

## **Imposed Obedience versus Expressed Obedience: Rethinking on Transnational Legal Process**

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### **Abstract**

“Why do nations obey international law?” is one of the prominent questions that has arisen among scholars of international law. Therefore, this article anticipates to rethink the reason for obeying that was presented by Transnationalists through the Transnational Legal Process (TLP). TLP provides an opportunity for transnational actors to gather, interact, and interpret legal norms. Conversely, nationalists and Standard Point viewers criticize TLP. This was investigated through archival literature on these two schools from the perspective of International Relations. However, it is impossible to appraise either school as boon and bane can be identified. Hence, this article hypothesizes that transnational actors gather at international fora to reconstruct interest and identity of states to accumulate them to achieve a common goal despite ideational differences. As a result of that, rather ensuring human betterment, state excellence has overtaken human betterment since sovereignty and nationalism are still major concerns of states. But as TLP suggests selfish national interests of states can be altered and reconstructed via continuous participation in TLP. Therefore, this article signifies the process of TLP in the law formulating process even if internalization is the challenge.

**Keywords:** Transnational Legal Process, statehood, international law

*Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.*  
– Louis Henkin

## 1 Introduction

States comply with International Law (hereafter IL) only as long as it fulfils its national interests. There is an absence of normative authority of IL itself and an inability to influence states that are powerful enough to violate it. This happens due to the anarchical nature of the international system.<sup>1</sup> Nevertheless, this does not directly and entirely comply with security dilemmas or competition among states, as cooperation is possible to some extent, though the international system (hereafter IS) looks like a ‘cobweb’ and goes beyond the billiard board.<sup>2</sup> The architecture of IS was also altered after the cold war and the world’s power was balanced under unipolar power by making the United States the superpower. Apart from that, new non-state actors<sup>3</sup> have entered into IS as byproducts of functionalism and neo-functionalism<sup>4</sup>.

The main intention of this assignment is to analyze the Transnational Legal Process (TLP) where interaction, interpretation and internalization operate, paying special temporal attention to the post-cold war era. The first section of this assignment will explain the functions of TLP while the second part observes the insights of TLP and the third section reviews Eric A. Posner’s skeptical observations on TLP from the perspective of Standard View and Transnationalists and Nationalists debate in the US. Finally, this will sketch out what I consider to be a balanced approach to understanding the relationship between IL and Domestic Law in the post-cold war period.

## 2 Transnational Legal Process: TLP

TLP is a vertical process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize<sup>5</sup> rules of transnational law (Koh, 1996, 183–184). As Harold Hongju Koh further explains, TLP has the following distinctive features:

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<sup>1</sup> Anarchy means the absence of a global authority to establish and maintain regulations to create an order in international relations. The anarchical nature exists as the international system consists of sovereign states which are the most powerful, independent and autonomous actors in the international arena.

<sup>2</sup> International Relations was compatible with the ‘cobweb’ model rather than the ‘billiard ball’ model as current relationships are more complicated, like a cobweb, and it is not as simple as it was before, like billiard balls, and inter-dependency can be seen among actors.

<sup>3</sup> Such as international organizations, non-governmental organizations, multi-national companies

<sup>4</sup> Functionalism promotes collective security which gathers capabilities and interest to securitize both states and humans and it focuses international integration, like the UN. Neo-functionalism addresses regional integration through supranational bodies like the European Union.

<sup>5</sup> According to Koh (1998, p. 642), this internalization can happen in three ways:

- Political internalization: This occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy.
- Social internalization: This occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it.
- Legal internalization: This occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of these three.

1. **Non-traditional:** This breaks down two traditional dichotomies that have historically dominated the study of PIL.
2. **Non-statist:** The scope of the system does not only primarily consist of states but also non-state actors are included.
3. **Dynamic:** TLP is dynamic as it transforms, mutates and percolates up and down from public to private, from domestic to the international level.
4. **Normative:** New rules of law emerge as a result of the process of interaction which are interpreted and internalized. In fact, this process shapes law by providing opportunities for future interactions, and those further interactions will internalize those norms and thus explains the rationale behind how law influences and why nations obey.

As a result of this continuous further interactions, interests and identities of participants will reconstitute as participants repeatedly participate in the TLP as mentioned in Figure 1.

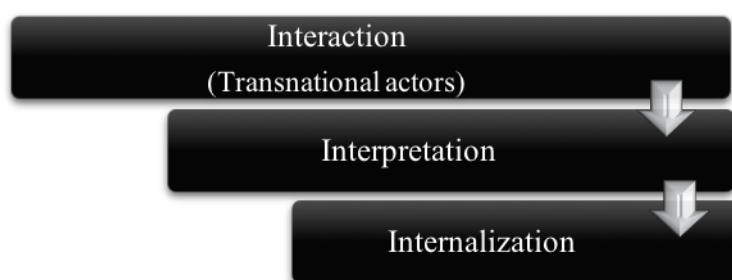


Figure 1: Transnational Legal Process

This process provides an answer to why nations obey IL referring to the concepts of **interest** and **identity**.

### 2.1 Interest

According to Regulatory Liberalism (RL), states do not engage in competition or war as cooperation is possible, and RL claims that the benefits of IL, accepted “rules of the game”, and international organizations would contribute to the peaceful settlement of disputes among states and enhance global cooperation (Viotti & Kauppi, 1999, p. 202). Therefore, states do not maximize their power vis-à-vis other states in a zero-sum game and they employ cooperative strategies to pursue a more complex and multi-faceted long-run national interest (Koh, 1996, p. 199) in which compliance with negotiated norms serves as a winning strategy, as in a globalized world interdependency cannot be neglected.<sup>6</sup> In order to cooperate and achieve national interests collectively, states and non-state actors gather in regimes<sup>7</sup> and within these regimes IL gets a conceptual space to play critical role in stabilizing the expectations and in reinforcing the restraints. Koh further elaborates that legal rules promote compliance with

<sup>6</sup> Not only Regulatory Liberalism but also game theorists predict that states are rational and self-interested actors which pursue multiple strategies to achieve both short-term and long-term gains, depending on the relative costs and benefits of competition and cooperation, as Robert Axelrod describes in his 1984 work *The Evolution of Cooperation*.

<sup>7</sup> As Stephen Krasner defines, regimes are implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing for making and implementing collective choice.

regimes norms by reducing transaction costs, provide channels to settle disputes, triggering retaliatory action and etc.

## 2.2 Identity

Identity comes with political ideology, and identity theory focuses on non-state actors and domestic politics. The behaviour of national governments is influenced by individuals and transnational actors through TLP. If transnational actors have a liberal identity, then law will become universalistic and as a consequence of that IL will be formulated in a law zone rather than in a political zone (Slaughter, 1998).

However, nation states acquire their identity while considering IL as a part of their national self-interest (Koh, 1996, p. 204). Therefore, as states participate in TLP, through a complex combination of rational self-interest, transnational interaction, norm-internalization and identity formation, IL becomes a factor driving their international relations (Koh, 1996, p. 205). For instance, legal areas such as Comparative Law, Immigration and Refugee Law, International Business Transactions, International Commercial Law, International Trade Law, Foreign Relations Law, National Security Law, Law of Cyberspace, Law and Development, Environmental Law, and the Law of Transnational Crimes have now become fully recognized, integrated, and internalized into domestic legal systems.<sup>8</sup>

Once interaction and interpretation are done, states follow different practices in internationalizing treaty norms, which is to say, incorporating treaties into the state's legal structure. Monism and Dualism are the two principle theories describing the connection between IL and municipal laws.

## 3 Two principle theories: Monism and Dualism

The main distinction between Monism and Dualism is that monists assume a unified internal and international legal system while dualists prefer to distinguish between the internal and international legal system.

### 3.1 Monism and delegation theory

In a monist legal system, IL is considered joined with and part of the municipal law of a state, as demonstrated in Figure 2. IL gets mindlessly incorporated into the internal legal system by ratification of an IL.<sup>9</sup> Delegation theory<sup>10</sup> emphasizes IL delegates' rule-making power to each state in accordance with the procedure and system prevailing in each state, in accordance with the constitution and rules of the treaty or convention that member states sign and agree upon (LawNotes.in, n.d.). Monism attributes primacy to IL and treats it as a superior legal system. Both laws are applicable on human such as municipal law directly and IL indirectly through States. Neither of them is a system nor are they separate from the system. Therefore, Monism theory does not have any transformation as treaties are considered to be self-executing.

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<sup>8</sup> From remarks made by Harold Hongju Koh (2006, p. 2) at the plenary session on "What Is Transnational Law and Why Does It Matter?" at the 2006 AALS Annual Meeting in Washington, D.C. on January 4, 2006, which share ideas with Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 *Tulsa J. Comp. & Int'l L.*

<sup>9</sup> According to Hans Kelsen, an Austrian jurist and leader of the Monist school of thought, IL or municipal law mediately or immediately regulates the conduct of individuals.

<sup>10</sup> This theory comes with Monism and further explains the incorporation between international and municipal law.

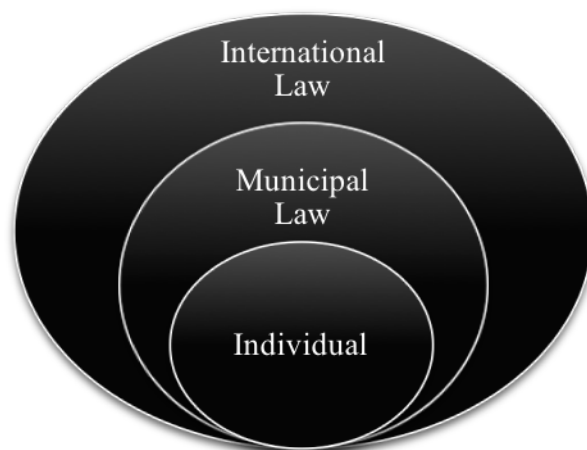


Figure 2: The connection between Municipal and International law under Monism theory

### 3.2 Dualism (Pluralism)

Dualism emphasizes that the rules of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other (Shaw, 2003, p. 122). This prevails as fundamentally and relatively the nature and system of *inter* and *intra* laws are varying. Therefore, Dualism attributes primacy to municipal law and considers it a superior legal system.<sup>11</sup>

Moreover, Dualists argue that IL cannot be directly applied to domestic legal systems unless it is transformed into municipal legislation, as Dualism accepts the separation between IL and municipal law. This transformation can happen in accordance with the following theories, as demonstrated in Figure 3.

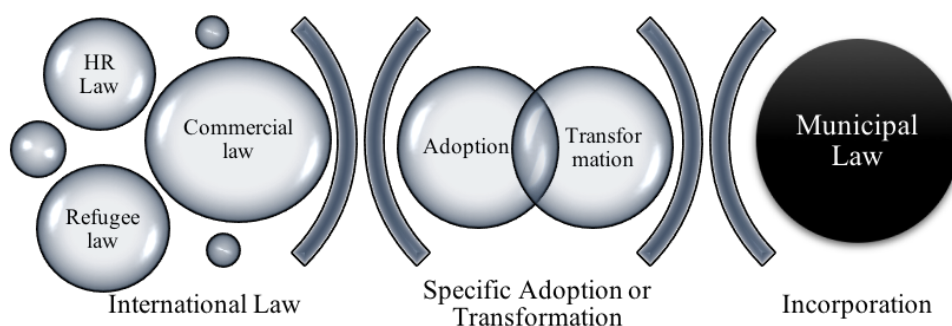


Figure 3: Dualism theory and legal transformation process

<sup>11</sup> Dualists give these three reasons to justify their argument:

- The origins of international law and municipal law are different as international law is the common will of states and municipal law is the will of a state itself.
- The subjects of municipal law are individuals whereas the subjects of international law are states.
- The substance of municipal law is law if sovereign over individuals whereas international law is not above but between sovereign states.

Specific Adoption Theory	Incorporation/Transformation Theory
IL cannot be applied in sovereign states unless and until the sovereign state specifically adopts that law by way of enactments.	IL undergoes transformation as it spreads universally. For an instance, International Convention law can be transformed into domestic law through legislative incorporation ( <i>inter alia</i> ) or automatic incorporation <sup>12</sup> .
State Practice: <b>India</b>	State Practice: <b>United States</b>
International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights have been adopted in India under the Protection of Human Rights Act, 1993. Similarly, the Model Arbitration Law (MAL) of United Nations Commission on International Trade Law was enacted by India as the Arbitration and Conciliation Act, 199.	The US has internalized international legal norms into US domestic law <sup>13</sup> through a range of interpretive techniques such as <ol style="list-style-type: none"> <li>1. Constitutional interpretation</li> <li>2. Treaty interpretation</li> <li>3. Incorporation of customary IL into domestic law</li> <li>4. Direct statutory interpretation of statutes that expressly incorporate IL</li> <li>5. Indirect statutory interpretation in accordance with the so-called “Charming Betsy” canon<sup>14</sup></li> <li>6. By interpreting state law in light of rules of IL.</li> </ol>

Table 1: Specific Adoption Theory and Transformation Theory

However, if emphasizing the fact that participating in TLP is a constructivist process, this reconstitutes national interest and identity. Therefore, states obey IL as a positive result of this reconstruction.

## 4 Rethinking on TLP

### 4.1 Skeptical observation: Standard View

Eric A. Posner (2004, p. 23-28) presented his concept Standard View (SV), which counters TLP. He essentially brings the following counter arguments against TLP:

1. First he mentioned that SV does not go in line with Realism as cooperation prevails and cooperation creates IL, although IL has a minimalist quality.

<sup>12</sup> Legislative incorporation is used in the UK, Commonwealth countries and Scandinavian countries, while France, Switzerland, the Netherlands, the United States, Latin American countries and some African and Asian countries use automatic incorporation.

<sup>13</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (referencing international norms and practices in holding unconstitutional executions of offenders who were under the age of eighteen when their crime was committed); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (discussing status of customary international law as federal common law); *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (interpreting the Warsaw Convention); *Lawrence v. Texas*, 539 U.S. 558 (2003) (referencing international norms and practices in holding unconstitutional the criminalization of consensual, adult, private, same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304 (2002) (referencing international norms and practices in holding unconstitutional executions of offenders with intellectual disabilities).

<sup>14</sup> This requires courts to construe ambiguous federal statutes to comport with governing rules of international law.

2. The world does not influence the state's interest and state interest is reflected at the international fora through states' behaviour.
3. The role of court is dull as political branches determine the foreign policy and the judiciary only follows those decisions with regards to IL. Therefore, political branches<sup>15</sup> decide the enforcement of laws as agents.

Posner's counter arguments undermine TLP as political branches can either support or suppress TLP.<sup>16</sup>

### 4.3 Transnationalists versus Nationalists

This section essentially focuses on the debate between Transnationalists and Nationalists<sup>17</sup> in the United States. Koh (2006, p. 749) presents this debate as follows:

- The transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy.
- The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law.
- The transnationalists view domestic courts as having a critical role to play in domesticating international law into US law, while nationalists argue instead that only the political branches can internalize international law.
- The transnationalists believe that US courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that US courts should limit their attention to the development of a national system.
- The transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity, while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs.

### 4.4 After the cold war

TLP is being challenged by the US after the 9/11 attack in terms of prisoners or war<sup>18</sup>, the death penalty, execution of juveniles etc. In 1991, "during the Gulf War, the US and its allies used a coercive approach, but within a framework of IL, to force Saddam to leave Kuwait through Security Council resolutions that created an inspections regime that was initially working" (Koh, 2004, p. 346–350). Finally, without having UNSC second resolution, the Bush administration invaded Iraq and won a smashing military victory. This shows that TLP has been defeated by US national interest.<sup>19</sup> This erupted the during Bush administration as Bush

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<sup>15</sup> Legislature and executive.

<sup>16</sup> The honest reason behind this is that state sovereignty maintains its supreme authority in the international system even though IL attempts to regulate the system. Therefore, national interest and identity surpass collective cooperation approaches like TLP if they threaten national interest.

<sup>17</sup> The group of Justices, including Breyer, Souter, Stevens, Ginsburg, and Kennedy, represent the contemporary Transnationalists camp, while the Nationalist camp is represented by Chief Justice John Roberts and Justices Scalia, Thomas, and Alito. These two camps have different perspectives on TLP discourse.

<sup>18</sup> "At this writing, three cases have been argued before the U.S. Supreme Court this term – the Guantanamo cases arising from the D.C. Circuit, the Jos Padilla case in the Second Circuit and the Yasser Hamdi case in the Fourth Circuit. Each of these cases asks whether U.S. conduct is consistent with the Geneva Conventions as well as the U.S. national interest and tests the extent to which our Supreme Court will internalize these international standards into U.S. law" (Koh 2004, p. 352).

<sup>19</sup> The main advantage that the United States had was that they have unsigned the International Criminal Court (ICC) treaty, and Iraq is not a party to that treaty either. In addition to that the United States is still holding

pursued a doctrine which relied on coercive and power-based internationalism as his foreign policy.

Apart from these counter arguments, IL is sometimes impossible to internalize due to the following reasons:

1. Reasons of power and coercion
2. Reasons of self-interest
3. Reasons of liberal theory – both rule legitimacy and political identity
4. Communitarian reasons
5. Nationalism

## 5 Conclusion

National interest and identity are fixed, and it is a product of the national political process which reflects the values and preferences of the public. Briefly, it emerges within the state. Therefore, states comply with IL till it advances national interest and identity. Material factors like power, international law, economic advantages, soft power strategies determine and reshape national interest and identity.

Conversely, since the end of the cold war, the world has become smaller and there are an immense number of dynamic and new threats which go beyond national territory. Hence individual approaches are not any more appropriate to overcome those threats. As an inevitable consequence, complex interdependence has been growing to ensure national survival which is national interest – the prime goal of a state.

TLP is one of the efforts used to gather at one forum, interpret norms and internalize those norms as laws into the domestic system by agents. Undoubtedly, TPL is a collective approach which can be a threat to someone else's national interest since a continuous TLP causes reconstruction of the national interest and identity of a state.

However, predominantly it should not be forgotten that in current phenomena still, national interest is prioritized as the prime objective of a state and it is solid. According to Realists, states are rational actors that only participate in international fora to gain comparative advantages.

When considering the discourse on TLP, it is worth indicating that TLP is a better option in that states can overcome dynamic threats such as climate change, cyber insecurity, economic insecurity, piracy, illegal maritime activities and so on through a collective approach. Because TLP creates an opportunity to bring national interests as a common interest which aims to accomplish human betterment.

Obedying or disobeying depends on state decision and, as constructivists mention, ideational factors are much important than material factors.<sup>20</sup> In that sense, although state identity and

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Guantanamo without Geneva Convention Rights, as well as being one of the countries which permit the execution of juveniles.

<sup>20</sup> Ideational factors are neglected by Realism and Liberalism schools of thought when they develop their discourse on International Relations and both of these schools thought that state identities and interests are exogenously given. But Constructivism views the material world as shaped by human action and interactions which are determined by dynamic normative and epistemic interpretations of the material world.



interest is reconstructed as a result of TLP, it represents a hybrid between IL and domestic law that can be downloaded, uploaded and transplanted from one national system to another national system which aims for human betterment. Because dynamic facets of new threats in the post-cold war era cannot be eliminated alone. If IL is formulated to protect humans, TLP is the best way to alter ideational factors like values, norms and interest of states to make this world a better place to live in. Because TLP influences states in active ways to obey IL by internalizing those into domestic laws. Moreover, human security is very important and much emphasized in the post-cold war period, and human security of another country should not be threatened by selfish national interests. But initially TLP may clash with national interests, as supranationalism is not simple to establish in a heterogeneous world.

Perhaps TLP may not be the best way to make states obey IL, but it is a better way that states can begin to engage in reconstructing their national interest and identities to accomplish human betterment.

According to these findings, this can be concluded with the reinterpretation of Louis Henkin's above-mentioned quotation as follows:

Almost all nations **will** observe almost all principles of international law and almost all of their obligations almost all the time **if those aim to protect humans without concentrating on state excellence.**

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