Gendering the Compliance Agenda: Feminism, Human Rights and Violence Against Women

by

Megan Louise Pearce

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Megan Louise Pearce 2014
Gendering the Compliance Agenda: Feminism, Human Rights and Violence Against Women

Megan Louise Pearce
Master of Laws
Faculty of Law
University of Toronto
2014

Abstract

Driven by the work of feminists, the last three decades have seen international human rights law reformed to respond better to the scourge of violence against women. A central feature of these reforms – the due diligence standard – extends state responsibility into the private sphere, where women are most often subject to violence. This thesis examines why feminist progress at the level of law has not delivered real change. It argues that the work of feminists, whose efforts helped transform the law, must be extended to address the next challenge: the gap between the promise of the law, and reality. Applying feminist observations to the prevailing set of compliance theories, this thesis reveals some blind spots in current theories of compliance with international law, and illuminates some of the reasons why the due diligence standard has not been effective in eliminating violence against women.
Acknowledgments

I wish to thank my supervisor, Karen Knop, for providing generous, supportive, and insightful assistance throughout the entire process of writing this thesis.
# Table of Contents

ACKNOWLEDGMENTS .............................................................................................................. III

TABLE OF CONTENTS ............................................................................................................. IV

1 INTRODUCTION .................................................................................................................. 1

2 VIOLENCE AGAINST WOMEN: PREVALENCE, PERPETRATORS, CAUSES AND RESPONSES. 4
   2.1 PREVALENCE, PERPETRATORS AND CAUSES ................................................................ 4
   2.2 HUMAN RIGHTS RESPONSES ......................................................................................... 6
       2.2.1 Violence against women as a human rights issue ....................................................... 6
       2.2.2 Feminist critique of international human rights law ................................................... 7
       2.2.3 The reform of international human rights law ............................................................. 11
       2.2.4 The development of the due diligence standard ........................................................... 14

3 COMPLIANCE THEORIES ................................................................................................... 27
   3.1 INTEREST-BASED THEORIES AND RATIONALITY ...................................................... 27
   3.2 NORM-BASED THEORIES AND PERSUASION ............................................................. 29
   3.3 INSTITUTIONS AND ACCULTURATION ......................................................................... 32
   3.4 LEGALITY AND LEGAL OBLIGATION ........................................................................... 34
       3.4.1 Legitimacy and fairness ......................................................................................... 34
       3.4.2 Interational law ..................................................................................................... 36
   3.5 THE NATURE OF COMPLIANCE .................................................................................... 37

4 DUE DILIGENCE, FEMINISM AND COMPLIANCE THEORY ............................................... 37
   4.1 FEMINISM AND RATIONALISM .................................................................................... 38
   4.2 FEMINISM AND CONSTRUCTIVISM .............................................................................. 40
   4.3 FEMINISM, INSTITUTIONS AND ACCULTURATION ...................................................... 43
       4.3.1 Gendered institutions ............................................................................................ 43
       4.3.2 Re-gendered institutions? ...................................................................................... 45
       4.3.3 Isomorphism and de-coupling .............................................................................. 49
   4.4 FEMINISM, LEGALITY AND LEGITIMACY ................................................................. 53
       4.4.1 Due diligence and the interational account .............................................................. 53

5 CONCLUSIONS ................................................................................................................... 60
1 Introduction

According to the United Nations, ‘there is no region of the world, no country and no culture in which women’s freedom from violence has been secured’.1 Nonetheless its prevalence, violence against women was long considered a problem beyond the reach of international human rights law. Perpetrated by non-state actors, and caused largely by patriarchal cultural and social structures, violence against women fit uneasily in an international legal framework designed to constrain states from abuses of their power. Despite these obstacles, feminists, activists and policy-makers worked hard to reform international human rights law to address better the scourge of violence against women. In particular, international and regional instruments were developed that explicitly condemn violence against women and hold states responsible even for violence committed by non-state actors. At the heart of these measures is the due diligence standard, which requires that states exercise due diligence to prevent, investigate and punish violence against women, to address violence at the level of the individual and society. In considerable part because of the work of feminists, there now exists the beginnings of a framework that offers an adequate legal response to violence against women.

Why has this legal reform not translated into less violence against women? This thesis looks to the growing body of scholarship aimed at understanding the efficacy, or inefficacy, of international law, given that it operates in a system without strong centralized mechanisms for interpretation, application and enforcement. Often grouped under the heading “compliance theory”2 this literature examines why, and under what conditions, states and non-state actors comply with international law.

---

1 In-depth study on all forms of violence against women: Report of the Secretary-General, UNGOAR, 61st Sess, Supp No 60(a), UN Doc A/61/122/Add.1 (2006) at para 69 [Secretary General In-depth Study]. While acknowledging that there is some definitional distinction between ‘violence against women’ and ‘gender-based violence’, this thesis will use the terms interchangeably. This in part reflects the use of both terms in the international and regional human rights systems. However, the term ‘violence against women’ will be used predominantly, reflecting this thesis’s focus on rights violations perpetrated against women.

However, in the context of violence against women, theories of compliance fail to tell the full story. This thesis argues that the work of feminists, whose efforts helped transform the law, must be extended to address the next challenge: the gap between the promise of the law, and reality. It proposes that compliance literature must first engage with feminist insights if it is to be useful in explaining, and addressing, the persistence of violence against women despite advancements at the legal level. By examining compliance theories through the lens of violence against women, this thesis reveals some gaps in the current literature, and contributes by filling in these gaps. And this thesis also highlights that, ironically, theories of compliance with international law exhibit flaws similar to those that beset international law itself: they are androcentric and state-centric.

Before examining compliance theories in detail, Part 2 of this thesis outlines the prevalence and causes of violence against women, as well as the human rights law responses. As noted above, considerable legal reform was necessary for international human rights law to apply to violence against women. This reform followed a robust feminist critique of the traditional conception of international human rights law. Part 2 will describe the main strands of this critique before outlining the jurisprudence establishing the due diligence standard, which (at least partially) responds to feminist criticisms. Part 2 concludes that, while the due diligence standard is not a perfect legal solution, it offers a viable and effective human rights response to the problem of violence against women.

Taking the due diligence standard as a starting point, Part 3 of this thesis goes on to examine the prevailing theories about why state and non-state actors comply with international law. This survey of compliance literature goes from rationalist explanations grounded in the realist international relations tradition to more recent accounts that focus on the inherent features of international law. From this review, four main reasons for compliance with international law can be distilled: self-interest (rationalism), the persuasive content of certain norms (constructivism), institutional influences (acculturation), and legal obligation (legality and legitimacy).

Having extracted the dominant features of the various compliance theories, Part 4 brings feminist observations to bear on each of these theories. In line with the approach of much feminist scholarship, this thesis does not wed itself to a particular version of feminism, instead using what Hilary Charlesworth and Christine Chinkin describe as ‘situated judgment’, for example using
liberal feminism to expose the failure of law’s promise of equality, and more radical approaches to bolster critiques of androcentrism and institutionalized male bias.\(^3\) This thesis, while resembling a feminist critique, tends more towards a ‘feminist application’ – incorporating the work of feminists from various disciplines into the dominant theories of compliance. In this way, this thesis deploys some techniques central to most feminist methodologies, making visible women’s exclusion and subordination,\(^4\) and revealing the androcentrism that permeates apparently neutral institutions, laws and conceptual frameworks.\(^5\) Finally, it subscribes to one of the primary goals of the feminist project: ‘feminism was (and remains) a political movement interested primarily in women’s rights and gender emancipation’.\(^6\)

As Part 4 of this thesis will demonstrate, applying feminist observations to compliance literature makes visible some previously inconspicuous theoretical gaps in the current suite of compliance theories, and highlights some fruitful areas for future research. In undertaking this project, this thesis builds upon some existing feminist scholarship, in particular, the work of feminists examining traditional international relations scholarship, who have shown the androcentrism of rationalist accounts of state behavior, and the work of feminists grappling with constructivist accounts of norm diffusion, who have revealed the absence of gender from mainstream theorizing. After first outlining these engagements, Part 4 also examines two recent and sophisticated compliance theories, grounded in sociological institutionalism (acculturation) and legal obligation (legality and legitimacy), which have received little attention from feminists.


\(^5\) Bartlett, “Feminist Legal Method”, *supra* note 4 at 866 (see also generally 863-867); See also Brooke A. Ackerly, Maria Stern & Jacqui True, “Feminist methodologies for International Relations” in Ackerly, Stern & True, *supra* note 4 at 9.

As Part 5 of this thesis concludes, applying feminist observations shows compliance theories to have missed some parts of the broader picture, parts that are imperative to eradicating violence against women using international human rights law. This thesis’s feminist orientation helps deconstruct the dominant accounts of compliance and reveal their blind spots. But this thesis is also an exercise in reconstruction: by making visible the gaps in the current set of compliance literature, and proposing some theoretical reforms, this thesis helps lay the foundations for a theory of compliance that can better understand the failure of the due diligence standard to effectively reduce violence against women.

2 Violence against women: prevalence, perpetrators, causes and responses

2.1 Prevalence, perpetrators and causes

Violence against women is a global epidemic. It is frequently reported that one in three women experience violence in their lifetime; in some regions the statistic is as high as 70-80 per cent. The effects of violence against women have been ably documented in detail elsewhere and need not be repeated here. Suffice it to say that violence against women has devastating consequences, including heavy economic and social costs and adverse affects on women’s health and wellbeing. Tragically, violence against women frequently results in death. Women of every nationality, class, race, ethnicity, religion, and age are subject to gender-based violence.

---

8 United Nations Secretary General’s Campaign, Unite to End Violence Against Women, Fact Sheet, (2008) at 1; K. M. Devries et al, “The Global Prevalence of Intimate Partner Violence Against Women” (2013) 340: 6140 Science 1527 at 1527 (‘results show that globally, in 2010, 30% [95% confidence internal (CI) 27.8 to 32.3%] of women aged 15 and over have experienced, in their lifetime, physical and/sexual intimate partner violence’ and attaching a table showing regional variation with central sub-Saharan Africa at 55-80%).
9 See e.g. Secretary General In-depth Study, supra note 1 at para 156-181; Devries et al, supra note 8.
10 Ibid.
11 Ibid.
12 Secretary General In-depth Study, supra note 1 at para 28.
Gender-based violence can affect the spectrum of women’s lives – from discrimination in the public realm and state-sanctioned abuse, to violence and sexual abuse in the context of an intimate relationship.13 While state-initiated violence against women certainly occurs, women most often experience violence in the ‘private sphere’,14 such as the home or within the family and at the hands of an intimate partner.15 Therefore, individuals, not states or state agents, are the most common perpetrators. The ‘private’ nature of much violence against women, and its tendency to be perpetrated by individuals (that is, non-state actors), are flip sides of the same coin, and the first main feature of violence against women.

In drawing the world’s attention to the scourge of violence against women, activists and feminists have sought to expose its structural causes. The international community has been urged to think of violence against women not as ‘random, individual acts of misconduct’ but as originating from the systematic subordination of women by men.16 Moreover, violence against women also often intersects with other categories of oppression and marginalization, such as minority or migrant status, sexual orientation, or disability.17 While the precise causes of violence against women will vary from case to case, patriarchal structures almost always underlie the various individual and societal factors that contribute to violence against women.18 Thus, the second feature of violence against women is its complex, structural and intersectional causes.

13 Aulette & Wittner, supra note 7 at 257.

14 Carin Benninger-Budel, “Introduction” in Carin Benninger-Budel, ed, Due Diligence and its Application to Protect Women from Violence (Leiden: Martinus Nijhoff Publishers, 2008) 1 at 1. Feminists have expressed legitimate concerns, elaborated on below at 2.2.2, about using the word ‘private’ to denote the place in which violence against women tends to take place. While acknowledging these concerns, ‘private violence’ remains a helpful linguistic short-hand to denote violence perpetrated by non-state actors, usually individuals, in a domestic or family environment, and beyond the realm of official or ‘public’ action.


16 Secretary General’s In-Depth Study, supra note 1 at paras 23 and 70.

17 Ibid at para 361.

18 Ibid at paras 65 – 66.
Both of these features have clear implications for preventing and responding to violence against women: measures purporting to do so must go beyond the state to the private sphere, and address deeply entrenched ‘social and cultural norms, institutionalized in the law and political structures and embedded in local and global economies’.  

2.2 Human rights responses

2.2.1 Violence against women as a human rights issue

As the global movement to combat violence against women gained traction, it intersected with the human rights movement. Realizing the power of the international human rights framework, activists sought to transform political agendas to combat violence against women into the language of human rights. However, this transformation did not take place until the 1980s, prior to which the women’s rights agenda focused primarily on promoting women’s rights in the political and public arena. The late arrival of violence against women on the human rights agenda is reflected in its glaring omission from Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which opened for signature in 1979. By the mid-1990s, however, the issue had risen to prominence: at the 1993 World Conference on Human Rights in Vienna (Vienna Conference), women’s groups rallied around the violence against

19 Ibid at para 70.


22 Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (New York: Cornell University Press, 1998) at 166 [Keck & Sikkink, Activists Beyond Borders]. See also Friedman, supra note 20 at 20.

women agenda, and it was one of the four central issues at the United Nations Conference on Women in Beijing in 1995.

2.2.2 Feminist critique of international human rights law

Despite mobilizing international human rights law to combat violence against women, many feminists have been critical of the same framework. Ultimately, ‘[f]eminist scholars have argued that international human rights norms were initially articulated and continue to be interpreted and applied to reflect men’s experiences while overlooking the harms that most commonly or disproportionately affect women’. In more particular terms, feminists have shown how international human rights law is ill suited to respond to the two dominant features of violence against women identified above at 2.1, that is: (1) its perpetration by non-state actors, often individuals in a private context, and (2) its complex structural and intersectional causes. The following section deals with each aspect of the critique in turn.

First, international human rights law has traditionally been concerned with the state and its abuses of civil and political rights. For feminists, this focus developed because international human rights law has been made by men to respond to ‘what men fear will happen to them’.

---

24 Secretary General’s In-depth Study, supra note 1 at para 32.

25 Keck & Sikkink, Activists Beyond Borders, supra note 22 at 166; Friedman, supra note 20 at 27.


This is reflected in the primacy given to what are often labeled ‘first generation human rights’, such as the right to be free from arbitrary detention, the right to a fair trial, the right not to be tortured, and so on.\textsuperscript{30} These guarantees protect men, who dominate the public realm in which these rights violations take place. The short list of \textit{jus cogens} norms, which are said to represent the most fundamental values of the international community, also reflects this bias towards prohibiting violations of public rights perpetrated by the state against individuals.\textsuperscript{31} In contrast, women, by reason of their historical subordination, suffer from oppression in the private sphere to which they have been relegated.\textsuperscript{32} By focusing on the perpetration of rights violations by the state, international human rights law often leaves unaddressed the violence suffered by women at the hands of individuals and other non-state actors.\textsuperscript{33} Highlighting the gendered operation of this public/private distinction, feminists have argued that the state-focus of international human rights law considerably limits its capacity to respond to many of the harms experienced by women.\textsuperscript{34} It is worth noting that this public/private critique has been challenged by feminists on a number of fronts. First, the distinction between ‘public’ and ‘private’ described above is not a bright line that operates uniformly against women’s interests.\textsuperscript{35} For example, women’s bodily and sexual freedom has been preserved (in some respects) by an insistence on privacy.\textsuperscript{36} Second, rejection of the public/private divide tends to assume that state intervention into the private sphere will be benevolent; that women’s lives would be safer if the distinction did not exist. Clearly this is not

\textsuperscript{30} \textit{Ibid}; Brooks, \textit{supra} note 28 at 348; Charlesworth & Chinkin, \textit{Boundaries, supra} note 3 at 323-324.

\textsuperscript{31} See generally Charlesworth and Chinkin, “Gender of \textit{Jus Cogens}”, \textit{supra} note 30.


\textsuperscript{33} Brooks, \textit{supra} note 28 at 349; Edwards, \textit{supra} note 27 at 66.

\textsuperscript{34} See e.g. Romany, \textit{supra} note 32; Donna Sullivan, “The Public/Private Distinction in International Human Rights Law” in Cook, \textit{supra} note 26, 126 at 126.


\textsuperscript{36} \textit{Ibid}.
always the case. Many women have suffered from state encroachment into their private lives through practices such as forced sterilization, and social and economic policies that operate to undermine the family. Thus, the private sphere can in fact be a sanctuary from interference by the state. Third, the public/private critique overemphasizes the extent to which women’s lives are conducted in private, oversimplifies women’s experiences and underemphasizes the huge contributions women have made and continue to make to the public realm. That said, however the distinction is described, feminists are undoubtedly right that the perpetration of violence against women by non-state actors has traditionally placed it beyond the reach of international human rights law, thus limiting that framework’s ability to protect women from violence.

The second major part of the feminist critique of international human rights law has two components: a concern about the value of individual rights claims, and their basis in the principle of non-discrimination. Dealing with the latter component first, feminists argue that the idea of non-discrimination, which underlies most international human rights instruments, is ill equipped to transform the entrenched and intersectional, social and cultural practices that contribute to violence against women. Calling for equal treatment ‘makes contingent social structures seem permanent’ and does nothing to transform existing unequal power relations. Moreover, feminist scholars argue that, as it is currently applied, the non-discrimination model relies on men as the standard. Therefore, unless and until women conform to or adopt established (masculine) behaviors and capabilities, they will remain excluded. While a progressive


40 *Ibid* at 165; Charlesworth, “What are Women’s IHR”, *supra* note 26 at 64.

41 *Ibid* at 60 – 65.


approach to non-discrimination – better described as ‘equality’ – might offer scope to ‘do away with women’s subordinate status’, such an approach is not readily apparent in practice.\textsuperscript{44} In addition, individual rights claims risk universalizing the complex and hugely varied experiences of the world’s women, and essentializing the causes of their oppression.\textsuperscript{45} According to Johanna Bond, ‘[t]he unqualified embrace of universalism within the international human rights movement has led to a static understanding of human rights, one that assumes that victims of human rights violations experience those violations in the same way’.\textsuperscript{46} It has also led to the construction of ‘woman’ in certain, essentialized ways. For example, Radhika Coomaraswamy criticizes how international human rights law ‘privileges a free, independent woman, endowed with rights and rational agency’.\textsuperscript{47} Dianne Otto argues that international human rights law has fashioned a different version of ‘woman’ – a heterosexual wife and mother dependant on men as fathers, husbands, the (male) state and also on the male-dominated United Nations.\textsuperscript{48} In either case, the underlying criticism is the same: international human rights law fails to recognize that women are not a homogenous category whose subordination results from gender alone.\textsuperscript{49} Feminists have argued that this does not preclude the utility of international human rights law working for women, but rather that the framework must do better to ‘accommodate the diversity of women and women’s lives without compromising its strength that lies in its appeal to universality and the promotion of gender equality’.\textsuperscript{50}

\textsuperscript{44} Edwards, \textit{supra} note 27 at 175.

\textsuperscript{45} Peterson, “Whose Rights?”, \textit{supra} note 26 at 306; Brooks, \textit{supra} note 28 at 353-354; Engle, “Discourses Meeting”, \textit{supra} note 26 at 59-60; Radhika Coomaraswamy, “To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights” in Cook, \textit{supra} note 26, 39 at 47.


\textsuperscript{47} Coomaraswamy, \textit{supra} note 45 at 40.


\textsuperscript{49} Bond, \textit{supra} note 46 at 73 – 74;

\textsuperscript{50} Edwards, \textit{supra} note 27 at 79.
Of course, the preceding review is not intended to describe exhaustively feminist concerns about international human rights law and the legal and political system in which it operates. Rather, it is confined to an outline of the major critiques of the law, as distinct from feminist concerns about, for example, the institutional marginalization of women’s rights, or the effects of cultural relativism on women’s rights claims. These concerns pertain more to compliance, and are elaborated upon throughout the remainder of this thesis.

2.2.3 The reform of international human rights law

Many of the critiques articulated above were mounted in the early 1990s. While their message remains relevant, considerable legal reform has been undertaken since then in order to overcome the deficiencies identified by feminists. First, in 1992, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) issued General Recommendation No. 19, which asserted that ‘[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men’. By linking violence against women to discrimination, General Recommendation 19 rectified the failure of CEDAW to address violence against women. General Recommendation 19 also made explicit that discrimination under the Convention is not restricted to action by or on behalf of Governments...States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’.

Subsequent to General Recommendation 19, three international instruments were developed that describe violence against women as a human rights violation: Declaration on the Elimination of Violence Against Women, Inter-American Convention on the Prevention, Punishment and

52 Edwards, supra note 27 at 183.
Eradication of Violence Against Women (Belém do Pará), and Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Protocol to the ACHPR). In addition, on 1 August 2014, the European Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force, building upon the Council of Europe’s Recommendation to member states on the protection of women from violence.

To varying degrees, each of these instruments contains provisions that address the feminist critiques outlined above. With respect to the first feature of violence against women, each instrument requires states to take measures to eliminate violence against women committed in both the ‘public’ and the ‘private’ sphere. DEVAW and Belém do Pará also both make explicit that violence against women can occur at the hands of the state, or be perpetrated by the community or a member of the family. The absence of an equivalent provision in the Istanbul Convention and the Protocol to the ACHPR is a weakness in both those instruments, perhaps even more so for the Istanbul Convention, because it failed to carry over this aspect of the earlier Council Recommendation.

---


56 *European Convention on preventing and combating violence against women and domestic violence*, 5 November 2011, CETS No. 210 (entered into force 1 August 2014) [Istanbul Convention].


58 *Ibid*, art II; *DEVAW*, supra note 53, art 4(c); *Belém do Pará*, supra note 54, art 3; Council Recommendation, supra note 57, art 4(II) and definitions clause, para 1; *Protocol to the ACHPR*, supra note 55, art 4(2)(a); Istanbul Convention, supra note 56, art 4(1).

59 *DEVAW*, supra note 53, art 2; *Belém do Pará*, supra note 54, art 2.

60 Council Recommendation, supra note 57, appendix (definition clause).
With respect to the second feature of violence against women, all five instruments recognize the complex and structural causes of such violence, although in different ways. For example, the preamble to *DEVAW* states categorically that:

> violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.\(^\text{61}\)

Likewise, the preamble to *Belém do Pará* acknowledges in briefer terms that ‘violence against women…[is] a manifestation of the historically unequal power relations between women and men’.\(^\text{62}\) The *Council Recommendation* and the *Istanbul Convention* also make this plain.\(^\text{63}\) In contrast, the *Protocol to the ACHPR* is not explicit on this point. Nevertheless, each instrument contains measures aimed at tackling this second feature of violence against women. For example, *Belém do Pará* requires states to ‘undertake progressively specific measures…to modify social and cultural patterns of conduct of men and women…to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes…which legitimize or exacerbate violence against women’.\(^\text{64}\) *DEVAW*, the *Protocol to the ACPHR*, the *Istanbul Convention* and the *Council Recommendation* also contain comparable provisions.\(^\text{65}\) Finally, *DEVAW*, *Belém do Pará*, the *Istanbul Convention* and the *Protocol to the ACPHR*...
ACPHR each recognize that certain groups of women, such as those from racial or ethnic minorities, or other marginalized groups, may require special protection from violence.\textsuperscript{66}

2.2.4 The development of the due diligence standard

One of the key concepts to emerge out of feminist reform efforts with respect to violence against women is the due diligence standard.\textsuperscript{67} Early application of this standard suggests that it has considerable potential to address some of the feminist concerns outlined above. Explicitly enshrined in General Recommendation 19, \textit{DEVAW}, Belém do Pará, the \textit{Istanbul Convention} and the \textit{Council Recommendation}, the due diligence standard requires states to act with due diligence to prevent, investigate and punish violence against women, whether such violence is perpetrated by the state or by private persons.\textsuperscript{68} The Inter-American Commission on Human Rights (the Commission), the CEDAW Committee, and the European Court of Human Rights (ECtHR) have each considered the due diligence standard in cases where state authorities have failed to protect a woman and her family members from domestic violence, with sometimes fatal consequences.\textsuperscript{69} A review of this case law illustrates how the due diligence standard is currently being invoked, and its potential to oblige states to address the structural and intersectional causes of private violence.

\textsuperscript{66} \textit{DEVAW}, supra note 53, preamble, Belém do Pará, supra note 54, art 9; \textit{Protocol to the ACHPR}, supra note 55, arts 22, 23 and 24 (with respect to elderly women, women with disabilities and ‘other marginalized groups’, respectively); \textit{Istanbul Convention}, supra note 56, art 4(3).


\textsuperscript{68} General Recommendation 19, supra note 51 at para 9; \textit{DEVAW}, supra note 53, art 4(c); Belém do Pará, supra note 54, art 7(b); \textit{Istanbul Convention}, supra note 56, art 5(2); \textit{Council Recommendation}, supra note 57, art 4(1).

2.2.4.1 Inter-American system

The due diligence standard was first articulated by the Inter-American Court of Human Rights in the 1989 case of Velásquez-Rodriguez v Honduras. In that case, the Inter-American Court of Human Rights held that

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it.

While Velásquez Rodriguez concerned the disappearance and arbitrary detention of a male student by ‘persons connected with the Armed Forces [of Honduras] or under its direction’, the principle articulated in this case has since been applied on two occasions by the Inter-American Commission on Human Rights (the Commission) in the context of domestic violence: Maria Da Penha v Brazil, and Jessica Lenahan (Gonzales) v United States.

In Maria da Penha v Brazil, the applicant (Maria da Penha) had been subjected to repeated acts of serious violence over the course of her marriage to her then husband, Marco Antônio Heredia Viveiros (Viveiros). This violence culminated in Viveiros attempting to kill Maria da Penha, rendering her paraplegic. He was charged with attempted murder for his conduct. However, seventeen years after Viveiros’s attempt on her life, no final ruling had been made by the

---

70 Velásquez Rodriguez v Honduras, 29 July 1988, Series C, Decisions and Judgments, No 4 [Velásquez Rodriguez v Honduras].
71 Ibid at para 172
72 Ibid at para 147(f).
73 Maria da Penha v Brazil, supra note 69.
74 Gonzales v United States, supra note 69.
75 Maria da Penha v Brazil, supra note 69 at paras 8-9.
76 Ibid at para 8.
77 Ibid at para 13.
Brazilian judicial system, and Viveiros remained free.\textsuperscript{78} While the Commission affirmed that the state had positive obligations with respect to the conduct of non-state actors, it confined its conclusions to finding a violation of Maria da Penha’s rights to a fair trial and to judicial protection under the \textit{Inter-American Convention on Human Rights}.\textsuperscript{79} With respect to \textit{Belém do Pará}, the Commission held that Brazil’s failure to prosecute and convict Viveiros created an environment conducive to domestic violence.\textsuperscript{80} Thus, the decision focuses on the rather narrow point of state obligations to investigate and prosecute, rather than the Brazilian authorities’ broader obligation to prevent and protect Maria da Penha from violations of her right to security of the person.\textsuperscript{81}

In \textit{Gonzales v United States}, the Commission did consider this broader issue.\textsuperscript{82} This case related to the tragic killing of Jessica Lenahan’s three children while they were in the physical custody of her former husband Simon Gonzales on 22 and 23 June 1999.\textsuperscript{83} Gonzales had been abusive towards Lenahan, a woman of Latin-American and Native-American descent, for approximately three years.\textsuperscript{84} During that time, police were alerted to Gonzales’s violent conduct at least four times, including on two occasions when he broke into Lenahan’s house.\textsuperscript{85} On 21 May 1999, Lenahan obtained a restraining order against Gonzales as a result of his violent and destructive behavior.\textsuperscript{86} Then, sometime before 5:50pm on 22 June 1999, Gonzales took the children from

\begin{itemize}
\item \textsuperscript{78} \textit{Ibid} at paras 12-19.
\item \textsuperscript{80} \textit{Maria da Penha v Brazil}, supra note 69 at para 56.
\item \textsuperscript{81} Moser, supra note 79 at 440-441.
\item \textsuperscript{83} \textit{Ibid} at para 32.
\item \textsuperscript{84} \textit{Ibid} at paras 18-19 and 65-70.
\item \textsuperscript{85} \textit{Ibid} at paras 19 and 67.
\item \textsuperscript{86} \textit{Ibid} at paras 20 and 66.
\end{itemize}
outside Lenahan’s house, in violation of the restraining order.87 Lenehan contacted the local police on eight occasions between the time her children went missing and when they were ultimately found dead in Gonzales’s car at about 3:30am on 23 June 1999.88 Police took virtually no positive steps to find Lenahan’s daughters, and were on several occasions dismissive of her pleas, in which she made clear that her former husband had taken her daughters in violation of a restraining order.89

In reviewing the applicable law in this case,90 the Commission emphasized that a state’s failure to protect women from violence perpetrated by ‘private actors…constitutes a form of discrimination, and denies women their right to equality before the law’, as well as being a violation of a woman’s right to life.91 The Commission unequivocally endorsed the due diligence standard and acknowledged the increasing ‘recognition of violence against women as a human rights problem requiring state action’.92 It also acknowledged the intersectional nature of much violence against women, stating that ‘certain groups of women face discrimination on the basis of more than one factor during their lifetime, based on their young age, race and ethnic origin, among others, which increases their exposure to acts of violence’.93 Ultimately, the Commission concluded that the United States failed to act with due diligence to protect Lenahan and her daughters from domestic violence.94 According to the Commission, the United States violated the right to life of Lenahan’s daughters, by failing to prevent their death, and failed to provide

87 Ibid at paras 24-25.
88 Ibid at para 146.
89 Ibid at paras 152-158.
90 America is not a signatory to Belém do Pará, or the Inter-American Convention on Human Rights. As a result, the case was decided only by reference to the American Convention of the Rights and Duties of Man. Ibid at para 4. See also Moser, supra note 79 at 442.
91 Gonzales v United States, supra note 69 at paras 111 – 113, 131 – 135.
92 Ibid at paras 119 – 130.
93 Ibid at para 113.
94 Ibid at para 199.
Lenahan and her daughter with equal protection under and the law. It noted that these ‘systemic failures’ were particularly egregious given Lenahan’s belonging to an ethnic and racial minority and a low-income group.

2.2.4.2 CEDAW Committee

The CEDAW Committee has considered the due diligence standard in the following cases: AT v Hungary, Yildirim v Austria, and Goekce, v Austria. In each case, the applicants invoked essentially the same argument. Relying on General Recommendation 19, which articulates states’ positive obligations to eliminate discrimination perpetrated by non-state actors, the applicants have alleged that the failure of the state in question to eliminate discrimination has resulted in the violation of the applicant’s rights to security of the person and/or life.

The CEDAW Committee first applied the due diligence standard in AT v Hungary. In this case, AT alleged that she was subject to ‘regular and severe domestic violence and serious threats’ by LF, who was her common law husband and the father of her two children. At one point, LF moved out, and AT changed the locks after further incidences of severe violence. Nevertheless, LF applied to the courts for access to the residence, which was granted on the basis that AT’s claims of violence could not be substantiated, and that LF’s right to access his property could not be restricted. Two criminal proceedings were initiated in relation to the allegations

95 Ibid.
96 Ibid at para 161.
97 AT v Hungary, supra note 69.
98 Yildirim v Austria, supra note 69.
99 Goekce, v Austria, supra note 69.
101 AT v Austria, supra note 69 at para 2.1.
102 Ibid at paras 2.2-23.
103 Ibid at para 2.4.
of violence, but at no point was LF detained.\textsuperscript{104} Finally, for the period during which AT was subject to violence, Hungarian law contained no provisions allowing for protection orders or restraining orders to be issued in the context of domestic violence. AT was also unable to access a shelter.

The CEDAW Committee found that by failing to have in place adequate legal and institutional arrangements to protect women from violence, in tandem with the low priority afforded to domestic violence cases in Hungary’s court system, Hungary had violated article 2 of CEDAW, which requires states to put in place adequate measures to ensure the practical realization of the principle of equality through both legislative means and the practice of state authorities and institutions.\textsuperscript{105} The CEDAW Committee affirmed that Hungary’s obligation to eliminate discrimination extended to preventing and protecting women from violence and that Hungary’s failure to discharge this obligation ‘constitute[d] a violation of the author’s human rights and fundamental freedoms, particularly her right to security of the person’.\textsuperscript{106} In addition, the CEDAW Committee found that Hungary had violated article 5(a) of CEDAW, which requires states to modify social and cultural ‘patterns of conduct’ to eliminate prejudices and other practices that are based on the idea that women are inferior.\textsuperscript{107} The CEDAW Committee pointed to the following as evidence of Hungary’s failure to eliminate such patterns of conduct: the persistent violence suffered by AT at the hands of LF, the failure of criminal and civil proceedings to bar LF from her home, the absence of a mechanism to obtain a protection order, and AT’s inability to flee to an appropriate shelter.\textsuperscript{108} For the CEDAW Committee, these aspects combined revealed a concerning ‘persistence of entrenched traditional stereotypes, regarding the role of women and men in the family’.\textsuperscript{109}

\textsuperscript{104} Ibid at para 2.6.
\textsuperscript{105} Ibid at para 9.3.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid at para 9.4.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
In the second case before CEDAW – *Yildirim v Austria* – the claim was made on behalf of Ms Yildirim, who had been killed by her husband. In that case, Ms Yildirim was subject to repeated threats on her life and serious violence between July 2003 and September 2003. During that period, the police were notified of Ms Yildirim’s husband’s violent conduct seven times and the public prosecutor was twice asked to detain Ms Yildirim’s husband due to his violent behavior. Both of those requests were denied. Despite obtaining a protection order against her husband on 1 September 2003, Ms Yildirim was stabbed and killed by him on 11 September 2003. He was later arrested and convicted of her murder.

In contrast to *AT v Hungary*, in *Yildirim v Austria*, the CEDAW Committee acknowledged that Austria in fact had in place ‘a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators’. Nevertheless, the CEDAW Committee held that despite these detailed measures, Austria had failed to practically realize its stated commitment to ensure women’s enjoyment of their human rights and fundamental freedoms, without discrimination (a violation of article 2). It went on to find that Austrian authorities knew or should have known that Ms Yildirim was in a situation of extreme danger, and that by failing to detain Mr Yildirim, Austria had breached its obligation to act with due diligence. It concluded that Ms Yildirim’s right to life and physical and mental integrity had been violated by reason of Austria’s failure to eliminate discrimination against women.

---

110 *Yildirim v Austria*, supra note 69 at paras 2.1-2.13.
111 *Ibid* at paras 2.3-2.10.
112 *Ibid* at paras 2.4 and 2.10.
115 *Ibid* at para 12.1.2.
116 *Ibid* at paras 12.1.2 and 12.3.
118 *Ibid* at para 12.3.
Finally, and also in contrast to _AT v Hungary_, the CEDAW Committee elected not to make a finding about whether Austria had discharged its obligation under article 5(a) to modify cultural and social patterns of conduct that are based on the idea of the inferiority of women.  

The third case heard by the CEDAW Committee – that of _Goekce v Austria_ – has facts that are tragically similar to those of _Yildirim v Austria_. Over a three year period between 1999 and 2002, Ms Goekce was repeatedly assaulted by her husband. The police were called on several occasions, on three of which they issued temporary orders expelling Mr Goekce from Ms Goekce’s house. Notwithstanding his persistent violence, the public prosecutor denied requests to detain Mr Goekce, and he was able to purchase a gun despite being prohibited from owning a weapon. On 7 December 2002, police were alerted to a dispute between the couple, although no police were sent to investigate. Later that same day, Ms Goekce was shot and killed by her husband.

The CEDAW Committee treated _Goekce v Austria_ in the same manner as _Yildirim v Austria_. It acknowledged Austria’s comprehensive measures to address domestic violence, but found that the failure of Austria to practically realize these measures constituted discrimination, in violation of _CEDAW_ article 2. Specifically, the CEDAW Committee found that the public prosecutor should have acceded to the police requests to detain Mr Goekce, and that ‘in light of the long record of earlier disturbances and battering, by not responding to the [last] call immediately, police are accountable for failing to exercise due diligence to protect Şahide Goekce’. As in _Yildirim_, the CEDAW Committee elected not to determine whether article 5(a) had been violated.

---

119 _Ibid_ at para 12.2.
120 _Goekce v Austria_, _supra_ note 69 at paras 2.9 and 12.1.3
121 _Ibid_ at para 2.11.
122 _Ibid_ at para 2.12.
123 _Ibid_ at paras 12.1.2-12.1.2.
124 _Ibid_ at para 12.1.4.
2.2.4.3 European Court of Human Rights

The ECtHR has two seminal decisions that establish state responsibility for the conduct of non-state actors in the context of domestic violence: Opuz v. Turkey, and Bevacqua and S. v Bulgaria.

In Bevacqua v Bulgaria, Mrs Valentina Nikolaeva Bevacqua brought a claim on behalf of herself and her minor son (both applicants are referred to as ‘Bevacqua’ for simplicity). She alleged that during the course of divorce and custody proceedings against her (then) husband, she was repeatedly assaulted by him. Despite obtaining medical treatment, maintaining records of her injuries and making repeated complaints to the authorities, Bulgarian prosecution authorities refused on multiple occasions to bring criminal proceedings against former husband. Bevacqua ultimately brought an action under article 3 (prohibition against torture), article 8 (right to respect for private and family life), article 13 (right to a remedy), and article 14 (prohibition against discrimination) of the European Convention on Human Rights (ECHR).

The ECtHR ultimately considered only whether Bevacqua’s allegations amounted to a violation of article 8. In its review of the relevant law, the ECtHR emphasized the Council Recommendation, DEVAW, and the 2006 report of the Special Rapporteur on violence against women, which asserted that the due diligence standard had become a rule of customary international law. It then went on to confirm that in certain circumstances, authorities have positive obligations, under article 8 alone, or in combination with the right to life (article 2) or the prohibition against torture (article 3), to:

- maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals… The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need

---

125 Bevacqua v Bulgaria, supra note 69 at paras 7 – 38.
126 Ibid at para 38.
127 Ibid at paras 54 and 63.
128 Ibid at para 55.
129 Ibid at para 53.
for active State involvement in their protection has been emphasised in a number of international instruments.\(^{130}\)

Applying these concepts to the facts, the ECtHR confirmed that Bulgaria had violated article 8 by failing to fulfill its positive obligation to sanction or otherwise prohibit Bevacqua’s former husband for his repeated acts of violence.\(^{131}\)

In 2009, the ECtHR issued *Opuz v Turkey*, in which it expanded upon its reasoning in *Bevacqua v Bulgaria*. The applicant, Opuz, started a relationship with ‘HO’ in 1990.\(^{132}\) During the entire course of their relationship, and for some years after it ended, HO repeatedly assaulted Opuz, including by stabbing her on at least one occasion and attempting to run her and her mother over with a car. He also threatened to kill Opuz and her mother on numerous occasions.\(^{133}\) Opuz and her mother repeatedly reported HO’s conduct to the authorities, and criminal proceedings were instituted against HO on five occasions.\(^{134}\) However, on two of these occasions, Opuz and her mother withdrew their complaints and the prosecutions were discontinued.\(^{135}\) Opuz and her mother later stated that they withdrew their complaints because HO had threatened them.\(^{136}\) On two other occasions, no prosecution was commenced due to ‘insufficient evidence’, despite medical evidence of assault and the statements of Opuz and her mother.\(^{137}\) In late February 2002, Opuz’s mother made another complaint to the police about HO’s threats to kill her and Opuz.\(^{138}\) Two weeks later on 11 March 2002, HO shot and killed Opuz’s mother.\(^{139}\) HO was sentenced to

---

130 *Ibid* at para 64.  
131 *Ibid* at paras 83-84.  
132 *Opuz v Turkey*, supra note 69 at para 8.  
133 *Ibid* at paras 8 – 69.  
134 *Ibid* at paras 11, 14, 25, 43, 50  
135 *Ibid* at paras 19 and 33.  
137 *Ibid* at paras 20-21, and 45-46.  
139 *Ibid* at para 54.
imprisonment for his conduct, and was released around 26 March 2008, after which he continued to threaten Opuz.  

It was not until November 2008, following a request for information from the ECtHR, that measures were finally taken by police to protect Opuz. 

The ECtHR considered whether there had been a violation of articles 2, 3 and 14 of the ECHR. As in Bevacqua v Bulgaria, the ECtHR reviewed the relevant international law, noting the due diligence requirement in DEVAW, the Council Recommendation, and the decisions of the CEDAW Committee and the Inter-American Court of Human Rights. It then went on to state:

"a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims." 

After reviewing how Turkish authorities’ handled Opuz’s case, the ECtHR determined that they had not complied with their obligation to act with due diligence by failing to protect the right to life of Opuz’s mother in violation of article 2 of the ECHR. In addition, the ECtHR held that the authorities’ failure to prevent HO’s recurring attacks, ‘perpetrated…without hindrance and with impunity’ amounted to a violation of article 3 of the ECHR. Finally, the ECtHR found that the ‘unresponsiveness of the judicial system and the impunity enjoyed by aggressors’ amounted to discrimination under article 14 of the ECHR. Importantly, in reaching these conclusions, the ECtHR condemned Turkish authorities’ characterization of HO’s conduct

---

140 Ibid at paras 59 – 68.  
141 Ibid at para 69.  
142 Ibid at para 116.  
143 Ibid at para 72 – 86.  
144 Ibid at para 131.  
145 Ibid at paras 128 – 149.  
146 Ibid at paras 160-176.  
147 Ibid at paras 199-202.
towards Opuz and her mother as a ‘family’ or ‘private matter’.\textsuperscript{148} It also noted in particular that, in the city where Opuz lived, the ‘great majority’ of women subject to domestic violence were also of Kurdish origin, economically dependent on their families, and were either illiterate or possessed very low levels of education.\textsuperscript{149}

\textbf{2.2.4.4 Conclusions – due diligence standard}

The jurisprudence described above categorically establishes that the due diligence standard imposes on states an obligation to protect women from violence perpetrated by non-state actors.\textsuperscript{150} In fact, a former Special Rapporteur on violence against women, Yakin Ertürk, points to the instruments and case law described above as evidence of ‘a rule of customary international law that obliges states to prevent and respond to acts of violence against women with due diligence’.\textsuperscript{151} In addition, each of the international tribunals listed above has recognized the link between patriarchal gender norms, and cultural or traditional practices that subordinate women and perpetuate the existence of domestic violence.\textsuperscript{152} The tribunals in \textit{Opuz v Turkey} and \textit{Gonzales v United States} were also prepared to highlight that women often experience overlapping forms of discrimination, which increases their risk of violence.\textsuperscript{153} Finally, each of the tribunals has emphasized that it is not enough that states put in place a legislative response to violence against women; such reforms must also be effective in practice.\textsuperscript{154}

\begin{flushleft}
\textsuperscript{148} \textit{Ibid} at paras 123 and 143-144.

\textsuperscript{149} \textit{Ibid} at para 195.

\textsuperscript{150} \textit{Ibid} at para 128; \textit{AT v Hungary}, supra note 69 at para 9.2; \textit{Goekce v Austria}, supra note 69 at para 12.1.1; \textit{Yildirim v Austria}, supra note 69 at 12.1.1; \textit{Maria da Penha v Brazil}, supra note 69 at para 42; \textit{Gonzales v United States}, supra note 69 at paras 119-120; \textit{Bevacqua v Bulgaria}, supra note 69 at para 65.

\textsuperscript{151} SRVAW, \textit{Due Diligence Standard as a Tool}, supra note 67 at paras 19-29.

\textsuperscript{152} \textit{Gonzales v United States}, supra note 69 at paras 113, 126-127; \textit{AT v Hungary}, supra note 69 at para 9.4; \textit{Yildirim v Austria}, supra note 69 at para 12.2; \textit{Goekce v Austria}, supra note 69 at para 12.2; \textit{Opuz v Turkey}, supra note 69 at para 197-198.

\textsuperscript{153} \textit{Ibid} at para 195; \textit{Gonzales v United States}, supra note 69 at para 161.

\textsuperscript{154} \textit{Ibid} at paras 161-162; \textit{Yildirim v Austria}, supra note 69 at para 12.1.2; \textit{Goekce v Austria}, supra note 69 at para 12.1.2; \textit{Opuz v Turkey}, supra note 69 at para 136.
\end{flushleft}
This is not to suggest that the due diligence standard is a panacea to the concerns of all feminists. In terms of its application, the jurisprudence outlined above shows a clear focus on criminal justice responses, with much less emphasis on what states are doing to prevent violence against women.\textsuperscript{155} The decisions also conceive of violence against women predominantly as ‘harm done’, a conception which must be overcome if a progressive and effective response to violence against women is to emerge.\textsuperscript{156} Finally, the intersectional nature of violence was acknowledged in only two of the cases reviewed above, and in neither of which was it dealt with in any detail.

At a theoretical level, there are differences between feminists about the value of continued reliance on the non-discrimination standard, a principle which continues to underlie the due diligence framework.\textsuperscript{157} Edwards argues that requiring women to establish a link between the violence they suffer and sex discrimination is itself discriminatory: proving ‘violence that disproportionately affects men is not burdened with an additional link to sex discrimination’ or the failure of state action.\textsuperscript{158} Other feminists have argued that viewing violence against women as a product of unequal relations properly recognizes its structural causes.\textsuperscript{159} In addition, while the due diligence framework prohibits violence perpetrated by non-state actors, its focus remains state-centric, on the sufficiency of state action in preventing, prosecuting and punishing violence against women.\textsuperscript{160} The diversity of feminist perspectives, as illustrated by the disagreements just described, is a common casualty of feminist reform projects, during which feminists may be forced to thesis over their differences in order to achieve a particular reform agenda,\textsuperscript{161} in this case, the development of the due diligence standard. While acknowledging this, this thesis

\begin{itemize}
\item \textsuperscript{155} SRVAW, \textit{Due Diligence Standard as a Tool}, supra note 67 at paras 1 and 46.
\item \textsuperscript{156} Yakin Ertürk, “Linking research, policy and action: A look at the work of the special rapporteur on violence against women” (2012) 60:2 Current Sociology 142 at 153.
\item \textsuperscript{157} For an overview of some different feminist approaches, see Edwards, \textit{supra} note 27 at 141-148.
\item \textsuperscript{158} \textit{Ibid} at 194-195.
\item \textsuperscript{160} SRVAW, \textit{Due Diligence Standard as a Tool}, supra note 67 at para 15.
\item \textsuperscript{161} See e.g. Karen Engle, “Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina” (2005) 99 AJIL 778.
\end{itemize}
considers that the due diligence framework still offers considerable promise: in her 2006 report, former Special Rapporteur Ertürk emphasized that due diligence, expansively interpreted and progressively applied, has the potential to ‘address the root causes of violence against women and to hold non-State actors accountable for their acts’.  

3 Compliance theories

Given the promise of the due diligence standard as a legal response to violence against women, why does such violence persist? This thesis looks to theories of compliance for the answer to this question. The following section of this thesis outlines the prevailing accounts of compliance, from more established theories with foundations in realist and constructivist versions of international relations to more recent theoretical accounts that draw on concepts in sociological institutionalism and the inherent features of international law.

3.1 Interest-based theories and rationality

Interest-based theories of compliance have their origins in the realist tradition of international relations, and its analysis of what motivates state behavior. Generally speaking, they are predicated on the notion that states are the central actors in international society, and will comply with international law when, rationally assessed, it is in their interests to do so. While the source of self-interest differs between the theories, it remains the determining influence on state behavior. Realist and neorealist theories define state interests as security and (sometimes) wealth, and propose that states will comply with international law when to do so maximizes these interests. Therefore, realist and neorealist theories cannot easily account for cooperation.

---

162 SRVAW, *Due Diligence Standard as a Tool*, supra note 67 at paras 2 and 102.
163 Secretary General In-depth Study, supra note 1 at para 275.
164 Kingsbury, *supra* note 2 at 351.
between states, let alone compliance with international law, instead predicting inevitable power struggles and warfare.\(^\text{167}\)

Rationalist accounts of compliance were originally derived from, but later challenged, realist and neorealist theories of state behavior.\(^\text{168}\) Drawing on rational choice models of behavior, rationalist accounts propose that states will comply with international law when it maximizes their interests ‘given their perceptions of the interests of other states and the distribution of state power’.\(^\text{169}\) Rationalist theories do not exclude the possibility of cooperation between states, such as through the formation of institutions, but argue that it occurs because it generates stability between states and reduces transaction costs.\(^\text{170}\) In addition, while legal rules play a role by affecting the various costs and benefits of compliance,\(^\text{171}\) rationalist accounts predict that states have no inherent preference to comply with international law.\(^\text{172}\) Thus, international law matters, but not its content.

Liberal theories of international law also rely on rationalism as the driver of state behavior. The primary difference between liberal theories of compliance and the theories discussed in the preceding paragraphs is that liberal theories (and their neoliberal counterparts) acknowledge the existence of domestic and transnational actors in the formation of preferences.\(^\text{173}\) Domestically, state preferences are the aggregate of individual preferences, which are mobilized through


\(^{168}\) Kingsbury, supra note 2 at 351; Keohane, supra note 167 at 381.

\(^{169}\) Goldsmith & Posner, Limits, supra note 165 at 3; Benjamin Stachursky, The Promise and Perils of Transnationalization: NGO Activism and the Socialization of Women’s Human Rights in Egypt and Iran (New York: Routledge, 2013) at 2.

\(^{170}\) Ibid at 51-52; Keohane, “International Institutions”, supra note 167 at 386; Kingsbury, supra note 2 at 352-353; Finnemore, National Interests, supra note 166 at 13.

\(^{171}\) Kingsbury, supra note 2 at 535.

\(^{172}\) Goldsmith, supra note 165 at 9.

\(^{173}\) Kingsbury, supra note 2 at 357-358;
domestic processes of political representation. As well as domestic pressures, transnational actors (including other states), international institutions, and other non-state groups such as non-government organizations, can affect state preferences. Compliance will occur when international rules align with these preferences. Thus, liberal theories of compliance share realist and rationalist accounts’ ambivalence about the normative force of international law, instead privileging the preferences of actors who ‘are on average rational and risk-averse’. Ultimately, whatever their theoretical foundation, interest-based theories of compliance share some common features: states occupy a central role in the international system, and their preferences are predetermined, unproblematic and based on rationally assessed self-interest. Moreover, the normative content of law has no effect beyond self-interest, which is usually only altered by coercion, hard enforcement or reputational effects.

3.2 Norm-based theories and persuasion

Distinct from interest-based theories of compliance are those theories that emphasize the importance of ‘norms’. This distinction is a product of the division that emerged in international relations scholarship between realism (and related iterations such as neorealism and neoliberalism) and constructivism. Robert Keohane refers to this intellectual divide as being between a rationalistic approach and a reflective (norm-based) approach. Norm-based theories

174 Ibid at 356.
175 Ibid at 358.
177 Ibid at 240.
179 Ibid; Keohane, supra note 167 at 387.
181 Ibid; Keohane, supra note 167.
182 Ibid at 382.
have their intellectual origins in constructivism, scholars of which tend to argue that norms matter, and that state behavior, including compliance with international law, cannot be explained solely by reference to interests. Rather, constructivists acknowledge that while material interests play a role in why states comply with international law, they argue that norms (also described as ideas) also influence state behavior, and affect the identities of states. Contrary to rationalist accounts, constructivists believe that state preferences and identities are not fixed but rather can be shaped by interactions within the broader institutions and social systems of which states are a part.

Constructivist scholars have different accounts about the precise manner in which norms change state behavior and lead to compliance with international law. It is often suggested that Martha Finnemore and Kathryn Sikkink’s 1998 article, detailing the ‘life cycle’ of norm influence, was the genesis for several detailed theoretical and empirical studies on how human rights norms influence the behavior of states. The most recent of these studies, The Persistent Power of Human Rights, describes five phases of state behavior, from repression through to norm-consistent behavior. International legal scholars have also developed theories that emphasize the importance of interaction and persuasion, and thus fall within the category of

184 Ruggie, supra note 180 at 864; Kingsbury, supra note 2 at 358; Stachursky, supra note 169 at 52; Jutta Brunnée & Stephen J. Toope, “Constructivism and International Law” in Jeffrey L. Dunoff & Mark A. Pollack, eds, Interdisciplinary perspectives on international law and international relations: the state of the art (Cambridge: Cambridge University Press, 2011) 119 [Brunnée & Toope, “Constructivism”].
185 Ibid at 111-112; Hathaway & Koh, Foundations, supra note 183 at 112; Finnemore, supra note 166 at 15 Stachursky, supra note 169 at 51.
188 Risse, Ropp & Sikkink, Persistent Power, supra note 187 at 6-7.
constructivism. Principal among this work is that of Harold Koh, and Abram and Antonia Handler Chayes, which tend to focus more on process and interaction as the source of compliance, and less on the content of norms. According to the Chayeses, states comply with treaty obligations because they are persuaded to do so through an ‘iterative process of discourse among the parties, the treaty organization, and the wider public’. This process, which the Chayeses describe as being ‘usefully viewed as management’ ultimately ‘jawbones’ states into compliance. Koh’s transnational legal process describes a three stage ‘vertical’ process of compliance: first, a transnational actor instigates an interaction; second, this interaction results in the interpretation of the relevant legal norms by an interpretive body; and third, the interpreted international norm is internalized into the domestic legal system. According to Koh, ‘repeated participation in the process will help to reconstitute the interests and even the identities of participants in the process’.

While disagreement persists with respect to how and why norms matter, a common thread amongst ‘norm-based’ theories of compliance is that the content of norms (which may include rules or laws) is such that it persuades states to comply. This is because norms ‘embody a quality of “oughtness” and shared moral assessment’. According to Ryan Goodman and Derek

---

189 Brunée & Toope, “Constructivism”, supra note 184 at 130-131 (describing Koh and the Chayeses as constructivists, although noting that ‘managerialism ultimately rests on the logic of consequences’).


191 Chayes & Chayes, supra note 190 at 180.

192 Ibid at 180-181.


194 Ibid.

195 Hathaway & Koh, Foundations, supra note 183 at 111.

196 Finnemore & Sikkink, “International Norm Dynamics”, supra note 186. See also Finnemore, supra note 166 at 2.
Jinks, the mechanism of influence is persuasion, which occurs when states, interacting within a certain institutional context, change their behavior after determining that the content of a particular norm is congruent with the state’s identity, beliefs and values. Norms, therefore, represent ‘standard[s] of appropriate behavior for actors with a given identity’. Thus, while there is variation among norm-based theories – for example ‘purer’ constructivist explanations for state behavior, compared to arguably more specific ‘legal process’ theories, such as those articulated by Koh and the Chayeses – they remain united by their reliance on persuasion and interaction as drivers of state behavior.

3.3 Institutions and acculturation

Goodman and Jinks advance one of the most recent accounts of compliance with international human rights law, in their 2013 book Socializing States, which builds on a 2004 article in the Duke Law Journal. Goodman and Jinks’s theory differs from the interest-based and norm-based theories in its emphasis on a third mechanism of influence – acculturation, by which they mean:

the general process by which actors adopt the beliefs and behavior patterns of the surrounding culture….The touchstone of acculturation is that identification with a reference group generates varying degrees of cognitive and social pressures to conform.

Rather than being influenced by international relations scholarship, as rationalists and constructivists tend to be, Goodman and Jinks use sociological approaches to law to inform their theorizing. Drawing on well-established theories of individual behavior, Goodman and Jinks


\[198\] Finnemore & Sikkink, “International Norm Dynamics”, supra note 196.

\[199\] Goodman & Jinks, Socializing States, supra note 197.


\[201\] Goodman & Jinks, Socializing States, supra note 197 at 4.

argue that a key determinant of actor behavior is the extent to which an actor identifies with a particular reference group; this in turn, informs the effectiveness of social and cognitive pressures to conform.\textsuperscript{203} The authors extend this analysis to states, which they argue are ‘formal organizations embedded in, and structured by, a wider institutional environment’.\textsuperscript{204} The influence of sociological institutionalism is made explicit by the authors, who emphasize how actors are influenced by the institutional environment in which they operate, including its culture, social structure and other cognitive pressures.\textsuperscript{205} State legal and political decision-making will conform to ‘expected behaviors that are legitimated in the wider institutional environment’.\textsuperscript{206} ‘Institutions’ in this sense do not mean simply material structures such as governments or bureaucracies, although the term may encompass these things. Rather, institutions are ‘beliefs, values, and cognitive scripts’.\textsuperscript{207}

To establish the existence of the mechanism of acculturation, the authors devote considerable space to distinguishing it from interest-based and norm-based approaches to compliance.\textsuperscript{208} Goodman and Jinks explain that unlike norm-based theories, states influenced by acculturation need not accept the validity or legitimacy of the norm as required by norm-based theories that rely on persuasion.\textsuperscript{209} Rather, states will be influenced more by how important the norm or rule is to other actors within the broader institutional setting and their own relation to the group.\textsuperscript{210} Acculturation can also be contrasted with rationalist-based theories of compliance, which pessimistically predict that in the absence of enforcement measures or other kinds of material

\textsuperscript{204} Ibid at 10-11.
\textsuperscript{205} Ibid at 10.
\textsuperscript{206} Ibid at 41.
\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid at 29.
inducements, international human rights law is ‘doomed to failure’.\textsuperscript{211} Goodman and Jinks show how states often commit to human rights norms, despite material disincentives to do so, because they value their status within a regional or global community.\textsuperscript{212} According to the authors, ‘acculturation captures those circumstances in which actors conform to social pressure not because of a second-order calculation of costs and benefits, but rather because “conforming” and “belonging” themselves confer substantial affective returns’.\textsuperscript{213} Ultimately, the authors make a convincing case for the existence of acculturation as a ‘conceptually distinct, empirically supported, and potentially effective approach to promoting human rights through international law’.\textsuperscript{214} While they do not assert that acculturation is the most important, or the most effective mechanism, they argue that its existence has significant consequences for some key international human rights regime design questions, including decisions about membership conditions, rule precision, and monitoring and enforcement.\textsuperscript{215}

3.4 Legality and legal obligation

Finally, there are theories that focus on the inherent features of law and legal obligation in generating compliance, best represented by the work of Thomas Franck,\textsuperscript{216} and the interactional account advanced by Jutta Brunnée and Stephen Toope.\textsuperscript{217}

3.4.1 Legitimacy and fairness

Franck’s account, which came earlier, argues that a ‘compliance pull’ is generated when legal rules are perceived as fair.\textsuperscript{218} For Franck, fairness in international law is comprised of two

\begin{itemize}
  \item \textsuperscript{211} \textit{Ibid} at 167.
  \item \textsuperscript{212} \textit{Ibid} at 169.
  \item \textsuperscript{213} \textit{Ibid} at 31.
  \item \textsuperscript{214} \textit{Ibid} at 167.
  \item \textsuperscript{215} \textit{Ibid} at 9, and chapters 5-7.
  \item \textsuperscript{217} Brunnée & Toope, \textit{Legitimacy and Legality}, supra note 178.
\end{itemize}
aspects: procedural fairness (right process) and substantive fairness (distributive justice). Procedural fairness, also called ‘legitimacy’, is ‘a key factor in fairness, for it accommodates deeply felt popular beliefs that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied’. Legitimate legal rules have four distinctive features. First, legitimate rules are determinate, in that they have the ability to convey clearly the rule’s ‘essential meaning’. Second, a legitimate rule conveys symbolic validation; it has attributes, such as ritual or pedigree, which communicate the rule’s authority. Third, rules are legitimate when they display coherence – treating like cases alike and relating ‘in a principled fashion to other rules of the same system’. Fourth and finally, legitimate rules show adherence:

the vertical nexus between a single primary rule of obligation…and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community…rules are better able to pull towards compliance if they are demonstrably supported by procedural and institutional framework.

Compliance is also induced when a rule is perceived as substantively fair, that is, it accords with principles of distributive justice derived from the moral values of the ‘community in which the legal system operates’. Franck argues that international law will be voluntarily obeyed ‘because most people think it right to act justly’.

---

218 Ibid at 17.
219 Franck, supra note 216 at 7-8.
220 Ibid at 7-8.
221 Ibid at 30.
222 Ibid at 34.
223 Ibid at 38.
224 Ibid at 41-42.
225 Ibid at 8.
226 Ibid at 8 (emphasis in original).
3.4.2 Interactional law

Like Franck, Brunnée and Toope offer an account of compliance that looks to the features internal to law that generate compliance. Brunnée and Toope argue that three elements combine to create legal obligation:

first, legal norms can only arise in the context of social norms based on shared understandings. Second, internal features of the law, which we call criteria of legality, are crucial to law’s ability to promote adherence, or to inspire ‘fidelity’. Third, legal norms are built, maintained, and sometimes destroyed through a continuing practice of legality.\(^\text{227}\)

Brunnée and Toope’s criteria of legality are as follows: ‘generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action’.\(^\text{228}\) These criteria are drawn directly from Lon L. Fuller’s theory of domestic law and, according to the authors, operate to generate fidelity to the law.\(^\text{229}\)

The ability of interactional law to create fidelity is a key feature of Brunnée and Toope’s theory – it is a distinctive type of legal obligation, separate from an actor’s moral stance on a particular legal rule.\(^\text{230}\) In this way, as is admitted by the authors, they share considerable common ground with Franck; both Franck’s theory of legitimacy and Brunnée and Toope’s theory of interactional law believe that ‘legal legitimacy matters to compliance’.\(^\text{231}\) However, the interactional account insists that legitimacy requires legal rules be congruent with underlying social norms and also be reflected in continuous practice.\(^\text{232}\) Thus, it also differs from Franck’s positivist account, which emphasizes instead the features of law’s form – for example, adherence, coherence and determinacy – that induce compliance.

---

\(^{227}\) Brunnée and Toope, *Legitimacy and Legality*, supra note 178 at 15.

\(^{228}\) Ibid at 6.

\(^{229}\) Ibid at 30.

\(^{230}\) Ibid.

\(^{231}\) Ibid at 94.

\(^{232}\) Ibid at 95 – 99.
3.5 The nature of compliance

Amongst this considerable literature, surprisingly few scholars articulate exactly what is meant by compliance.²³³ Robert Howse and Rudi Teitel have argued that in order to understand the effects of international law, it is necessary to look ‘beyond compliance’.²³⁴ In particular, they argue that international law has significant and important effects beyond the traditional understanding of compliance as meaning ‘conformity or obedience to rules or even transformation of state conduct in a manner that conduces to the purposes of the rules’.²³⁵ While using the term ‘compliance’, this thesis adopts a broad understanding of the effects of international law, one that encompasses both ‘rule compliance’ and the less tangible effects of international human rights law, such as its capacity to create domestic political mobilization and its expressive function. In the context of violence against women, all aspects of compliance are important: states (and individuals) need to adhere to rules prohibiting violence against women, but structural and often intangible societal transformation is also necessary for real change to be achieved.

4 Due diligence, feminism and compliance theory

Do the preceding theories explain the persistence of violence against women? Feminists have critiqued rationalism and constructivism, concepts which underlie current theories of compliance, and in doing so have illuminated some of the ways in which these theories are inadequate to explain compliance with norms prohibiting violence against women. After outlining these critiques, this thesis brings feminist observations to bear on Goodman and Jinks’s concept of acculturation and Brunnée and Toope’s theory of interactional law. This analysis contributes to the broader project of this thesis – that is, to illuminate why progressive legal advancements have not led to less violence against women – and also proposes some


²³⁴ See generally, ibid.

²³⁵ Ibid at 130.
amendments to each of these theories, so they are better equipped to explain the persistence of violence against women.

4.1 Feminism and rationalism

Feminists have devoted considerable scholarship to critiquing both the practice and study of what Keohone describes as ‘rationalist’ explanations of state behavior. At times the dialogue generated by this engagement has been fraught, revealing some of the profound epistemological and methodological differences between feminist scholars and those studying (more traditional) international relations. At the level of study, feminists have revealed how traditional international relations scholarship depicts as ‘objective’ and ‘neutral’ a theory of state behavior that is based on a gendered reality. Feminists argue that androcentrism permeates ‘the methods, notions of truth, frameworks, criteria of validity, and unquestioned concepts’ that underpin realist and rationalist explanations of state behavior. Moreover, feminists dispute the universality of a model that relies on the ‘rational human individual standing apart from the realm of lived experience, manipulating it to maximize his own self-interest’. ‘Rationality’ itself is characterized by concrete and abstract reasoning processes typically associated with

---


239 Wibben, supra note 236 at 100. See also Tickner, Gender in IR, supra note 236 at 34-35;

masculinity. Thus, rationalist models frame male experiences and decision making processes as the norm and those of women as the deviation. Rationalist approaches thus have a tendency to ‘deny to women…the status of independent rational agents’.

With respect to the practice of international relations, feminists have made visible the empirical truth that states and their interests are deeply gendered: men continue to dominate the upper echelons of states and the international arena remains focused on ‘“masculine” virtues’ such as security, power, autonomy and material wealth. According to some feminist scholars, the gender hierarchy created within the state is sustained using ‘hegemonic masculinity’, which celebrates typically masculine traits such as strength, power, courage and autonomy. These features are then ‘projected onto the behavior of states whose success as international actors is measured in terms of their power capabilities and capacity for self-help and autonomy’. Given the reality of male dominance in state and international institutions, and the manner in which male traits underpin state relations, it is hardly surprising that the state is implicated in the maintenance of power structures that continuously reinforce the oppression of women.

Despite this pessimistic conclusion, there is a fledgling body of scholarship that aims to find and exploit the points where feminism and rationalist approaches overlap. So far, this scholarship

241 Tickner, *Gender in IR*, supra note 236 at 91

242 Amanda Driscoll & Mona Lena Krook, “Feminism and rational choice theory” (2012) 4:2 European Political Science Review 195 at 200 [Driscoll & Krook, “Feminism and rational choice theory”].


246 *Ibid* at 6-7. See also Charlesworth & Chinkin, *Boundaries*, supra note 3 at 125.


has focused on whether rational choice concepts can explain policies aimed at increasing the representation of women in domestic politics.  

However, there may be scope to expand these insights beyond this somewhat narrow context. Existing literature suggests that replacing the ‘generic actor’ of rationalist theories with feminist insights about the influence of gender on actor behavior would improve the explanatory power of models based on rationalism. According to Amanda Driscoll and Mona Lena Krook:

focusing on the social meanings given to biological differences opens up opportunities to explore how gender norms affect the respective preferences, risk evaluations and strategic calculations of women and men – or, alternatively, to recognize inequalities in outcomes that might otherwise be obscured.

Once these dynamics are revealed, scholars may then be better able to transform the ‘dynamics sustaining women’s marginalization’.

4.2 Feminism and constructivism

Feminists and constructivists have had a more productive engagement. This is unsurprising given that both fields draw on concepts of social construction to inform their theorizing. Both oppose the notion advanced by rationalists that state identities and preferences are predetermined, favoring instead the idea that identities and interests can be constructed (and reconstructed) through social interaction. However, despite their common ground and shared (or similar) ontology, feminists and constructivists diverge in the way they treat power and gender. Locher


250 Ibid at 205.

251 Ibid at 205.

252 Ibid at 204.


and Prügl assert that ‘because they leave the social construction of power under-theorized, constructivists lack the tools to explain how gender and power reproduce, and how and why certain constructs emerge as more influential than others’. When constructivists have paid attention to power, they have described it in a manner separate from social construction, rather than intimately bound up with it. That women typically hold less power than men in states and international institutions suggests that norms prohibiting violence against women, such as the due diligence standard, may possess less influence.

In the context of international relations, constructivism also tends to focus on the state as the most relevant actor to the diffusion of norms. However, feminists and those analyzing the implementation of women’s rights norms have argued that societal level change is paramount to addressing the perpetration of violence against women by individuals, unraveling patriarchal structures, and changing cultural practices that harm women. Constructivist accounts explain the manner in which states might be persuaded by the content of norms prohibiting gender violence, but fail to acknowledge that individual perpetrators and society as a whole must also be persuaded. Thus, current constructivist theorizing on the diffusion of norms ‘conceptualizes international norms, once established, as causes that produce effects within domestic contexts (or fail to do so)’. This unidirectional dynamic is not always present in the context of violence against women – instead, there may be considerable push back from states’ domestic polities, which undermines the domestic implementation of a norm. Merry argues that because ‘gender violence is deeply embedded in systems of kinship, religion, warfare, and nationalism, its

256 Locher & Prügl, “Feminism and Constructivism”, supra note 253 at 78 and 85.
257 Stachursky, supra note 169 at 3; Report of the Special Rapporteur on violence against women, its causes and consequences, Cultural practices in the family that are violence towards women, UNESCOR, 58th Sess, Provisional agenda item 12(a), UN Doc E/CN.4/2002/83, (2002) 4 [SRVAW, Cultural practices in the family]; Secretary General In-depth Study, supra note 1 at para 271-272.
258 Stachursky, supra note 169 at 39.
260 Ibid at 115.
prevention requires major social changes in communities, families and nations. Powerful local
groups often resist these changes’.\footnote{Stachursky notes that constructivist studies of the diffusion of international human rights have	ended to focus on the ‘classic category of negative rights’ aimed at ensuring the individual’s freedom from state oppression. This gap in the scholarship could explain the failure of constructivists to incorporate into their theories the particular features of norms prohibiting violence against women. One very recent analysis by Alison Brysk goes some way towards filling the gap. Brysk uses the spiral model of human rights change to compare the dynamics of compliance in the context of female genital mutilation versus gender-based asylum policies. She notes that the original ‘spiral model’ – which is amongst the most sophisticated constructivist accounts of human rights change – assumed that when violations occurred, it was because states were capable but unwilling to adopt changes. However, in the context of female genital mutilation, the rights violators are often non-state actors, including individuals and social institutions such as local clergy. Brysk argues that in such circumstances, compliance failures are often a product of ‘limited state capacity and decentralized control over rights violators’. How then to ensure compliance by local groups and other non-state actors? Brysk notes recent studies that suggest that in the context of female-genital mutilation,}{261}

Stachursky notes that constructivist studies of the diffusion of international human rights have tended to focus on the ‘classic category of negative rights’ aimed at ensuring the individual’s freedom from state oppression.\footnote{Sally Engle Merry, \textit{Human Rights and Gender Violence: Translating International Law into Local Justice} (Chicago: University of Chicago Press, 2006) at 2. See also Stachursky, \textit{supra} note 169 at 23; Judith Wyttenbach, “Violence Against Women, Cultural/Religious Traditions and the International Standard of Due Diligence” in Benninger-Budel, \textit{supra} note 14, 225 at 225-228. See also Elizabeth Hegel Boyle, \textit{Female Genital Cutting: cultural conflict in the global community} (Baltimore: The John Hopkins University Press, 2002) (examining the dynamics between international, national and individual adoption (or rejection) of norms and laws prohibiting female genital cutting).}{262}

This gap in the scholarship could explain the failure of constructivists to incorporate into their theories the particular features of norms prohibiting violence against women. One very recent analysis by Alison Brysk goes some way towards filling the gap.\footnote{Stachursky, \textit{supra} note 169 at 5.}{263}

Brysk uses the spiral model of human rights change to compare the dynamics of compliance in the context of female genital mutilation versus gender-based asylum policies. She notes that the original ‘spiral model’ – which is amongst the most sophisticated constructivist accounts of human rights change – assumed that when violations occurred, it was because states were capable but unwilling to adopt changes.\footnote{Alison Brysk, “Changing hearts and minds: sexual politics and human rights” in Risse, Ropp & Sikkink, \textit{Persistent Power}, \textit{supra} note 187, 259.}{264}

However, in the context of female genital mutilation, the rights violators are often non-state actors, including individuals and social institutions such as local clergy.\footnote{\textit{Ibid} at 261.}{265}

Brysk argues that in such circumstances, compliance failures are often a product of ‘limited state capacity and decentralized control over rights violators’.\footnote{\textit{Ibid} at 260.}{266}

How then to ensure compliance by local groups and other non-state actors? Brysk notes recent studies that suggest that in the context of female-genital mutilation,
compliance is improved by changing norms, rather than seeking more centralized authority or increasing state capacity.\textsuperscript{267}

Constructivist accounts have the potential to explain why, in the context of violence against women, progress at a legal level has not translated into real change. However, some amendments are needed. First, to accommodate the existence of local level dynamics, constructivist accounts must also theorize the process of domestic norm ‘translation’ in order to properly describe how norms prohibiting violence against women are implemented (or not).\textsuperscript{268} Second, constructivist accounts need to make explicit how gender and power influence the content of norms and their relative influence. In this connection, constructivist scholars of compliance can draw on the work of feminists working in constructivism who ‘focus on the ways that ideas about gender shape and are shaped by global politics, seeing gender subordination as the dynamic result of social processes and suggest[ing] that, therefore changing norms about masculinity and femininity is essential to redressing it’.\textsuperscript{269}

4.3 Feminism, institutions and acculturation

4.3.1 Gendered institutions

Goodman and Jinks articulated their description of acculturation relatively recently. It is thus hardly surprising that feminists have not engaged with it explicitly. Nevertheless, given Goodman and Jinks’s reliance on institutionalism, it is apt to draw on the small but growing number of feminists writing about that approach.\textsuperscript{270} Like their counterparts working with

\begin{itemize}
\item \textsuperscript{267} Ibid at 260,
\item \textsuperscript{268} Ibid; Stachursky, \textit{supra} note 169. See also Merry, \textit{supra} note 261; Coomaraswamy, \textit{supra} note 45 at 39 (making the same point, although not writing specifically about constructivism).
\item \textsuperscript{269} Sjoberg & Tickner, “Feminist lenses”, \textit{supra} note 4 at 6.
constructivism, feminists writing about institutionalism highlight the crucial role played by gender and power at all institutional levels, from ‘trivial’ day-to-day interactions, to institution wide ‘symbolic’ practices. Because they fail to make explicit the pervasive influence of power and gender, and their role in privileging certain groups and interests over others, feminists have accused sociological institutionalists of having a “bloodless” understanding of institutions.

In contrast to mainstream institutionalists, feminists, attuned to the systematic marginalization of women’s concerns, have revealed the manner in which institutional mechanisms and measures to address ‘women’s human rights violations’ are given ‘less power, fewer resources and a lower priority than ‘mainstream’ human rights bodies’. For instance, Susanne Zwingel conducts a detailed analysis of the CEDAW Committee’s historical place in the United Nations system, ultimately concluding:

CEDAW as a women’s rights regime has been situated within hegemonic international structures that have made its effective functioning cumbersome…e.g. it had to make itself acceptable as a human rights instrument, it had to deal with inadequate administrative support, and it had to work continuously to make the relevance of women’s [rights] widely understood – no other Treaty Body was confronted with such difficulties.


271 Kenny & Mackay, “Skeptical Notes”, supra note 270 at 274.


273 Charlesworth & Chinkin, Boundaries, supra note 3 at 219.

4.3.2 Re-gendered institutions?

That all said, there is some scope for optimism: feminists argue that in so far as institutions are currently gendered, they can also be re-gendered.275 For feminists working within and outside of institutionalism, achieving this requires, at a minimum, greater representation and participation of women in formal domestic and international institutions,276 on the premise that women’s inclusion can re-gender informal institutional structures, such as beliefs, norms and cultural values.277 Edwards describes the challenges achieving this apparently simple reform in the United Nations treaty body system, arguing that the political process by which members are elected to the main treaty bodies operates against women and ensures their underrepresentation.278 In particular, the tendency of governments to nominate individuals from elite political and judicial circles favors men, who dominate this demographic.279 Predictably, therefore, female membership of the main treaty bodies, excluding the CEDAW Committee (95.6 per cent female membership) and the Children’s Committee (61.1 per cent female membership), is around 25 per cent.280 Perhaps most troubling is that ‘there has been no systematic change in the number of women occupying committee positions’,281 a trend


278 Edwards, supra note 27 at 94-99.

279 Ibid at 95.


281 See Edwards, supra note 27 at 97.
evidenced across the entire United Nations system.\textsuperscript{282} In fact, a 2008 report to the Secretary-General on the status of women in the staff categories of ‘professional’ or higher predicts that ‘gender balance will be reached by 2120’, given the current rate of progress towards gender balance in the professional and higher category of staff is 0.17 percent average annual increment.\textsuperscript{283}

A more nuanced institutional level response has come in the form of gender mainstreaming. In the United Nations context, gender mainstreaming obligates ‘all components of the U.N. human rights system to “regularly and systematically take a gender perspective into account in the implementation of their mandates”’.\textsuperscript{284} Gender mainstreaming has also been taken up in the European Union, other international institutions, such as the World Bank,\textsuperscript{285} and at a national level.\textsuperscript{286} Conceptually, gender mainstreaming seeks to affect values, norms and cognitive processes: in other words, institutions. From a feminist perspective, gender mainstreaming could be ‘revolutionary’\textsuperscript{287} – it has the potential to combat the gender hierarchies and hegemonies that operate within institutions,\textsuperscript{288} thereby offering the promise of changing institutions, policymaking and outcomes for women.\textsuperscript{289} It also addresses the two primary feminist critiques outlined in Part 2.2.2, because of ‘the resonance between the mainstreaming concept and understandings about the pathology of gender-based inequalities and the non-essentialising

\begin{footnotesize}
\begin{enumerate}
  \item[283] Ibid.
  \item[287] Ibid at 288.
  \item[288] Prügl, “International Institutions”, supra note 270 at 78.
\end{enumerate}
\end{footnotesize}
quality of good mainstreaming practices’. As evidence of the promise of gender mainstreaming, United Nations documents have repeatedly affirmed its importance as a strategy in the elimination of violence against women.

Unfortunately, feminists, as well as scholars without an explicit feminist orientation, have concluded that the success of gender mainstreaming has been muted. Across the United Nations system, gender equality and the gendered implications of human rights violations are not well understood and continue to be regarded by many of the treaty bodies as a ‘women’s concern’. A more focused review of gender mainstreaming at the United Nations Development Program (UNDP), the World Bank, the Organisation for Security and Cooperation in Europe (OSCE) and the European Union, conducted by Emilie Hafner-Burton and Mark Pollack finds varied results between institutions.

For example, despite gender-mainstreaming initiatives being adopted by the UNDP as early as the 1980s and 1990s and being integrated into ‘the core of U.N.D.P. programming…it is far from clear whether these policies have brought about the institutional changes in structure and culture that are necessary for a mainstreaming approach’ to transform the UNDP’s programs ‘on the ground’. Conversely, the World Bank’s initial resistance to gender mainstreaming has not precluded the organization ultimately making considerable progress in implementing a gender mainstreaming approach. In the European context, Hafner-Burton and Pollack document ‘positive developments’ in the OSCE, including the employment of a full-time gender advisor, the establishment of a gender unit and the use of ‘gender focal

---

291 Secretary General’s In-depth Study, supra note 1 at paras 62, 284; Ending Violence Against Women: From words to action: Study of the Secretary-General (New York: United Nations Publication, 2006) at 22.
292 Zwingel, CEDAW, supra note 274 at 183-184; Charlesworth, “Not Waving but Drowning” supra note 277 at 8-11.
293 Hafner-Burton & Pollack, supra note 287.
294 Ibid at 289-290.
295 Ibid at 292.
points’ for all OSCE country missions.296 The institutional structures that lead to the success or failure of gender mainstreaming need to be closely evaluated, if the concept is to have any positive impact.

There are also some conceptual difficulties with gender mainstreaming. It has been described as both ‘deceptively simple’ and ‘extraordinary demanding’, which suggests, at best, some variation in how the concept is understood.297 This has lead to problems properly operationalizing gender mainstreaming. Mona Lee Krook and Jacqui True argue that despite being conceived of as an ‘agenda-setting’ approach, it has resulted in gender simply being added to policy and decision-making, rather than changing ‘existing agendas’ or altering ‘patterns of gender inequality’.298 But beyond this, gender mainstreaming may even undermine the feminist project. Charlesworth’s assessment is that ‘gender mainstreaming actually detracts attention from the ways that sexed and gendered inequalities are woven into the international system’.299 True takes it one step further suggesting that gender mainstreaming, by normalizing gender-based analysis, runs counter to its very goal, which is to disrupt invisible gender hierarchies.300 This is a concern echoed by Jo Shaw:

[t]he danger with mainstreaming…is that such inclusiveness may involve as much ‘framing out’ of radical interests and ideas as ‘framing in’, and may result in the co-option of feminist ideals into a soft-focus family-friendly world in which choice and freedom are merely rhetorical devices rather than real experience.301

Given these practical and conceptual assessments, there must be some doubt about whether gender mainstreaming can reform institutional and institutionalized gendered power relations, as

---


297 Hafner-Burton & Pollack, supra note 285 at 288; Beveridge & Nott, supra note 290 at 308.

298 Krook & True, supra note 276 at 120 – 122.

299 Ibid at 2.

300 Jacqui True, “Feminist problems with international norms: Gender mainstreaming in global governance” in Tickner & Sjoberg, supra note 4, 73 at 80.

301 Shaw, supra note 296 at 221.
feminists had hoped. This will be no surprise to feminists who have explicitly acknowledged a central dilemma in all feminist-driven reform projects: ‘the more that women work within the mainstream, they more they prop up the bias of that same system’.  

4.3.3 Isomorphism and de-coupling

Like constructivist and rationalist accounts of compliance, Goodman and Jinks’s theory of state socialization retains (as the name suggests) a focus on the state – that is, the state is the primary actor upon which institutional influences operate. In fact, the authors readily admit that acculturation-driven change can result in ‘shallow’ reforms at the state level. Isomorphism and decoupling are two key consequences of such shallow level reforms. Isomorphism is the tendency for the ‘structures, behavior and policies’ of states to homogenize irrespective of local factors, such as economic, social and political conditions. Similarly, decoupling occurs when a state’s formal policies are ‘disconnected from internal (functional and social) demands and implementation’. Notably, there is strong evidence of both isomorphism and decoupling in the context of violence against women reforms, a point made by both feminist political scientists and Goodman and Jinks. Both sets of scholars highlight how a relatively large number of states have committed to prohibiting violence against women, usually in the form of domestic violence reforms (isomorphism), but that such commitments rarely, if ever, lead to substantive changes in state practices or improvements in the status and treatment of women at a domestic level (decoupling).

---

302 Charlesworth, “Not Waving but Drowning”, supra note 277 at 18.
304 Goodman & Jinks, Socializing States, supra note 197, chapter 8.
306 Ibid at 43.
The reliance on isomorphism and decoupling illustrates that Goodman and Jinks’s theory of socialization is a top-down process, with norms emerging at an international level and then filtering down to states. Thus, like constructivist approaches, acculturative processes are driven by global scripts that focus on the state as the site of norm diffusion. This leaves Goodman and Jinks’s theory of socialization open to the same critique as that made about constructivist theories: it cannot properly explain whether, and if so how, norms prohibiting violence against women can infiltrate beyond the state to individuals and domestic society. However, on closer inspection, there is a role for local actors in Goodman and Jinks’s theory of acculturation. First, Goodman and Jinks argue that decoupling creates domestic opportunities for local and global activists to agitate for proper change. This dynamic was closely examined by Beth Simmons in her widely heralded Mobilizing for Human Rights, which argued that under certain domestic conditions, the ratification of human rights treaties increased the ‘expected value of mobilization of local stakeholders’. However, while Simmons’s analysis and Goodman and Jinks’s discussion looks at domestic dynamics, the focus remains on how domestic actors seek to influence the state.

Decoupling may also facilitate compliance by allowing global models to be adapted to better suit local conditions. It is this feature of decoupling which offers considerable potential in the

---


309 Ibid at 144-157. See also Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (New York: Cambridge University Press, 2009) (describing how states’ commitments to international human rights treaties can create space for domestic activists to mobilize for change).

310 Beth A. Simmons, “Reflections on Mobilizing for Human Rights” (2011) 44 Journal of International Law and Politics 729 at 734. See generally, Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (New York: Cambridge University Press, 2009) [Simmons, Mobilizing]. Simmons analysis is applied to women’s rights, although not violence against women. Instead, she evaluates girls’ education, policies to enhance women’s reproductive autonomy and women’s participation on the work force (see generally, Ibid at 202-236).

311 Ibid.

312 Goodman & Jinks, Socializing States, supra note 197 at 141.
context of violence against women. In particular, it presents fruitful opportunities for women’s local advocacy groups and other civil society actors to translate or (re)frame norms prohibiting violence against women into culturally legitimate standards.\textsuperscript{313} This is particularly important in the context of violence against women, given how frequently harmful practices are bound up in notions of ‘culture’ that are then used to excuse, justify, condone or encourage violence against women.\textsuperscript{314} Of course, this is culture in the narrow sense, described dammingly by Arita Rao as ‘a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices’.\textsuperscript{315} However, culture is better understood as a dynamic and hybrid concept, operating as a site for negotiations and contests about values, power and identity.\textsuperscript{316} Thus, while culture can certainly be hijacked by powerful groups and used as a barrier to women’s rights, it can also serve as a site for mobilization: \textsuperscript{317} ‘[l]ocal norms can be paths to change as well as barriers’.\textsuperscript{318} In order to overcome culturally based local resistance to women’s rights, domestic level activists working within states must therefore ‘translate global language into locally relevant terms’.\textsuperscript{319}

Despite the potential importance of local activists in Goodman and Jinks’ theory, the authors’ maintain that under acculturation, domestic civil society and non-government organizations may be causally dispensable in some circumstances.\textsuperscript{320} That is, ‘states may be motivated to make fundamental transformations because of global social and cognitive pressures – even in the

\textsuperscript{313} Krook & True, supra note 276 at 105; Zwingel, “How Do Norms Travel?”, supra note 259 at 125; Susanne Zwingel, “From Intergovernmental Negotiations to (Sub)national Change: a transnational perspective on the impact of CEDAW” (2005) 7:3 International Feminist Journal of Politics 400 at 415-416 [Zwingel, “(Sub)national Change”].

\textsuperscript{314} Secretary General In-depth Study, supra note 1 at 78-85.

\textsuperscript{315} Arita Rao, “The Politics of Gender and Culture in International Human Rights Discourse” in Peters & Wolper, supra note 20 at 173. See also Stachursky, supra note 169 at 30.

\textsuperscript{316} Merry, supra note 261 at 9; Stachursky, supra note 169 at 28; Abdullah An-Na’m, “State Responsibility Under International Human Rights Law to Change Religious and Customary Laws” in Cook, supra note 26,167 at 174.

\textsuperscript{317} Stachursky, supra note 169 at 27-29; Merry, supra note 261 at 11; An-Na’m, supra note 316 at 178-179.

\textsuperscript{318} Merry, supra note 261 at 15.

\textsuperscript{319} Merry, supra note 261 at 218.

\textsuperscript{320} Goodman & Jinks, Socializing States, supra note 197 at 157.
absence of internal constituencies or national social movements advocating such change.\textsuperscript{321} In support of this conclusion, Goodman and Jinks point to the proliferation of domestic violence reforms in Latin America, ‘despite dramatic differences (and sometimes in the absence of) women’s political influence’.\textsuperscript{322} However, the ‘causal dispensability’ of these groups seems strikingly at odds with the large literature describing the success of women’s organizing in Latin America, and around the world.\textsuperscript{323} While women’s rights groups often organized across national boundaries, and used international conferences to create networks and drive change, the origins and concerns of these groups were frequently domestic.\textsuperscript{324} Whether this kind of activism is properly perceived of as domestic or international is an empirical question beyond the scope of this thesis. However, from a descriptive perspective, Goodman and Jinks fail to acknowledge the essential role that non-government organizations with women’s rights agendas (whether exclusively domestic or international) have in generating the global scripts that influence national action.\textsuperscript{325}

Like constructivist accounts, compliance scholarship that relies on the influence of institutional factors needs to explain better how gender influences institutions and the privileging of certain institutional scripts over others. If the wider institutional environment has the influence Goodman and Jinks argue it does, the marginalization of ‘women’s issues’ at an institutional level has the potential to undermine compliance with the due diligence standard. It also reveals the importance of re-gendering institutions. The muted impact of gender mainstreaming has troubling consequences in this regard. But the assessment is not entirely negative: by acknowledging the existence of de-coupling, Goodman and Jinks’s description of acculturation

\textsuperscript{321} Ibid at 159.
\textsuperscript{322} Ibid at 157
\textsuperscript{323} Friedman, supra note 20 at 21-22.
\textsuperscript{324} Ibid.
\textsuperscript{325} Ibid.
has space to incorporate the local level ‘norm-translators’ that are imperative to ensuring that global scripts are effective in generating societal- and individual-level change.\textsuperscript{326}

### 4.4 Feminism, legality and legitimacy

Theories of legal obligation in international law, such as those advanced by Brunnée and Toope, or Franck, have received very limited attention from feminists. The most notable exception is the examination undertaken by Karen Knop of Franck’s analysis of the emergence of the right to self-determination in international law.\textsuperscript{327} On Franck’s account, all four criteria of legitimacy – determinacy, symbolic validation (pedigree), coherence and adherence – ‘point the same way: toward the expansion of the democratic entitlement’.\textsuperscript{328} Knop introduces women’s experiences into the account to illustrate how self-determination may have been increasingly legitimate for men, but not necessarily women.\textsuperscript{329} Knop shows that by reason of women’s historical lack of suffrage, Franck’s indicators of legitimacy, in particular, pedigree, coherence and adherence, point away from women’s inclusion in self-determination.\textsuperscript{330} Adopting a similar approach to that taken by Knop, the following section examines whether the due diligence standard points towards, or away from, the creation of legal obligation as conceived of by Brunnée and Toope.

#### 4.4.1 Due diligence and the interactional account

As outlined above, the interactional account of compliance requires that shared understandings exist before legal obligation can be created.\textsuperscript{331} While Brunnée and Toope’s framework does not insist on deep agreement between actors, it requires actors to agree at least on what they intend to

---

\textsuperscript{326} Ibid at 229.

\textsuperscript{327} Thomas M. Franck, “The Emerging Right to Democratic Governance” (1992) 82 AJIL 46.


\textsuperscript{329} Ibid.

\textsuperscript{330} Ibid at 180–183.

\textsuperscript{331} Ibid at 42.
achieve together and the general parameters of how it will be achieved. With respect to the due diligence standard, there is scope to argue that shared understandings exist, at least at an international level.

In the lead up to the Vienna Conference, women organized around the theme that women’s rights are human rights, thus laying the groundwork for states to recognize violence against women as a human rights violation. In this connection, it is worth briefly noting that the interactional account gives explicit recognition to the role played by non-state actors, such as non-governmental organizations, in generating shared understandings. The role of non-governmental organizations and women’s rights activists in bringing violence against women to the international stage as a rights violation cannot be overstated. In fact, due in large part to feminist activism, states at the Vienna Conference agreed on the need to eliminate violence against women, and this goal was stressed in the Vienna Declaration and Program for Action (Vienna Declaration). Specifically, the Vienna Declaration expressed states’ commitment to ending violence against women in public and private life, the development of a declaration prohibiting violence against women, and the appointment of a special rapporteur on the topic. Both the declaration and the special rapporteur came to fruition, in the form of DEVAW (in December 1993) and the appointment in March 1994 of the Special Rapporteur on violence against women, its causes and consequences. As further evidence of shared understandings, the Platform for Action generated at the Fourth World Conference on Women in Beijing (Beijing Platform) in

332 Ibid at 42.


1995 reiterated states’ commitment to eliminating violence against women. At a regional level, shared understandings can also be inferred from the adoption in 1994 of Belém do Pará, the 2002 Council Recommendation, the 2003 Protocol to the ACHPR, and the 2011 Istanbul Convention.

For the most part, the development of DEVAW, Belém do Pará, the Beijing Platform, the Council Recommendation and related Istanbul Convention show states’ understanding that eliminating violence against women in the public and private sphere is a state responsibility, to be achieved by, amongst other things, exercising due diligence to prevent, investigate and punish acts of violence against women, whether committed by the state or individuals. It can be argued that by creating and committing to these instruments, states share an understanding that violence against women is a product of patriarchal power structures that intersect and are exacerbated by traditional or cultural practices, and that any response must be a multilevel one, directed at eradicating the causes of violence against women in families, communities and at a state level. Thus, with respect to eliminating violence against women, states have arguably ‘developed [the] basic understandings about what they hope to achieve together’ required by the interactional account.

---


339 Belém do Pará, supra note 54.

340 Council Recommendation, supra note 57.

341 Protocol to the ACHPR, supra note 55.

342 Istanbul Convention, supra note 56.

343 DEVAW, supra note 53, art 4; Belém do Pará, supra note 54, art 7; Beijing Platform, supra note 338 at para 124; Council Recommendation, supra note 57, art 4(II); Istanbul Convention, supra note 56, art 5(2).

344 DEVAW, supra note 53, preamble, art 4; Belém do Pará, supra note 339, arts 7-8; Beijing Platform, supra note 338 at 118; Council Recommendation, supra note x, preamble, art III and appendix.

345 Brunnée and Toope, Legitimacy and Legality, supra note 178 at 42.
However, shared understandings are not enough. To generate compliance, international law must also have legal legitimacy, which, as outlined above, has the following criteria: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action. While a detailed examination of each of these criteria is beyond the scope of this thesis, for present purposes it suffices to illustrate that the due diligence standard falls short of satisfying at least two of these criteria: clarity and non-contradiction.

To meet the criteria of legality, international rules must be clear. Despite being first articulated in the human rights context in the 1989 case of Velásquez Rodríguez v Honduras, there remains considerable uncertainty about the precise obligations imposed by the due diligence standard in the context of violence against women. The former Special Rapporteur on violence against women, Yakin Ertürk, asserts that the due diligence standard provides a useful ‘yardstick’ against which to measure whether a state has complied with its obligations to combat violence against women, but acknowledges that ‘there remains a lack of clarity concerning its scope and content’. Several reports of Special Rapporteurs have listed the matters as indicative of state compliance with the obligation of due diligence:

ratification of international human rights instruments, constitutional guarantees of equality for women; the existence of national legislation and/or administrative sanctions providing adequate redress for women victims of violence; policies or plans of action that deal with the issue of violence against women; the gender sensitivity of the criminal justice system and the police; accessibility and availability of support services; the existence of measures to raise awareness and modify discriminatory policies in the field of education, the media, and the collection of data and statistic concerning violence against women.

This is a long list of complex policies. A similar, although not identical, list, enumerated by the Inter-American Commission on Human Rights, tends to focus more on the implementation of a

---

346 Velásquez Rodríguez v Honduras, supra note 70 at para 172
347 SRVAW, Due Diligence Standard as a Tool, supra note 67 at para 14.
criminal justice response, with less emphasis on preventative measures.\textsuperscript{349} Human rights experts, including several Special Rapporteurs, have further elaborated upon the components of the due diligence standard.\textsuperscript{350} In doing so, the content of the due diligence standard has expanded, becoming considerably more complex and less clear. In her 2013 report, Special Rapporteur Rashida Manjoo described due diligence as imposing on states dual responsibilities: to address ‘systemic-level structures’ that cause and perpetuate violence against women, and to combat violence against individual women.\textsuperscript{351} Moreover, proper implementation of the due diligence framework requires states address the intersectional causes of violence against women.\textsuperscript{352} Finally, whether states have complied with their obligation of due diligence will vary from case to case, further complicating what is required of states in each case to discharge their obligations with respect to due diligence.

To satisfy the criteria of legality, international rules must also not be contradictory, in that they must not require or permit, and prohibit, at the same time.\textsuperscript{353} In the context of the absolute prohibition on torture, Brunnée and Toope note that the non-contradiction criterion is met because ‘no rule in international law would ever require torture’.\textsuperscript{354} Unfortunately this criterion cannot be distilled to such a clear statement in the context of due diligence and violence against women. While international law does not require violence against women, it protects privacy, liberty, the right to family and religious freedom, and this leads in some circumstances to

\textsuperscript{349} SRVAW, Due Diligence Standard as a Tool, supra note 67 at para 33.
\textsuperscript{352} See generally, Report of the Special Rapporteur on violence against women, its causes and consequences, Multiple and intersecting forms of discrimination and violence against women, UNGAOR, 17th Sess, Agenda item 3, UN Doc A/HRC/17/26, (2011).
\textsuperscript{353} Brunnée and Toope, Legitimacy and Legality, supra note 217 at 256.
\textsuperscript{354} Ibid at 256.
permitting, or justifying, violence against women. Perhaps the most obvious example in this
connection is how the protection afforded by international human rights law to cultural, religious
or traditional practices, can in fact allow religious or customary systems that justify violence
against women.\textsuperscript{355} The existence of plural legal systems is particularly problematic in this
respect, with many containing laws that permit violence against women.\textsuperscript{356} Secular human rights
standards can also conflict with states’ obligations to act with due diligence. For example, in the
CEDAW Committee case of \textit{Yildirim v Austria}, Austria repeatedly emphasized that detaining the
applicant’s husband would have involved a ‘massive interference’ with his ‘fundamental
freedoms’\textsuperscript{357} and that issuing an arrest warrant would have been ‘disproportionately invasive’.\textsuperscript{358}
While the CEDAW Committee firmly rejected this contention,\textsuperscript{359} Austria’s argument illustrates
that states’ obligations to act with due diligence frequently can come into conflict, if not directly
contradict, other international human rights laws. Thus, due diligence falls short of meeting the
criteria of non-contradiction required for legality under the interactional account.

Brunnée and Toope also argue that ‘[f]or law to exist and to endure, a community of practice
needs to maintain or expand underlying shared understandings’.\textsuperscript{360} Thus, for legal norms to
have any force, they must be continuously practised ‘or they can be destroyed’.\textsuperscript{361} However,
under the interactional theory it is not sufficient for laws to simply be practised. If it were, then
the theory would make no distinction between social norms and legal norms.\textsuperscript{362} Rather, such

\begin{thebibliography}{99}
\bibitem{355} SRVAW, \textit{Cultural practices in the family}, supra note 257 at 3 and para 1; SRVAW, \textit{Due Diligence Standard as a Tool}, supra note 67 at para 65; \textit{Due Diligence Framework}, supra note 350 at 63-64.
\bibitem{357} \textit{Yildirim v Austria}, supra note 69 at para 4.5.
\bibitem{358} \textit{Ibid} at 12.1.5.
\bibitem{359} \textit{Ibid}.
\bibitem{360} Brunnée and Toope, \textit{Legitimacy and Legality}, supra note 217 at 352.
\bibitem{361} \textit{Ibid}.
\bibitem{362} \textit{Ibid} at 47-49.
\end{thebibliography}
practice must be tied to the criteria of legality, which themselves generate fidelity to the law.363 The practice of legality is thus closely tied to the criteria of congruence, which requires correspondence between legal norms and official action.364 Unfortunately, it is easy to dispose of this criteria of interactional law: the continuing prevalence of violence against women around the world suggests that states have not practised due diligence – there is simply no practice of legality emerging.

The preceding analysis shows that the interactional account has the potential to explain why the due diligence standard has not translated into a real reduction in violence against women. However, examining the due diligence standard using the interactional account gives little reason for optimism. As illustrated above, given the breadth and complexity of obligations imposed by due diligence, clarity may be hard to achieve. Further, laws protecting women from violence are often contested and contradictory. As Catherine MacKinnon forcefully articulates:

> [g]ender crime, as it evolves as a matter or substantive law, is impelling the alteration of major technical rubrics like state versus non-state, challenging jurisdiction and sovereignty, interrogating standards of fairness in trials and policy and organization in altercations, resisting many traditional cultural practices, and walking right across the line between war and peace.365

Thus, due diligence is a progressive expansion of state obligations into the private sphere, and a challenge to more traditional international legal rules that have historically failed to protect women from violence. It requires states to implement multifaceted and multilevel responses to address the structural and intersectional causes of violence against women. To transform existing power relations, women need a rights framework that mounts a challenge to the status quo. The due diligence standard offers such a framework. However, in departing from and confronting established rules and norms, due diligence might always fall short of some of the interactional account’s criteria of legality, such as clarity and non-contradiction. Perhaps most troubling is that this may be an unavoidable bind: the features of due diligence that fail interactional law’s

363 Ibid at 47.
364 Ibid at 49.
legality test are exactly those that make the obligation of due diligence useful for protecting women against violence.

5 Conclusions

The development of the concept of due diligence in international human rights law has gone some way to remedying that field’s structural inability to address violence against women. Yet feminist progress at the level of law has not delivered real change. This thesis has argued that, ironically, the very theories of compliance that might explain and thereby help address this gap are themselves in need of feminist attention. In order to remedy this theoretical deficit, this thesis applies feminist observations to the prevailing set of compliance theories. In doing so, this thesis has both illuminated some of the reasons why the due diligence standard has not been effective in eliminating violence against women, and has revealed some blind spots in current theories of compliance with international law. These deficiencies can be grouped under three main headings, to be elaborated upon below.

First, feminists have highlighted that gender, as a social structure leading to the creation and reinforcement of unequal power relations, is always relevant to compliance.366 In particular, they have revealed how each theory of compliance under-theorizes how gender and its related power dynamics impact state behavior. This theoretical deficit has been well articulated by feminists working in traditional international relations, while feminists engaged with constructivism and institutionalism have made this observation more recently. Whatever the mechanisms through which human rights gain traction – interests (rationalists), norms (constructivists), or institutions and global scripts (acculturation) – gender operates to privilege certain (male) interests over others. However, by illuminating how gender dynamics influence compliance, feminists have also revealed some potential avenues for change. Feminists working in constructivism argue that changing norms improves compliance with prohibitions on violence against women and counteracts gender subordination. Similarly, feminists writing about institutionalism have evaluated how institutions can be re-gendered so as to counteract institutional influences that

366 Raewyn Connell, Gender: in world perspective (Cambridge: Polity, 2009) at 10 (‘gender must be understood as a social structure…It is a pattern in our social arrangements and in the everyday activities or practices which those arrangements govern’).
prioritize men’s concerns and marginalize women’s. The implications of these observations must be incorporated into future research on compliance with the due diligence standard.

Second, each theory retains, to varying degrees, a focus on the state as the principal actor in ensuring the implementation of international human rights law. Even when domestic actors are acknowledged, such as in Simmons’s theory of domestic mobilization, or Koh’s vertical process of norm diffusion, the state remains the target of advocacy efforts. Such a focus is less problematic when ‘public’ rights are being violated – in such circumstances, the state is the perpetrator, and efforts to alter state behavior can have direct ramifications for the protection of human rights. However, violence against women overwhelmingly occurs in private, often at the hands of individual perpetrators, and is a product of often overlapping forms of patriarchal societal forces. Thus, in the context of violence against women, focusing on compliance by the state does not tell the whole story. International human rights laws must also reach the individuals that perpetrate violence against women. Moreover, attitudes and practices at the level of society often operate to counteract the implementation of norms – such as due diligence – that prohibit violence against women. Local ‘norm-translators’, and in particular civil society, domestic activists, and religious and cultural organizations, may be better placed to reach out to individual perpetrators and to translate the prohibition against violence against women into locally legitimate terms. Compliance theories that are silent on these societal level dynamics can offer only a partial explanation of compliance with norms prohibiting violence against women.

Third, this thesis has revealed that all but one of the prevailing theories of compliance lack an interdisciplinary approach. Put more specifically, compliance with international human rights law invites consideration of both actor behavior (mainly, state behavior) and international law – the two component pieces of the compliance puzzle. And yet a review of the dominant compliance theories reveals a focus only on what influences state behavior – be it interests, norms, or institutions – and how. Apart from Brunnée and Toope’s theory of interactional law, which dwells on “the quintessentially juridical problematique of ‘obligation’”,367 little attention is paid to law. For rationalists, it barely matters, except in so far as creating and obeying it

advances rationally determined self-interest, however defined. Nor do constructivists or Goodman and Jinks (and their counterparts in sociological institutionalism) necessarily consider law itself to matter, beyond its capacity to express norms and shared understandings. The focus remains on how international law is given effect; that is, ‘how it “works” in society’.\(^{368}\) Brunnée and Toope argue that law is often conceptualized as ‘benign and as the endpoint in normative development’.\(^{369}\) International law’s characteristics remain largely unexamined.\(^{370}\) In contrast to compliance theorists, feminists have closely examined the characteristics of international human rights law to reveal its gender bias. Feminist observations with respect to international human rights law illustrate that most compliance theories have a ‘flat, one-dimensional’ view of international human rights law,\(^{371}\) and that they ‘begin with the notion that there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed’.\(^{372}\) But, as illustrated above, even the feminist achievement of the due diligence standard lacks a clear and uncontested meaning, and this has ramifications for compliance. Compliance theories that fail to view international human rights law through a critical lens can explain only partially the success or failure of compliance. Ultimately, ‘[t]he idea of embracing a less illusioned (and less disillusioned) and more nuanced picture of the operation of global law represents perhaps the most fruitful possibility for intellectual exchange’.\(^{373}\)

A more interdisciplinary approach to compliance might also illuminate the broader effects of international law. Underlying the mammoth efforts undertaken by feminists to reform the law is the assumption that the contents of international legal rules are important. Of course, this issue is closely linked to the extent to which international law ‘matters’; whether international law is more than ‘irrelevant decoration’ on the rationally formed interests of states, their morally

\(^{368}\) Ibid.

\(^{369}\) Brunnée & Toope, “Constructivism”, supra note 184 at 128.

\(^{370}\) Ibid at 12-14.


\(^{372}\) Howse & Teitel, supra note 233 at 127.

\(^{373}\) Klabbers, supra note 371 at 73.
motivated preferences or states’ desire to conform. A detailed exploration of this broader question is beyond the scope of this thesis. However, this thesis does propose that the positively expressed rules of international law have implications for compliance, and compliance theory. Ultimately, ‘law is a powerful idea’. As Koskeniemmi argues, it allows a scandal to be articulated: for example, it was the violation of international law that led to global outrage at the United States’ use of force in Iraq. Prohibiting conduct with the language of international human rights law ‘transforms individual suffering into an objective wrong that concerns not just the victim, but everyone’. The deconstruction and reconstruction of the rules of international law would not be a central concern of feminist international lawyers unless the idea of ‘law as powerful’ did not underpin the feminist conception of international law.

Using feminist observations, this thesis has shown that power and gender, local level dynamics, and international law qua law, are all integral components of compliance – mainstream accounts of compliance should make these features explicit in order to properly understand the persistence of violence against women, despite its effective prohibition.

---


375 Klabbers, supra note 371 at 73.

376 Ibid at 72; Koskenniemi, “Constitutionalism”, supra note 374 at 35.

377 Ibid.
Bibliography

TREATIES, CONVENTIONS AND DECLARATIONS


*European Convention on preventing and combating violence against women and domestic violence*, 5 November 2011, CETS No.: 2010 (enters into force 1 August 2014).


JURISPRUDENCE


*Bevacqua and S. v Bulgaria*, No. 71127/01, [2008] ECHR.


*Opuz v. Turkey*, No. 33401/02, [2009] ECHR.


SECONDARY MATERIALS: MONOGRAPHS


SECONDARY MATERIALS: ARTICLES


Driscoll, Amanda & Mona Lena Krook. “Can there be a feminist rational choice institutionalism?” (2009) 5:2 Politics and Gender 238

__________. “Feminism and rational choice theory” (2012) 4:2 European Political Science Review 195


__________. “Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovnia” (2005) 99 AJIL 778


Franck, Thomas M. “The Emerging Right to Democratic Governance” (1992) 82 AJIL 46

Freeman, Marsha A. “International Institutions and Gendered Justice” (1999) 52:2 Journal of International Affairs 513


____________. “Internalization Through Socialization” (2005) 54 Duke L. J. 975

___________. “The mystery of legal obligation” (2011) 3:2 International Theory 319


MacKinnon, Catherine A. “Creating International Law: Gender as the Leading Edge” (2013) 36 Harv. J. L. & Gender 105


SECONDARY MATERIALS: BOOK CHAPTERS AND EDITED COLLECTIONS


OTHER MATERIALS


Council of Europe, Committee of Ministers, 794 Meeting of Minister’s Deputies, Recommendation Rec(2002)5 on the protection of women against violence (2002).


In-depth study on all forms of violence against women: Report of the Secretary-General, UNGOAR, 61st Sess, Supp No 60(a), UN Doc A/61/122/Add.1 (2006).


