestic politics delimit the role of persuasion. His starting point is that both the rationalist logic of consequences and the constructivist logic of appropriateness capture and explain key features of social life. But the relationship between the two in Checkel's model is not hierarchical or developmental. Rather, the dominant logic of action varies as a function of the domestic structure, with four categories of states identified: liberal, corporatist, statist, and state-above-society. The more centralized the government is, the more likely it is that methods of persuasion will lead to norm-conformity: state leaders who have a high level of autonomy will internalize the norms and a policy change will ensue. In more liberal polities, individuals and private groups serve as the main diffusers of international norms, and they can succeed in altering elites' behaviour by means of mobilization and pressure. In such cases, norms do not have a constitutive effect but a constraining one.<sup>117</sup> Social groups may be driven by nonmaterial goals, but their mode of operation is strategic. The government's response, in turn, is driven by cost-benefit calculations.

I suggested earlier that that we must also consider the importance of horizontal legitimacy in international lawmaking, achieved through the interaction between *all* relevant actors. Checkel's model is too quick to dismiss the possibility that leaders of decentralized governments may also be socialized (by means of persuasion) in the same way that elites of other states can, only that the former may need to engage in a two level 'game' for the purpose of adopting and then applying the norms domestically.<sup>118</sup> But there is another difficulty here, one that has to do with the implications of this model for the ways in which *vertical* legitimacy may be attained. Given the assumption that persuasion works better under conditions of political insulation, this model predicts that deliberation involving

---

<sup>117</sup> See Checkel, *supra* notes 58 and 92.

<sup>118</sup> See text accompanying *supra* notes 95-98. Checkel's argument resembles the curious proposition offered by one analyst, who argues that autocrats are more likely to protect the environment. See J. Klick, "Autocrats and the Environment, or It's Easy Being Green" (2002) George Mason Law & Economics Research Paper No. 02-16, online: <<http://ssrn.com/abstract=311063>>.

persuasion mechanisms will generally not take place within open societies. While the case study offered by Checkel may have confirmed this hypothesis (the diffusion of European citizenship rights norms in Germany and Great Britain), one must be careful of drawing generalizable conclusions from it. Over the past few decades, a number of Western democracies have been experimenting with discursive forms of public participation that are modelled on the ideals of deliberative democracy. Assessing the vast and rich literature that treats this alternative conception of democratic decision making is of course beyond the scope of the present enquiry, but the debate that it has generated does suggest that the image of representative democracy founded on instrumental rationality implied by this model is neither a theoretical nor a practical given.<sup>119</sup>

Therefore, constructivists, who take norms to have a *constitutive effect* on actors cannot afford to disregard the normative approaches in domestic politics (and the empirical evidence supporting them) to the development of collective understandings in a process of *deliberative decision making*. Accepting that instrumental rationality stands at the basis of the political process in democratic societies means that compliance with norms is driven by strategic bargaining most of the time, and that norms in general have a constraining effect rather than a constitutive one. This finding leaves us with a puzzling proposition: that the generalizable assumptions regarding the intersubjectivity of norms and the usefulness of social learning for processes of developing shared understandings across cultures actually hold in very rare cases, and only in diplomatic settings.

This proposition implies an almost negligible role for constructivism in world politics and international law. Whenever a liberal state is involved, international norms will have an impact on its behaviour only through a domestic political dynamic that involves a struggle between interest groups. A norm will be complied with if and when the more powerful social group will succeed in forcing the

---

<sup>119</sup> For a recent critical review of the practical aspects of discursive democratic approach see D.M. Ryfe, "Does Deliberative Democracy Work?" (2005) 8 Annu. Rev. Polit. Sci. 49. See also the sources cited in *supra* note 103. Some of these experiments might serve as a beginning of a response to Checkel's concerns, who wonders 'how does one maintain complex learning in settings where the static created by domestic politics hinders it?' (*supra* note 88 at 91).

government to do so. Can the state's *identity* be said to have changed in this process? Have its *preferences* changed? Has its cultural values been transformed? The answer appears to be negative. We are told that existing individual preferences were aggregated, not that new ones were endogenized. Checkel thus follows liberal theorists and 'peers inside the black box' only to find the same limited (not to say impoverished) image of liberal politics which could have the unfortunate effect of legitimizing the status quo. This raises the same difficulties with the analytical orientation of IR constructivism pointed to above: given the absence of a constructivist theory of politics, social learning is not granted the normative priority over other forms of norm diffusion.

The limited utility of this view of politics becomes even more apparent if we consider a class of international norms that is rarely treated in existing literature, namely norms that directly (or through national implementation measures) target a large group of 'norm-takers.' Authors who have explored the impact of domestic structures on compliance have focused thus far on norms that could be implemented in relatively simple measures taken by the state, at the executive or legislative level. Examples include definition of citizenship,<sup>120</sup> the treatment of immigrants,<sup>121</sup> policy toward the law of the sea regime,<sup>122</sup> upholding peace agreements,<sup>123</sup> arms control policies,<sup>124</sup> and adoption of human rights treaties.<sup>125</sup> In these examples, compliance with the norms in question was achieved (or could be achieved) in an act of the state through its agencies. The target actors are therefore very often the government and its proxies. In such cases, interest groups, social movements and lay citizens may take part in the public debate over the adoption of the norm, but they have limited

---

<sup>120</sup> Checkel's studies in *supra* notes 58, 88 and 92.

<sup>121</sup> Gurowitz, *supra* note 109.

<sup>122</sup> H.H. Koh, "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 *Hous. L. Rev.* 623 at 636-642.

<sup>123</sup> Koh, *supra* note 111 at 2651-2654.

<sup>124</sup> *Ibid.* at 2646-2648.

<sup>125</sup> See Koh's discussion of the European human rights convention in British law in *supra* note 122 at 670-674 and more generally in H.H. Koh, "How is International Human Rights Law Enforced?" (1998) 74 *Ind. L. J.* 1397.

involvement in its implementation. The internalization dynamic is not only linear; it is also unidirectional, from society to the state. It also creates a curious dichotomy between a 'good society' and a 'bad government,' assuming that segments of society active in the political process will necessarily be pro-norm while the government will resist normative change.

Consider however, the two examples given above – those of climate change norms and intellectual property rights. Compliance with treaties that aim to tackle global warming or curb violations of copyrights involves not only significant legislative efforts, but also the active participation of a multitude of actors, from governments to business corporations to private consumers. It also requires wide public support for costly implementation measures. This is when the *vertical* aspect of the legitimacy of norms becomes crucial, and where pressuring governments to comply may be a necessary but not a sufficient condition for compliance.

A rationalist would argue, of course, that once there is a willingness on the side of governments to comply, ensuring the implementation of norms domestically can be achieved by coercive measures. After all, this is the crucial difference between bringing international actors to comply and doing so domestically, where there exists a central authority to enforce legal rules. Coercion may not even be necessary in practice: the threat of punishment is what prevents people from violating the law. But reliance upon threats of punishment is a strategy that is likely to be ineffective when the resources devoted to enforcement are moderate and the opportunities for cheating high (detering people from copying articles, CDs, or DVDs, for example, is virtually impossible. Enforcing measures to reduce personal energy consumption levels would require resources that a society might not be willing to devote).<sup>126</sup> Studies of compliance with domestic law suggest that the perceived morality and legitimacy of norms are the main factors shaping law-related behaviour, and that they have a greater

---

<sup>126</sup> See Tyler, *supra* note 8.

effect than assessments of the likelihood of being caught and punished for wrongdoing.<sup>127</sup>

This is how the international and the domestic spheres of law become truly intertwined. For compliance with the law to be voluntary, 'norm-takers' must consider the norm to be legitimate. People would obey such norms, therefore, out of a sense of obligation that is based on their personal sense of what is right and wrong. The legitimacy of some international norms, even after they become state law, rests on understandings that must be globally shared, across different cultural perceptions and values. Consider, then, climate change norms. Taking measures to fight global warming is the 'right thing to do' for the common good. The common good is the prevention of harm to more than the regulated community members (i.e. the state). In fact, it would possibly *not* involve members of that community during the target actors' lifetime. Rather, it is an obligation toward (a) members of other living communities (e.g. small island states), (b) future generations, (c) ecosystems and non-humans. These obligations to 'outsiders' are examples of how global interconnectedness blurs the boundaries between the national and the international by creating interests that are generalizable on a global scale. The development of such generalizable interests in the face of considerable cultural divide is heavily dependent on the ability of both national and international actors to engage in meaningful, coercion-free, deliberation. It also requires, I have argued, a consideration of how the horizontal and the vertical dimensions of legitimacy could overlap and ultimately merge.

## **V. Conclusion: The Promise of Critical Constructivism**

Reviewing the attempts by students of compliance to grapple with the puzzle motivating this article (to what extent is cultural diversity reckoned with in the study of international normative change), I have pointed to some of the blindspots and inconsistencies in the proposed models. Rationalism accords a limited role for law in international relations. Legal norms, rationalists argue, mostly in the form of

---

<sup>127</sup> *Ibid.* at 225. One such study cited by Tyler is R. Paternoster, "Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective" (1989) 23 *Law & Soc'y Rev.* 7.

treaties, are best understood as declarations of convergence of opinions. Positions do not tend to change in the process of lawmaking; they just become clearer. Once a convergence is found, law may assume its instrumental role of enlarging the shadow of the future through the use of penalties and incentives. Similarly, if ideas, beliefs and cultural attitudes have no causal role to play in the process of lawmaking, culture does not really matter for compliance with the resultant norms.

Conventional constructivists have identified two causal mechanisms leading to compliance that are nonmaterial: persuasion and acculturation. Both are said to bring about internalization of norms and to habitual compliance as a result. While, theoretically, constructivists rely upon persuasion as a pure form of socialization, their studies often describe a process where material and social pressure is the main factor inducing norm conformity. The process of social pressure, labelled 'acculturation,' involves measures of normative coercion that are effective in a relatively cohesive social environment, but are arguably ill suited to culturally diverse global arenas.

Persuasion, on the other hand, is not a unidirectional form of socialization. It consists of uncoerced discursive interventions that may bring about normative change through the development of shared understandings. In the study of 'top-down' socialization, it has been shown how persuasion may be found in diplomatic settings, where state representatives are sometimes convinced to comply with international norms in a process of social learning. These studies, I have argued, fail to engage the normative aspects of norm compliance, and do not fully consider the implications that the horizontal and the vertical dimensions of legitimacy have for the power of norms to redefine preferences and identities. In their attempts at examining the impact of domestic structures on compliance (where the question of cultural difference becomes particularly crucial), some studies present us with a peculiar proposition: that norms may have a profound (i.e. constitutive) effect at the international level under certain conditions but not much more than an instrumental role at the domestic level. This implies that social learning as a means of bridging cultural divides stops at the border of states: once an international norm is agreed upon, its domestic implementation proceeds in ways that have no

resemblance to the deliberative mode of interaction envisioned globally.

Why this lack of consistency then? If identity (and derivative preferences) of social actors is partly constituted in collective dialogues, then at the very least, an explanation is in order as to why the emphasis on identity and preference change by means of argumentative persuasion holds in some cases (i.e. inter-state discourse) but not in others (state – society relations), or why it is found in the interaction between some types of actors but not others, or in some contexts but not others.

Such explanation, which could bring students of politics and law closer to a comprehensive and coherent compliance model, is still lacking. One reason for this neglect, as argued above, is the assumption regarding the stability of norms. The approaches highlighting acculturation as a causal mechanism concentrate on pre-established norms, and assume that their meaning is stable over time and across cultures. Interaction between agents is examined against an existing standard of behaviour, the origins of which (as well as its shifting meaning and legitimacy) remain bracketed.<sup>128</sup> Studies emphasizing persuasion, on the other hand, take the concept of mutual constitution more seriously by exploring not only how global normative structures constitute agents, but also how agents with different culturally determined preferences produce and reproduce norms through discursive interaction. This dynamic nature of norms, however, is typically explored in horizontal interactions taking place at the supranational level only, rather than carried ‘all the way down.’

Another reason for constructivism’s incomplete engagement with cultural difference lies in the normative agnosticism adopted by many of its adherents.<sup>129</sup> Conventional constructivists in both

---

<sup>128</sup> For a similar point see A. Wiener, “The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to ‘Interaction’ (2007) 10 Crit. Rev. Int’l Soc. Pol. Phil 47. See also J. Brunnée and S.J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 Colum. J. Transnat’l L. 19 (arguing that ‘law is not exhaustive of attempts to provide structure to human existence through norms. Normativity is a continuum.’ *Ibid.* at 60). Constructivism’s limitation in fully capturing a long-term perspective on compliance, they argue, is rooted in its legal-positivist underpinnings (*id.*, *passim*).

<sup>129</sup> For a discussion see Adler, *supra* note 54 at 3-28.



disciplines avoid making normative assumptions in the selection of what data is important, in interpreting that data, and in articulating why such research is significant. While making claims regarding the nature of social interaction, constructivism does not make explicit claims about the *content* of social relations and the norms that social actors may (or ought to) produce. Constructivism offers a 'thin' description of agents and structures and must be filled with substantive commitments before it may be considered a theory 'of something.'<sup>130</sup> The studies of compliance reviewed above eclectically borrow from substantive theories when studying compliance with international norms, but they typically do not state their normative agenda.<sup>131</sup> There is an irony in the fact that these analysts take pains at demonstrating why facts and values cannot be separated in social life, but claim to keep such separation in their own study of norms. Of the approaches to compliance outlined above, liberal theory is the most reflexive approach to the study of norms in that it is supported – whether explicitly or not – by a rich tradition of political theorizing upon which its premises and normative commitments rest. Arguably, its theoretical coherence is part of the reason for its prominence in both academia and the institutions of global governance.

Critical constructivism, I would like to suggest, holds greater promise in confronting some of the difficult questions raised by the challenge of cultural difference. Critical theorists suggest that the way to make new articulations of universality and particularity possible is through the adoption of a 'thin' universalism.<sup>132</sup> On the one hand, we ought to recognize that 'human subjects cannot perceive the world other than through the distorting lens of language and culture which

---

<sup>130</sup> M. Finnemore and K. Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4 Ann. Rev. Polit. Sci. 391 at 393.

<sup>131</sup> Finnemore and Sikkink do not consider this to be problematic when writing, 'constructivists are not elaborating theories and engaging in wars among various "isms" (realism versus liberalism, for example). Rather, the modern constructivist research program... focuses on issues... and it aims at contingent generalizations' (*ibid.* at 396).

<sup>132</sup> Most notably A. Linklater, *The Transformation of Political Community* (Cambridge: Polity Press, 1998), and also R. Shapcott, "Cosmopolitan Conversations: Justice Dialogue and the Cosmopolitan Project" (2002) 16 Global Society 221.

has already made them what they are as moral subjects,<sup>133</sup> and on the other hand remain loyal to the epistemologically foundationalist project of the Enlightenment 'which builds the goal of a cosmopolitan community of humankind.'<sup>134</sup> A thin conception of universalism accepts that there are certain duties which members of each state owe others by virtue of humanity alone, and that certain moral principles may be shared across cultures. However,

[n]o culture can assume that its moral claims automatically have this transcultural status. Only through dialogue with other cultures can progress be made in separating merely local truths from those with wider acclaim.<sup>135</sup>

The dialogic approach rests on Habermas' notion of discourse ethics, which as we have seen finds confirmation in some empirical studies of international normative change. What often remains unacknowledged in these studies is that a discourse approach is founded on a set of normative commitments shared by critical theorists. The notion of discourse builds on the need to allow participants in political deliberation to account for their beliefs and actions in terms that would be intelligible to others, who may accept or contest them.<sup>136</sup> The assumption is that principles, norms or any institutional arrangement can be said to be valid only if they meet the approval of all those affected by them.<sup>137</sup> The implication is that a political community committed to discourse ethics must consider the effect of its actions on its members, as well as on outsiders.<sup>138</sup> As Linklater explains, '[t]he aim of discourse ethics is to remove the modes of exclusion which obstruct the goal – which may never be realized – of global arrangements which rest upon the consent of each

---

<sup>133</sup> Linklater, *ibid.* at 48.

<sup>134</sup> *Ibid.* at 76.

<sup>135</sup> *Ibid.* at 79.

<sup>136</sup> J. Habermas, *Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1989) at 99.

<sup>137</sup> *Ibid.* at 82.

<sup>138</sup> Linklater, *supra* note 132 at 91.

and every member of the human race.’<sup>139</sup> Discourse ethics may thus provide the normative ground upon which the theoretical preference for social learning as a compliance tool could rest. If cultural diversity is truly to be reckoned with, the building of shared understandings both among and within nations ought to proceed through discursive means.

This kind of normative reflection is unavoidable in theory building, and the forgoing discussion demonstrates why the development of a culturally attuned theory of compliance cannot be value-free.<sup>140</sup> More to the point, in a culturally diverse global environment, one must be mindful of the normative implications of reliance on coercion (be it material or nonmaterial) as a method of inducing ‘conformity’ with norms. The theoretical preference for acculturation could be based on either (1) the belief that these norms embody values that *ought to be shared* across cultures, or (2) the argument that while persuasion is generally the preferred causal mechanism for inducing compliance with norms, the use of acculturation (or perhaps even material coercion) is normatively defensible when the norms have already reached the status of global consensus. The first argument is purely normative (and it is often used in liberal theorizing) while the second may also involve an attempt at empirical corroboration. Either way, analytical precision is necessary for maintaining theoretical coherence.

There are some moves in the critical direction, taken by both IR and IL scholars studying compliance, that adopt a more expansive view of legal normativity, and accept that compliance is a normatively infused concept.<sup>141</sup> These are solitary voices, however, and compliance

---

<sup>139</sup> *Ibid.* at 93.

<sup>140</sup> A point already made by B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 Mich. J. Int’l L. 345 at 346. A notable attempt at a synthesis of analytic and normative IR theory is made by Adler, *supra* note 54.

<sup>141</sup> See A. Wiener, “Contested Compliance: Interventions on the Normative Structure of World Politics” (2004) 10 Eur. J. Int’l Rel. 189, and also Wiener, *supra* notes 128 and 108; Brunnee and Toope, *supra* notes 52, 97 and 128; and Alkoby, *supra* note 91. See also A. Alkoby, “Improving Access to Essential Medicines: International Law, Normative Change and the Role of Civil Society” in L. Forman and J. C. Cohen, eds., *Access to Medicines as a Human Right: What Does it Mean for Corporate Responsibility?* (Toronto: University of Toronto Press, forthcoming). Price and Reus-Smith also seem to emphasize the

research on the IL side continues to be dominated by rationalist-liberal influences from IR. When international lawyers look beyond the consequential explanations of global social action, they often turn to the rich conventional constructivist analyses reviewed above. These studies do provide a conceptual opening toward a deeper, more nuanced understanding of international normative change, but as this article suggests, the potential remains only partly fulfilled.

---

interpretive qualities of both critical theory and constructivism, and begin to touch upon the notion of 'moral inclusion' in critical theory that constructivism may draw on, but they ultimately view constructivism as a social, not a political theory. See R. Price and C. Reus-Smith, "Dangerous Liaisons? Critical International Theory and Constructivism" (1998) 4 *Eur. J. Int'l Rel.* 259.