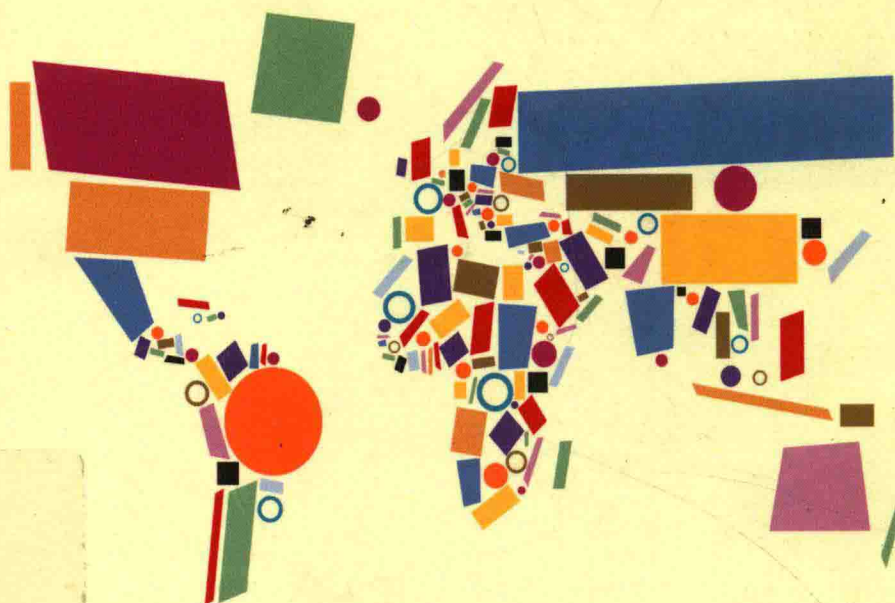


SOCIALIZING STATES

PROMOTING HUMAN RIGHTS
THROUGH INTERNATIONAL LAW



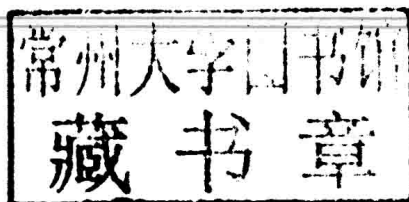
RYAN GOODMAN
AND DEREK JINKS

Socializing States

*Promoting Human Rights
through International Law*



Ryan Goodman
and
Derek Jinks



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Socializing States

For Melissa, Ella, and Ethan
-R.G.

For Cathy, Hannah, and Andrew
-D.J.

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CHAPTER 1



Introduction: Rethinking State Socialization and International Human Rights Law

How can the international legal regime encourage states to respect human rights? The role of international law in global politics is both nonobvious and nontrivial. There are clearly good reasons to think that like-minded states, at times, coordinate their response to common problems through international law. Might there also be good reasons to contemplate a more ambitious role for the international legal order? Might the international regime, under certain conditions, encourage meaningful changes in state behavior or in the very definition of state preferences? For example, how might global institutions encourage universal acceptance of a state responsibility to provide public education for all children? And how might officials across the world be motivated to forgo torture as a policy instrument even during periods of national emergency? The ambition of this book is to improve our understanding of how exactly the international legal regime can help to promote the adoption of fairer, more humane forms of governance.

These are, of course, central questions for students and practitioners of international law and politics. The design of an effective international legal regime requires an understanding of the levers of influence on states (and other relevant actors). That is, regime design choices in international law turn on an empirical understanding of (1) the composition and functioning of social forces that influence states at the international level—for example, how exactly material payoffs, reasoned arguments, or international

status might motivate recalcitrant states; and (2) the conditions under which the different modes of influence are more or less effective.

Addressing those subjects also leads to more fine-grained questions. For example, how might different modes of influence supplement or undermine one another? What lasting effects do different modes of influence have in domestic politics following the adoption of a global (or regional) norm? What is the value of partial compliance over time?

In this book, we identify three specific mechanisms for influencing state practice: material inducement, persuasion, and acculturation. We also describe the distinct, and sometimes competing, logic of each mechanism. Most importantly, we maintain that acculturation is an overlooked, conceptually distinct social process through which state behavior is influenced. The description we offer of the international legal regime and the policy recommendations issuing from this description refine—and, at times, defy—conventional wisdom in human rights scholarship.¹

A. THE EMPIRICAL STUDY OF INTERNATIONAL LAW

The increasing exchange between international relations theory and international law illuminates some difficulties involved in regime design and offers useful insights to resolve them. The existing scholarship, however, also has significant limitations. Inspired by the theoretical frameworks and empirical findings of international relations research, legal scholars began to develop empirically oriented legal analyses of international human rights law. This groundbreaking “first generation” of empirical international legal studies demonstrates that international law “matters.” Nevertheless, the existing literature does not adequately account for the regime design implications of this line of research. Regime design debates often turn on unexamined or undefended empirical assumptions about foundational matters such as the conditions under which external pressure can influence state behavior, which social or political forces are potentially effective, and the relationship between state preferences and material and ideational structure at the global level. Moreover, prevailing approaches to these problems are predicated on a thin and underspecified conception of the social processes that affect states.²

1. This project builds on, and extends, our previous work on the topic. See Goodman and Jinks 2009; Goodman and Jinks 2008; Goodman and Jinks 2005; Goodman and Jinks 2004; Goodman and Jinks 2003.

2. Ginsburg and Schaffer 2012: 1 (“The theoretical debate over whether international law matters is a stale one. What matters now is the study of the conditions under which international law is formed and has effects”); Dunoff and Pollack 2013. The debate over whether international law matters is related to the debate over whether international law is law at all. See O’Connell 2008 (summarizing the debate over the legal status of international law).

What is needed is a “second generation” of empirical international legal studies aimed at clarifying the social mechanisms for influencing state practice. Several recent scholarly works plainly constitute the beginnings of this next phase of empirical international legal studies.³ This growing body of work has made great strides in identifying the conditions under which international human rights law contributes to human rights improvements. This second generation, in our view, should build on this work by generating concrete, empirically falsifiable propositions about the role of the international legal regime in transforming state preferences and behaviors. Indeed, mechanism-based theorizing moves beyond empirical correlations and conditional theories by facilitating ever richer accounts of the properties and processes that are causally responsible for changes in actors’ beliefs, preferences, and practices. A mechanism-based approach involves systematic evaluation of whether an observed relationship reflects true causation. Accordingly, researchers examine, for example, whether a regular pattern of outputs (e.g., similar constitutional interpretations) when actors (e.g., judges/members of the legal community) are exposed to particular inputs (e.g., foreign constitutional developments among prestigious countries) suggests the dominance of particular mechanisms of influence. This form of analysis is also conducive to evaluating the structure and content of predicted changes in practice when actors are driven by one mechanism versus another. And greater precision in identifying the internal logic of different mechanisms can uncover unintended consequences—for example, negative interactions between mechanisms such as displacement and crowding-out effects (chapter 9). In short, a well-specified analysis of causal mechanisms can potentially inform and fundamentally reshape ongoing debates about human rights law and practice.

Consider the now-well-accepted findings that compliance with international human rights law is more likely in democracies and in states with a strong domestic civil society.⁴ This literature strongly suggests that formal and informal domestic institutions matter for promoting compliance, but the literature does little to specify how or why international human rights obligations ought to influence actors under these conditions. In our view, the growing, invaluable literature identifying the conditions under which human rights law matters would benefit from a greater theoretical specification of the institutional and behavioral mechanisms by which law moves relevant actors.⁵

3. Ginsburg 2012 and Schaffer (summarizing much of this research and noting some of its strengths and weaknesses); see also Hafner-Burton 2012; Hafner-Burton, Victor, and Lupu 2012.

4. See, e.g., Simmons 2009; Neumayer 2005; Keith 1999.

5. In chapter 4, for example, we provide a detailed illustration of how our approach might supplement prevailing approaches through the analysis of Beth Simmons’s groundbreaking work on compliance with human rights treaties.

This is not to say that the prevailing literature provides no mechanism-based accounts of international human rights law. Our claim is instead that the prevailing literature has provided an indispensable but plainly incomplete framework for identifying mechanisms of state influence. Prevailing approaches suggest that the international regime alters human rights practices, if at all, either by *materially inducing* states (and individuals) or by *persuading* states (and individuals) of the validity and legitimacy of human rights law. In our view, the former approach fails to grasp the complexity of the social environment within which states act, and the latter fails to account for many ways in which the diffusion of social and legal norms occurs. Indeed, a rich cluster of empirical studies from different academic disciplines document particular processes that socialize states in the absence of material inducement or persuasion. These studies conclude that the power of social influence can be harnessed even if (1) collective action problems and political constraints that inhibit effective material inducements are not overcome and (2) the complete internalization sought through persuasion is not achieved. We contend that this scholarship now requires a reexamination of the empirical foundations of the international human rights regime.

This book provides a more complete conceptual framework by identifying a third mechanism by which international institutions might change state behavior—what we call *acculturation*. By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. More specifically, this mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self. Acculturation encompasses a number of microprocesses including mimicry, identification, and status maximization.

The touchstone of acculturation is that identification with a reference group generates varying degrees of cognitive and social pressures to conform. We do not suggest that international legal scholarship has completely failed to identify aspects of this process. Rather, we maintain that the mechanism is underemphasized, insufficiently specified, and poorly understood, and that it is often conflated or confused with other constructivist mechanisms such as persuasion. Differentiating the mechanism of acculturation and specifying the microprocesses through which it operates are profoundly important, however, for addressing questions pertaining to the adoption of international legal norms. Indeed, each of the three mechanisms—material inducement, persuasion, and acculturation—is likely to have distinct implications along a number of dimensions including the durability of norm adherence, patterns of adoption, and modes of contestation.

In making the case for more complex, more sociologically plausible models of law's influence, we are mindful of some of the ways in which our own analysis grossly oversimplifies the role of institutions, culture, and social structure in global politics. Any complex social process involves multiple, overlapping, partially compatible, partially incompatible instances of social influence—and these influences occur at multiple levels of generality simultaneously. In addition, the inherently recursive character of social processes greatly complicates the task of understanding the role of any normative system, including international law.⁶ One problem, put crudely, is that actors are simultaneously influencing their environment (including other actors) and being influenced by their environment (including other actors). Another problem is that all actors at any given moment occupy multiple roles, identify with multiple reference groups, pursue multiple partially incompatible purposes, and enact multiple highly legitimated scripts for social action. Socialization processes drive the background preferences of actors regarding the legitimate means and ends of social life.⁷ These complications (and others) make it difficult to present a social account of international law in a clear and convincing manner. In other words, these conceptual challenges render the task of articulating and defending a messy enterprise.

As an expositional aid, our conceptual, descriptive, and normative analysis almost exclusively references a stylized social encounter between rights-regarding actors—including states, international organizations, and nongovernmental organizations—and rights-disregarding actors. A group of actors, understood as the influence agents, attempt to induce another group of actors, understood as the influence target, to change some aspect of its behavior. *A* influences *B* to engage in (or refrain from engaging in) *C*. This social encounter is, of course, stylized in several important respects. Most directly, actors in all social encounters are both shaped by and shape their wider environment. In other words, *A* would always be both influence agent and target of influence in any actual social encounter with *B*. Moreover, across a range of issues and institutional settings, specific states will occupy the position of influence agent and target of influence. The United States, for example, might be usefully understood as an influence agent in the global-level struggle to induce Syria to observe human rights and humanitarian law in its ongoing civil war. On the other hand, the United States might be usefully understood as a target of influence

6. See Shaffer 2012: 257–58; Halliday 2009; Halliday and Carruthers 2007.

7. For an overview and assessment of these and other challenges to social constructivist ontology, see Elder-Vass 2012; Elder-Vass 2010. In the international relations context specifically, see Wendt 1999.

regarding its treatment of detainees in the “global war on terror.” The notion of an influencing or influenced actor is best understood as a generalized concept. On a more fundamental level, we do not seek to explain the role of socialization in the formation of various background characteristics of the prevailing international order. We do not seek to explain in any systematic way why the prevailing model of legitimate statehood emerged in the form it has or why the international community is committed to a particular conception of universally applicable individual rights. We do not seek to explain the role of socialization processes in producing asymmetries in social legitimacy or in social, economic, or military power. Each of these aspects of the international order is, no doubt, the product of various social processes. Nevertheless, we do not extend our analysis to these admittedly important features of the world order, instead undertaking a more focused, more detailed consideration of the role of culture in international human rights regimes. Modeling this stylized encounter in the human rights context—even in the comprehensive, integrated way that we envision⁸—would reflect only one (intensely important) aspect of the wider “transnational legal process.”⁹

B. OBJECTIVES OF THE PROJECT

Two descriptive concerns motivate our project. First we are concerned about issues of compliance. We are thus keen to explicate how—and under what conditions—state actors are induced to obey international law and to bring their practices into line with international human rights standards. Second, we are equally concerned with the effects of the international human rights regime on state practices more broadly.¹⁰ In other words, we are also keen to explore the ways in which the international human rights regime might produce—intended and unintended—beliefs about state responsibilities, conceptions of illegitimate state conduct, and changes in governance structures beyond mere rule-adherence.

In our descriptive analysis, we aim to identify, differentiate, and fully articulate the mechanisms that drive state behavior. Toward this end, we emphasize the mechanism of acculturation because it is often neglected or poorly understood. Our ultimate goal, though, is an *integrated model* of the human rights regime’s influence on states. Such a model would account for all the mechanisms of influence, their interactions, and the conditions

8. See *infra* chapter 9.

9. See Schaffer 2012.

10. Howse and Teitel 2010.

under which one or another mechanism is most likely either to effectuate change or to enhance the prospect that another mechanism will do so.

Additionally, a general normative objective also motivates the project. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of global (and regional) institutions to promote human rights.¹¹ That is, our objective is to help actors to exploit mechanisms of social influence in designing and operating the international human rights regime.

In particular, our attention to acculturation can be exploited in two respects—to promote desirable norms and to arrest undesirable ones. First, acculturation can be substantially responsible for the diffusion of desirable policies across the world. Accordingly, actors and institutions can learn how to harness the mechanism of acculturation to promote human rights norms within different states. For example, the UN Office of the High Commissioner for Human Rights can learn how to spread desirable national policies by tapping into public officials' search for standardized models of modern statehood and into their concerns about national prestige.

Second, acculturation can be substantially responsible for the diffusion of undesirable policies. The substantive norm could be intrinsically undesirable—such as the spread of eugenics in the interwar period. Or the substantive norm might be generally beneficial, but acculturation can lead to inefficient forms of policy adoption—for example, truth commissions that are not well tailored to national needs. In the case of deleterious norms, actors and institutions that have a better understanding of acculturation can learn how to overcome or impede the causal process.

Aside from the specific focus on acculturation, our analysis of the composition and interaction of different mechanisms can also improve regime design and operation. Indeed, greater conceptual clarity about the prospect and limits of each mechanism can improve decisions involving the allocation of limited resources to promote human rights. And every step toward the development of an integrated model furthers this objective.

11. The general formulation that is central in this project is how international law, as such, promotes changes in the behavior or preferences of states. It is important to note, though, that the changes sought are often only a reaffirmation of, or more meaningful compliance with, normative commitments already formally incorporated into state law and policy. See Burke-White and Slaughter 2006: 350 ("International rules and institutions will and should be designed as a set of spurs and checks on domestic political actors to ensure that they do what they should be doing anyway, that is, what they have already committed to do in their domestic constitutions and laws"). Indeed, we document the widespread acceptance of international human rights standards in national constitutions in chapter 4.

We accordingly consider in detail how a close analysis of the characteristics and functioning of each mechanism matters for regime design and operation. We link each of the three mechanisms of social influence to specific regime characteristics—identifying several ways in which an acculturation-centered approach would differ from the more common regime design approaches of material inducement and persuasion. In short, we reverse-engineer structural regime design principles from the salient characteristics of underlying social processes.

Through a systematic evaluation of four formal design problems—membership rules, precision of obligations, and enforcement/compliance—we elaborate an alternative way to conceive of regime design. Our analysis not only recommends reexamination of policy debates in human rights law; it also provides a conceptual framework within which the costs and benefits of various design principles and advocacy strategies might be assessed. Applications relate to formal and informal aspects of the contemporary human rights regime, such as peer review among states in restricted membership organizations; the drafting of treaty text; legal practices regulating the incorporation of treaties in national systems; and transnational advocacy groups' advocacy of economic and social rights. We maintain that the analyses and recommendations issuing from understanding the distinct role of acculturation defy conventional wisdom in human rights scholarship. Without this understanding, several characteristics of international society, in fact, will persistently frustrate efforts to obtain compliance with human rights law solely by materially inducing and persuading recalcitrant actors.

Many will sensibly argue that the best approach to the design and operation of the human rights regime would incorporate elements of all three mechanisms. This argument reflects the view that the identified mechanisms reinforce each other through a dynamic relationship that is sacrificed when a regime emphasizes one mechanism to the exclusion of others. This is an important point. However, the kind of analysis contemplated by this line of criticism (i.e., the development of an integrated theory of regime design accounting for each mechanism) first requires, in our view, identification and clear differentiation of these mechanisms. This conceptual clarification is a first step, which enables subsequent work aimed at identifying the conditions under which each of the mechanisms would predominate—and potentially reinforce or frustrate the operation of the others. Moreover, we think it useful to link specific mechanisms to concrete regime design problems. Doing so illustrates the design features suggested by each and further clarifies the conceptual commitments of each mechanism. Our analysis of regime design problems yields three models

of human rights regimes—one built on each of the mechanisms. But we do not suggest that any regime does or should exhibit all of the features of a single mechanism.

The fundamental point is that, although we emphasize acculturation in what follows, we do not claim that acculturation is the most effective or most important mechanism for influencing states. Our claim is that theories of human rights law's influence—and the approaches to international human rights regime design derived from such theories—must account for the acculturative effects of the international regime.

C. THEORIZING STATE SOCIALIZATION

Although much of the book addresses macro-level phenomena and does so through a detailed analysis of macro-level evidence, we ultimately seek to develop a theory of the microfoundations of global order—one that takes culture seriously and that takes both social structure and agency seriously. This is why we emphasize organizational studies and sociological institutionalism on the one hand and the behavioral and psychological foundations of social action and social influence on the other. A fuller accounting of the mechanisms by which the human rights regime influences states is a necessary step in building the sort of theory of law's influence that we have in mind. Law and legal institutions are, in part, a tool for the socialization of relevant actors. Moreover, this socialization occurs by way of multiple, discrete mechanisms including acculturation. These mechanisms, in turn, operate through various microprocesses at the individual level. An integrated theory of these mechanisms promises to facilitate better description and design of the international human rights regime.

Making a convincing case for our model of mechanisms of influence obviously requires making a convincing case for international-level acculturation of states. To do so, we must prove, as an empirical matter, that this socialization process occurs at the international level and that it influences state policies and practices. We must also make a minimally plausible normative case for acculturation as an organizing principle of international human rights regimes. We make the case in full for acculturation—including its role in a broader theory of international law—in the balance of the book. Before turning to the heart of the argument, we should make clear the theoretical foundations of our project (the present section) and the specific ways in which our argument might contribute to the academic and policy literatures on international human rights law and international law more generally (section D).