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BETH SIMMONS'S *MOBILIZING FOR HUMAN RIGHTS*: A 'BEYOND COMPLIANCE' PERSPECTIVE

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In *Mobilizing for Human Rights*, Beth Simmons seeks to understand the impact of human rights treaties through examining their multiple effects on and through diverse agents within the state.¹ This work is a leading example of a perspective on the way international law works that we call “beyond compliance.” This is the title of a recent article where we attempt to conceptualize some of the responses to realist skeptics about international law, including people like Simmons and also to some extent Ryan Goodman and Harold Koh, while seeking to broaden and deepen the response to the realists.²

Simmons clearly looks at the effects of international law through a broader lens than that of state compliance with rules—compliance induced by sanctions or other incentive mechanisms such as reputation effects. And as a result, the book actually shows that going beyond rule compliance can produce illuminating quantitative and qualitative analysis of international law impacts.

The significance of this approach, however, seems to be muted or understated as Simmons herself never does break with the language of “compliance” in the way in which she articulates the effects of international law. To some extent, this is a matter of semantics, of course. But it is not merely so. For is it really conceptually adequate to describe effects never intended or expected by the authors of the rules in question as “compliance”? Can one properly describe as “compliance” the effect of human rights treaties in empowering non-state actors

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1. Beth A. Simmons, *MOBILIZING FOR HUMAN RIGHTS* (2009).

2. See Robert Howse & Ruti Teitel, *Beyond Compliance*, 1 *GLOBAL POL'Y J.* 127, 127 (2010) (arguing that “the lens of rule compliance” is too narrow to properly evaluate the goals of international law, as it omits the complex interactions of multiple actors on international law and oversimplifies the role of politics).

to militate for domestic social and political change? Secondly, perhaps because of the way that she conceptualizes the relationship of the international to the domestic, most of the analysis in Simmons's book looks at how *domestic* actors take a ratified treaty and produce important, normative, sometimes transformative effects domestically. But at the same time, in many respects these effects are mediated through forms of litigation and dialogue that extend beyond the domestic domain—the International Criminal Court, for example, or the Inter-American Court of Human Rights. Of course, one cannot do everything in one book. But the setup of the project seems to suppose these two levels, the domestic and the international, as acoustically separate. Yet, there is a lot going on in what we would call the transnational. This is not a matter of an entirely different set of agents. Rather those whom Simmons identifies as domestic agents have frequently, in fact, pursued their claims before regional or international tribunals; the subsequent rulings of these tribunals have then been used as a basis for making more effective demands against governments for human rights protection. Indeed, sometimes they come back in the form of constitutional norms whether via constitutional amendment or made law through constitutional interpretation.³

Another set of reflections concerns interpretation and the sense that the norms themselves are dynamic in the hands of the actors in question. If one were to take Simmons's project a step further, one would need to investigate cases where the relevant agents have taken ratified treaty norms and succeeded in using those as a basis for creating new normative and institutional structures for human rights, including the effects on constitutionalism.

3. See, e.g., Martin Bohmer, *Panel III: Hybrid Legal Cultures, Borrowings and Impositions: The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority*, 77 REV. JUR. U.P.R. 411, 411, 427–28 (2008) (responding to critics who argue that borrowing from foreign constitutional traditions means the resulting law will lack legitimacy, noting that critiques of borrowing proceed from the premise that the only source of a constitution's legitimacy is the local, deliberative process that articulates itself as text, and arguing that privileging the process of drafting a rule as the first, and therefore *only* deliberative moment fails to account for the way in which the law is also constituted through the interpretation and response to its articulation).

Simmons's work undertakes to explore what makes the Convention Against Torture of real importance in Chile and other countries in Latin America. We can see that the region has moved from an initial position where there is really flagrant disregard of the protections against torture in the Convention and practices of amnesty or impunity throughout the continent to the current scenario where there is a widely recognized duty of accountability and many instances where amnesties have been reconsidered or revoked.⁴

The part of the story told by Simmons documents meticulously the increasing respect for and invocation of the Convention Against Torture in Chile in particular; the other part is the involvement of transnational institutions and actors. Here we are thinking of civil society actors engaged, for example, in litigation in the Inter-American Court of Human Rights.⁵ The resulting case law established that states parties had duties to protect their citizens even against non-state actors engaged in human rights abuses. Without such bold interpretations at the transnational level, the American Convention on Human Rights would have been much less effective at the domestic level. Thus, we should not underestimate the effects of litigation outside of Chile that resulted in demand for the extradition of Pinochet and his return to Chile for prosecution.⁶

Simmons rightly pays attention to the ruling of a Chilean court, which established ongoing state responsibility for kidnappings and disappearances under the prior regime. Ongoing responsibility entailed, above all, a right to accountability concerning what happened in the past, regardless of do-

4. Human Rights Watch has reported on developments related to torture and accountability on a country-by-country basis. HUMAN RIGHTS WATCH, *WORLD REPORT 2012: EVENTS OF 2011*, at 209 (2012) (Argentina); *id.* at 218 (Brazil); *id.* at 226 (Chile); *id.* at 232 (Colombia); *id.* at 242 (Ecuador); *id.* at 248–49 (Guatemala); *id.* at 256 (Haiti); *id.* at 259 (Honduras); *id.* at 265–66 (Mexico); *id.* at 273–74 (Peru).

5. For example, the Centro de Estudios Legales y Sociales is a non-governmental agency that engages in strategic social litigation before the Argentine Courts and the Inter-American Court of Human Rights. CENTRO DE ESTUDIOS LEGALES Y SOCIALES, <http://www.cels.org.ar/home/index.php> (last visited on Feb. 18, 2012).

6. See *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 WLR 827, [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.) (U.K.) (stating that the systematic use of torture was an international crime for which there could be no immunity).

mestic legal obstacles, such as statutes of limitations. But would such a ruling have really been possible without the jurisprudential *acquis* of the Inter-American Court of Human Rights? The Inter-American Court jurisprudence on this matter originated with the Velasquez Rodriguez case,⁷ where, under the American Convention, Honduras was found responsible for kidnappings because of the failure to investigate or to engage in other forms of accountability.⁸ Simmons points to subsequent cases, which fundamentally hold that the amnesty is no longer valid for crimes against humanity and that there is an unqualified duty to prosecute. Again here, we would note that these rulings were preceded by subsequent jurisprudence of the Inter-American Court, in cases such as Barrios Altos, which concerned accountability for a massacre during the Fujimori crackdown on the drug war.⁹ Barrios Altos held that there is a right to judicial protection when crimes against humanity are committed, even where the actual role of the state in these violations is unclear or unproven.¹⁰

In these cases, the Inter-American Court was crafting a teleological or purposive interpretation of the human rights norms in question, in light of the challenges posed by recent history in Latin America. Nowhere were the specific duties of prevention, investigation, and punishment obvious from the text of the American Convention. Though of course there is a provision committing to provision of remedies.¹¹ Instead, the Court relied on an expansive view of the right to life and security of the person—rights provided for in the Convention. Thus, the domestic effects identified by Simmons ultimately depended on a broader normative universe that supported, or sustained the legitimacy of, a certain *reading* of the treaty text (this broader normative universe has been described by one of

7. Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 21, 1989), *reprinted in* 28 I.L.M. 294 (1989).

8. *Id.* ¶ 178.

9. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 4–5 (Mar. 14, 2001).

10. *Id.* ¶ 43.

11. *See* American Convention on Human Rights, art. 2, Nov. 21, 1969, 1144 U.N.T.S. 143 (stating that parties to the convention shall undertake legislative or other measures as may be necessary to give effect to the rights or freedoms espoused in the convention).

us, Teitel, as “Humanity Law”).¹² Ultimately the question of compliance cannot be properly understood without attention to the problem of interpretation. The application of treaty rules through interpretation makes the norms themselves dynamic and results in the construction of new meanings. The dynamism in question is constituted by constant motion back and forth between domestic, international and transnational sites of interpretation. We have attempted to sketch at least one plane on which this motion occurs in another recent piece in this journal, “Cross-Judging.”¹³

12. See generally RUTI TEITEL, *HUMANITY'S LAW* (2011) (studying the normative shift in the international law from prioritizing state security to protecting human security).

13. See Ruti Teitel & Robert Howse, *Cross-judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 960 (2009) (arguing that qualitative changes, not merely an increase in the numbers and use of tribunals, “make international law seem more like a domestic legal system”).

