

**A Strategy and Framework for Identifying Compliance
Requirements under International Law (with an
illustration relating to international human rights
norms)**

Candidate: Amarjit Singh

Degree: PhD London School of Economics (2011)

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Abstract

This thesis addresses the issue of compliance requirements under international law. Compliance with international norms is a contested issue. On the one hand the meaning of compliance is contingent on the theory of international law one holds. But on the other hand, the requirements for compliance are not clearly set out in the norm itself. This is problematic as the increased normative impact of international law brings more non-state actors under the regulation of regimes devised to regulate state activities. Compliance is expected of non-state actors with international norms, the compliance requirements of which are not clear even for states, the intended regulatees. Also, as the reach of international law expands, international law is under threat of fragmentation. This means actors must contend with competing compliance requirements further prompting a need to identify those requirements more clearly and systematically. A general scheme for identifying such compliance requirements could help improve understanding of the meaning of compliance and improve levels of compliance. I propose such a scheme by critically examining key aspects of the concept of compliance and reviewing compliance theories. The thesis then sets out a Compliance Strategy and Framework (CSF) to systematically identify compliance requirements under international law. I then provide a Compliance Framework (CF), which sets out those requirements. This scheme will of necessity be of a general nature to be adapted in application to particular issue areas of international law. I illustrate the Compliance Strategy and Framework (CSF) by adapting it to the area of human rights. Specifically I show how the CSF may be applied to identify compliance requirements with the human rights associated with participation and

accountability and I extend that example with a simple illustration aimed at using the CSF to identify the World Bank's compliance requirements in relation to those human rights in the context of a Bank project. Finally, my thesis contends that the CSF is a valid scheme, according to international law, for identifying compliance requirements with norms of international law.

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Chapter 1 Introduction

1.1. Outlining the problem

This thesis examines the issue of systematically identifying requirements for an actor's compliance with norms of international law. Obviously, the issue of compliance is important for international law, as for all legal and regulatory systems, and so various commentators have examined it, producing theories for why actors comply with international law¹. But while such theories have provided insights into the motivations for an actor's complying with international law, the issue of how an actor might achieve compliance has not been systematically addressed. This thesis sets out to do so. In particular, this thesis examines the issue of systematically identifying compliance requirements for actors in relation to norms of international law. The aim is to identify, describe and examine requirements for such compliance, and in so doing to suggest a strategy and framework as a solution for the identification of such requirements for use in specific cases.

There is no universally authoritative definition of the concept of compliance. The literature provides various definitions of the concept such as:

¹ Andrew Guzman, *How International Law Works*, Oxford University Press, 2007, Markus Burgstaller, *Theories Of Compliance With International Law*, Brill Academic Publishers, 2004, Beth A. Simmons, 'Compliance with International Agreements', 1 *Annu. Rev. Polit. Sci.* (1998), pp. 75-93, Daniel E. Ho, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?', 5 *J. Int'l Econ. L.*, 647 (2002).

- a. 'a state of conformity or identity between an actor's behaviour and a specified rule',²
- b. a 'factual matching of state behaviour and international norms'.³
- c. 'whether countries in fact adhere to the provisions of the accord and to the implementing measures that have been instituted'.⁴
- d. '[conformity] between the conduct required of the state by [an international] obligation and the conduct actually adopted by the state – i.e. between the requirements of international law and the facts of the matter'.⁵
- e. 'the fulfilment by the contracting parties of their obligations under a multilateral ... agreement'.⁶

While there may be no universal authoritative definition of 'compliance',⁷ common features of a definition of the concept can be discerned and would arguably comprise at

² Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations*, Sage Publications, 2002, pp.538-558 at p. 539.

³ Dinah Shelton, 'Introduction', in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5.

⁴ Harold K. Jacobson and Edith Brown Weiss, *Engaging Countries: Strengthening compliance with international environmental accords*, Cambridge, Mass.: MIT Press, 1998, p. 4.

⁵ James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, p. 125. The definition is an adaptation of the ILC's description of non-compliance: 'the breach of an international obligation consists in the disconformity between the conduct required of the state by that obligation and the conduct actually adopted by the state – i.e. between the requirements of international law and the facts of the matter.'

⁶ United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, June 2006, p. 59. The definition adapts the UNEP's definition of compliance with international environmental agreements: '“Compliance” means the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement'.

⁷ One reason for the lack of an authoritative definition of 'compliance' as noted by the United Nations Environment Programme (UNEP), in the context of negotiating multilateral environmental agreements (MEAs), is that in practice 'definitions often are vague so as to reach consensus in negotiating an MEA and to maintain flexibility in evolution of an MEA'. The UNEP further noted that its definition of compliance was 'designed to be consistent with international definitions (to the extent they exist) and usages', and that it derived the definition through consultations with various MEA Secretariats State Parties. United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, June 2006, p. 60.

least these three elements: (1) the conformation of (2) the actor's conduct to (3) an applicable norm or rule.

The conduct of each actor will be governed by its 'operative normative environment', which comprises both legally and non-legally binding norms applicable to that actor and its conduct⁸. The situation where an actor is motivated or expected to comply with a norm of international law is referred to here as a *compliance situation*. Compliance theories explain the motivations for an actor's compliance with its applicable norms, that is, the motivations for the actor to produce conduct conforming to such norms. But, as noted above, the issue of how to systematically think through the actor's requirements for producing the conforming conduct in a particular compliance situation has not been addressed.

So while the definitions say what compliance is, i.e. conforming or matching conduct, they do not specify what the actor is to do in order to comply. This can give rise to uncertainty as to what to do in order to comply and to the risk of non-compliance. International treaty norms for example are not always clear as to what conduct they require of states. So state officials have to assess what to do to comply. A systematic approach to identifying the state's compliance requirements could help reduce the uncertainty in determining what to do to comply.

⁸ Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law*, 345 (1998), p. 363.

The need to know what to do to comply is not restricted to state actors. International law's reach has expanded to cover the conduct of non-state actors. But there is an added dimension to non-state actors determining what to do to comply with a norm of international law norm. Those norms are designed for states. So there is the issue of transposing and adapting those norms to the characteristics of the non-state actor.

The interpretation of the content of norms by international administrative bodies and tribunals can help states define what they must do to comply with an international norm. But the idea of compliance requirements, as discussed in the next section, extends beyond the content of the norm. As will be shown, compliance requirements help orchestrate the course of conduct an actor adopts in order to achieve compliance with an applicable norm of international law.

But interpretation of the norm can be of limited assistance where the norm is not legally binding. Because such norms are usually not subject to rules of treaty interpretation as with the case of states, without clear, authoritative interpretation, the uncertainty involved in determining what to do to comply with an international norm can be heightened. The norm's perceived lack of legitimacy because of its lack of clarity may also undermine compliance with such norms.

The expanded reach of international law has also given rise to the problem of overlapping and parallel regulations governing a compliance situation. For an actor,

working out its compliance requirements in such situations may be particularly problematic and uncertain, and carry a higher risk of non-compliance.

The following examples highlight some of the issues that can arise in relation to identifying an actor's compliance requirements with norms of international law.

The first example concerns the findings that a mining company in India did not respect the rights of a resident tribal community. The findings were made by the United Kingdom's National Contact Point under the OECD's Guidelines for Multinational Enterprises (the Guidelines). Under the Guidelines, companies registered in the territory of member state are expected to comply with certain norms while undertaking operations overseas. One of those norms is that the company would 'respect human rights' where it operates. And under the Guidelines, a process exists where complaints of the company's non-compliance with the applicable guideline can be made to the OECD's National Contact Point (NCP) in the company's home state. An NGO brought such a complaint against the company, Vedanta Plc, and the UK's NCP found that

Vedanta, through its Indian subsidiary, did not respect the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People.⁹

⁹ NCP Final Statement, 'Summary of the Conclusions'.

The issues raised by this example are the following:

1. How were norms designed for states transposed onto a non-state actor?
2. How would Vedanta plc have been able to validly identify its compliance requirements with the norms concerned?
3. How would it be possible to delineate what Vedanta was supposed to do and what the state was supposed to do?
4. How to coordinate findings such as the NCPs with the findings of the state where the state also investigates the issue? In this case, India's investigation showed Vedanta's subsidiary had violated environmental laws but not apparently any human rights laws in India.

The second example concerns the World Bank and its engagement with human rights issues in connection with its projects. The World Bank has consistently maintained it does not have obligations under international law in relation to the human rights of the people affected by its programmes and projects¹⁰. However, the Bank recognises that the realisation of human rights in the countries and communities where it operates is a relevant factor in achieving its mandate. For instance, the Bank has acknowledged that political rights such as the right to participation are relevant to the success and sustainability of its projects. Thus, in a 1995 legal opinion, the Bank's General Counsel posited the following scenario in which the Bank may legitimately promote individual

¹⁰ Ibrahim Shihata, 'The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements', 17(1) *Den. J. Int'l L. & Pol'y* 39.

political rights in the interest of a project's needs and withhold funding if such rights were not protected¹¹:

The Bank, benefiting from its experience in development finance, seeks participation of affected people in the design and implementation of many types of projects it finances, and requires consultation with local communities and local NGOs in the preparation of the 'environment assessment' of projects with significant impact on the environment. Such participation and consultation, to be useful at all, require a reasonable measure of free expression and assembly. The Bank would, in my view, be acting within proper limits if it asked that this freedom be insured when needed for the above purposes. Its denial of lending for a given project in the absence of this requirement where it applies cannot be reasonably described as an illegitimate interference in the political affairs of the country concerned, just because the rights to free expression and assembly in general are normally listed among political rights.

The issues raised in the World Bank example are:

1. How are the World Bank's own compliance requirements relating to human rights norms to be identified, if the Bank finds that the enjoyment of such rights is relevant to its mandate?
2. How to delineate what the Bank is supposed to do compared with what the state is to do.

As the examples above illustrates, actors can face conflicting normative regimes with their respective compliance pressures and requirements. Questions arising include:

- a. Which human rights are in issue?
- b. Are the requirements of the corporation or of the World Bank the same as those of the states concerned?

¹¹ World Bank, *Prohibition of Political Activities in the Bank's Work*, Legal opinion of the General Counsel, 11 July 1995 (SecM95-707, July 12, 1995), in Ibrahim Shihata, *World Bank Legal Papers*, Boston: Martinus Nijhoff, 2000, p. 235.

- c. How do the requirements of the corporation or of the World Bank relate to those of the states concerned?

The above examples indicate the importance of being able to systematically identify an actor's compliance requirements in relation to norms of international law. Yet to do involves facing certain issues arising from the concept of compliance itself. For example, compliance and non-compliance are not always necessarily binary conditions. They can be binary in nature when the norm concerned prescribes some limit that the actor's conduct must not transgress such as maximum allowed levels of pollution. But even with this example, there is an issue of sustaining compliance, assuming the actor currently complies with the pollution limit. Sustaining that compliance will involve certain behavioural undertakings or patterns on the part of the actor. Compliance is thus an ongoing phenomenon, suggesting that it is critical to focus on the various elements of behaviour or conduct that go towards achieving compliance and would in themselves be evidence of the actor's compliance.

Further, the circumstances of the actors of whom compliance with a norm is expected also vary meaning their capacities to comply with a norm will vary¹². In such cases, the problem of compliance is less likely to be conceived of in binary terms but rather viewed in terms of degrees of compliance¹³. Here the determination of compliance will be a more subjective exercise with perhaps greater emphasis being laid on

¹² Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000.

¹³ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1998.

progressively moving the situation to one of better or improved compliance. That emphasis then must necessarily involve a focus on the actor's efforts to comply with the norm, including elements of the actor's behaviour or conduct that go towards achieving such compliance.

Attempts at achieving or sustaining compliance may prove unsuccessful but may not be rectified because neither the actor nor an external observer is able to determine that certain compliance requirements were not undertaken. However, even where non-compliance may be relatively easily detected, the issue remains of what the actor must do or refrain from doing in order to return to a state of compliance. It is suggested that if the actor's compliance requirements were systematically thought through before the compliance effort is undertaken, there is a greater likelihood of compliance with the international norm in question. There would probably also be more efficient learning across actors in terms of what works in order to comply with a particular norm.

And bearing in mind international law norms can regulate the conduct of actors even when not legally binding, and can conflict in specific cases, an approach based on systematically identifying compliance requirements can help improve the coherence of international law by emphasising the compliance pressure and resulting compliance-seeking behaviour relating to a specific international law norm. This is because this approach can apply to all actors irrespective whether the norm is legally binding, as the key issue is whether a compliance-seeking effect arises, and facilitates the resolution of

any conflict between issue areas by promoting the self-conscious and transparent balancing of potentially competing values and visions.

For the reasons above and the situations or cases identified above, the need to identify an actor's compliance requirements in relation to norms of international law can arise. Accordingly, a systematic review and approach to identifying such compliance requirements can be useful. This thesis attempts to do that. The next section examines the concept of compliance requirements relating to norms of international law.

1.2. Compliance requirements

This section explains the concept of compliance requirements more fully. As the idea of compliance with norms of international law includes the idea of compliance with international obligations, examples from the law on state responsibility, which concerns the consequences of non-compliance with international obligations, are pertinent and can help in explaining the concept of compliance requirements. It can do so by analogy with the idea of conduct or actions required of states for compliance with obligations under international law.

The law on state responsibility sets out the conditions in international law under which states are considered responsible for internationally wrongful acts, as well as the consequences that flow from such acts.¹⁴ An act of a state that is internationally wrongful

¹⁴ James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, p. 74.

can be an act or an omission, attributable to the state, that constitutes a breach of the state's international obligation.¹⁵ And as recalled from the previous section, the International Law Commission's (ILC) concept of a breach of an international obligation provided a definition of compliance in terms of conduct conforming to an actor's international obligation.

But the conforming conduct itself is the subject-matter of the obligation, whereas the concept of compliance requirement is concerned with the requirements on the part of the actor, that go to producing the conforming conduct. In its final draft Articles on State Responsibility, the ILC does not provide any focus or guidance on the requirements that go to producing the conduct on the part of the state actor that conforms with the state's international obligations. This is because the ILC's focus was on when an international wrong arises or when a breach of an international obligation occurs.¹⁶ And so the ILC notes that:

“Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached”.¹⁷

And elsewhere:

“But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.”¹⁸

¹⁵ Ibid., page 81.

¹⁶ And the consequences in terms of international responsibility that would follow.

¹⁷ James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, p. 77.

¹⁸ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 125.

As such the focus is on the end-state situation, specifically when there may be said to have been non-compliance with an international obligation, and not, as mentioned, on what the state actor is required to do to produce that situation.

However, the ILC's earlier work on state responsibility addressed concepts that can help explain the idea of 'compliance requirements' and in so doing situate it within the body of international law. In that earlier work, the ILC drew a distinction between international obligations that are characterised as obligations of conduct and obligations of results¹⁹. Obligations of conduct refer to obligations to perform or to refrain from performing a specified action²⁰. The failure to undertake that conduct would prima facie constitute an internationally wrongful act attracting international responsibility²¹. Obligations of result refer to obligations to achieve a specified result, outcome or state of affairs. The means by which the state is to achieve that result are not specified by the obligation. So the state has discretion over what means to adopt to achieve the result required by an international obligation of result²².

¹⁹ The idea of an obligation of result and that of an obligation of conduct was considered by the International Law Commission at an earlier stage in its work on state responsibility. While noting these concepts have become an "accepted part of the language of international law", the International Law Commission deleted them from its final draft articles on state responsibility. The ILC concluded the concepts were not determinative of when an international wrong occurred triggering a State's international responsibility. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, pp. 20 - 22.

²⁰ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 12, para. 1.

²¹ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 18, para. 23.

²² Report of the International Law Commission (1977) 2 *Yrbk. ILC* 12, para. 1, "There are other cases in which the international obligation only requires the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses."

The ILC went on to note that “every international obligation has an object or, one might say, a result [that] requires of the obligated State a certain course of conduct.”²³. So under an obligation of result, the state actor is obligated to achieve a specified result by undertaking a particular course of conduct. The same can logically be said of obligations of conduct where the action specifically determined in the obligation must result from a certain course of conduct undertaken by the state. For instance, Article 6(2) of the International Covenant on Economic, Social and Cultural Rights²⁴ consists of an obligation of conduct because it requires of states parties a specifically determined action, namely that:

The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes.²⁵ (emphasis added)

Clearly the state party complying with Article 6(2) will have to undertake ‘a certain course of conduct’ to provide the ‘technical and vocational guidance and training programmes’ stipulated in the provision. In this sense the distinction between ‘obligations of conduct’ and ‘obligations of result’ is a distinction without a difference, at least for the purposes of determining when an international wrong had occurred, which was one of the reasons why that distinction was deleted from the final draft Articles on State Responsibility.²⁶

²³ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 13, para. 8.

²⁴ International Covenant on Economic, Social and Cultural Rights (1966), entered into force 3 Jan. 1976, General Assembly Res. A/RES/2200A (XXI), 993 UNTS 3.

²⁵ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development*, Oxford University Press, 1995, p. 109; Philip Alston and Gerard Quinn, ‘The Nature and Scope of the Parties’ Obligations under the ICESCR’, p. 185, footnote 106.

²⁶ James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, pp. 20-22.

But the fate of the ILC's distinction between obligations of conduct and result is not relevant to the purpose here of explaining the concept of compliance requirements in relation to norms of international law by analogy with the idea of conduct or actions required of states for compliance with obligations under international law. Instead what is relevant to note is that 'the course of conduct' required to comply with an international norm is the object of interest and is by definition never specified, being left to the actor to determine in any particular case. Nevertheless, what is evident from the ILC's 1977 report on its work on state responsibility is that what it had in mind when it discussed these concepts was that 'course of conduct' was synonymous with the measures the state actor may take to attain the result specified in an obligation of result.²⁷ And an example of such a measure that the ILC referred to was the enactment of relevant legislation.²⁸

But identifying the measures an actor ought to take to comply with an international norm, while necessary, is insufficient to fully identify its compliance requirements in relation to that norm. Take the example of a state faced with the obligation in Article 6(2) of the ICESCR of having to provide the 'technical and vocational guidance and training programmes'. There may be legislative, administrative, financial and technical measures the state would have to take to comply with this obligation. But there is also a need to systematically and validly think through how these measures would have to be orchestrated to produce the result required of the obligation, or in other words, for the

²⁷ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 27, para. 23: 'What matters is that the result required by the obligation should in fact be achieved; if it is not, a breach has been committed, whatever measures are taken by the State.' (emphasis added)

²⁸ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 23, paras. 8, 14-16.

state's conduct to conform to that required by the obligation. For instance, how to account for the possibility that the legislation adopted has unintended negative effects? Or how to think through the monitoring of the measures adopted by the actor when they are applied in practice? These considerations need to be accounted for in addition to the measures comprising an actor's 'course of conduct' when seeking what the actor is to do to comply with an applicable international norm.

So some other requirements for compliance are needed in addition to the elements of a course of conduct the actor may adopt. The other requirements can be identified from theories of compliance with international norms and from considerations arising from the concept of compliance itself. Together with the acts or omissions comprising an actor's adopted course of conduct for complying with an international norm, these other requirements make up the set of compliance requirements relating to a particular actor in a particular situation. Thus the compliance requirements relating to an international norm can be defined as *the set of acts and omissions, plus the considerations for orchestrating them, that are required for an actor to achieve or maintain compliance in a particular case or compliance situation.*

In sum, compliance requirements comprise behaviours dictated by the content of a norm as well as the procedural or organisational aspects of achieving compliance with the norm. In other words, where the approach to an issue is norm compliance, the range of prescriptions that may be validly considered can be broader than those comprising the

content of a norm as decision-makers have to make an *ex ante* determination of what they need to do in order to comply with a norm.

So in any compliance situation there will be the following three basis for the actor's compliance requirements, namely (1) the theories of compliance, (2) considerations arising from the concept of compliance and (3) the applicable international norms. Basis (1) and (2) are addressed in Chapter 2 of this thesis, while basis (3) is addressed in Chapters 3 and 5.

One feature worth noting about the idea of 'compliance requirements' is that it is broad in scope. Firstly, it applies to non-binding as well as binding international norms. Second, it applies to compliance situations involving states as well as non-state actors like corporations and international organisations. The idea of 'course of conduct' is not limited to cases involving states' compliance with international obligations and so a way to systematically think through what is to be done to comply with an international law, or 'the course of conduct' that can apply to both states and non-state actors can be useful.

It needs to be explained how the idea of 'compliance requirements' relates to the content of a international norm. Whether it is prescribed by the norm or not, the content of the norm must still be worked out for a particular compliance situation. This is because the compliance requirements must work to that content. That content can be identified by interpretation according to the Vienna Convention on the Law of Treaties²⁹ if it is a treaty

²⁹ 1155 U.N.T.S. 331, Article 31.

norm. Or that content can be identified by some other mode of authoritative interpretation, for example by an international tribunal. So in undertaking that review the international tribunal or body would have to interpret and apply the obligation to the case before it. In doing so it would employ concepts like reasonableness, the margin of appreciation and proportionality. As such those concepts would operate to define the obligations requirements of the actor and allow the international tribunal or body to see if the actor has acted in a manner that is “not in conformity with what is required of it by that obligation”³⁰. Those concepts will also define part of the compliance requirements of the actor concerned and can be transposed to the case of an actor not legally bound by the international norm that imposed that obligation but is nevertheless seeking or expected to comply with that norm.

And such a transposition would be valid because:

- (1) Implicitly, the underlying rationale of those concepts would probably apply where the norm was not binding.
- (2) Explicitly, the non-binding norm could be based on the binding norm ‘as interpreted and applied’.
- (3) The non-binding norm itself could be ‘interpreted and applied’. For instance, non-binding guidelines can be given an authoritative interpretation.

³⁰ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 125.

In conclusion, this section explained and defined the concept of compliance requirements with norms of international law. The next section addresses some other relevant conceptual considerations.

1.3. Conceptual considerations

The subject addressed in this thesis is the identification of an actor's compliance requirements in relation to norms of international law. Two concepts relating to that subject need to be examined further. One is the concept of actor under international law. The other is the concept of norm of international law. These concepts and particular considerations relating to them from the perspective of compliance with international law norms will be discussed in this section.

1.3.1. Actors

The concept of actor under international law has traditionally referred to states. The fact of states as the makers of international law and international law as the law governing the relations between states clearly meant that states were subjects of international law and as such possessed international legal personality, that is the ability to possess duties and exercise rights under international law. The more prominent role played by international organisations after World War Two led to their also being recognised as possessing international legal personality.³¹ Whereas states enjoy full legal personality, international organisations have limited legal personality, shaped to the extent needed to carry out their

³¹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 1949 ICJ Rep., p. 147 ('Reparations'). See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ Rep. 73, pp. 89-90.

functions and tasks. But whether their personality was full or limited, these actors could acquire duties and obligations under international, giving rise to issues as to whether they were or were not in compliance with the international norms that applied to them.

But international law has widened in scope over the years and now instruments and norms of international law may be directed not only at states and international organisations but also at other non-state actors like individuals and corporations.³² So now the category of ‘actor under international law’, or more accurately, ‘actor whose conduct is governed by a norm or norms of international law’ is a very broad one. For instance, as noted in relation to the Vedanta plc example given in the previous section, corporations, which otherwise do not have legal obligations under international law concerning human rights, can be expected to comply with the norm ‘respect human rights’, and be held accountable for not respecting international recognised human rights in their operations in a particular country.

The actor’s normative characteristics

Thus an actor can be expected to comply with a norm of international law even if such a norm is not legally binding on the actor under international law. Instead, from a compliance perspective, the key characteristic of an actor to consider is its operative normative environment.³³ An actor’s operative normative environment refers to all the

³² Hilary Charlesworth and Christine Chinkin, ‘Regulatory Frameworks in International Law’, in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds.), *Regulating Law*, Oxford University Press, 2004, p. 248; Anne-Marie Slaughter, ‘International Law and International Relations Theory: Twenty Years Later’, in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The state of the art*, Cambridge University Press, 2013, p. 619.

³³ Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan Journal of International Law*, 345 (1998), p. 363.

norms applicable to the actor, or governing its conduct, at any one time³⁴. The norms may be applicable due to the operation of law, the actor's voluntary acceptance of them, or because of societal expectations that the actor comply with them. Whatever is the basis for the norm's application will depend on the characteristics of the particular actor. Accordingly, the actor's characteristics, specifically their normative aspects, will be one key determinant for identifying its compliance requirements relating to the relevant international law norms in a particular case.

While the idea of 'norms of international law' and the nature of norms will be further developed in the next section, a particular implication of the fact that actors can face expectations of compliance with norms of international law even if they lack international legal personality bears noting. This decoupling of compliance from an actor's international legal personality means that analysing an actor's conduct from a compliance perspective can give a more complete picture of the regulatory effect of international law as that regulatory effect is not limited to cases where actors have duties under international law. This implication is relevant for instance in cases where some states may not have signed and ratified certain treaties but yet are not free to act contrary to the particular treaty provisions. And it has resonance in cases where gaps in international law may be noted as in the example of corporations that lack obligations concerning human rights under international law but whose conduct can substantially

³⁴ So in the diagram of the CSF later in this chapter, the Actor category is followed by the Norms category. In the Actors category, consideration is given to the actor's operative normative environment, that is to all the norms governing the actor's conduct at the time. Then in the Norms category, the norms relating to the compliance issue in a particular case are considered in light of, or given the actor's normative environment.

affect the enjoyment of those rights or the ability of states to meet their obligations regarding human rights.

As already noted, companies can face expectations of compliance with internationally recognised human rights norms even where such norms are not legally binding or where the companies may not have voluntarily adhered to them. So perceived gaps in international law may not appear to be so in terms of an actor's actual conduct, suggesting, as indicated, that the regulatory effect of international law may be more coherent and whole in practice. It is thus submitted that such a characterisation of international law's regulatory effect can be better analysed from a compliance perspective.

But the application of international law norms to a variety of actors irrespective of their international legal personality can give rise to the problem of systematically identifying their compliance requirements, especially where such norms are usually designed to regulate state conduct. In such cases, the issue arises as to how those norms may be translated or transposed to the case of non-state actors. As noted in the Section 1.1, even the requirements for compliance with international law norms that are legally binding on state actors may not be precisely known because the content of such norms have not been precisely defined.

Although there is no systematic approach to the issue of validly and appropriately transposing the compliance requirements in relation to an international norm from one

category of actor to another, ad hoc examples of doing so exist. So for instance, the codified customary law of treaties has been transposed to the case of international organisations.³⁵ And elements of the international law of responsibility for states and of criminal responsibility for individuals have been transposed to the case of identifying the human rights duties of corporations.³⁶ In the latter case it was suggested that in transposing the norms concerned it was necessary to explicitly recognise where the norms relating to one category of actor could apply to another category of actor and where they would not. In the specific case, this involved determining ‘the similarity or differences between corporate behaviour in the area of human rights and individual or state behaviour’, the norms being transposable, at least *prima facie* arguably so, where the behaviour was similar as to how it affected the enjoyment of human rights³⁷.

It is submitted that recognising such similarities or differences in behaviour involves a focus on the actor’s operational characteristics. Such a focus should go together with a consideration of an actor’s normative characteristics, such as that discussed above in relation to the actor’s normative environment, to determine comprehensively the norms applicable to the actor, whatever the issue area and whether the norms are legally or non-legally binding. The focus on the actor’s operational characteristics, from the perspective of compliance, is discussed next.

³⁵ Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, 2007, p. 400, referring to the adaptation of the 1969 Vienna Convention on the Law of Treaties, entered into force 27 Jan. 1980, 1166 UNTS 331, to the case of international organizations in the form of the yet to come into force 1986 Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations, ILM (1986) 543.

³⁶ Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal*, 2001, pp. 443-545.

³⁷ Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal*, 2001, pp. 443-545, at p. 496.

The actor's operational characteristics

As mentioned the operational characteristics of the actor are a key factor to consider and will influence the compliance requirements identified for an actor in relation to the international norms applying to it. This is because the manner of the actor's operations will determine to a large extent the manner in which its conduct affects the rights and interests protected by such norms. In this regard the compliance requirements for a state actor and for a non-state actor will differ because they operate differently from one another, including in the manner which affects the subject-matter of international norms. But, it may be the case that at a general level there is similarity in operation and this allows the transposition of the norms regulating states to the regulation of like conduct by non-state actors. Nevertheless, the specific compliance requirements will likely still be influenced by the particulars of the actor's operations.

Another reason why the actor's operational characteristics matter for the identification of its compliance requirements is that those requirements will depend on the actor's capacity to comply.³⁸ And that capacity is a function of the actor's characteristics. For instance, a state's administrative capacity is a key determinant of its compliance with international norms.³⁹ A number of factors are found to be relevant in this regard; the education and training levels of administrative staff, the financial support

³⁸ Peter M. Haas, 'Choosing to Comply: Theorising from International Relations and Comparative Politics', in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International System*, Oxford University Press, 2003, pp. 43-64.

³⁹ Harold K. Jacobson and Edith Brown Weiss, 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project', *Global Governance* 1 (1995), pp. 119-148, at p. 141. ('Strengthening Compliance')

given to administrative agencies, and whether administrative bodies or officers are cloaked with adequate authority to carry out the tasks assigned to them.

Capacity builds up over time so different actors will be situated differently in terms of their ability to comply with international norms depending on how they have performed in relation to the subject-matter of the norms in the past. Actors that already have a good track record of performance in a subject area are likely to be better able to comply with international norms regulating that area.⁴⁰ And while economic factors can be important determinants of the ability to comply, in many cases the issue may not be how many resources are available but how well or appropriately the available resources are employed. Thus it has been found that in the area of newborn and maternal health, variations in health outcomes sometimes had less to do with a country's economic position than with whether its health personnel were applying appropriate techniques and interventions. The level of training, as mentioned above, can thus be a stronger determinant in such instances.⁴¹

Governance factors are another facet of an actor's capacity to comply. In large countries and large organisations, especially multinational corporations with operations in different countries, it may be more difficult to control local units and ensure they all operate to the same level.⁴² Also the extent to which political systems operate

⁴⁰ Harold K. Jacobson and Edith Brown Weiss, 'Strengthening Compliance', p. 140.

⁴¹ Shyama Kuruvilla, Flavia Bustreo, Paul Hunt, Amarjit Singh, et al., 'The Millennium Development Goals and Human Rights: Realizing Shared Commitments', *Human Rights Quarterly* 34 (2012), 141-177.

⁴² Harold K. Jacobson and Edith Brown Weiss, 'Strengthening Compliance', p. 142.

transparently and allow watchdog groups like relevant civic groups and non-governmental organisations (NGOs) to operate effectively, affects the level of compliance with international norms. With transparency and effective watchdogs groups there can be better performance of an actor's efforts at compliance and less chance for the actor to deviate from compliance or for efforts at compliance to stall or take a wrong turn so that time and resources are wasted.⁴³

But it is not only collective actors that can make a difference to levels of compliance. The attitudes and capabilities of individuals matters as well. For instance, national leaders or leaders of corporations can make a difference to how well states or corporations comply with international norms. For instance an international oil company operating in an Asian country would choose to comply with its own stricter environmental codes than the country's environmental laws because the company's chief executive office (CEO) had made it a priority to ensure the company's operations would not adversely affect the environment. And because the company's managers in the Asia country knew that if there were to be an environmental problem it would definitely be brought to the CEO's attention, they ensured that operations in that country complied with the company's environmental codes.⁴⁴

In addition to an organisation's leaders, the attitudes of individuals affected by the organisation's activities matters as well. With greater access to information, individuals

⁴³ Harold K. Jacobson and Edith Brown Weiss, 'Strengthening Compliance', p. 142.

⁴⁴ Personal communication to the author from one of the company's managers in the Asian country concerned.

are better able to demand their rights and entitlements. Having information and access to information can be empowering and has a heritage reaching back to the first printing presses that made books and pamphlets more cheaply and readily available helped spread the ideas of representative government and individuals rights and liberties that scholars and individuals like Jonh Locke and Thomas Paine wrote about to fuel the American Revolution and provide the constitutional foundations of the newly formed United States of America. And such ideas have resonated through the years, probably because they manifest a fundamental truth about the trajectory of human societies, that as they become more developed and settled and secure, the individual comes to the fore, so that with the Internet and e-commerce and information technology, the voices of individuals are heard more and more, whether in the blogs they self-publish or the individualised ring-tones they carefully download onto to their phones. There is a demand for individuality that the vendors of ring-tones are ready and willing to supply and so the idea of the empowered self becomes more and more of a reality.⁴⁵ Thus the role of the individual must also be considered in relation to the actor's operational characteristics, both from the perspective of the actor's leadership and the people affected by the actor's operations.

1.3.2. Norms

The concept of 'norms' must be clarified both as a matter of providing a definition that informs the use of the term in this thesis and because in the literature on international law

⁴⁵ Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism*, Oxford University Press, 1999. Of course, with technology's benefits comes the potential for wrongful use. For example, the degree of electronic surveillance governments employ and the use of pilotless drone airplanes to bomb locations identified by electronic signatures from the phones used by enemy targets, may be considered wrongful use of technology.

and compliance with international norms, the term ‘norms’ is sometimes interchangeably used with the terms standards.⁴⁶ Additionally, researchers in the area of international regulation have noted that actors in that area refer to concepts like ‘principles, standards, rules or guidelines’⁴⁷. So this section begins with a clarification of the concept of ‘norms’. It then discusses two considerations arising from the idea of identifying compliance requirements with norms of international law.

Norms can be regarded as ‘prescriptions for actions in situations of choice’⁴⁸ and as including ‘all rules of conduct’⁴⁹. For the purposes of this thesis, the concept can also be usefully regarded as including ‘rules, principles, standards and guidelines.’⁵⁰ So principles, standards, rules and guidelines are all types of norms in that they all prescribe some conduct or behaviour that the actor to whom they are directed must or is expected to comply with. The concepts ‘principles’ and ‘rules’ are related in a specific manner in that ‘[r]ules prescribe relatively specific acts; principles prescribe highly unspecific actions’⁵¹. So once the general agreement as to the actor’s conduct has been settled in the

⁴⁶ For example, ‘Standards are typically set directly by the primary actors of international law, sovereign states. This means that international legal norms are highly negotiated, allowing considerable leeway for differences among states.’ (emphasis added): Hilary Charlesworth and Christine Chinkin, ‘Regulatory Frameworks in International Law’, in John Braithwaite, Christine Parker, Nicola Lacey, Colin Scott (eds.) *Regulating Law*, Oxford University Press, 2004, pp.246-268.

⁴⁷ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 19.

⁴⁸ Abram Chayes, Antonia Handler Chayes and Ronald B. Mitchell, ‘Managing Compliance: A Comparative Perspective’, in Edith Brown Weiss and Harold Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, 2000, p. 42.

⁴⁹ Dinah Shelton, ‘Introduction’, in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5.

⁵⁰ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 19.

⁵¹ Joseph Raz, ‘Legal Principles and the Limits of Law’, 81 *Yale Law Journal* (1972) 823-854, p. 838.

form of an applicable principle, then rules, or the more detailed prescriptions for the actor's conduct may be produced or designed.⁵²

Standards, as prescriptions for an actor's conduct operate differently from principles and rules in that they set some measure against which to assess the actor's conduct for compliance.⁵³ The literature identifies two types of standards. On the one hand they can be highly specific like standards against which to measure a bank's capital adequacy levels or a corporations accounting practices⁵⁴. The other conception of 'standards' calls for the determination of what conduct is permissible according to the facts of the particular case⁵⁵. Thus standards may be established by reference to concepts like 'due care', 'due diligence', 'best interests' or 'reasonableness'.⁵⁶ In relation to this second type of standard, the enquiry as to whether the actor has complied will necessarily be a subjective one, undertaken on a case-by-case basis, taking into account all the circumstances of the case or the compliance situation.

Finally, guidelines are directions for conduct where more settled norms of conduct like principles, rules or standards are yet to be achieved. While actors may appreciate that their conduct in a particular may need regulation, the precise form and

⁵² John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 19.

⁵³ Dinah Shelton, 'Introduction', in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5; John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 19.

⁵⁴ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 20.

⁵⁵ Louis Kaplow, 'Rules Versus Standards: An Economic Analysis', 42 *Duke L.J.* 557 (1992-1993), p. 560.

⁵⁶ Louis Kaplow, 'Rules Versus Standards: An Economic Analysis', 42 *Duke L.J.* 557 (1992-1993), p. 559-560; Frederic Schauer, *Thinking Like a Lawyer: A new introduction to legal reasoning*, Harvard University Press, 2009, p. 189; Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *Am. J. Int'l L.* 179 (2010), p. 19.

nature of such regulation has yet to be agreed upon.⁵⁷ For instance, the area in which the actors are operating may be undergoing rapid development necessitating the need for the adoption of guidelines as a provisional regulatory measure.⁵⁸ The relationship of principles, rules, standards and guidelines just described is represented in Diagram 1 below. In considering this relationship it bears noting that norms are not static. They can evolve in the direction of wider acceptance and greater concreteness and specificity. Thus a guideline can over time become a principle that generates rules.⁵⁹

⁵⁷ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 20.

⁵⁸ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 20.

⁵⁹ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 20.

Diagram 1. Illustrating the relationship between norms, principles, rules, standards and guidelines (from Braithwaite and Drahos⁶⁰).

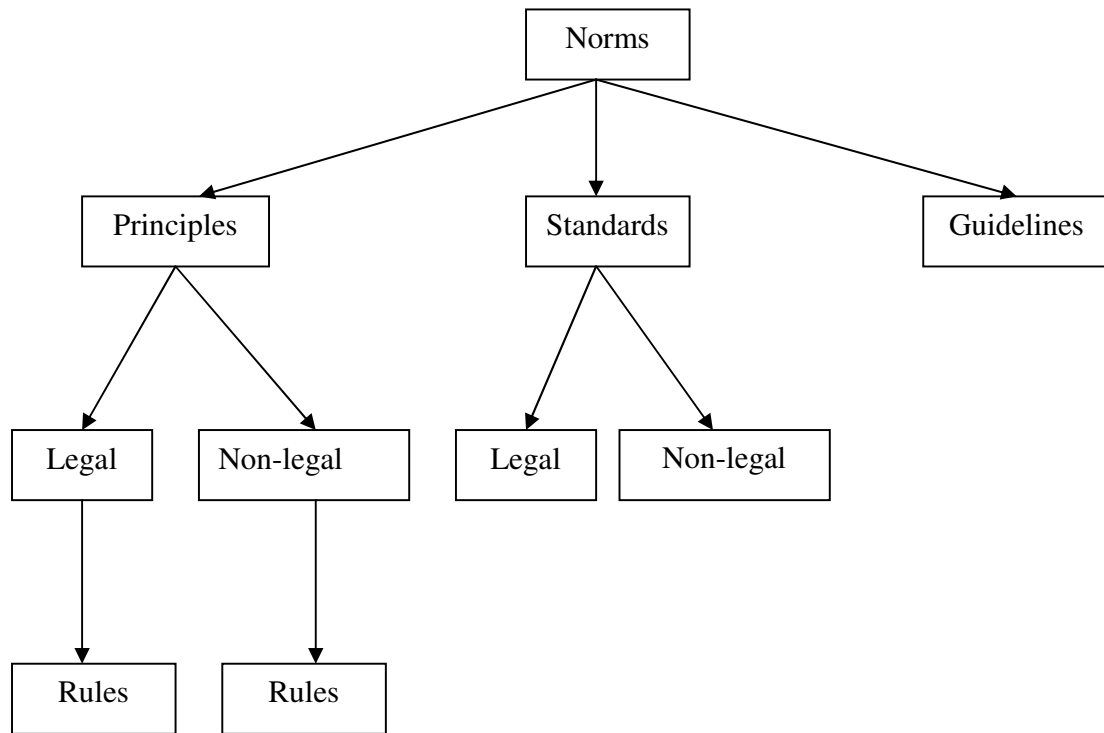


Diagram 1 emphasises the general nature of the category ‘norms’ and while in this thesis the general term ‘norm’ is used, in any particular case such usage may refer to a principle, rule, standard or guideline. And in any particular area of international law being considered, two or more of these concepts may be in operation. For example, in the area of human rights, the applicable prescription may be to ‘respect human rights’. In relation to the scheme represented in Diagram 1, ‘respect human rights’ would be termed a principle as it is a general indication or agreement as to the conduct expected of the

⁶⁰ John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, p. 20.

actor. That general conduct could be specified further, as for instance where a human rights treaty body issues general comments to indicate more specific measures for a state party to the human rights treaty to adopt. In terms of Diagram 1, the provisions setting out the more specific conduct would be regarded as rules.

Internationally recognised human rights may also be defined by standards. For instance, many of those rights are subject to permissible limitations or derogations. Thus the human right to take part in the conduct of public affairs may be subject to restrictions provided such restrictions are not unreasonable.⁶¹ The prescription of conduct here is a standard as it calls for the determination of whether the conduct at issue is reasonable or not according to the facts of the particular case. So in one area, norms of the type ‘principles’, ‘rules’ and ‘standards’ may be in operation at any one time in relation to a particular case. As norms they all prescribe conduct in relation to the actor concerned. And in analysing an actor’s compliance requirements in relation to a particular case, the clarification of the type of norm that is being applied can be useful for clearly defining the set of applicable norms in relation to which those compliance requirements are to be identified. Section 4.1.1. examines how the analysis of international human rights norms in terms of principles and standards is relevant to identifying compliance requirements in relation to such norms.

⁶¹ International Covenant on Civil and Political Rights (1966), entered into force 23 March 1976, General Assembly Res. A/RES/2200A (XXI), 999 UNTS 171, Article 25: ‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives’.

As noted in the previous section, norms can either be legally binding under international law or non-legally binding. This fact is recognised in Diagram 1 in the reference to principles and standards being non-legal. And as norms evolve, a non-legal norm can evolve into a legal norm over time. From a compliance perspective the key feature of the norm is whether it induces the actor to comply and in this sense the concept of compliance can be said to be agnostic about causality.⁶² The prevalence of non-legally binding codes that are not based on agreements between states highlights the expanded scope and reach of international law.⁶³ So when identifying its compliance requirements, the actor's operative normative environment must be considered fully to cover all applicable norms.

But the expansion of international law, including through non-legally binding norms, increases the risks that norms within an actor's operative environment will conflict with one another, exerting mutually pressures for compliance on the actor.⁶⁴ This feature of norms is discussed next, including how an approach based on identifying an actor's compliance requirements can help resolve such norm conflicts.

⁶² Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations*, Sage Publications, 2002, pp.538-558, at p. 539; Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000. See Chapter 2, Section 2.4.1. for further discussion on the issue of compliance and causality.

⁶³ Jose Alvarez, *International Organisations as Law-makers*, Oxford University Press, 2006.

⁶⁴ International Law Commission, 'Risks Ensuing From Fragmentation of International Law', paper by Gerhard Hafner in Report of the International Law Commission on the work of its fifty-second session (1 May – 9 June and 10 July – 18 August 2000), A/55/10, pp. 143 - 150.

1.3.3. Fragmentation

The previous section touched on the possibility of there being conflicting norms governing a particular compliance situation. This problem has been analysed in the international law context under the rubric ‘the fragmentation of international law’.⁶⁵ The International Law Commission (ILC) studied this problem from 2002 to 2006 after the topic ‘Risks ensuing from the fragmentation of international law’ was included in its programme of work in 2000.⁶⁶ The risks alluded to by the ILC were those of

generating frictions and contradictions between the various legal regulations [such] ... that States even have to comply with mutually exclusive obligations.⁶⁷

That international law comprises various legal regimes is not a recent phenomenon and can be traced to the lack of a centralised legislative body at the international level to develop a harmonised body of international norms.⁶⁸ But in recent years the reach of international law has expanded and deepened. The growth of the influence of international organisations on international law-making, particularly after World War Two has likely contributed to development of parallel regimes and regulations. This in turn has been added to by the growth in international cooperation

⁶⁵ See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006 (‘Final Report on the Fragmentation of International Law’).

⁶⁶ International Law Commission, ‘Risks Ensuing From Fragmentation of International Law’, paper by Gerhard Hafner in Report of the International Law Commission on the work of its fifty-second session (1 May – 9 June and 10 July – 18 August 2000), A/55/10, pp. 143 – 150 (‘Risks Ensuing From Fragmentation of International Law’).

⁶⁷ *Risks Ensuing From Fragmentation of International Law*, p. 144.

⁶⁸ *Risks Ensuing From Fragmentation of International Law*, p. 145; Final Report on the Fragmentation of International Law, p. 10; Christian Leathley, ‘An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?’, 40 *N.Y.U. J. Int’l L. & Pol.* (2007), pp. 258-306, p. 262.

because of newly significant problems like international terrorism and because traditional alliances broke down with the end of the Cold War, allowing the space for new alliances and regulatory frameworks to arise.

Alongside these developments and as part of them, autonomous legal regimes have developed, each with their own normative or ideological biases and self-contained systems for norm-creation, adjudication and enforcement.⁶⁹ These include those relating to trade, human rights, the environment, diplomacy, crime prevention and security. And such regimes are supported by the relevant United Nations specialised agencies or other relevant international organisations and international non-governmental organisations, resulting in the

emergence of regimes of international law that have their basis in multilateral treaties and acts of international organisations, specialized treaties and customary patterns that are tailored to the needs and interests of each network but rarely take account of the outside world.⁷⁰

The fragmentation problem the ILC analysed concerned situations where states face conflicting obligations under international law or where disputes under international law may conceivably be addressed under separate regimes and therefore come under the jurisdictions of different tribunals or courts depending on how such disputes are characterised.⁷¹ Accordingly, the solution produced by the ILC was a mode of legal reasoning that involves working through the conflicting legal norms governing a

⁶⁹ Final Report on the Fragmentation of International Law, p. 11.

⁷⁰ Final Report on the Fragmentation of International Law, p. 244-245.

⁷¹ Final Report on the Fragmentation of International Law, p. 12-13.

particular case by recourse primarily to the articles of the Vienna Convention on the Law of Treaties.⁷²

The problem of systematically identifying compliance requirements with norms of international law overlaps with the problem of the fragmentation of international law in that there also the issue of conflicting norms of international law can arise. For example, an area that has raised issues of fragmentation of international law is the potential for conflict of norms between the regimes for the protection of international investment and for the protection of internationally recognised human rights⁷³. It has been suggested that arbitral tribunals facing such issues in the course of investment treaty arbitrations may adopt an approach that takes account of the applicable human rights norms relating to the investor's host state. And that this could be done as part of the interpretation of the investment treaty, where international law is the applicable law, and as part of determining what the investor's legitimate expectations might have been in relation to the investment.⁷⁴ It is suggested that the substance of both these types of inquiries could also be approached by inquiring into the investor's compliance requirements in the particular case. This is because the substance of such enquiries involve establishing a balance between the investor's rights and the state's right to regulate conduct in its own territory in order to meet its international commitments,

⁷² Final Report on the Fragmentation of International Law, p. 245.

⁷³ Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection', University of St. Gallen Law School Law and Economics Research Paper Series, Working Paper No. 2008-1, pp. 25-28; P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Dupuy, Francioni & Petersmann (eds), *Human Rights in International Investment Arbitration* (OUP, Oxford, 2009), pp. 45-62.

⁷⁴ Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', *ICLQ* Vol. 60, July 2011, pp 573-596, at pp. 591-592 and 594-596.

including those relating to human rights. As indicated above, the approach to identifying an actor's compliance requirements involves assessing all normative frameworks applicable to an actor and resolving any norm conflicts through a principled balancing of the interests involved. Doing so in a transparent manner can result in a valid and legitimate resolution of any competing interests. Such an approach as is proposed in this thesis therefore could help resolve the conflict of norm problem just described that can be faced by investment arbitration tribunals.

The perspective taken here in addressing the issue of systematically identifying compliance requirements in relation to international law norms is different from the approach of the ILC in its work. So is the scope of the perspective in this thesis. Accordingly, the proposed solution will be of a different nature from the ILC's as well.

In addressing the issue of identifying compliance requirements with norms of international law, the perspective is one of bringing the actor seeking to comply or expected to comply with an international law norm into compliance and to maintain that compliance. As such the compliance requirements perspective is concerned with addressing issues before a dispute arises and so before the problem of being at risk due to the operation of mutually exclusive obligations or commitments comes about. The scope of the compliance requirements approach is also different in that it also applies to the case of non-state actors and to the case of non-legally binding international law norms, whereas the ILC, in addressing the problem of fragmentation in international law, was

concerned with the situation of states facing conflicting international legal obligations and issues.

Accordingly the solution from the perspective of identifying an actor's compliance requirements in relation to international law norms is different. It involves thinking through and identifying the actor's compliance requirements so that its conduct can proceed in a valid and legitimate way according to the applicable international norms. This in turn involves thinking through an actor's operative normative environment, the set of legally binding and non-legally binding international norms governing the actor's conduct. Such a comprehensive consideration matters so as to ensure the compliance requirements may be legitimate, which may not be the case if the requirements are worked through and identified in the context of the issue area concerned alone. And because it is perceived to be more legitimate, and takes account of the requirements of other applicable areas of international law, such an approach is also able to address concerns emanating from those areas. Ultimately, it can build on complementarities between the issue areas. The result can lead to the strengthening of the first issue area itself, in terms of its acceptance by and coherence with other regimes, and of the international legal system as a whole. So for example, in the area of human rights, it has been noted:

Thus the capability of the international legal system to be relevant to human rights requires dislodging legal and conceptual boundaries between, for example, human rights law and international economic law, between state sovereignty and transnational law,

between international humanitarian law and military necessity, between law and non-law and between states and non-state actors.⁷⁵

Recalling the discussion on the concept of ‘norm’ in Section 1.2.2., it is noted that the actor’s operative normative environment takes account of all applicable principles, rules, standards and guidelines. In dealing with cases involving different and sometimes conflicting international law issue areas, the role of applicable standards can be particularly important. The standards referred to here include such standards as ‘reasonableness’, due diligence and the standard of necessity.⁷⁶ The application of such standards, which take account the actor’s circumstances and the facts of the compliance situation allow for the principled balancing of interests that should be undertaken in situations covered by conflicting norms. The compliance requirements identified through such a principled balancing approach are likely to be seen as more legitimate and valid than if they were determined in a manner perceived as less fair.

This section considered three conceptual issues pertinent to the issue of identifying an actor’s compliance requirements with norms of international law. First, the relevance of the actor’s characteristics to making such an inquiry was considered. The actor’s capacity for compliance with an applicable norm is a key factor in determining its compliance requirements in relation to that norm because those requirements must suit the actor’s capacity to be workable and sustainable. Second the concept of ‘norms’ was

⁷⁵ Christine Chinkin, ‘International Law and Human Rights’, in Evans (ed.) *Human Rights: Fifty Years On: A reappraisal*, Manchester University Press, 1998, pp. 105-129, at p. 121.

⁷⁶ That is the type of standards calling for the determination of compliant conduct according to the facts of the particular case as opposed to highly specific standards in the sense of a financial sector’s capital adequacy standards.

discussed in terms of its relation to other concepts like principles, rules, standards and guidelines as well as the relationship between those concepts. Finally, the problem of norm conflict in relation to international law or the fragmentation of international law was considered. The approach to identifying compliance requirements in relation to norms of international law that is examined in this thesis can provide a solution for resolving such conflicts in certain cases. It was noted that this approach is more comprehensive in scope than other approaches that might apply only to traditional subjects of international law such as states and only to cases on conflicting international legal norms. The approach to identifying compliance requirements reflects the full regulatory effect of international law in its application to the case of non-state actors and to both legally binding and non-legally binding norms. The next section outlines this approach in more detail in terms of the solution this thesis proposes to the problem of identifying compliance requirements in relation to norms of international law.

1.4. The proposed solution and its application

The proposed solution to the problem of identifying compliance requirements in relation to international law norms is a systematic approach to thinking through and identifying such requirements for a particular actor faced with the task of, or seeking to comply with, such norms. It comprises and synthesises elements derived from: (1) aspects of the concept of compliance, (2) theories of compliance with international law and (3) applicable concepts and norms of international law. The proposed solution has two parts.

First, the proposed solution involves systematically thinking through some key elements of an actor's compliance situation. There are three main elements of that situation:

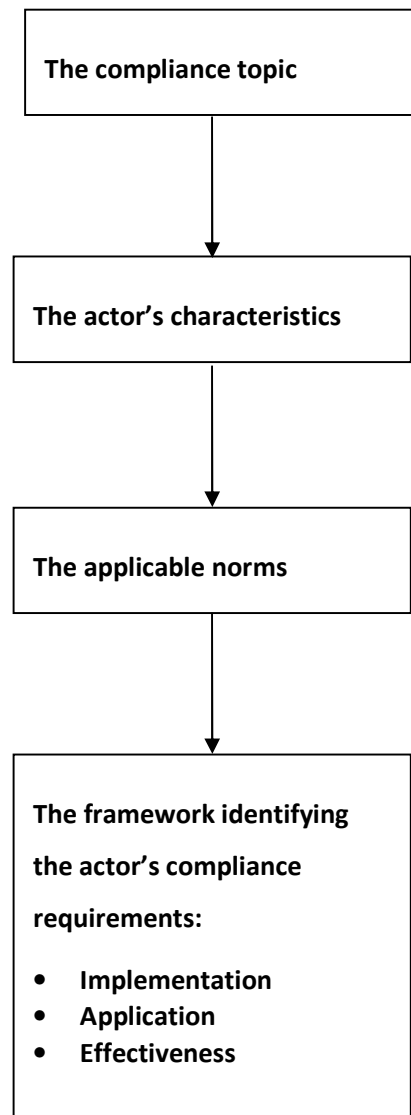
1. The compliance topic, which is the issue concerning which the actor's compliance is sought by the actor itself or expected of the actor by external interested parties. Any compliance topic will lead to the adoption of a 'course of conduct' whether the topic has to do with international trade law, environmental law, investment law, and so on.
2. The actor's characteristics made up of its normative environment⁷⁷ and its operational aspects. The actor's normative environment includes all norms governing the actor at the time the compliance issue arises, not just the norms concerning the compliance issue. This means that all norms affecting the actor's conduct are taken into consideration irrespective whether they are legally binding or not, whether they conflict or are from the same international law issue area or not. All such norms are part of an actor's operative normative environment and need to be considered in thinking through the actor's compliance requirements relating to the compliance issue.
3. The applicable international law norms. These refer to the norms relating to the compliance topic as they are defined or contextualised given the actor's characteristics, that is its operative normative environment and operational details.

Altogether, these three elements provide the basis for working through that actor's compliance requirements given its particular compliance situation. The actor's compliance requirements themselves are identified in terms of three categories:

⁷⁷ Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law*, 345 (1998), p. 363.

implementation of measures for compliance ('implementation'), application of those measures ('application') and determining the effectiveness of those measures ('effectiveness'). These three categories make up the Compliance Framework (CF) for identifying the actor's compliance requirements as represented in the last box of Diagram 1. Altogether, the four components of Diagram 2 are referred to as the Compliance Strategy and Framework (CSF) where the Compliance Strategy (CS) is a road map to systematically identify compliance requirements under international law that incorporates the Compliance Framework (CF), which sets out those requirements.

Diagram 2: Elements of a systematic approach to identifying an actor's compliance requirements in relation to norms of international law.



To help explain it further the CSF can also be described in reverse order, starting with the last box in Diagram 2 above. So to identify the compliance requirements in a particular case or compliance situation, it is necessary to know precisely which norms control that situation. These specifically applicable norms are ascertained by first considering the normative aspects of the compliance topic and then applying them to the case of the actor concerned. Doing so involves taking into account the actor's normative and operational characteristics. Applying the compliance topic to these aspects of the actor concerned yields the generally applicable norms for the compliance situation under consideration and for which the compliance requirements need to be identified.

As already mentioned, the elements of the CSF will be developed and explained in the following chapters with part of the explanation undertaken by illustrating the use of the CSF in systematically identifying and specifying the actor's compliance requirements in relation to international human rights norms. Accordingly, the uses of the CSF in terms of specific international law issues area concerning human rights will also be discussed. In this section, the use of the CSF will be discussed in more general terms.

Of course it may not be possible to identify all compliance requirements for norms of international law. The components or behaviour may be so numerous, varied and constantly changing as to defy attempts at identifying them. There may be a virtually limitless number of compliance requirements because the numbers of cases that can arise is also virtually limitless and each will have its particular set of requirements. But it is submitted that a basic set of compliance requirements can be discerned that can be

applied to all cases as they arise. This basic set of compliance requirements can be discerned from compliance theories, the characteristics of compliance, and applicable international law norms, general and specific.

It is submitted therefore that it can be useful to isolate and consolidate the basic set of compliance requirements, and in so doing showing how the elements of that set interrelate. Not all the elements may be operative in each and every case. Depending on the circumstances of the case, some elements may be emphasised more than others. But the basic set of compliance requirements serves as a framework that can be tailored to the specifics of individual cases and then that can serve as the basis for working out more complex requirements if needed. For instance, difficult balancing or justice issues may need to be worked out, so it can be useful to have a basic framework as the basis for working them out. Formulating the means of identifying compliance requirements for a specific actor in a specific situation may also have other theoretical and practical benefits.

First, as a practical matter, by facilitating thinking through an actor's compliance requirements, the CSF addresses the problem outlined in Section 1.1, namely the lack of a systematic and valid way to identify such requirements. In doing so, it may reduce uncertainty actors may face in determining what it is they ought to do to be in compliance with a particular norm. If there is ambiguity as to the required behaviour, the actor may be at risk of non-compliance and so exposed to a sanction, most likely either economic or reputational in nature.

As noted above, international law has increased in its scope and complexity. The actors governed by its norms are no longer only states. Non-state actors like international organisations and companies are also expected to shape their conduct according to norms of international law. As international law has grown more complex, it has fragmented into numerous issue areas that increasingly overlap creating circumstances in which norms conflict. This too raises uncertainty as to how actors ought to behave when seemingly governed by conflicting norms. A systematic approach to think through its compliance requirements may help reduce such uncertainty and with it the risk of non-compliance.

Perhaps a more important practical benefit of thinking through compliance requirements relates to the very likely possibility that, in most cases, since compliance can be a complex phenomenon, the state of absolute compliance is a fiction. In reality, in most situations, actors are only more or less compliant with applicable norms. In other words, thinking or theorising in terms of compliance may be like economists thinking in terms of models that simplify reality. Seen in this light, a systematic approach to thinking through compliance requirements, in effect models the behaviour that would have to obtain in order for the actor to be in compliance with an applicable norm of international law.

Two observations can be made of such a way of thinking about systematically mapping out compliance requirements. First, it could be the basis for improved institution building in order to increase compliance levels. Second, it can be used practically to

identify gaps or weaknesses in an actor's compliance requirements in order than remedial action may be taken. If compliance is not absolute, it must mean such gaps exist and it may be worth systematically thinking about identifying compliance requirements so that such gaps can be filled. Ultimately, assuming the actor is interested in compliance, the idea is to act pre-emptively and proactively so that one's actions are more in compliance rather than not. Systematically thinking through one's compliance requirements may help in a practical way to achieve this aim.

So as a universal template for thinking through compliance requirements that is valid according to theories of compliance and of international law, the CSF can provide the framework on which to model an actor's behaviour or activities with the aim of complying with a norm of international law. Identifying international law compliance requirements systematically can also help other actors assess compliance levels for a particular actor.

Part of the task or exercise of identifying an actor's compliance requirements will involve the appraisal and resolution of conflicting claims on its conduct.⁷⁸ For instance, as noted earlier, even for a particular state actor, obligations under various international law subject areas, have presented a problem due to the so-called 'fragmentation of

⁷⁸ Steven Ratner explains this in relation to his work on developing a theory of legal responsibility for corporations in relation to human rights. Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale L.J.* 443, 2001, p. 526.

international law', leading commentators to call for approaches to compliance aimed at evaluating all normative influences on an actor.⁷⁹

The CSF, by systematically accounting for an actor's normative environment, can also highlight and clarify where conflicts of norms may arise. Doing so may provide the actor with options for resolving that conflict. By providing a focus on the actor's operational environment, the CSF also highlights situations where the conduct of multiple actors can be relevant to a compliance situation. For example, human rights issues concerning corporations can also involve questions about the conduct or responsibility of the state. It can be useful to think through the issues with the CSF, which can account for the conduct of various actors in relation to a particular issue.

Further, another practical issue is that with different actors effectively self-regulating and working out their own compliance requirements, a systematic approach that is valid because it accords with international law and compliance theory could help avoid inconsistent approaches to compliance with the same norms.

Finally, there may be a theoretical benefit in seeking to think through compliance requirements for international law norms in a systematic manner. Doing so could provide insight into the phenomenon of compliance itself, either generally or in relation to the particular issue area in which the CSF is applied.

⁷⁹ Christine Chinkin, 'International Law and Human Rights', in Evans (ed.) *Human Rights: Fifty Years On: A reappraisal*, Manchester University Press, 1998, pp. 105-129, at p. 121.

For one thing, examining the issue of compliance can illustrate and provide the basis for further examining the role of soft law norms in regulating an actor's conduct. As mentioned earlier, from the compliance perspective, soft law norms can have an effect equal to that of hard law norms in regulating an actor's conduct. For instance, viewing a situation from a compliance perspective can be very helpful where legally binding norms are not directly applicable to certain actors. The issue of business and human rights is an example of such a situation. The international law on human rights is not directly applicable to companies⁸⁰ yet there is a demand for such regulation⁸¹. Soft law norms, propelled by such demand, exhibit some effectiveness in regulating some corporate conduct from the human rights perspective. A framework that takes account of compliance with such norms can form the basis for determining how effective that kind of regulation might be.

In addition, by extending compliance requirements under international law to non-state actors, the issue of compliance can provide a common platform for interaction between all actors subject to international law in a way that the ideas of international responsibility and obligations under international law are unable to. And since ultimately, the aim of any legal system is the regulation of the conduct of the actors that are subject to its norms, it can be useful to have a framework that accounts equally for all actors in relation to the norms having such regulatory effect. By systematically taking account of

⁸⁰ James Crawford, Conference concept paper circulated at the Conference on Corporate Complicity in Human Rights Violations, Lauterpacht Centre for International Law, University of Cambridge, December 2009. (in author's possession)

⁸¹ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

various regulatory frameworks and working out an actor's compliance requirements accordingly, arguably the compliance strategy and framework suggested here goes some way to bolstering the coherence of international law.

In fact sometimes compliance pressure exists because societal expectations of compliance have outpaced the law. And when actors accede to that pressure by seeking to comply with a hitherto non-applicable norm, their efforts at compliance may serve to influence and direct the development of the law. Thus, a systematic approach to examining the nature of such requirements and to their identification could assist with theorising about and identifying patterns or trends in the development of international law.

It is suggested that a focus on systematically identifying requirements for compliance with international law is necessary and that a systematic identification of such requirements can help those actors motivated to comply with applicable international law norms to achieve and sustain such compliance.

1.5. Outline and method of the thesis

Chapters 1 and 2 lay out the theoretical and conceptual groundwork for the identification of the requirements for compliance with norms of international law. The claim made in these two chapters is that the requirements for compliance with international law norms outlined in the general Compliance Strategy and Framework (CSF) are valid for

compliance situations in every issue area of international law. Chapter 1 explains the concept of compliance requirements and the implications of the nature of the actors involved and of conflicting compliance expectations that may arise in compliance situations for the identification of compliance requirements.

Chapter 2 examines the various theories that have been developed to explain actors' compliance with norms of international law. It examines related issues and concepts concerning such compliance. These are, the causality linking an actor's conduct and a specific norm, the concepts of implementation and effectiveness and the idea of international regulation. Based on the discussion in Chapters 1 and 2, the general CSF is set out in full and explained at the end of Chapter 2.

The CSF that is proposed as a solution to the problem of thinking through an actor's compliance requirements is general in nature and it is next adapted to the area of international human rights law in Chapters 3 and 4. This offers a full explanation of the CSF that completes its exposition.

In Chapter 5, the human rights-specific CSF developed in Chapter 4 is used in a simple illustration in thinking through the compliance requirements for a specific set of human rights, namely those associated with the human rights principles of participation and accountability as identified by the United Nations' Office of the High Commissioner

for Human Rights⁸². As explained earlier, the aim of the thesis is to work out a systematic approach to identifying compliance requirements with norms of international law, and this illustration suggests an approach for doing so.

The method employed for the illustration is to take certain extant material for the illustration as given and as being true. So for instance it is taken as true what the OHCHR says about participation and accountability being key principles of the international law concerning human rights and the human rights associated with those principles. Consequently, the validity of the OHCHR's position under international law is not examined.

The principle of participation relates to the right of individuals to participate in decision-making processes that affect their lives and interests⁸³. The application of this principle was seen in the examples involving Vedanta Resources and the World Bank above. The principle of accountability refers to the right of individuals to hold those whose conduct affects their lives and interests to account⁸⁴.

The principles of participation and accountability encapsulate multiple human rights, facilitating the illustration of the CSF in compliance situations involving more than one norm, which is likely to be the situation faced by users of the CSF in real-world cases. Further, participation and accountability are related concepts in that the degree of

⁸² Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006.

⁸³ A reference to the explanation of this principle.

⁸⁴ A reference to the explanation of this principle.

accountability in any one case may be connected to issues of participation in the sense that greater participation may mean improved accountability⁸⁵. Likewise, more effective accountability mechanisms could engender greater participation. Thus, selecting these principles permits the demonstration of the CSF in situations involving related compliance issues.

The illustration of the CSF in Chapter 5 is useful in its own right as an illustration of the CSF in thinking through and identifying compliance requirements for a set of norms without reference to the conduct and characteristics of a particular actor. But to show how the CSF and CF could be used with reference to a particular actor, Chapter 6 presents a simple illustration in which the CSF and CF are used to identify compliance requirements of the World Bank in relation to the human rights relating to participation and accountability that were addressed in Chapter 5.

⁸⁵ D.J. Galligan discusses the role of participation in legal and administrative processes in *Due Process and Fair Procedures*, Oxford University Press, 1996, p.131-143.

Chapter 2 International regulation, compliance theories and compliance considerations

As stated in Chapter 1, this thesis aims to propose a systematic approach to working out an actor's compliance requirements relating to international law norms in a specific situation. This chapter takes a step towards that goal by examining various aspects of the concept of compliance with international norms to extract and show the compliance requirements that derive from those aspects of compliance. The first section discusses aspects of international regulation that are pertinent to the issue of compliance requirements. Then the theories explaining compliance or the existence of compliance-seeking behaviour are described and examined. Finally, some key aspects of compliance are examined, namely the issue of causality, and the related concepts of implementation and effectiveness, as well as the fact that compliance can take time and be a matter of degree. Together, these sections uncover and describe key compliance requirements relating to norms of international law. At the chapter's close, these requirements are systematically organised and represented as the Compliance Strategy and Framework.

2.1. International regulation and compliance

International regulation refers collectively to activities like setting norms, monitoring an actor's compliance with those norms and the enforcement of those norms at the international level.⁸⁶ Traditionally the subjects of international regulation were states and later international organisations. But now corporations and individuals are also governed by international law norms, while non-governmental organisations (NGOs) are involved in setting international norms and monitoring and reporting on their compliance.⁸⁷ This expanded reach of international law is also seen in terms of the subject-matter it regulates, which covers many areas where cooperation is needed to secure common interests such as the environment, trade, investment, financial regulation, counter-terrorism, human rights, and maritime passage and pollution.⁸⁸

International law has always been concerned with the regulation of activities within the territory of states. The international law on the treatment of aliens was and is concerned with the treatment accorded by a state to foreign nationals within its borders. Injury to a foreign national could be raised to the international, state-to-state level, by the device of treating the injury as one done to the national's home state itself, which could lead to diplomatic entanglements and in extreme cases, the exercise of gunboat diplomacy, where the offended home state might blockade the host state's ports until

⁸⁶ Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds.), *Regulating Law*, Oxford University Press, 2004, at p.1; Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds.), *Regulating Law*, Oxford University Press, 2004, p. 246.

⁸⁷ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 246.

⁸⁸ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 247.

reparations were made for the injury inflicted. The international law on state responsibility developed in part to regulate the relations between states where such injury was alleged or had occurred.

Today the same concern that what is done within the territory could seriously affect the national interests of other states means that now more than ever before, international regulations are designed to be implemented and enforced domestically. And so many international norms can pierce a state's sovereignty shield and regulate domestic activities. The difference now is that, as indicated, the subject-matter regulated by international norms is more vast in scope than in the past and also that implementation and enforcement at the domestic level is not the domain of the state alone but increasingly has come to be mediated by international organisations like the United Nations' specialised agencies and by NGOs,⁸⁹ in certain cases because state services are now delivered in partnerships with NGOs and private sector companies.⁹⁰

But international norms have come to be applied not only to non-state actors at the domestic level, over increasing subject areas. They also apply to such actors in relation to their conduct across borders. So for instance, human rights norms, as seen in the example in Chapter 1, attach to global companies based in one country but having

⁸⁹ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 249.

⁹⁰ Anne-Marie Slaughter, 'International Law and International Relations Theory: Twenty Years Later'; in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The state of the art*, Cambridge University Press, 2013, p. 619-621. In such case, the question of the liability and accountability of the partnership as a whole, and of each individual partner separately, can arise though for the state, the position remains it is legally responsible for activities attributable to it under agency principles and under the law on international responsibility. See James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, pp. 91-93.

operations in another. These developments in international law can be summed up in comments like these:

If global rules regulate individuals, corporations, foundations, nongovernmental organisations (NGOs), and other social actors, as well as states, ... [p]erhaps we are moving toward intergovernmental law (regulating relations between governments) and global law (regulating all nongovernmental actors acting across borders⁹¹.

Still, global norms will, in operation, have their content defined, to a greater or lesser extent, by local circumstances, depending on the case. This is because a norm that is not rooted in the circumstances of its application may lack the flexibility of interpretation and application to account for actors' differing circumstances and capacities to comply. As a result, such norms can lack the perception of legitimacy that compels compliance and underlies a valid and effective international regulatory framework.⁹² Thus because an actor's capacity to comply with a norm depends on its characteristics and context, these features of an actor's compliance situation will shape expectations of its compliance with the norm. So for instance, in international investment law, while the international law norm that an investor is entitled to fair and equitable treatment by the host state may be regarded as having 'an objective core', its application will depend on the expectations nurtured and fostered by the local laws as the stand specifically at the time of the investment.'⁹³

⁹¹ Anne-Marie Slaughter, 'International Law and International Relations Theory: Twenty Years Later', p. 619.

⁹² See the discussion on fairness, legitimacy and compliance in Section 2.3.6. Legitimacy Theory.

⁹³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008, p. 135.

The reference to local circumstances and contexts obviously undermines the uniformity of international regulation. But arguably this cost has to be evaluated against the gains that international regulation can make in terms of its perceived legitimacy and fairness.⁹⁴ However, while allowance for local context can be made, there will be a problem where the flexibility and discretion reserved to the local level for interpreting and applying an international norm, is not undertaken in good faith and goes so far as to hollow out the norm's object and purpose. Cases where this problem arises do not consist of the reasonable balancing of factors to allow for local circumstances, but more likely of stretching the norm or its exceptions to cover non-compliance.⁹⁵

Yet, where actors are applying international norms to local contexts in good faith, there presents itself the opportunity for discourse and persuasion between the actor and those external parties that may have an interest in the actor's compliance.⁹⁶ The meaning of the local application of the norm would be contested between these parties. But the norm as applied will likely be perceived as being legitimate, having been justified to the interested community, and so become more likely be complied with.⁹⁷ Thus, in the process of complying with a norm that is part of an international regulatory framework, the meaning of the norm is likely to be constructed, as in fact, may the identities of the

⁹⁴ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 265, referring to problems with transplanting international norms in the context of East Timor's post-independence situation, when it was administered by the UN. East Timor became independent on 20 May 2002, having previously been under Indonesian rule. See the discussion in Section 2.3.6. Legitimacy Theory.

⁹⁵ See the discussion of this issue in Section 3.2.1.2. Margin of Appreciation.

⁹⁶ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 265.

⁹⁷ See the discussion in Section 2.3.6. Legitimacy Theory.

actor's engaged in dialogue and justification comprising such a process.⁹⁸ The next section considers some of these issues in examining theories of compliance to see what compliance requirements elements or criteria they might suggest.

2.2. Compliance theories

In this section six theories of compliance are described to identify from them elements relevant to the identification of compliance requirements in relation to international law norms.

2.2.1. Realism

Realism predicts compliance with international norms where it is in the actor's self-interest to comply with those norms. For powerful states that interest is defined in terms of the compliance of other states with the relevant international norms⁹⁹. The powerful state itself need not be in compliance with those norms but where such compliance makes it easier to ensure or obtain the compliance of other states, the powerful state constrains itself to comply and sustain that compliance. For weaker states, compliance is brought about and sustained on pain of sanctions for non-compliance. The international norms are incidental. They do not on their own motivate their compliance. Instead compliance is determined on a calculation of costs and benefits involved in complying with a norm. Where compliance brings the actor more benefits than costs, it is in the actor's interests to

⁹⁸ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', p. 246; Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law*, 387 (2000), p. 405. See discussions on compliance and actor interaction, construction of meaning and persuasive dialogue in Sections 2.3.3. Liberalism, 2.3.4. Managerialism and 2.3.6. Transnational Legal Process.

⁹⁹ Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law*, 345 (1998), pp. 350-351.

comply with the norm. If the costs of compliance outweigh the benefits, the actor will likely choose not to comply.

As an example, direct sanctions are also applied to propel states to end human rights violations. This is a controversial issue with differing views as to its efficacy¹⁰⁰ and also concerns over the negative human rights impacts of sanctions¹⁰¹. Thus direct sanctions in the name of human rights have been or are being applied as in the case of apartheid South Africa or the present regimes in Myanmar and Zimbabwe. The sanctioned states of course are meant to face an economic cost but also face a reputational cost¹⁰². Which costs will cause the sanctioned state to finally comply with the international norm in issue, if at all, will depend on the circumstances of the case. However, even if a change in conduct is brought about, it will likely have involved an interplay of the fact of the sanctions, domestic political factors and the activities of international institutions and non-governmental actors.

In realist theory, the actor is the state as a unitary entity¹⁰³. The corollary of this is that realism is only concerned with explanations of compliance on the basis of activities

¹⁰⁰ States opposed to sanctions emphasise engagement to bring about the change in the target government's conduct. These states may actually be adopting a realist attitude in that engagement rather than sanctions suit their interests best. The sanctioning states justify their interests are at stake by invoking the instrumentalist *raison d'être* for the international human rights regulatory framework found in the United Nations Charter and the two international covenants. For more on the interests of states in promoting human rights, see Oona Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* 1935 (2002), p. 1946, fn. 23, 24 and the associated text.

¹⁰¹ See for instance, CESCR General Comment 8, E/C.12/1997/8, 12 December 1997.

¹⁰² Robert O. Keohane, 'International Relations and International Law: Two Optics', 38 *Harv. J. Int'l L.* 487 (1997).

¹⁰³ Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', in Eyal Benvenisti and Moshe Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press, 2004, pp. 16 - 49.

at the international level as that is the arena for inter-state interaction¹⁰⁴. This idea of the state has its limitations as non-state actors play an increasingly influential role in domestic and international regulation¹⁰⁵. Realism therefore has limited predictive power where compliance is brought about by activities of interest groups at the international or domestic level, including within the actor's apparatus. Still, as discussed below, there are commonplace examples of the response of actors to expectations based on international norms that appear to be explainable in realist terms.

For instance, while realism is limited as a compliance theory for not accounting for the activities of non-state actors in motivating compliance, the realist lens can nevertheless be applied to explain apparent human rights compliance by non-state actors, specifically multinational corporations. Like states, these actors can also face economic and reputational costs for non-compliance with human rights norms. Faced with domestic and international pressure, as well possibly from pressure within their organisation, either among employees or in some cases senior officials, such companies may undertake human rights commitments either of their own or as part of an international initiative like the UN's Global Compact. It is in the interests of these companies not only to undertake such commitments but also to ensure and sustain their compliance with the human rights norms such commitments embody. Again, compliance is only ensured as long as the costs of non-compliance exceed the benefits of compliance¹⁰⁶.

¹⁰⁴ Oona Hathaway, 'Do Human Rights Treaties Make a Difference?', p. 1945.

¹⁰⁵ See Section 2.1. International regulation and compliance.

¹⁰⁶ This is not unlike any other regulatory framework for corporations. Where the regulatory fine for transgressing a law is low, the company will be less likely to maintain compliance.

The realist theory of compliance says that individual preference does not matter¹⁰⁷. But that is not necessarily so. There is an internal aspect in that it is also concerned with the self-interest of the actor. This is both in relation to the powerful actor dictating or requiring compliance and the weaker actor that is responding to the pressure to comply. The interest of the organisation is defined and renewed by the individuals making up the organisation, especially those at the top of the organisation's hierarchy. For instance, the interests of the countries may change when a new leader takes office. Thus the powerful actor's self-interest must be constructed, which implies a role for external normative influence, but the realist theory does not address this aspect of the factors motivating compliance. So factors internal to an organisation can influence its external strategic interest. The weaker states self-interest lies in asserting its sovereignty in the face of power and it is able to do so to some extent by positive rules allowing for contextual compliance, for instance the doctrine of margin of appreciation¹⁰⁸ or differentiated responsibilities¹⁰⁹. These rules suggest that compliance requirements arise only in relation to conduct within the control of the actor concerned. In defining its discretion, the weaker states self-interest will also be constructed and will involve justification to the stronger state. This implies some element of interaction and interpretation. The realist theory does not account for these factors but other theories, as discussed below, do.

¹⁰⁷ Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', in Eyal Benvenisti and Moshe Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press, 2004, pp. 16 - 49.

¹⁰⁸ Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16(5) *EJIL* 907 (2005).

¹⁰⁹ Lavanya Rajamani, *Differential treatment in international environmental law*, Oxford University Press, 2006.

Finally, if an actor's interest is set in terms of compliance with an international norm, key decision-maker's in that actor will have to transmit the decision to comply to individuals throughout the actor's hierarchy. So the attitude of individuals within the organisation becomes an important requirement for its compliance with the relevant international norm *once* the decision to comply with that norm is made.

In summing up the discussion on realism as an explanation for compliance with international norms, the implications of this theory for identifying compliance requirements should be highlighted. First, the actor complies when it is in the interest of the actor to comply. That interest must be defined by the context of the actor. Context is also important as it constructs the identity of the actor and so constructs its interest. So context defines and constructs the actor's interest and therefore whether it will comply with a particular international norm. Finally, by not dealing with the issue, realist theory emphasises the role and attitude of individuals as a requirement for compliance.

2.2.2. Institutionalism

Institutionalism theory grew out of regime theory which showed that international regimes, by which was meant international 'rules, norms, principles and decision-making procedures',¹¹⁰ could promote and sustain states' compliance with norms of international law. International regimes facilitate state interaction and enhance international cooperation by reducing uncertainty among states that are members or part of an international regime.¹¹¹ And so institutions help counter the anarchy that may otherwise prevail between states by providing a means for the provision and exchange of information, thus lending some transparency to a state's conduct.¹¹²

Like realism, institutionalism is concerned with international interactions among states as unitary actors pursuing their self-interests¹¹³. Their interests include interests in addressing common problems at the international level through international cooperation. As mentioned, international institutions facilitate that cooperation. But they do so only to the extent that the institutions members do not deviate from the institution's norms.¹¹⁴ The key issue then is what features of institutions operate to reduce deviation or non-compliance.

¹¹⁰ Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', in Eyal Benvenisti and Moshe Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press, 2004, pp. 16 – 49, at p. 25.

¹¹¹ Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, 1984, p. 244.

¹¹² Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', p. 27.

¹¹³ Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', p. 26.

¹¹⁴ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations*, Sage Publications, 2002, pp.538-558, at p. 540.

These features include the facilitation of information sharing to reduce uncertainty, the promotion of learning and the provision of conditions for orderly negotiations and the monitoring of state behaviour.¹¹⁵ All of these can involve repeated interaction and such interaction can also lead to the internalisation of norms by the actors concerned and thereby to the construction of their identities.¹¹⁶

2.2.3. Liberalism

Liberalism departs from realism and institutionalism by discarding the notion of the state as a unitary actor. Its concern is still with explaining the compliance of states with international norms. However it seeks that explanation by looking to domestic factors or elements internal to the state. For liberal theorists, domestic politics matter¹¹⁷. Domestic factors like 'societal ideas, interests and institutions' shape the preferences or interests of states thus influencing their behaviour¹¹⁸. As with realism and institutionalism, the concern is still with the interests of the states. The difference is that liberalism penetrates below the state level to find the factors defining those interests.

For liberalism, international norms matter but only as seeds crystallising domestic interests that subsequently engage in political contests so as to direct the state's behaviour on the international plane¹¹⁹. Similarly international politics matter in shaping domestic

¹¹⁵ Anne-Marie Slaughter, 'International law and international relations theory: a prospectus', p. 27.

¹¹⁶ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', p. 540.

¹¹⁷ Oona Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* 1935 (2002), p. 1952.

¹¹⁸ Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organisation*, 513 (1997), p. 513.

¹¹⁹ Xinyuan Dai, 'Why Comply? The Domestic Constituency Mechanism', 59 *International Organisation*, Spring 2005, pp. 363 – 398.

perceptions of the state's interests. This is because international politics influence domestic political contests that shape the state's international behaviour. An example of such dynamics is provided when domestic political considerations determine the decisions of states to ratify and comply with international climate change agreements or not. In this example, liberalism provides tools to predict a state's behaviour.

Liberalism's fundamental reliance on domestic politics as the explanatory variable for state behaviour has led to the theory being largely directed at the behaviour of liberal states. For, after all, it is in such states that domestic politics is most vigorous. Thus liberal theorists assert that liberal democratic states are more likely to comply with international legal obligations because such obligations mobilise domestic pressure on the state to comply with such obligations¹²⁰. Such an assertion is tautologous, causally problematic and thus undermines the power of liberalism to explain compliance with international norms.

If liberal states are by definition predisposed to the idea of the rule of law as a constitutive value, this fact would be a conflating variable and could be the primary causal factor explaining their compliance with international law. It also does not follow why polities of liberal states are predisposed to the idea of compliance with international law. Surely, if one were to maintain fidelity with the fundamental elements of liberalism, the locus of explanation must lie with the perceived self-interests of the politically strongest domestic groups. If those interests are not best served by compliance with

¹²⁰ Oona Hathaway, 'Do Human Rights Treaties Make a Difference?', p. 1953, footnote 64.

international law, the response may well be to interpret that law favourably and thereby bring the law into compliance with domestic interests. In this all states are alike, whatever their political hue. This apologist subtext to liberalism does not appear to be acknowledged by the theory's proponents.

Despite the confusion one finds in thinking associated with liberalism, the theory does advance compliance theory by adverting to the role of domestic factors in explaining the compliance of state actors with international norms. This insight is of course transposable to non-state actors such as international organisations, international NGOs and multinational corporations. These actors too have internal constituencies that are either predisposed or otherwise to compliance with applicable international norms. Their compliance with such norms may also be explained by which constituency is politically dominant within the organisation.

Liberalism points to the characteristics of the actor, whether state or non-state, as a key consideration or predictor if the actor will comply with an international norm. In this sense, it is similar to realism in highlighting the importance of the actor's context to predicting compliance. However, as liberalism is internally focused, this means that the compliance requirement it suggests is the presence of a domestic constituency that is motivated to comply with an international norm. For states, these would be political constituencies and key decision-makers. For non-state actors, these would be the organisation's employees and its senior management.

While advertng to internal factors that motivate compliance, liberalism does not focus on external factors that do so other than the obvious one of the fact that the focus is on the state's compliance with international norms. The question or the fact of such compliance brings into play the role of international pressure groups seeking or resisting compliance as the case may be. As mentioned earlier, liberalism alludes to these external factors but only on the basis of their indirect effect on shaping domestic pressure. The set of theories that are examined next place greater emphasis on both external and internal factors motivating compliance with international norms.

2.2.4. Managerialism

The Managerial theory of compliance seeks to explain compliance with multilateral regulatory agreements dealing with issues requiring international cooperation among states. These issues concern matters like monetary affairs, security, trade, the environment, and human rights.¹²¹ The theory is suggested as an alternative to the ‘enforcement model’ of compliance emphasised by Realism, which highlights the use of sanctions, military or economic, to produce compliance. Managerialism by contrast relies mainly on a cooperative, problem-solving approach to compliance.¹²²

It is submitted that as with the discussion of the previous compliance theories, aspects of the Managerial theory of compliance can be applied to cases of compliance with other international law norms, besides treaty norms, and to non-state actors like international organisations and corporations. The theory in fact acknowledges this, especially where the norms in question, even if non-binding, are based on or derived from treaty norms.¹²³

Managerialism explains states’ treaty compliance on the basis of their propensity to comply with their treaty obligations¹²⁴. It rejects, as not keeping with experience, the idea of the state as a rational actor complying with its international obligations only when it is in the state’s interests to do so. As such, Managerialism conceives the problem of

¹²¹ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 1.

¹²² Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 3.

¹²³ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 2.

¹²⁴ Hathaway, p. 1956, footnote 76 for the Chayes’ reference, Chayes’ pp. 3-9.

compliance as one where certain factors compel the state actor's non-compliance, meaning that achieving compliance is about managing those factors propelling non-compliance in the face of the state's propensity to comply.

The assumption that states tend to comply with their international treaty obligations is based on three factors, namely efficiency, interests and norms. The efficiency argument is that states expend effort and limited resources, entering into international agreements, and unless circumstances change, are motivated to comply with their treaty commitments. The alternative of non-compliance would be wasteful and inefficient. The theory notes that because government agencies tend to adopt standard operating procedures in response to authoritative rule systems such as those manifested in treaties the result is that compliance, and not deviation, is the normal presumption.¹²⁵

The 'interests' factor acknowledges that a state's treaty ratification often reflects the interests of various government agencies, and possibly the legislature and civil society groups, sometimes honed and developed over the many years of treaty-making.¹²⁶ As such the state's interests underlying its treaty commitments are unlikely to change substantially once the treaty comes into force. Finally the 'norms' factor refers to the role

¹²⁵ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 4; Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment*, Cornell University Press, 1989, pp. 78-79.

¹²⁶ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, pp. 4-6.

of norms in decision-making process and how norms can be the independent basis for an actor's conforming behaviour.¹²⁷

So Managerialism, through the three factors mentioned above, suggests some basic requirements for compliance. For example, a framework to guide the decision-making of a government agency, international organisation or corporation could enhance its compliance with a particular norm. Engagement with stakeholders concerned with the subject-matter of the norm could create the interests within the agency, organisation or corporation in seeking and maintaining compliance with a norm, while the norm itself, if legitimately applied to the state, international organisation or corporation, could produce conforming behaviour.

Of course the validity of Managerialism's assumption of states' propensity to comply with their treaty obligations can be challenged. States may narrowly tailor their treaty commitments through the use of reservations that negate the costs of ratifying the treaty to such a degree as to call into question the state's commitment to the spirit and purpose underlying the treaty. In some cases states may ratify treaties only to seek to evade their commitments afterwards through favourable interpretations or by seeming to exercise permitted discretion in applying the treaty in less than good faith¹²⁸.

¹²⁷ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 8.

¹²⁸ See Abba Kolo and Thomas Walde, 'Capital Transfer Restriction in Modern Investment Treaties', in August Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, 2008, pp. 205-243 at p. 223, referring to the power of investor-state tribunals to review decisions and actions of State officials to see if the discretion afforded the State under bilateral investment treaties was exercised in good faith.

Managerialism's proponents acknowledge this¹²⁹. But for the purpose of examining the nature of compliance requirements such objections are not critical. The overall validity of the compliance theory, and the factors it highlights, provide the basis for such requirements. And the validity of the compliance requirements identified this way is not undermined if the compliance theory they are derived from fails to account for some instances of non-compliance.

Managerialism suggests three reasons why there is non-compliance or incomplete compliance despite the reasons it says make states ordinarily want to comply with their treaty commitments.¹³⁰ These are:¹³¹

- (1) ambiguity and indeterminacy of treaty language,
- (2) limitations on the capacity of parties to carry out their undertakings, and
- (3) the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.

The first reason indicated above relates to the imprecision of language and the virtual impossibility to capture at the outset all the circumstances in which a treaty provision will come to be applied. This results in a 'zone of ambiguity within which it is difficult to say with precision what is permitted and what forbidden.'¹³² This is the problem of defining the content of a norm that was discussed in Chapter 1 in relation to the idea of compliance requirements.¹³³ It was also noted in the earlier discussion on

¹²⁹ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1995, p. 7.

¹³⁰ The proponents of Managerialism say the evidence suggests wilful non-compliance to be the exception rather than the rule, Chayes and Chayes, *The New Sovereignty*, p. 10.

¹³¹ Chayes and Chayes, *The New Sovereignty*, p. 10.

¹³² Chayes and Chayes, *The New Sovereignty*, p. 10.

¹³³ See Section 1.1 Outlining the problem.

Legitimacy Theory, which regards a norm's the lack of clarity as undermining its 'compliance pull'.¹³⁴

By the second reason for non-compliance, Managerialists mean the state's inability to regulate not only the conduct of government officials but also 'the activities of individuals and private entities',¹³⁵ engaged, or otherwise able to control, the activities international treaties seek to regulate. Examples of such activities are unfair labour practices, the release of environmental pollutants, and the proliferation of nuclear material. A state's promulgation of legislation implementing the treaty is often not enough. Appropriate administrative regulations and effective enforcement are also necessary. In addition adequate financial, and scientific and technical resources will likely be required.¹³⁶

The third reason is the fact that the internal changes treaties are designed to bring about usually take substantial time.¹³⁷ So there can be a considerable lag between a state's undertaking an international obligation and conditions within its territory approximating the state of affairs the obligation entailed. Lack of capacity by some states can be provided for by employing transition periods in treaties. But the variation in capacities among all the countries in the world can also result in treaties with global coverage having rather low obligations requirements because these have to match the capacities of the poorest countries. For these reasons, Managerialists accept it may take a

¹³⁴ See Section 2.3.6. Legitimacy Theory.

¹³⁵ Chayes and Chayes, *The New Sovereignty*, p. 14.

¹³⁶ Chayes and Chayes, *The New Sovereignty*, p. 14.

¹³⁷ Chayes and Chayes, *The New Sovereignty*, p. 15.

long time for some states to come into compliance with for example, treaties concerning the environment and human rights. Nevertheless they regard such treaties as initiating a process to bring about the changes sought even though that may take time.¹³⁸

In the face of factors like lack of norm clarity, lack of capacity and the time it takes to be fully compliant, Managerialism Theory notes that international treaty regimes are designed so as persuade states to comply. In this regard, the theory notes three features of those regimes in particular: transparency, dispute settlement, capacity building.¹³⁹ Transparency refers to ‘the generation and dissemination of information about the requirements of the regime and the parties’ performance under it’.¹⁴⁰ By facilitating the provision and sharing of information, transparency helps to ensure that all treaty members have a common understanding of what they are required to under the treaty¹⁴¹. In this way it can help minimise the divergence of views among state members as to what they are required to do to comply with the norm concerned that may arise because the treaty provision lacks that clarity.

Through the information provided, members of a treaty gain knowledge as to how other treaty members are performing. This allows for mutual reassurance that all members are playing by the rules and so may generate more compliance because everyone knows there is no free riding or moves afoot to undermine the effectiveness of the treaty. Conversely a transparent treaty regime deters non-compliance because any

¹³⁸ Chayes and Chayes, *The New Sovereignty*, p. 16.

¹³⁹ Chayes and Chayes, *The New Sovereignty*, p. 25.

¹⁴⁰ Chayes and Chayes, *The New Sovereignty*, p. 22.

¹⁴¹ Chayes and Chayes, *The New Sovereignty*, p. 22.

behaviour that deviates from the requirements of the norm can be detected, causing the treaty member concerned to answer to the other members for that non-compliance.¹⁴²

Managerialism suggests a valid compliance strategy is one that emphasises the clarification and specification of applicable norms, and one that takes account of the actor's capacity to undertake a course of conduct needed to comply. Such a strategy would emphasise 'justification, discourse and persuasion',¹⁴³ indicating transparency and capacity-building as compliance requirements and context as a compliance consideration.

2.2.5. Legitimacy Theory

Legitimacy Theory posits that the legitimacy of international norms secures a state's compliance with them¹⁴⁴. According to the theory, legitimacy is a quality a norm that leads 'to the belief that it is fair because it was made and is applied in accordance with 'right process',¹⁴⁵ In other words a norm that has come into being or that has been applied according to right process is legitimate, and so is likely to be complied with.¹⁴⁶ The making of a norm refers to its promulgation and interpretation as both acts 'make' a norm while the application of a norm refers to its use in guiding a decision. That decision could be what the actor should do to comply with the norm or it could a decision of an external

¹⁴² Chayes and Chayes, *The New Sovereignty*, p. 22-23.

¹⁴³ Chayes and Chayes, *The New Sovereignty*, p. 28.

¹⁴⁴ Thomas M. Franck, 'Legitimacy in the International System', 82(4) *AJIL* (Oct., 1988), pp. 705-759, p. 706. Franck writes of rules and their legitimacy but the theory would apply equally to norms. See Section 1.3.2. for a discussion of how rules relate to norms. Cross-reference with the discussion in Chapter 1.

¹⁴⁵ Thomas Franck, *Fairness in international law and institutions*, New York, Clarendon Press, 1995, p. 26 ('Fairness'); Thomas M. Franck, 'Legitimacy in the International System', 82(4) *AJIL* (Oct., 1988), pp. 705-759, p. 706 ('Legitimacy').

¹⁴⁶ Thomas Franck, *Fairness*, New York, Clarendon Press, 1995, p. 26.

party, for instance a judge, as to whether or not, given a certain set of facts, the actor was in compliance with the norm or not.

The concept of legitimacy described above has been twinned with the idea of justice as being two components of the concept of fairness. The two components are independent of one another and operate as part of fairness discourse to explain the working of international and international institutions in specific instances. The legitimacy component reflects societal desires for order and the justice component, for change.¹⁴⁷ Together they help explain how international law and institutions provide a stable framework for international cooperation and interaction while maintaining the flexibility to adapt to varying circumstances that is necessary to usefully serve the needs of the international community. In the discussion below, the focus will be on legitimacy as the factor explaining an actor's compliance with international norms.

According to Legitimacy Theory, four indicators or properties of a norm determine its legitimacy. The extent to which a norm exhibits these properties, it will be perceived to be more or less legitimate and so more or less fair consequently having more or less compliance pull. The four indicators or properties of a norm's legitimacy are¹⁴⁸:

1. Determinacy
2. Symbolic validation
3. Coherence
4. Adherence.

¹⁴⁷ Thomas Franck, *Fairness*, New York, Clarendon Press, 1995, p. 25.

¹⁴⁸ Thomas Franck, *Fairness*, New York, Clarendon Press, 1995, p. 30; Thomas M. Franck, 'Legitimacy', 82(4) *AJIL* (Oct., 1988), pp. 705-759, p. 712.

Determinacy

Determinacy refers to whether a norm has a clear message and meaning to those it addresses such that they can understand what the norm expects of them. A norm with these features is more likely to be complied with. When faced with a determinate norm, an actor is less able to justify noncompliance because the determinacy of the norm does not admit of other meanings or other modes of compliance other than the one set out in its text.¹⁴⁹

In reality the situation is not so straightforward. Those making norms, either through the creation of a treaty or the authoritative interpretation of an existing norm, usually cannot foresee and account for all situations in which the norm will be applied. Accordingly, international norms refer to standards like reasonableness, due diligence or proportionality that render them more flexible in application but at the same time less determinate. By the lights of Legitimacy Theory, the norm's determinacy is low, which threatens its compliance pull. But the theory makes an allowance for such cases by acknowledging the standard introduces a justice component that permits a fairness calculus to be applied, which can actually help enhance compliance with the norm or standard because it allows for the actor's circumstances to be taken into account in making an assessment whether the actor has complied with the norm or not.¹⁵⁰ The application of the margin of appreciation doctrine which takes account of the circumstances of the case when international bodies or tribunals review the conduct of

¹⁴⁹ Thomas Franck, *Fairness*, New York, Clarendon Press, 1995, pp. 30-31.

¹⁵⁰ Thomas Franck, *Fairness*, New York, Clarendon Press, 1995, pp. 33.

national authorities, is an example of the application of such a fairness calculus that conduces to compliance because it allows the actor concerned to perceive the applicable norm as being both legitimate and fair.¹⁵¹

Symbolic validation

The second indicator or property of a norm's legitimacy speaks to its authority in the international social order.¹⁵² The provenance of a norm's authority has a number of dimensions to it. It can have to do with its pedigree as a source of normative obligation.¹⁵³ For instance, is the norm contained in a treaty or in custom, is an emanation from an international tribunal or an international organisation?¹⁵⁴ In another sense a norm is symbolically valid where it is produced by an authority exercised according to right process, which means the authority is exercised in a manner that is institutionally recognised and valid.¹⁵⁵ The emphasis in connection with the symbolic validity of legitimacy according to Legitimacy Theory is the preservation of a stable social order. And so values like the predictability and stability of expectations within a normative system are emphasised.

Coherence

The third indicator of a norm's legitimacy is its coherence, which refers to the degree to which it is applied in a principled fashion. According to Legitimacy Theory, there are two dimensions to the principled application of a norm. One is that 'its application ... treats

¹⁵¹ See the discussion in the next chapter at Section 3.2.1.2. Margin of Appreciation.

¹⁵² Thomas Franck, *Fairness*, p. 34.

¹⁵³ Thomas M. Franck, 'Legitimacy', 82(4) *AJIL* (Oct., 1988), pp. 705-759, p. 705.

¹⁵⁴ Thomas M. Franck, 'Legitimacy', 82(4) *AJIL* (Oct., 1988), pp. 705-759, p. 705.

¹⁵⁵ Thomas Frank, *Fairness*, p. 34.

like cases alike'. The second is that it 'relates in a principled fashion to other rules of the same system.'¹⁵⁶ Taking them together, it means a norm exhibits coherence when its application in an issue area coheres with the principles and purposes of that issue area and that the rule relates to other like rules also in a principled manner.

The idea of coherence in terms of like cases being treated alike is straightforward but carries with it a particular implication for dealing with cases that are similar in nearly all respects but are distinct in some particular and importantly determinative respect. These cases represent the existence of some exception to the norm in question. In such cases the idea of treating all cases uniformly is abandoned and the distinct case is treated differently. But for the basis for the different treatment to be valid, it must derive from principles representing the rationale for the normative system in question and those principles must cohere with principles underpinning the system of law as a whole. So for instance in the area of trade law the most favoured nation treatment (MFN) norm operates to eliminate favouritism among a country's trading partners. But poor countries that would be outcompeted from the global trading system are treated differently under a system of preferences that entitles their export to reduced duties or no duties at all.

According to Legitimacy Theory, the deviation from the MFN norm can be justified. For although granting the preferences deviates from the MFN norm, doing so enables coherence with a more fundamental principle or goal of the global trading system, namely to increase trade by all countries, which means not having some countries

¹⁵⁶ Thomas Franck, *Fairness*, p. 38.

sidelined and frozen out of the system. By allowing preferential treatment and thus carving out an exception to the application of the MFN norm, the more fundamental purpose of the global trading system is upheld. In this way encapsulating the exception to the MFN norm coheres within the international trading system issue area.

Of course, since there are always bound to be differences among those subject to any system of law, it might be observed that the different cases can simply be treated differently without the need for a principled justification but simply on their own terms and that way allowing like cases to always end up being treated alike. However, such an observation misses the point that carving out exceptions in a careful, considered and principled manner helps maintain the overall normative structure of the particular issue area of international law. If every difference was entitled to an exception simply on its own terms, there would be so many loopholes to that aspect of the issue area as to call into question its legitimacy to compel compliance. In fact it might be possible to design a loophole on demand and so turn a situation of non-compliance into one of compliance.

Thus the legitimacy of a differentiated system of law, where equal subjects of that system are entitled to be treated differently under certain circumstances, is preserved provided the differentiation is made with reference to some principle, goal or purpose of the system. And as indicated above, not only must the basis of differentiation cohere with the overall purpose or goal of that particular system of law or issue area. To ensure legitimacy of the norm permitting the exception, it must cohere with like norms in other issue areas of international law where differentiated treatment obtains. So to ensure the

legitimacy of the norm or norms concerned, a principle for differentiated treatment in the global trading system must cohere with general principles for differentiated treatment within the body of international law.

Such principles can be found in the area of international environmental law¹⁵⁷ and in the area of international human rights law in respect of provisions recognising the rights of individuals belonging to groups previously discriminated against to preferential treatment or affirmative action. In this fashion the norms in one issue area in international law are reflected in norms in other issue areas signifying the second dimension of coherence noted above, namely that to ensure the legitimacy of a norm it must not only cohere in a principled fashion within the issue area of international law it inhabits, but also with like norms in other international law issue areas thus connecting it with the body of international law generally.

In connection with the discussion on coherence as a basis for the legitimacy of a norm and hence its power to compel compliance, or its compliance pull, the discussion on the fragmentation of international law in Chapter 1 is relevant.¹⁵⁸ In thinking through a norm's compliance requirement using the CSF, it should be the case that the norm that the actor is concerned with is one that is identified in as determinative a manner as possible, as indicated in the discussion on the determinacy indicia of legitimacy above, and also that it coheres within the issue area of the Compliance Topic as well as with respect to the body of international law generally. According to Legitimacy Theory, a

¹⁵⁷ Lavanya Rajamani, *Differential treatment in international environmental law*, Oxford University Press, 2006.

¹⁵⁸ See Section 1.2.3. Fragmentation.

norm without these properties is not likely to be generating much compliance pull and so is not likely to engender strong efforts at compliance. So the CSF, as explained later in this chapter is designed to identify the applicable norm with precision taking account of the actor's operative normative environment, that is the body of binding and non-binding norms governing the actor's conduct, so that the identified norm is also one exhibiting the strongest coherence property.

Adherence

The fourth and last indicia of the legitimacy of a norm is adherence which is the vertical connection between norm governing an actor's conduct, designated a primary norm, and a body of higher-order secondary norms 'governing the creation, interpretation and application' of the primary norms.¹⁵⁹ The secondary norms represent the 'procedural and institutional framework' according to which a community is organised¹⁶⁰ as well as the fundamental normative values it subscribes to. Thus the legitimacy of a primary norm is based on the degree to which it conforms with the secondary norms.¹⁶¹

Ultimately the secondary norms apply to actors as a function of their status as members of a community, such as the international community in the case of international law. In other words the secondary norms are not created by the actor's consent. They exist and apply to the actors by virtue of their existing in a community. So for international law, the secondary norms include the *jus cogens* or peremptory norms, and the norm *pacta sunt servanda*, by which a treaty's terms bind states parties. The

¹⁵⁹ Thomas Franck, *Fairness*, p. 41.

¹⁶⁰ Thomas Franck, *Fairness*, p. 41.

¹⁶¹ Thomas Franck, *Fairness*, p. 42.

adherence of the primary norms to these secondary norms signals the legitimacy of the primary norm because it could not validly exist in contravention of the secondary norm.

In conclusion, Legitimacy Theory can be said to identify the following as requirements for compliance with international norms:

1. Clarity as to what the norms requires as conforming behaviour
2. Coherence of the requirements for conforming behaviour with other norms applicable to the actor
3. Validity of the interpretation placed on the norm in terms of consistency (and maybe transparency) of that interpretation and the process of interpretation

Underlying these three elements and indeed Legitimacy Theory itself is the idea of rightness of process, akin to the ideas of procedural fairness and procedural justice. These concepts relate to the ‘how’ of things. How to design a process that is fair and therefore legitimate in the eyes of those subject to that process and therefore liable to enjoin their compliance with that process. In this sense Legitimacy Theory offers an overall rationale for the idea of the Compliance Strategy and Framework (CSF) that has been alluded to in Chapter 1¹⁶² and that will be developed later in this Chapter. The CSF, as will be seen, offers a way to systematically think through an actor’s compliance requirements for international norms that builds on aspects of Legitimacy Theory like the clarity and determinacy of norms, and their coherence, but also the idea of a right process in the sense of one that is transparent and fair in that it takes account of the actor’s

¹⁶² Section 1.4. The proposed solution and its applications.

characteristics, both normative and operational, and one that seeks to move the actor towards compliance through an iterative, discursive process.¹⁶³

2.2.6. Transnational Legal Process

Transnational Legal Process (TLP) agrees with Managerialism and Legitimacy Theory that actors comply with norms because they have internalised the norms and that that is what drives compliance in the main as opposed to external enforcement of norms¹⁶⁴. TLP seeks however to examine further the process of norm-internalisation and suggests that the process consists of three phases: interaction, interpretation and internalisation.

First, other actors initiate an interaction, or series of interactions, with the actor concerned. These other actors are referred to in TLP as transnational actors and consist of those actors interested in the actor's compliance with a particular norm. They include the actor's peers, such as other states, international organisations or corporations, non-governmental organisations (NGOs), individuals of particular eminence, experts, officials or staff of the actor concerned, and ordinary citizens. Some of the actors in these categories can be described as belonging to an 'epistemic community', a network of professionals with particular expertise such that they have 'an authoritative claim to policy-relevant knowledge'.¹⁶⁵ Thus TLP looks to such actors' expectations of

¹⁶³ Thomas Franck, Legitimacy, p. 709, citing Jurgen Habermas, *Communication and The Evolution of Society*, (T. McCarthy trans.) 1979, pp. 178-179.

¹⁶⁴ Harold H. Koh, 'Why Do Nations Obey International Law', 106 *Yale Law Journal* 2599 (1996-1997), p. 2645.

¹⁶⁵ Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* 1 (1992), p. 3.

compliance by the actor with a particular norm, leading to interactions with the actor concerned such that its behaviour is turned to complying with the norm.

This interaction leads to an interpretation or enunciation of the applicable international norm, which is the second stage. Finally, the third stage involves the internalisation of the interpreted or enunciated norm into the actor's 'internal normative system'.¹⁶⁶ This process is the transnational legal process that gives the theory its name. The idea is that the norm enunciated at the second stage guides future interactions of the actor community with the actor concerned and such interactions will further the internalisation of the norm by the actor, increasing and strengthening the primary actor's norm compliance in the process.¹⁶⁷

From the description of the TLP above, certain of its features bear resemblance to the CSF outlined in Chapter 1. But there are key differences. The idea of the Compliance Situation, of which the Compliance Topic is a part, would cover the interaction or first phase of the TLP. The Compliance Situation it will be recalled in one where the actor is seeking or expected to comply with the norm or norms that characterise the Compliance Topic¹⁶⁸. As such it encapsulates, though not explicitly, the idea of interactions with other actors as a factor motivating the actor to compliance. However, the idea of the Compliance Situation focuses attention explicitly on the Compliance Topic, which is important since the clear identification of the Compliance Topic helps to clarify its

¹⁶⁶ Harold Koh, *Why Do Nations Obey*, p. 2646.

¹⁶⁷ Harold Koh, p. 2646. The theory goes on to suggest that, 'repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.'

¹⁶⁸ See Section 1.1. Outlining the problem.

normative aspects, which is key to identifying the compliance requirements in relation to the norm or norms that characterise a particular Compliance Topic.

The second similarity consists in the recognition that interaction with the actor concerned results in the enunciation or identification of the applicable norm. The key difference is that the CSF highlights the importance of the actor's characteristics as the mediating prism through which the norm or norms characterising the Compliance Topic are translated into the Applicable Norm in relation to which compliance requirements will be determined. It is suggested here that highlighting the actor's characteristics is critical because they are key to identifying or interpreting the Applicable Norm. Finally, the TLP does not offer an explanation of how the norm that has been interpreted in response to an interaction with the actor community, is internalised by the actor concerned. It is suggested that the Compliance Framework (CF) can offer such an explanation; that the use of the CF in identifying the actor's compliance requirements in relation to an international law norm can lead to the norm's internalisation.

The TLP bears resemblance with Managerialism as well in its emphasis on interaction, repeated interaction and iteration, recalling Managerialism's recognition of the importance of persuasive discourse. Such discourse can involve a process in which the actor is involved in repeated participation in the interaction-interpretation-internalisation dynamic such that 'the interests and even the identities of the participants in the process' are reconstituted. Thus there is an element of social construction at play

that compliance theories such as TLP and Managerialism capture¹⁶⁹. This means that through repeated participation and over time, there is alignment of the actor's interests with external expectations of its conduct that results in enhanced compliance with particular international law norms.

But the process can also work in the other direction, meaning the alignment is achieved because of a shift in external expectation in the direction of the actor's interests. This would be compliance by stealth in the sense that the actor has not had to change its conduct. It has not moved to compliance. Rather compliance has come to it. A third dynamic may also be considered that is probably a better reflection of reality. And that is that interactions and iterations in both directions, taking account of changing circumstances along the way, lead to developments in international law that are internalised by both transnational actors and the actor concerned, creating 'patterns of behaviour that ripen into [newer] institutions, regimes, and transnational networks.'¹⁷⁰

As mentioned earlier, legal obligations alone may be insufficient grounds for regulating behaviour or compliance in the absence of enforcement. Thus the compliance theories just reviewed offer other motivations for compliance like self-interest or aligned preferences). And in some cases, expectations for compliance that are internalised provide another reason for compliance.

¹⁶⁹ Jose Alvarez, *International Organisations as Law-makers*, Oxford University Press,

¹⁷⁰ Harold Koh, *Why Do Nations Obey*, p. 2654.

No single theory can explain fully the compliance by an actor with its obligations or commitments in relation to norms of international law. In fact, the different compliance theories suggest different basis for compliance with international law, meaning they are individually indeterminate in the sense that a single theory does not explain or predict every instance of compliance or lack of compliance. An improved compliance theory is likely to incorporate aspects of existing theories. More than one theory may be at work for a particular situation. In the next section some implications for identifying compliance requirements with international norms are considered arising from the concept of compliance.

2.3. Conceptual considerations for compliance

There are features of the concept of compliance that give rise to certain considerations for the actor seeking to comply to take into account in identifying its compliance requirements. These considerations are referred to as compliance considerations and are the third basis for identifying compliance requirements.

2.3.1. Compliance and causality

One feature of compliance that gives rise to compliance considerations concerns its causal dimension; what causes compliance with a norm of international law. There are three aspects to this causality issue. The first aspects concerns the type of norm an actor can be said to comply with. Does an actor comply with only legal norms or also with non-legal norms? This aspect of the causal dimension to compliance has already been

addressed.¹⁷¹ Actors, as discussed, comply with both types of norms and so the focus might properly be on the reasons why actors comply with the norms they comply with; the actor's motivation for compliance.¹⁷² These reasons and motivations were addressed in the previous section on Compliance Theories, and can be instrumental, where, according to Realism, the actor complies because it is in its interests to do, chief among which is its concern to avoid punishment and to preserve and enhance its relative power by securing the benefits of compliance.¹⁷³ Or the actor may comply with a particular norm because it has internalised it, according to the Transnational Legal Process theory, and so complies with the norm as a matter of obedience.¹⁷⁴

But, recalling the definition of compliance from Chapter 1, that compliance is conformity of an actor's conduct to an applicable norm, the definition does not specify the actor's motivation for so conforming its conduct. In other words, the concern indicated in the definition of compliance¹⁷⁵ is whether the actor's behaviour in fact matches the international norm.¹⁷⁶ So it is possible for an actor to be said to in compliance with a norm without actually making a conscious effort to comply with it.

¹⁷¹ See the discussion at Sections 1.2.2.Norms and 2.2. International regulation and compliance.

¹⁷² Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law*, 387 (2000), p. 391.

¹⁷³ See the discussion at Section 2.3.1 Realism.

¹⁷⁴ See the discussion at Section 2.3.6 Transnational Legal Process. Obedience then may be understood as the highest form of compliance. The other manifestations of compliant behaviour may be described as 'coincidence' where there is no causal connection between the matching behavior and the norm, 'conformance' where merely conforms to the rule when convenient but not out of a sense of obligation, legal or moral, and 'compliance', where the norm governs the actor's conduct because the actor wants to gain some benefit through complying, or avoid punishment for not complying. See Harold H. Koh, 'Why Do Nations Obey International Law', 106 *Yale Law Journal* 2599 (1996-1997), p. 2600 at footnote 3.

¹⁷⁵ The definition stated here is derived from a range of definitions identified and referred to in Section 1.1. Outline of the problem.

¹⁷⁶ Dinah Shelton, 'Introduction', in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5.

Such compliance is referred to as automatic¹⁷⁷ or coincidental compliance.¹⁷⁸ It is this feature of the concept of compliance that gives rise to a particular consideration for identifying an actor's compliance requirements with a norm of international law.

Automatic compliance can come about in two ways. First, the conduct required by the norm already matches the actor's current operations or practice.¹⁷⁹ Then, as soon as the actor undertake the commitment reflected in the norm, it will be in compliance without having done anything further. In such a case, the actor's compliance would simply be an artefact of the norm that was chosen.¹⁸⁰ For instance, whale-catch quotas in international whaling conventions, matched the existing catch levels of the whaling industry, meaning compliance by countries with such industries was automatic. The phenomenon of agreeing to do what you are already doing anyway can be a problem for international law where most of the norms are set by states on a consensual basis. This self-regulatory scheme¹⁸¹ is susceptible to its subjects only agreeing to be bound by norms they know beforehand they will have little difficulty complying with. And the fact that actors possess varying capacities for compliance can justify selection of the weakest norms in the application of a least common denominator calculus.¹⁸²

¹⁷⁷ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations*, Sage Publications, 2002, pp.538-558, at p. 539.

¹⁷⁸ Harold H. Koh, 'Why Do Nations Obey International Law', 106 *Yale Law Journal* 2599 (1996-1997), p. 2600 at footnote 3.

¹⁷⁹ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', p. 539.

¹⁸⁰ Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', p. 391.

¹⁸¹ Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law', in John Braithwaite, Christine Parker, Nicola Lacey, Colin Scott (eds.) *Regulating Law*, Oxford University Press, 2004, pp.246-268, p. 248.

¹⁸² Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', p. 539.

The second mode of automatic compliance can arise where the actor's conduct moves into compliance with the norm but for entirely extraneous reasons or by happenstance.¹⁸³ For instance, a weakening economy may cause polluting industries to shut down, bringing the state or the local government into compliance with international environmental norms for regulating harmful pollution. Since these are cases where the actor is in compliance despite not making any conscious effort to achieve compliance, the compliance exhibited in this manner may be called passive compliance in contrast to active compliance where the actor consciously seeks and attains compliance.

In the case of active compliance, the actor does undertake those activities to implement international norms, that is to make them effective internally. The concept of the implementation of international norms is obviously a clear one to understand and involves activities like passing appropriate laws and enforcing those laws, in the case of state actors. In fact all compliance theories presuppose the actor is engaged in active compliance because these theories explain *why* the actor complies with international law norms. So they are explaining situations where the actor is motivated to comply. In a passive compliance situation, the issue of the actor's motivation is not central and in fact hardly ever arises.

The issue of causality as it arises in connection with the concept of compliance has a number of implication for identifying compliance requirements in relation to

¹⁸³ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', p. 539.

international norms. One implication of that feature is that sustainability is a compliance consideration and must inform the identification of an actor's compliance requirement. Because there can be compliance without the actor actually doing anything or engaging in any course of conduct, a requirement for compliance is for the actor to ensure the sustainability of its compliance with the norm in question. Causality is an important consideration in identifying compliance requirements because emphasising causality helps eliminate inadvertent or accidental reliance on coincidental compliance.

This in turn means that a system of monitoring that compliance is required. It also means by implication that the norm must be clearly identified (for the purposes of the Compliance Framework (CF) as discussed later in the chapter). So in terms of the design of the CF two issues arise because of the fact of sustainability as a compliance requirement. One is that the applicable norm must be clearly identified. The other is that ensuring the sustainability of compliance must be provided for in the CF's design by the requirement of having a system of monitoring the actor's compliance with the norm concerned.

The compliance consideration of sustainability, although it comes to the fore with particular relevance for cases where there is no causal connection between the actor's conduct and its compliance, is also a consideration the actor or any external interested party would have to bear it in mind in cases where there is a causal connection between the actor's conduct and its compliance with a particular norm. In this case, the basis for the consideration of sustainability is also that the actor wants to maintain compliance and

avoid becoming non-compliant. Arguably this concern with ensuring the sustainability of the actor's compliance is stronger where the compliance is indirectly attained rather than where it is attained through a causal link between the norm and the actor's conduct. Because in the former case there is greater risk that the sustainability may not be maintained (for whatever reason, e.g. lack of care, lack of due diligence) than in the latter case where the actor's attention is already actively focused on the issue of complying with the norm in question.

2.2.2. Compliance in stages: Implementation, Application and Effectiveness

This section examines the other feature of compliance from which compliance considerations arise in connection with the identification of compliance requirements relating to international norms. Unlike the case of examining the causal dimension or feature of compliance, here the feature of compliance is examined comparatively and indirectly by considering features of two concepts that are closely related to the concept of compliance. These are the concepts of the implementation and effectiveness of international norms.

The implementation of international norms refers to 'the process of putting international [norms] into practice' within the governance structure of the actor¹⁸⁴ so that they are made effective internally.¹⁸⁵ For states this would refer to putting international

¹⁸⁴ Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law*, 387 (2000), p. 392; Dinah Shelton, 'Introduction', in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5.

¹⁸⁵ Edith Brown Weiss and Harold Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, 2000, p. 4.

norms into practice within its system of law. As noted earlier, international regulation is largely aimed at regulating activities within the territory of states and the domain of activities so regulated has been expanding¹⁸⁶. The mode of such regulation within states is primarily legal and administrative and so the implementation of international norms in the context of a state actor includes activities like passing legislation, enacting regulations and policies, creating institutions and mechanisms, and enforcing the law,¹⁸⁷ where the content of the laws, regulations and policies conform to the obligatory or prescriptive language of the norm.¹⁸⁸ And depending on the issue area concerned, for both state and non-state actors, some form of institutional acculturation to be aware of the importance of compliance may also be necessary.¹⁸⁹

Compliance, as noted, may be causally disconnected from the international norm in question. So it may not necessarily depend on the implementation activities undertaken by the actor. For instance, implementation activities may be undertaken by a state to comply with international environmental agreements but pollution levels in that country may come down because the polluting economic sectors entered a depressed state. All the while the implementation activities had no effect on the levels of pollution in that country

¹⁸⁶ See the discussion at Section 2.2. International Regulation and Compliance.

¹⁸⁷ Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', p. 392. While the discussion on implementation of international norms normally deals with the case of domestic implementation of such norms, Raustiala note that such implementation by states also has an international dimension, for instance, where states physically establish a secretariat created pursuant to a treaty. So a state's creation of institutions in the implementation of an international norm can refer to the creation of institutions at the domestic and international levels.

¹⁸⁸ Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths', 32 *U. Rich. L. Rev.* 1555, (1998-1999), p. 1562.

¹⁸⁹ For example, in relation to international human rights, state officials like 'judicial and administrative authorities should be made aware of the need to ensure compliance with the [state's ICCPR] obligations'. Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26/05/2004.

and it may possibly be the case that those implementation activities were ineffectual. In that case, the intervening economic depression not only would have had the effect of lowering the pollution levels but also of masking the impotency of the state's implementation activities. Accordingly, snapshot views of compliance can be misleading¹⁹⁰ and for an actor interested in complying with an international law norm, it would be necessary to trace the causal path linking the apparently compliant activity with the norm that the actor is seeking to comply with.

But the concern here is with active compliance, where the actor is motivated to comply with an applicable international norm and is interested to identify its compliance requirements in relation to that norm. This active compliance then is not only one where implementation activities are undertaken by the actor but where the actor is also interested to see that its implementation activities or implementing actions are complied with or followed through¹⁹¹ The focus here, as noted elsewhere in this thesis, is to prevent non-compliance¹⁹² and where non-compliance is suspected or detected, to remedy that situation and bring the actor back into compliance.

The account for this aspect of compliance, which is concerned with the actor following through on its implementation activities, and which comes into focus when features of the concepts of compliance and implementation are contracted, it can be

¹⁹⁰ Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', p. 393.

¹⁹¹ Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements', p. 1563; Edith Brown Weiss and Harold Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, 2000, p. 4.

¹⁹² Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements', p. 1563.

isolated as a compliance consideration call ‘application’. ‘Implementation’ is a compliance consideration in its own right because whether an actor is in compliance with an applicable international norm or not depends at the outset in large part on the nature of the implementing activities it undertakes in relation to that norm. As noted above, implementing activities can be impotent and masked in a snapshot look at an actor’s compliance where actually those activities are inadequate for the purpose of implementing the norm concerned.

‘Application’ as a compliance consideration that follows sequentially after ‘implementation’. It has two aspects. One is that, as discussed, ‘application’ can be understood as internal compliance, that is compliance with the actor’s implementing activities.¹⁹³ The other aspect concerns the manner in which the implementing activities are being applied in practice. Because they may be applied as designed and thus show internal compliance but may not be operating as desired. For instance, affordability issues or concerns with cultural appropriateness may lead to mechanisms designed to carry out implementing policies not being used by the target population. And of course, the problem with taking a snapshot view of compliance, as mentioned earlier, is one where the actor is complying perfectly with laws, regulations, policies or mechanisms that are simply not fit for the purpose they are designed to meet. So the ‘application’ compliance consideration takes account of these type of issues that can arise when the actor is

¹⁹³ Philippe Sands, ‘Compliance with International Environmental Agreements: Existing International Arrangements’, in James Cameron, Jacob Werksman and Peter Roderick (eds.), *Improving Compliance with International Environmental Law*, London : Earthscan, 1996, pp. 48-81, p. 52: ‘Once and obligation has been domestically implemented the party must ensure that it is complied with by those within its jurisdiction and control. Several treaties expressly require Parties to ensure such compliance’.

following through with activities undertaken in connection with the ‘implementation’ consideration.

Conceiving of compliance not just as a binary condition, that is the actor is either in compliance or not, but as a process, as it almost inevitably will be in most situations¹⁹⁴, the implementation and application compliance considerations discussed here, can be understood as ‘stages’ of the compliance process. The two stages are part of a triumvirate, with the ‘effectiveness’ stage, which is discussed next.

‘Effectiveness’ is a compliance consideration derived from contrasting the features of the concept of the effectiveness of an international norm with the concept of norm compliance. The idea of an international norm’s effectiveness is a broad and expansive one and speaks to whether the norm successfully addressed the problem it was designed to address.¹⁹⁵ It is an idea that operates at the international regime level and so while a state may be in compliance with its treaty obligations, the treaty may nevertheless prove ineffective in addressing the common international problem it was designed to

¹⁹⁴ Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan Journal of International Law*, 345 (1998), p. 348: ‘the assumption that conformity and non-conformity are binary is not an adequate reflection of international practice, in which degrees of conformity or non-conformity and the circumstances of particular behaviour often seem more important to the participants’.

¹⁹⁵ Dinah Shelton, ‘Introduction’, in Dinah Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2000, p. 5; Kal Raustiala, ‘Compliance and Effectiveness in International Regulatory Cooperation’, 32 *Case Western Reserve Journal of International Law*, 387 (2000), p. 393: ‘Effectiveness is a concept that can be defined in varying ways: as the degree to which a given rule induces changes in behavior that further the goals of the rule; the degree to which a rule improves the state of the underlying problem; or the degree to which a rule achieves its inherent policy objectives.’

tackle¹⁹⁶. It can be difficult to determine with exactness that a change that ended the problem the treaty or the treaty norm was designed to tackle, resulted from the institution and application of the norm itself. Too many intervening factors may have played a role in that result. Accordingly, a narrower conception of an international norm's effectiveness could be one where the effective norm is one 'that leads to observable, desired behavioural change.'¹⁹⁷

In terms of being a compliance consideration, the concept of a norm's effectiveness is the same as that just discussed but is applied to the actor's international governance environment as opposed to at the international level. The focus would be, following sequentially along the 'implementation' and 'application' stages, on whether the implementing activities as applied, assuming the application of those activities to be correct or unproblematic, achieved their goal. And that goal most likely would be an 'observable, desired behavioural change' of the appropriate kind. For instance, an implementing activity like an affirmative action law would be effective depending on whether more government positions and educational opportunities are being occupied by members of the minority group than before the law's passage.

So, as discussed above, the concept of compliance can be broken into three stages: implementation, application and effectiveness, each of which is a consideration

¹⁹⁶ Edith Brown Weiss and Harold Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, 2000, p. 5.

¹⁹⁷ Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law*, 387 (2000), p. 394.

for an actor seeking to identify its compliance requirements with a norm of international law.

Before leaving the discussion in this sub-section, it may be noted that the point above observed that it can be difficult to determine that a treaty was responsible for a change it sought to bring about. Thus the effectiveness of treaties can be difficult to prove. But on a much smaller scale, the same can be said in some cases about whether an action taken to implement an international norm actually caused the required result that was observed. So in terms of the Compliance Framework as discussed later, it may be difficult to show that an action taken at the implementation level led to the required result observed at the effectiveness level. That is to say, this is another type of causality that can arise in relation to the concept of compliance. In the previous section the problem was one where there was compliance without the actor doing anything to comply. Here the problem is that the actor has done something to try to comply and the course of conduct adopted by the actor has seemed to produce the required result but it could still be that some other factor caused that result and not the actor's course of conduct.

It is submitted in relation to the issue described in the paragraph above, that the compliance requirement would be to carefully and clearly identify the causal pathway that leads to the expected result. That way if the cause was not the implementing action, remedial activities can be undertaken to ensure a proper causal pathway exists connecting the implementing action and the expected result. But if the proper pathway already exists

then the actor can undertake some action or course of conduct to be able to sustain or even enhance its compliance with the international norm concerned.

The observation about causality and compliance echoes and re-emphasises the points made in the previous section because the nature of compliance makes causality an important consideration. And there are two particular aspects to that nature, as discussed next. First, that compliance is ongoing, there is a temporal dimension as emphasised by Managerialism. So it is important to ensure that an actor's compliance is sustained, especially as circumstances external and internal to the actor are susceptible to change. Second, that compliance can be a matter of degree and in such cases, the aim will be for actors to keep enhancing their compliance and move to ever more compliance than before. An example of such a case is that of the progressiveness of human rights realisation. Human rights compliance is an ongoing process and actors can always do more to enhance their compliance with human rights norms.¹⁹⁸ So here the causality element is important so that the actor can always maintain the onward momentum of its compliance.

2.2.3. Compliance can take time and can be a matter of degree

As noted in the discussion on Managerialism, there is a temporal dimension to the issue of an actor's compliance with an applicable norm¹⁹⁹. Compliance can take time in other words. Also, in noting above that compliance is often not a binary condition, it may be observed that in many cases, the issue is not whether the actor has complied or not but

¹⁹⁸ See Section 4.1.3. Sustainability.

¹⁹⁹ See the discussion in Section 2.3.5. Managerialism.

how far it has complied.²⁰⁰ Compliance is relative and a matter of degree in other words. So another consideration arises from the concept of compliance, namely that one of the elements of an actor's compliance requirements is likely to be the setting of targets in relation to the implementing activities the actor has undertaken to comply with the applicable international law.

The targets may be time bound or based on some quantifying measure, such as population. But the purpose of the target is so that it is possible to obtain an idea of the position of the actor on its progress to full compliance. For each target, a series of benchmarks may be established to mark out the stages reached by the actor in attaining compliance.²⁰¹ Such targets and benchmarks would reflect the fact that compliance is a process and their purpose is to provide a check on the progress made by the actor as part of that process and a goal towards which the actor's progress is headed.²⁰²

So from the consideration of the concept of compliance, a number of considerations arise that indicate what elements would comprise an actor's compliance requirements in relation to a particular international norm. The next section will assemble these elements into a more developed version of the Compliance Strategy and Framework than the one discussed in Chapter 1.

²⁰⁰ Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law*, 345 (1998), p. 348.

²⁰¹ Amarjit Singh, 'Business and Human Rights: A framework for identifying human rights compliance requirements', paper submitted in evidence to the Joint Committee on Human Rights of the UK Parliament, May 2009. (Amarjit Singh, 'Business and Human Rights')

²⁰² Amarjit Singh, 'Business and Human Rights'.

2.4. The general strategy and framework for identifying and specifying compliance requirements with norms of international law

Where the factors motivating compliance exist, actors will want to or need to comply with the applicable international norms. The previous two sections have discussed and abstracted various compliance requirements for actors seeking to comply or improve compliance with international norms. This section organises those requirements into the Compliance Strategy and Framework (CSF).

The CSF has a strategic aspect in that it offers a systematic way to think through an actor's compliance requirements, which helps meet the actor's aim of achieving or sustaining compliance with an international norm. This strategic aspect finds resonance in the literature on compliance, which is concerned, explicitly or implicitly, with strategies to improve compliance with international norms.²⁰³ The emphasis on compliance strategies is also mirrored in the aim behind theorising about compliance of improving institutional design in order to improve or enhance compliance²⁰⁴. Features of these strategies and their associated institutional design involve producing incentives for the actor to improve its compliance with the applicable norm.

²⁰³ Roger Fisher, *Improving Compliance with International Law*, University Press of Virginia, 1981; Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths', 32 *U. Rich. L. Rev.* 1555, (1998-1999).

²⁰⁴ George W. Downs, Kyle W. Danish and Peter N. Barsoom, 'The Transformational Model of International Regime Design: Triumph of Hope or Experience', 38 *Colum. Journal of Transnational Law*, 465 (2000); Roger Fisher, *Improving Compliance with International Law*, University Press of Virginia, 1981.

These incentives could be the threat of military or economic sanction or the sanction of reputational loss. The managerial approach to compliance for example can be understood as setting out a strategy to achieve compliance through iterative contact and dialogue with the state in contrast to the enforcement approach to compliance. Alternatively, the incentive could be the availability of technical assistance in order to improve the capacity for improved compliance. The design of reporting and monitoring mechanisms could yet be another means for providing incentives to comply by opening the actor's conduct to public scrutiny and criticism²⁰⁵.

Strategies to incentivise compliance could also be functional in nature, being based on the idea that compliance with the norm is in the actor's operational or commercial interests. This could be because such compliance boosts the actor's operational effectiveness both in relation to a particular area of activity and to its overall performance. Conversely, aligning a compliance strategy with the actor's existing operational features can enhance that actor's compliance with a particular norm. This can form the basis for the institutional design of compliance improvement. Here the incentive works by reducing the adaptive costs for the actor of incorporating the compliance strategy into its operations.

In some cases, the improved effectiveness can imply a commercial and strategic advantage. The example of the World Bank in Chapter 1 where the Bank required the state's compliance with norms concerning participation rights illustrates this type of

²⁰⁵ Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, 1998.

compliance incentive at play. Such compliance potentially helps improve the development and sustainability of the Bank's projects, which would have an operational pay-off for the Bank and any associated creditors and in that sense also for the state concerned. By virtue of the state's compliance with the norms, there could also be said to have been benefits for the people affected by the project in that their rights were respected in the manner the project was undertaken.

In relation to the various types of incentives for compliance indicated above, the identification of compliance requirements has a useful role to play. As such the CSF can likewise be adopted as a strategy aimed at improving compliance. It has aspects of both the capacity-improving and incentive-supplying models of compliance strategies. By helping an actor think through its compliance requirements in a systematic manner, the CSF can enhance an actor's capacity to improve its compliance or ensure current levels of compliance do not decline. An actor that can more clearly and accurately identify its compliance requirements will be better able to deploy its resources to effect compliance in a more effective and sustainable manner.

The CSF can also be used by interested external parties to monitor and assess an actor's compliance with a particular norm, generating incentives in the form of external pressure on the actor to improve its compliance.

Ultimately, the CSF, in providing a framework for identifying compliance requirements, helps orchestrate an actor's course of conduct in complying with a norm of

international law. In order to discuss the CSF's strategic aspect more meaningfully, it is necessary first to outline the elements of the CSF. These elements have been derived from the foregoing analysis and discussion in Chapters 1 and 2, and are represented in Diagrams 2 and 3 below as the general form of the CSF.

Diagram 2. Compliance Strategy for identifying compliance requirements in relation to norms of international law.

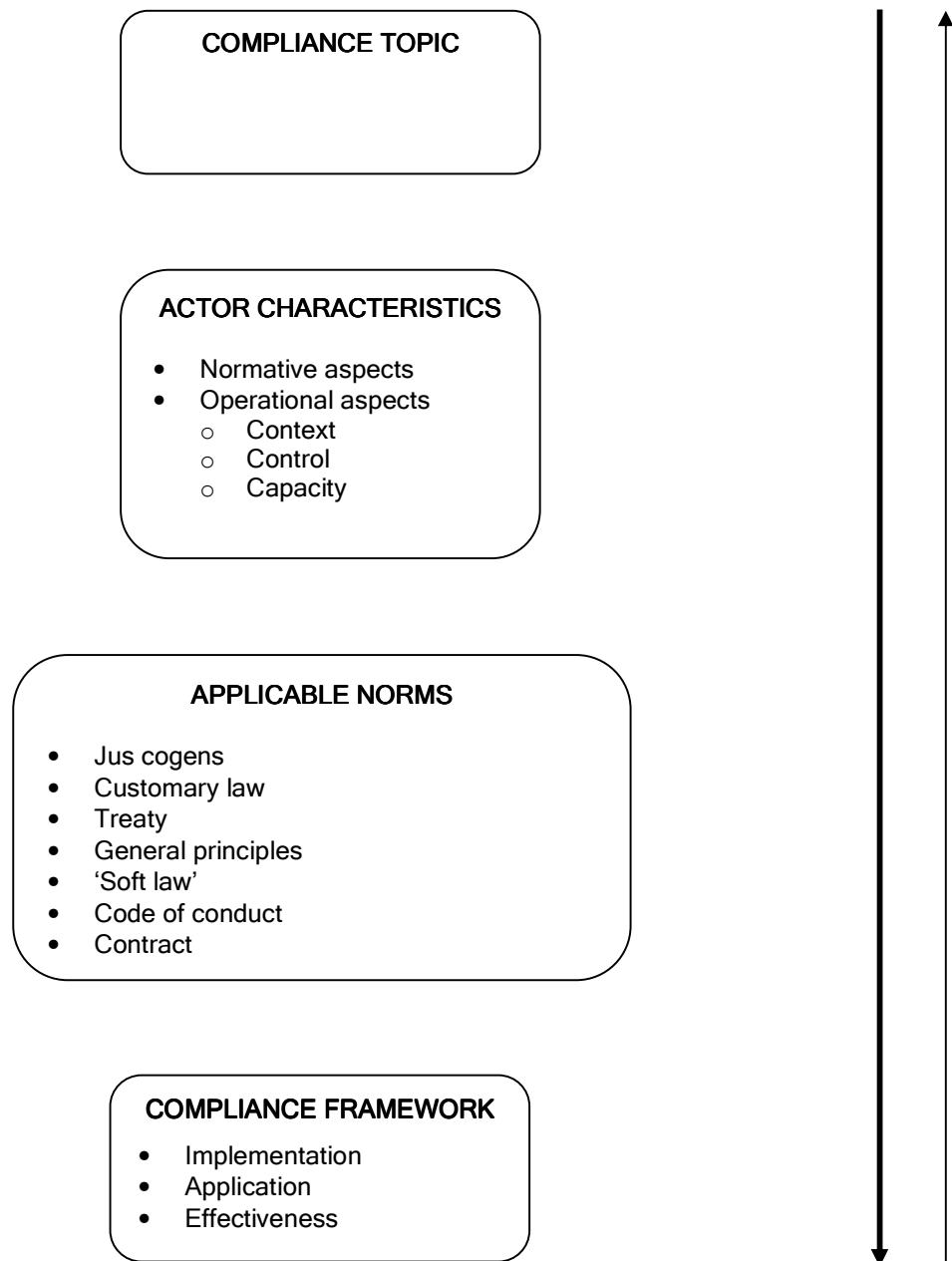
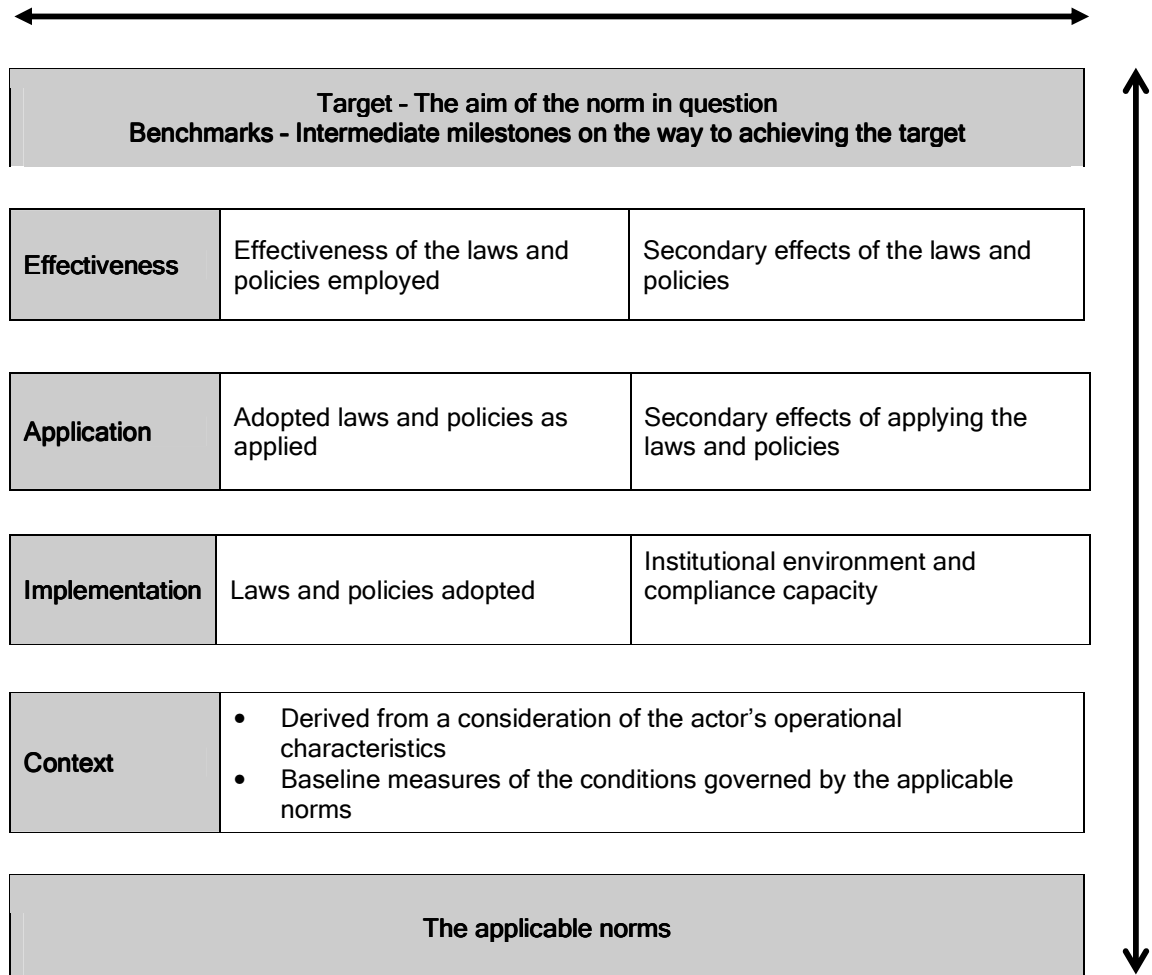


Diagram 3. Compliance Framework for identifying compliance requirements in relation to norms of international law. The double-headed arrow signifies the non-linear, dynamic application of the CF.



2.4.1. Elements of the Compliance Strategy and Framework

The Compliance Strategy and Framework consists of four elements as shown in Diagram 2. The last element is the Compliance Framework and will be described separately in the next section. The remaining three elements of the CSF are described here.

The Compliance Topic relates to the issue regarding which compliance is sought by the actor or is expected of the actor by other interested parties. It can be encapsulated in a single norm or comprise a number of norms, as for example in the case of participation as a human right, which is discussed in Chapter 5.²⁰⁶

The Compliance Topic needs to be clearly identified and maintained in the actor's consideration for, as seen in the section on causality²⁰⁷ there can be compliance without a causal link between the conforming conduct and the norm supposedly motivating that conduct. Because the CSF is a strategy based on the identification of compliance requirements with regards to a particular norm, there is a risk that the compliance requirements might be wrongly identified, and perhaps more likely, the requirements are not adhered to because the actor is already seemingly complying with the norm. The danger in the latter case is that the actor accidentally enters into a state of non-compliance.

At this level the norms underlying the Compliance Topic are at a general level. The area of international law has been identified and the norms relating to the Compliance Topic under that area of international law are identified. These norms next have to be

²⁰⁶ Section 5.2.1. The human rights aspect of participation.

²⁰⁷ Section 2.4.1. Compliance and causality

particularised to the context of whom compliance with them is expected. And that context has two aspects – normative and operational. Once particularised as the applicable norms, they are used as the basis of the CF-directed exercise of identifying the actor's compliance requirements.

In relation to the actor's normative characteristics, the entire normative environment is considered so as to identify any potential norm conflicts. The actor cannot sacrifice compliance with one set of international norms in order to comply with another set of international norms. This is the problem of fragmentation of international law discussed in Chapter 1.²⁰⁸ If there is norm conflict, then appropriate international law standards like 'proportionality' and 'margin of appreciation' can be used to undertake a principled balancing of the issues involved. The actor's operational characteristics are taken into account and may also lead to an application of the international law standards just mentioned if there are issues as to the capacity of the actor to comply with the applicable international law norm. Other operational features of the actor's characteristics will go to providing details of specific compliance requirements as they relate to the actor's manner of operation.²⁰⁹

As noted, the applicable norms are the particularised norms relating to the Compliance Topic after the Actor's normative and operational characteristics have been taken in to account. In this was the problem of fragmentation of international law is addressed but in addition concerns as to legitimacy of the applicable norms are also

²⁰⁸ See Section 1.3.3. Fragmentation.

²⁰⁹ See Section 1.3.1. Actors.

addressed. That is to say that the applicable norms exhibit the attributes of determinacy and coherence that enhance their compliance pull and so the likelihood that they will be complied with.²¹⁰ In this sense defining the Applicable Norms as just described is a compliance requirement in its own right. Without this step, identifying the compliance requirements in relation to the general norms concerning the compliance topic may not help ensure or improve the actor's compliance with those norms as those norms might be perceived as illegitimate in their application to the actor thus leading to non-compliance.

Finally, there is also an iterative aspect to the CSF, represented in the thinner upwards arrow in Diagram 3. This thinner arrow represents the fact that the effects of this upwards iteration will likely emerge over time. It was argued in Chapter 1 that one of the practical effects of the CSF is that it can guide and shape actors' compliance practices, including how they balance competing issues in undertaking a course of conduct aimed at achieving compliance with international law. In a related vein, it was also suggested that CSF could assist theoretical inquiries charting the development of international law. Such inquiries will trace the manner in which actors' practice evolves in response to the application of international norms to their operations and activities. The nature and effects of the development of international law, as reflected in evolving practice, will likely emerge over time, hence the thinner or weaker arrow in the diagram, but nevertheless it is worthwhile to take note of it when considering the CSF in its application and implications in relation to international law.

²¹⁰ See Section 2.3.6. Legitimacy Theory.

2.4.2. Elements of the Compliance Framework

This section addresses elements of the Compliance Framework starting with the Applicable Norms. This element does two things. First, it overlaps with the last element of the CSF and provides the basis, as mentioned, of the CF-directed exercise of identifying the actor's compliance requirements. Second, it is meant to address the causality issue. It is important in identifying the actor's compliance requirements that they are all consciously identified as relating to the Applicable Norms. Doing so provides all the compliance requirements with a common frame of reference, that is, they all relate to the applicable norms. Further, the concern here is with active and not passive compliance, that is with the case where the actor is actively seeking to comply with the identified norms. So those norms should be clearly identified and the actor's explicit concern would be with complying with them. Finally, the targets that are set for the actor, at the top of the CF, will relate directly to the norms and the effectiveness of the actor's implementing activities will be assessed in terms of those targets thus ensuring that the acts or omissions undertaken by the actor as identified by the CF will have been undertaken with an express view to complying with those norms.

The next element of the CF relates to issues of context. Again this element does two things. First it brings into the considerations based on the CF, the relevant operational characteristics identified in the CSF to produce the Applicable Norms. And so the actor's capacity can be taken account of in identifying its compliance requirements and also its operational characteristics. Secondly, it establishes a baseline against which to measure the effects of the course of conduct the actor will engage upon to comply with

the applicable norms. This way it will be possible to assess if there is any appreciable difference resulting from that course of conduct that moves the actor towards greater compliance with the applicable norms. The targets the actor may be aiming for would be set against the baseline conditions at the time the actor undertakes its course of conduct.

The third CF element relates to the identification of compliance requirements according to the Implementation, Application and Effectiveness stages. These three stages have been described earlier.²¹¹ The implementation stage relates to compliance requirements in the form of implementing activities as well requirements in terms of the necessary institutional features being present. The application stage relates to requirements touching on how those implementing activities work in practice and the effectiveness stage related to whether the implementation activities actually has their intended effect. Both the application and effectiveness stages require consideration of whether the implementing activities are having any negative effects.

The CF's three components representing the implementation, application and effectiveness stages of compliance are inter-related and so can have an effect on one another. Thus, for instance, a problem identified at the application or effectiveness stage may actually have to do with an issue at the implementation stage, which is where a decision-maker would seek to make an adjustment. Also, lessons learnt in connection with one stage or level of the CF may have implications for improving performance in connection with other levels of the CF.

²¹¹ Section 2.4.2. Compliance in stages: Implementation, Application and Effectiveness.

The three levels are represented distinctly not only to show how they inter-relate but also to emphasise that compliance is an iterative process that will likely involve, measures aimed at compliance being designed, tried and refined. This iterative process will involve all monitoring and if necessary, making changes at one or all three levels. It is useful to distinguish the three levels so that at any one time, it is possible to identify where action is being taken or is required to be taken. The entire CF is iterative but in a particular situation most of the iterative process will occur at the implementation, application and effectiveness levels.

The final element of the CF comprises targets and benchmarks. Targets are goals that the actor is aiming towards and benchmarks refer to markers or milestones along the way to achieving those goals. There are several reasons arising from the concept of compliance as to why targets and benchmarks are needed. First, compliance is about changing an actor's behaviour and compliance can take time.²¹² So it will be important to know if progress is being made towards achieving compliance and even in fact that the actor is headed in the right direction towards compliance rather than away from it. In any regime or system where there are a number of actors, there will be a deficit of trust and a problem of free ridership meaning that rather than a propensity to comply as the Managerialists would have it, there could actually be a propensity to defect if one member of the regime is seen as not keeping up their end of the bargain. In such cases, establishing targets and benchmarks in a fair and transparent manner allows all the actors

²¹² See Section 2.3.4. Managerialism and Section 2.4.3. Compliance can take time and can be a matter of degree.

in that regime to find out how their fellow actors are doing in terms of their compliance with the norms applicable to all of them.

The CSF and the CF outlined an explained about are of a general nature. To explain them further, it is necessary to adapt them to an area of international law and this is done in Chapter 4 with Chapter 3 intervening to highlight some compliance requirements arising from the area of international law chosen, which concerns human rights.

2.5. Conclusion

This chapter looked at the literature on compliance to identify elements of compliance requirements in relation to international norms. It did so in three parts. First it considered the issue of international regulation and its relationship with the issue of compliance with international law norms. The second part to identifying compliance requirements that was undertaken in this chapter involved examining theories of compliance and drawing out from these theories, which explain *why* actors comply, some indication as to *what* are compliance requirements. Finally, by looking at key considerations arising from the concept of compliance, namely the issue of causality in compliance, then the definition of compliance as explained by being contrasted with concepts of implementation and effectiveness, elements of compliance requirements were noted.

The compliance requirements identified by this two-part analysis were of a general nature. Specific regulatory frameworks under international law will have particular compliance requirements based on their underlying ethos, as well as on the

substance of their norms. The general compliance requirements provide the basic framework on which the more particular requirements can be overlaid. This of course is important from the perspective of the coherence of international law and in order for any conflict between international law frameworks to be validly resolved. In the next chapter, the features of the international regulatory framework concerning human rights are outlined. Those features will represent particular compliance requirements based on that framework. Together with the general compliance requirements identified in this chapter, they will form the basis for the human rights compliance requirements outlined in Chapter 4.

Chapter 3 The international regulatory framework concerning human rights

Chapters 1 and 2 have outlined the concept of compliance requirements for norms of international law, and have explained the Compliance Strategy and Framework (CSF) as a means for identifying such requirements in a particular case. As mentioned in those two chapters, the CSF will be illustrated with regards to the human rights issue area in international law. This chapter begins that illustration with an explanation and discussion of the normative framework for human rights at the international level, and its analysis will inform the subject of Chapter 4, the adaptation of the CSF for the identification of compliance requirements for international human rights norms.

3.1. The international normative framework concerning human rights

The normative framework concerning human rights at the international level is primarily encapsulated in the United Nations Charter²¹³ and the International Bill of Rights, comprising the Universal Declaration of Human Rights²¹⁴ (UDHR) and the International Covenant on Economic, Social and Cultural Rights²¹⁵ (ICESCR) and the International Covenant on Civil and Political Rights²¹⁶ (ICCPR). As such, the framework, which established the basis for international scrutiny of human rights within a state's territory, is a post-World War Two emanation, and was a reaction to the human rights depredations

²¹³ 892 UNTS 119, adopted 26 June 1945, entered into force 24 October 1945.

²¹⁴ UNGA Res 217(A) III, adopted 10 December 1948.

²¹⁵ 993 UNTS 3, adopted 16 December 1966, entered into force 3 January 1976.

²¹⁶ 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

of that conflict. However the concept that a state could inquire into the treatment of individuals by another sovereign has international law antecedents in the abolition of the slave trade, the treatment of aliens by host governments, and in the international labour movement with the creation of the International Labour Organisation in 1919.

The international human rights framework remains highly relevant to this day. It underpins and is one of the hallmarks of international accountability as between states and, a more recent trend, between states, civil society and human rights non-governmental organisations (NGOs) on the one hand, and international organisations and corporations on the other. For all these actors, the concern is arguably less now with the kinds of large-scale and widespread human rights violations that may threaten international peace and security²¹⁷. Instead it is more to do with seeing that all human beings are treated decently and with dignity. For instance, the United States, concerned that Bangladesh ‘has not taken or is not taking steps to afford internationally recognised worker rights to workers in the country’, suspended preferential treatment for imports from Bangladesh²¹⁸, providing an example of inter-state enforcement of international human rights norms aimed at bringing about compliance with the norms concerned.

²¹⁷ See for instance, the concerns expressed in the UDHR’s Preamble, ‘Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ... Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’. UNGA Res 217(A) III, 10 December 1948. Of course these concerns still dominate over regional and internal conflicts.

²¹⁸ Technical Trade Proclamation to Congress Regarding Bangladesh: To Modify Duty-free Treatment Under the Generalised System of Preferences and for Other Purposes, by the President of the United States, Office of the Press Secretary, The White House, 27 June 2013, <http://www.whitehouse.gov/the-press-office/2013/06/27/technical-trade-proclamation-congress-regarding-bangladesh>.

States are not only held to account in relation to their obligations concerning the human rights set out in the ICESCR and the ICCPR. As part of the review of their compliance with human rights norms by the United Nations' Human Rights Council, states' conduct is examined in relation to their obligations and commitments under:²¹⁹

- (a) The Charter of the United Nations;
- (b) The Universal Declaration of Human Rights;
- (c) Human rights instruments to which a State is party;
- (d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council (hereinafter "the Council").

[and in] addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.

These obligations and commitments have various formulations but as a general matter can be summarised as an obligation to ensure the realisation of human rights and to ensure those rights and respected and protected from being infringed by the actions of third parties.²²⁰ A typology of human rights obligations is also applied to state actors stating that they are to respect, protect and fulfil the human rights of individuals within their territory.²²¹

The position of non-state actors is less straightforward with regards to whether they have obligations under international law in relation to human rights. Consensus has grown around the idea that while corporations do not have legal obligations under

²¹⁹ Human Rights Council, Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, adopted 18 June 2007.

²²⁰ See Section 3.2.2.1. for a discussion of the obligations of states parties to the ICCPR and the ICESCR.

²²¹ See Section 3.2.2.2. for a discussion on the respect, protect, fulfil typology.

international law concerning human rights, they do have a ‘corporate responsibility to respect human rights’ that entails that they:

[S]hould respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.²²²

Thus for corporations there is an element of this responsibility to respect human rights not to violate human rights and to remedy situations in which such rights were transgressed. This responsibility is not a passive one. Rather the corporate actor is expected to under due diligence studies to determine if its activities are or are likely to negatively affect the enjoyment of human rights. They are also expected to provide people whose human rights may have been affected with an access to a remedy.²²³ In short what the corporate responsibility to respect human rights entails is the corporate undertaking a course of conduct to ensure its operations do not negatively affect human rights that can be quite detailed and extensive.

The position of international organisations in relation to human rights obligations or commitments is less specific. Academic writers have suggested that such organisations either only have the obligation under international law to respect human rights²²⁴ or the

²²² Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, Annex, 21 March 2011, p. 13, Guiding Principle 11.

²²³ Human Rights Council, Guiding Principles on Business and Human Rights, Guiding Principles 17 and 30.

²²⁴ Sigrun Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund, Cavendish, 2001; International Law Association, *Accountability of International Organisations: Final Report*, Berlin Conference, 2004.

more expansive obligation to respect, protect and fulfil human rights.²²⁵ Much may depend on the nature of the operations that these organisations undertake in the territory of states and in most cases, international organisations do not have the regulatory power states have within their territory to creditably be asked to undertake obligations to protect and fulfil human rights. So as with corporations, the position with international organisations is also likely to be that they are expected to respect human rights even if there is no obligation on them under international law to that effect.

Thus the position is that under international law, states have legal obligations in connection with human rights while non-state actors generally have a non-binding responsibility to respect human rights. But as noted above in relation to corporation even though the responsibility to respect human rights is non-binding, it can still entail considerable effort to comply. And as noted in earlier chapters, the issue of compliance can arise in connection with non-legally binding norms with as much force as in relation to legally binding norms. So the question may not be as much whether a human rights norm is binding or not but what the actor faced with its compliance has done about complying with the norm.

The international regulatory framework concerning human rights therefore comprises three main elements, namely the actor with some responsibility or obligation in relation to human rights, the general human rights norms pertaining to that actor and the specific human rights recognised under international law that are at issue in relation to

²²⁵ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

the conduct of that actor in a particular compliance situation. The last element is a constant in the sense that the human rights recognised under international law are a finite number at any particular point in time. The key variable is the actor. The characteristics of the actor, its normative environment and operational conduct, will mainly reflect and determine the manner and extent to which internationally recognised human rights may be affected by the actor's behaviour. Accordingly the general human rights norms are formulated so as to limit encroachment on the protection afforded by the international human rights framework by the actor's conduct. In this sense, the norm is determined by the actor's characteristics, in particular the manner in which the actor's conduct can affect the enjoyment and realisation of human rights.

Under international law in general and under the international law of human rights, there are concepts relating to the interpretation and application of international human rights norms to states that take into account the characteristics of the state in determining whether the state is in compliance with its international human rights obligations or not. The underlying rationale of these concepts allows for their transposition and application to the case of non-state actors. These concepts will be relevant to the identification of an actor's compliance requirements in relation to international human rights norms, and are discussed next.

3.2. Concepts relevant to the interpretation and application of international human rights norms

The previous section outline the international normative framework concerning human rights in terms of the actors whose conduct is regulated by that framework as well as its basic normative provisions and their sources in international law. This section examines key concepts concerning the interpretation and application of those key provisions. These concepts relate to: the content of obligations and commitments concerning human rights²²⁶, the nature of those obligations and commitments²²⁷, the actor's exercise of discretion in complying with such obligations and commitments²²⁸, and its power to limit the enjoyment of various human rights.²²⁹

All of these concepts have been developed for the interpretation and application of human rights norms as they relate to the conduct of states. Some, like the obligation to respect, have been applied to non-state actors²³⁰ in recognition of the fact, and to the extent that, the conduct of such actors can interfere with the enjoyment of human rights. In the same way, the approach in this section, to the examination of the concepts listed above is to focus on their underlying rationale and regulatory purpose. The basis of these concepts' application to the case of state conduct may then inform the basis of their application to the case of non-state actors. In this connection, the discussion in Chapter 1

²²⁶ Sections 3.2.1.3. Due diligence, 3.2.2.2. Obligations to respect, protect and fulfill human rights and to undertake institutional measures, 3.2.2.3. Availability, acceptability, accessibility, adaptability and quality of compliance measures (AAAAQ), 3.2.2.5. Minimum core obligation.

²²⁷ Sections 3.2.2.1. Obligations of conduct and result, and 3.2.2.4. Progressive realisation.

²²⁸ Section 3.2.1.2. Margin of appreciation.

²²⁹ Section 3.2.1.1. Proportionality.

²³⁰ See the discussion in Section 3.1.

on the Actor's Characteristics and in Chapter 2 about how such characteristics are taken into account when using the Compliance Strategy and Framework (CSF) is relevant.

In transposing norms of international law, and the concepts interpreting and applying those norms, from the case of states to non-state actors, the actor's characteristics will be key because they inform the manner in which the non-state actor could negatively affect the interests protected by the norms. In the area of human rights for instance, the interests of concern are the enjoyment and protection of internationally recognised human rights.

The discussion in this section starts with an examination of general international law concepts that are relevant to the interpretation and application of human rights norms. Following will be an examination of such concepts from the international human rights issue area specifically. The aim is to single out those aspects of these concepts that will be relevant to an actor's identification of its compliance requirements in relation to international law norms concerning human rights. So a key issue will be to see to what extent, and how, these concepts relate to the elements of the CSF described in Chapter 2, and the considerations underlying those elements.

3.2.1. General international law concepts relevant to the interpretation and application of human rights norms

Three general international law concepts or doctrines as discussed in this section. As mentioned earlier, they relate to the interpretation and application of international law norms, including norms concerning human rights. In this way, in any specific instance or compliance situation, these concepts will determine the content of the applicable human rights norms, and whether the actor is in compliance with those norms or not. The three concepts discussed in this section concern the actor's power to limit or restrict the enjoyment of various human rights (proportionality), the actor's exercise of discretion in complying with its obligations and commitments concerning human rights, and the degree of fault exhibited in the actor's conduct in carrying out those obligations and commitments.

3.2.1.1 Proportionality

International law recognises situations where the rights and interests protected by international norms in a particular situation conflicts with an actor's need to protect other important interests. For instance, the state's power to regulate affairs within its territory for public interest purposes may conflict with an investor's rights²³¹ or with rights protected under international human rights instruments²³². In such situations, the doctrine

²³¹ Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, *IIJ Working Paper 2009/6 (Global Administrative Law Series)*, 19 August 2009, pp. 21-40.

²³² Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, 1994, pp. 234-235.

of proportionality and the analysis it provides for helps determine the where the balance between such competing interests can validly be struck.

The doctrine of proportionality is not a substantive norm of international law but instead is applied in particular cases to smooth the application of international law²³³, through providing a means for assessing and weighing competing claims and a basis and structure for justifying authoritative decisions involving the balancing of interests.²³⁴ Having its roots in domestic law concerning the balance between the rights of the individual and the power vested in the state to account and provide for community interests, the doctrine of proportionality was developed in the context of German constitutional and administrative law before migrating to other civil law jurisdictions and eventually also to common law ones.²³⁵ Thus for instance Canada's Supreme Court in considering whether a piece of legislation complied with the country's Charter of Rights and Freedoms, used a three-part proportionality analysis or test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.²³⁶

²³³ Rosalyn Higgins, *Problems and Process*, p. 219.

²³⁴ Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance', p. 22.

²³⁵ Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance', p. 24.

²³⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103, 139.

And in South Africa, the Constitutional Court expressed the test of the proportionality of a state measure in terms of the following factors:

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.²³⁷

Proportionality analysis is also employed in relation to international human rights norms. For instance, at the regional level, in the context of the European Convention on Human Rights, the European Court of Human Rights has applied and explicated the proportionality doctrine in striking the balance between the individual's right to property and the state's right to regulate.²³⁸ And at the international level, the proportionality doctrine has been explicated by the United Nations human rights bodies. In 1984, the Siracusa Principles²³⁹ were put forward in terms of assisting the interpretation and application of the human rights set out in the International Covenant on Civil and Political Rights.²⁴⁰

²³⁷ *State v Makwanyane & Another*, 1995 (3) SA 391, 436 (CC).

²³⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953, ETS No.5. Protocol 1, Article 1, 20 March 1952: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'; *Sporrong and Lönroth Case*, Judgment of the European Court of Human Rights, 23 Sept. 1982, Ser. A, No. 52.

²³⁹ Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, Annex.

²⁴⁰ International Covenant on Civil and Political Rights (1966), entered into force 23 March 1976, General Assembly Res. A/RES/2200A (XXI), 999 UNTS 171. See, Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General, para. 2, Commission on Human Rights, Status of the International Covenants on Human Rights, 28 September 1984, E/CN.4/1985/4.

Thus the doctrine of proportionality relates to the idea that certain human rights are qualified, meaning that actors may legitimately restrict the scope of protection or provision made in relation to a particular human right and yet still be in compliance with its human rights obligation or responsibility. Where human rights are set out in treaties, the relevant treaty articles mention the grounds upon which the protection afforded to those rights might be restricted. It is a requirement for compliance with their human rights treaty obligations, that states seeking to restrict human rights only adopt measures proportionate to the pursuit of legitimate aims so as to ensure the continuous and effective protection of those rights²⁴¹. While states parties to human rights treaties have the power to restrict certain human rights in this manner, they are prohibited from applying restrictions that ‘would impair the essence of a Covenant right.’²⁴²

The doctrine also highlights the importance of considering the actor’s context in relation to human rights compliance assessment. It is allied with the margin of appreciation doctrine, which is discussed in the next section, in that it relates to a specific instance of deference to the discretion of the actor. The doctrine of proportionality ensures that any limitations or restrictions placed on the enjoyment of human rights is subject to review. The basis of such review is to ensure that the limits imposed on the enjoyment of the human right concerned was proportional to the aim being sought by imposing a limitation to begin with. Although the review may bring the matter up to the

²⁴¹ Human Rights Committee, General Comment 31, para.6.

²⁴² Human Rights Committee, General Comment 31, para.6.

international level, the question as to whether the limitation was proportional given the circumstances will involve a consideration of local conditions and contexts.

Accordingly the proportionality doctrine is relevant to the identification of compliance requirements with norms of international law as it permits actors to deal with situations where the norms governing them and so the compliance expectations they face conflict. Such cases require principled balancing of competing interests which proportionality analysis allows for. In the CSF and CF discussed in Chapter 2, proportionality analysis is particularly relevant at the application and effectiveness levels for the purposes of identifying compliance requirements for an actor in situations where compliance with the norm in question potentially causes restrictions of other rights and interests.

In Chapter 4, where the CSF is applied to area of international human rights norms, the CSF takes account of the need for such balancing at the stage of designing implementation activities, their application and in assessing their effectiveness. For the actor employing the CSF the incorporation of proportionality considerations in identifying its compliance requirements in relation to human rights norms or even more generally, helps ensure that competing claims are not ignored such that in complying with one set of norms, another set of norms is ignored or not complied with. Further incorporating the proportionality analysis within the CSF helps to ensure that the consideration of the factors to arrive at a particular balance among competing claims is

undertaken in a transparent manner with reasons that can be relatively easily explained by reference to the ‘boxes’ or elements of the CSF.

Applying the proportionality analysis in identifying or determining its compliance requirements also helps the actor show it arrived at those requirements through ‘right process’ as Legitimacy Theory emphasises. This can enhance the perception that the actor’s compliance requirements are fair and legitimate and so help ensure that they will be accepted as valid both by individuals internal to the actor and by external individuals and groups who are either going to be directly affected by the actor’s conduct or who are interested in assessing that conduct for compliance with the applicable human rights norm or other norm.

3.2.1.2. Margin of appreciation

The margin of appreciation relates to the discretion allowed states in interpreting and applying international norms internally. The doctrine is referred to implicitly in the ILC’s analysis of the rationale underlying obligations of result.

The margin of appreciation doctrine is one of review or judicial review by international courts and bodies over national decisions or conduct²⁴³. The question of its application therefore arises whenever a state’s conduct comes under authoritative scrutiny at the international level. As such, discussion and commentary of the margin of appreciation doctrine often takes the perspective of the external authoritative decision-maker making

²⁴³ Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008, p. 576; Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16(5) *EJIL* (2005), pp. 907-940.

an *ex post* determination of whether or not the state's conduct falls within the margin. Put simply, falling within the margin means the state is in compliance with the applicable international norm while falling without the margin means the state has failed to comply. So from the perspective of the state actor, the margin of appreciation doctrine raises the *ex ante* consideration of whether a proposed conduct falls within the margin or not. The actor seeking to comply with a norm will obviously choose the conduct it determines as falling within the margin.

In both the *ex ante* and *ex post* cases the margin of appreciation doctrine operates to define the boundaries of compliance and so the content of a particular international norm. From the perspective of the actor identifying compliance requirements in relation to a particular international norm, the doctrine can help determine those requirements because it defines what an actor can or cannot validly do, under international law, to comply with that norm. And so for that actor, whether a state, corporation or international organisation, faced with a compliance situation, the determination of its compliance requirements in relation to a particular norm is an *ex ante* exercise. For the external party scrutinising or reviewing that actor's conduct, the application of the margin of appreciation doctrine to identify the actor's compliance requirements would be an *ex post* exercise.

This section firsts explain the criteria for consideration when applying the margin of appreciation doctrine, illustrating the use of the doctrine at the international level. Then the doctrine's implications for identifying compliance requirements in relation to

norms of international law will be discussed. Finally some limitations in and criticisms of the application of the margin of appreciation doctrine are considered.

The doctrine explained

The margin of appreciation doctrine recognises that state officials have a degree of discretion in conducting their international obligations and operates as a presumption deferring to that exercise of discretion.²⁴⁴ The conduct amenable to that discretion relates to the interpretation and application of the international norm, covering both the laws and policies concerning the norm's subject-matter and their interpretation and application, as explained by the European Court of Human Rights (ECtHR) in *Handyside v. UK*.²⁴⁵ There, in considering whether the United Kingdom was in compliance with Article 10(2) of the European Convention on Human Rights²⁴⁶, which permits restrictions on the human right to freedom of expression, the ECtHR said,

'Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'.²⁴⁷

Because of the discretion possessed by the state and the indeterminacy of international norms²⁴⁸, the doctrine allows for the possibility of different actors applying the same international norm in a different manner with both actors being in compliance

²⁴⁴ Ian Brownlie, p. 576, Yuval Shany, p. 910.

²⁴⁵ *Handyside v UK*, 1 EHRR 737 (1976).

²⁴⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953, ETS No.5.

²⁴⁷ *Handyside v UK*, para. 48.

²⁴⁸ Domestic norms are also indeterminately stated and the issue is broadly one of the indeterminacy of language as discussed in relation to compliance theories in Chapter 2. See the discussion in Section 2.3.4. Managerialism and Section 2.3.5. Legitimacy Theory.

with the norm.²⁴⁹ In this way it takes into account actors' varying circumstances and contexts in determining if they have complied with an applicable international norm.

However that compliance is conditioned on the criteria for the valid application of the doctrine. Thus for an actor's conduct to enjoy the presumption and fall within the margin of appreciation, the actor must have exercised its discretion in good faith and its conduct must conform 'with the object and purpose of the governing norm.'²⁵⁰ The margin of appreciation thus permits an allowance to actors in light of their different capacities to comply with a norm²⁵¹. It also allows actors to balance competing interests and thus attempt to resolve competing normative demands they might face, which in the case of international human rights norms means balancing the national interests involved against the rights that are to be limited.²⁵²

The table of international examples

Apart from the case of the European Court of Human Rights²⁵³ the margin of appreciation doctrine and its underlying principle of deferring, within limits, to the discretion exercised by the state actor has also been applied by various other international tribunals and international review or decision-making bodies as indicated in Table xx in the Appendix to this chapter.²⁵⁴ The cases either expressly refer to the margin of

²⁴⁹ Yuval Shany, p. 910.

²⁵⁰ Yuval Shany, pp. 910-911.

²⁵¹ Yuval Shany, p. 915.

²⁵² *Leander v Sweden*, 9 EHRR (1987) 433, para. 59. See the discussion in Section 1.3.3. Fragmentation.

²⁵³ J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, 1988, pp. 136-157.

²⁵⁴ Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Values', 31 *NYU J Int'l L & Pol* (1999) 843; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16(5) *EJIL* (2005), pp. 926-935.

appreciation doctrine²⁵⁵ or its underlying rationale of deference to national authorities subject to review.²⁵⁶

Covering issue areas ranging from human rights, trade, investment, consular assistance and the law of the sea, the decisions referred to in this chapter's Appendix establish the margin of appreciation as a principle of review at the international level and arguably as a general doctrine of international law²⁵⁷. It is submitted that this is correct and that the doctrine is of general applicability because it simply reflects the reality of interactions among actors in connection with their compliance with international norms, which take account of, as the discussions in Chapter Two show, of the actor's circumstances, context and capacity. The interpretation and application of international norms in a compliance situation necessarily take account of such aspects of the actor's characteristics, and legitimately so, where, according to the margin of appreciation doctrine, the actor is acting in good faith.

The implications for identifying compliance requirements

As indicated earlier, the margin of appreciation doctrine informs the identification of an actor's compliance requirements in relation to an applicable norm. It does so in two ways.

First, it clarifies and specifies the content of the norm with which compliance is sought or

²⁵⁵ For example, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-AmCtHR, Series A, No 4 (1984), 'One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them' (para. 58)

²⁵⁶ *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12, 'the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification ... such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention"' (p. 62, para. 131)

²⁵⁷ Yuval Shany, p. 939.

expected. In terms of the CSF this means that the Applicable Norm is identified through the consideration of the Compliance Topic in light of the Actor's Characteristics. In other words, and at this stage, the norm has been interpreted, according to the margin of appreciation doctrine, in light of the actor's characteristics.

The actor may then think through its compliance requirements in relation the norm by employing the Compliance Framework. At this stage, the dynamic nature of the compliance situation and of the compliance phenomenon have to be accounted for. By this is recalled the fact that compliance with a norm is an iterative, dynamic process that unfolds over a period of time that can range up to a period of years. As a consequence, there may be modifications made at various times to the actor's compliance requirements, particularly those identified at the Implementation and Application stages of the Compliance Framework. In making these modifications the actor would also be applying the margin of appreciation doctrine as circumstances may be changing and new applications of the norm may be presenting themselves. Given this nature of the compliance situation, the margin of appreciation doctrine will influence the identification of compliance requirements by the actor using the Compliance Framework in terms that the requirement identified resolves any conflicting interests in a balanced manner taking account of the norm's object and purpose, and of the interests it protects.

The limitations and criticisms of the margin of appreciation doctrine

One of the criticisms of the doctrine is that it allows for actors to evade compliance and that it detracts from developing more concrete understandings of a norm if the norm can

always be amenable to flexible understanding. These are valid concerns and will manifest in some cases. But against them must be set aside the observation that employing the margin of appreciation enhances the coherence of the international normative framework and so the compliance pull of the norm. Also, by allowing for deference to the actor governed by the norm, it is possible to foster compliance and build on that compliance because the actor may feel such deference enhances the legitimacy of the norm as it applies to the actor since the actor has a hand in shaping the application of the norm to its particular circumstances. In terms of the Legitimacy Theory of compliance, actors are more apt to comply with a norm they perceive as legitimate or fair²⁵⁸, and a norm that an actor can shape to its circumstances is likely to be better complied with.

As for the criticisms mentioned earlier, the concerns they highlight may be overcome somewhat by the use of the CSF. First, in working through its compliance requirements, including through the application and influence of the margin of appreciation doctrine, the actor is having to behave in a transparent manner. This can counter motives aimed at evading or diluting compliance. Second, the CSF provides a means for comparing the compliance requirements of various actors, those facing similar circumstances in complying with a norm, as well those who may be faced with the same norm but under different circumstances. Such comparison, added to by comparative research that the CSF might help in framing, can facilitate lesson-learning and information sharing between fellow actors. This could lead increasingly reduced

²⁵⁸ Harold H. Koh, 'Why Do Nations Obey International Law', 106 *Yale Law Journal* (1996-1997) pp. 2599-2659, p. 2645.

flexibility in the interpretation of the norm and accordingly to the narrowing of the margin for such actors in such situations.

This section examined the doctrine of the margin of appreciation, noting its use as a doctrine of international law applicable to many important issue areas. Although the doctrine is one of review and usually applied by international tribunals and bodies reviewing the conduct of states, from the perspective of the actor wanting to having to comply with a norm of international law, the doctrine can help inform the actor's conduct so that it falls within the margin and complies with the norm in question. From the actor's perspective therefore, the doctrine can guide the identification of and influences the nature of the actor's compliance requirements. The next section considers the relevance of the international law concept of due diligence for identifying an actor's compliance requirements.

Appendix 1

Table 1: Examples of the application of the margin of appreciation doctrine and its underlying principle of deference to discretion at the national level.²⁵⁹

International body or tribunal	Decision or case	Relevant case extract
International Court of Justice	<i>LaGrand (Germany v. US)</i> [2001] ICJ Rep 466.	‘it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. <i>The choice of means must be left to the United States.</i> ’ (p. 514, para. 125, emphasis added)
International Court of Justice	<i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i> [2004] ICJ Rep 12	‘The question ... is an integral part of criminal proceedings before the courts of the United States and it is for them to determine the process of review and reconsideration.’ (p. 60, para. 122) ‘In stating in its Judgment in the <i>LaGrand</i> case that "the United States of America, <i>by means of its choosing</i> , shall allow the review and reconsideration of the conviction and sentence" (I. C..J. Reports 2001, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (I. C. J. Reports, p. 514,

²⁵⁹ Eyal Benvenisti, ‘Margin of Appreciation, Consensus and Universal Values’, 31 *NYU J Int’l L & Pol* (1999) 843; Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16(5) *EJIL* (2005), pp. 926-935.

		para. 125); including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.’ (p. 62, para. 131)
International Court of Justice	<i>Legality of the Threat or Use of Nuclear Weapons</i> [1996] ICJ Rep 226.	‘a balance has to be struck between the degree of suffering inflicted and the military advantage in view... And, of course, the balance has to be struck by States. The Court cannot usurp their judgment; but, in this case, it has a duty to find what that judgment is.’ (Separate Opinion of Judge Shahabuddeen, at p. 402)
WTO Appellate Body	<i>EC – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WTO Doc WT/DS135/AB/R (2001)	‘it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’ (para. 168)
GATT panel	<i>US – Restrictions on Imports of Tuna</i> , 33 ILM (1994) 839	‘The reasonableness inherent in the interpretation of “necessary” was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgment for that of the government’ (para. 3.73)
WTO Art. 22.6 arbitration panel	<i>US – Tax Treatment of ‘Foreign Sales Corp’</i> (Art. 22.6 arbitration), WTO Doc. WT/DS108/ARB (2002)	‘Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the “appropriateness” of such countermeasures – in light of the gravity of the breach – a margin of appreciation is to be granted, due to the severity of that breach’ (para. 5, expressing the view of one WTO arbitrator)
Human Rights Committee	<i>Hertzberg v Finland</i> , Comm. R.14/61 (7 August 1979), UN Doc. A/37/40 (1982)	‘[P]ublic morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion

		must be accorded to the responsible national authorities’ (para. 10.3)
Human Rights Committee	<i>Aumeeruddy-Cziffra v Mauritius</i> , Comm. 35/1978, UN Doc. A/36/40 (1981)	‘[T]he legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions’ (para. 9.2(b)(2)(ii))
Human Rights Committee	<i>Marshall v Canada</i> , Comm. No. 205/1986, UN Doc. CCPR/C/43/D/205/1986 (1991)	‘It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.’ (para. 5.4)
Human Rights Committee	<i>Mahuika v New Zealand</i> , Comm. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000)	‘While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nationwide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors’ court cases does not amount to a violation of article 14(1) of the Covenant.’ (para. 9.10)
Inter-American Court of Human Rights	<i>Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica</i> , Inter-AmCtHR,	‘One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain

	Series A, No 4 (1984)	margin of appreciation in giving expression to them' (para. 58)
European Court of Human Rights	<i>Handyside v UK</i> , 1 EHRR 737 (1976)	'Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force ... Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"' (paras. 48-49)
European Court of Human Rights	<i>Leander v Sweden</i> , 9 EHRR (1987) 433	'national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life' (para. 59)
North American Free Trade Agreement Arbitral Tribunal	<i>D. Myers, Inc v Canada</i> (Partial Award), 40 ILM (2001) 1408	'[A] breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of

		deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.’ (p. 1438)
International Tribunal for the Law of the Sea	<i>The Volga Case (Russia v Australia)</i> (Application for Prompt Release), Case No. 11, Judgement, 23 December 2002, Separate Opinion of Judge Cot.	‘While the coastal State does not have the right to take measures that are arbitrary or would contravene an obligation under international law, it has a considerable margin of appreciation within that framework.’ (para. 12)
Arbitration Tribunal appointed pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Air Services (“Bermuda 2”)	<i>United States-United Kingdom Arbitration concerning Heathrow Airport User Charges</i> (United States-United Kingdom): Award on the First Question (revised 18 June 1993), 30 November 1992, Reports of International Arbitral Awards, Vol. XXIV, pp. 3-334	‘With regard to the conduct required by the obligation, in the view of the Tribunal a Party is entitled to recognise the normal margin of appreciation enjoyed by charging authorities in relation to the complex economic situation that is relevant to the establishment of charges.’ (Chapter 5, para. 2.2.6)

3.2.2. Concepts specifically relating to human rights

In the previous section, general international law concepts relevant to the interpretation and application of human rights norms were examined to consider their implications for the identification of an actor's compliance requirements in relation to international law norms, and in relation to international human rights norms in particular. In this section specific concepts relating to the human rights issue area for the interpretation and application of human rights norms are considered. The aim is similar to that in the previous section. It is to analyse and assess what implications these concepts have for identifying an actor's compliance requirements in connection with international human rights norms.

Again, the concepts discussed here have mainly been designed with reference to a state actor and the expectation of its compliance with applicable norms of international human rights. And so the issue of generalising these concepts to the application of non-state actors has to be addressed, which will be done by focusing on the underlying basis for each concept and how that relates to securing the interests protected by the norms, namely the protection and enjoyment of human rights. By analogy and extension, the concepts discussed here would also apply to non-state actors that threaten those interests. Although the mode of operation of the non-state actor may vary from that of the state, meaning that in applying these concepts to non-state actors, their operational characteristics have to be taken into account so that the concepts can properly cover the impact such actors can have on the enjoyment and protection of human rights.

Apart from the issue of their application to non-state actors, there is an added dimension to discussing the concepts addressed in this section that relates to the division of internationally recognised human rights norms into the category of economic, social and cultural rights and the category of civil and political rights. This division was noted in Section 3.1 and stems from the difficulty states had in agreeing to a single treaty to legally bind states to the commitments contained in the Universal Declaration of Human Rights. But the differences in thinking about the two sets of rights have narrowed substantially over time. No longer is it valid to conceive of civil and political rights as being the subjects of negative obligations while economic, social and cultural rights are secured by positive obligations.²⁶⁰ Or to think that the obligations relating to economic, social and cultural rights are progressive in nature and so not justiciable while those relating to civil and political rights are of an immediate character and thus amenable to adjudication.²⁶¹ In fact, the motivation to dispel this distinction between the two sets of human rights led to the development of the first three concepts considered below.²⁶² They were developed in part to more concretely specify states' obligations concerning economic, social and cultural rights so as to address the justiciability concerns regarding this category of human rights and thereby negate the view that these rights were distinct from civil and political rights address the justiciability concerns regarding this category of human rights.²⁶³

²⁶⁰ See General Comment 31 for the positive obligations concerning civil and political rights.

²⁶¹ See General Comment 3.

²⁶² Section 3.2.2.1. Obligations of conduct and result, Section 3.2.2.2. Obligations to respect, protect and fulfill human rights, Section 3.2.2.3. Availability, acceptability, accessibility, adaptability and quality of compliance measures (AAAAQ).

²⁶³ Olivier de Schutter, *International Human Rights Law: Cases, materials, commentary*, Cambridge University Press, 2010, p. .

But with the narrowing of the differences between the two sets of rights and the emphasis on and recognition of their interdependent and interrelated nature²⁶⁴, the issue of the applicability or translation of concepts designed and developed in connection with one set of internationally recognised human rights, namely economic, social and cultural rights, to the understanding of compliance requirements in connection with civil and political rights arises.²⁶⁵ The concepts are in terms of what the state actor is required to do to meet its international obligation in connection with human rights and what individual rights-holders are entitled to, and it is suggested that they are applicable to both sets of human rights. This is because in both cases, the manner of complying with those obligations, which includes providing for and facilitating the rights-holders entitlements, will generally be the same in terms of the legislative, administrative, judicial and enforcement activities of the state. There may be unique or specific requirements relating to particular human rights but at a general level they will largely be the same, as the discussion below highlights. Accordingly, it is suggested that a discussion of the general aspects of the concepts in this section, will show their transposable features as between the two sets of human rights and as between state and non-state actors.

It should also be noted that the issue addressed in this thesis concerns the identification of compliance requirements with norms of international law. The CSF, explained and justified in Chapter 2, provides a framework for identifying such requirements in aid of complying with an applicable norm or of improving norm

²⁶⁴ Mention Vienna Declaration as well as the Preamble of the two covenants.

²⁶⁵ For a reference to the possibility that these concepts may not be translatable to civil and political rights, see Olivier de Schutter, *International Human Rights Law: Cases, materials, commentary*, Cambridge University Press, 2010, p. 241.

compliance. So the interest here is not with whether the concepts discussed below improve the justiciability of certain rights and are in that respect transferable to define an actor's obligations or commitments relating to civil and political rights. Instead, the concern is with examining those concepts for how they conceive of what the actor's requirements for complying with obligations or commitments relating to human rights in general might be. From this, together with the work done in Chapters 1 and 2, it is suggested that it will be possible to identify considerations in connection with complying with human rights norms, which will be outlined in Chapter 4. The discussion in this chapter plus that of the compliance considerations concerning human rights in the next chapter will inform the adaptation of the general CSF developed in Chapter 2 to the case of human rights norms. That adapted CSF will also be discussed in Chapter 4.

3.2.2.1. Obligation of conduct and result

The concept of obligations of conduct and of result are derived from Roman law and civil law traditions but as noted in Chapter 1, in their international law incarnations were analysed carefully by the International Law Commission (ILC) in its earlier work on the Draft Articles on State Responsibility.²⁶⁶ This distinction between international obligations was deleted in the final version of the Draft Articles²⁶⁷, and so to that extent

²⁶⁶ ILC Report on the Work of its 29th Session, 32 UN GAOR, Supp. (No. 10) 38-66, UN Doc. A/32/10 (1977), reprinted in [1977] 2 *Y.B. Int'l L. Comm'n*, pt. 2, at 11-30, with the reference to Roman law at footnote 22 p. 12; James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, text, and commentaries*, Cambridge University Press, 2002, pp. 20-22.

²⁶⁷ James Crawford, *International Law Commission's Articles on State Responsibility*, pp. 20-22. It was felt and country representatives said that the distinction did not add to any practical value to the determination of an internationally wrongful act. In addition, it was noted that the translation of the concepts from the domestic to the international context inverted their effect, thus rendering a suspect inconsistency to be deleted rather than preserved. The effect of the distinction of the concept at the international level as to

calls into question their use in identifying non-compliance with international obligations. However, in its commentary to the final version of the Draft Articles, the ILC recognised that the concepts of the obligations of conduct and result are nevertheless ‘an accepted part of the language of international law’²⁶⁸ and discussed their recognition and use by international tribunals.²⁶⁹ Likewise, the distinction between obligations of conduct and obligations of results is recognised in the international human rights issue area.²⁷⁰, which is why the concepts are discussed here rather than with the general international law concepts above.

An obligation of conduct is an international obligation requiring the state ‘to adopt a particular course of conduct’²⁷¹ or ‘to perform or to refrain from a specifically determined action.’²⁷² As discussed in Chapter 1, an obligation of result by contrast is one requiring a state ‘to achieve, by means of its own choice, a specified result’²⁷³ or one that ‘requires the State to bring about a certain situation or result, leaving it free to do so by

invert the effect of the concept such that the obligation of result, which was the more exacting at the domestic level, became the one more easy to comply with at the international level.

²⁶⁸ James Crawford, *International Law Commission's Articles on State Responsibility*, p. 21.

²⁶⁹ James Crawford, *International Law Commission's Articles on State Responsibility*, p. 129.

²⁷⁰ Christine Chinkin, ‘The United Nations Decade for the Elimination of Poverty: what role for international law?’ *Current Legal Problems*, 54 (2002) 553-589, p. 575; Guy S. Goodwin-Gill, ‘Obligations of Conduct and Result’, in Philip Alston and Katerina Tomasevski (eds.), *The Right to Food*, Martinus Nijhoff Publishers, 1984, pp. 111-118; Oscar Schachter, ‘The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights’, 73 *American Journal of International Law*, 462 (1979), p. 462; Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development*, Oxford University Press, 1995, pp. 107-109; CESCR, General Comment No. 3 on Article 2(1): The Nature of States Parties’ Obligations, (5th session, 1990), 14 December 1990, para. 1.

²⁷¹ ILC Report on the Work of its 29th Session, Draft Article 20, [1977] 2 *Y.B. Int’l L. Comm’n*, pt. 2, at pp. 11-30, p. 11.

²⁷² ILC 1977, p. 12.

²⁷³ ILC Report on the Work of its 29th Session, Draft Article 21, [1977] 2 *Y.B. Int’l L. Comm’n*, pt. 2, at pp. 11-30, p. 18.

whatever means it chooses.’²⁷⁴ The ILC further distinguished the two types of obligations on the basis that:²⁷⁵

Obligations of [conduct] are frequently encountered in international law where the action required of the State has to be taken at the level of direct relations between States. Obligations "of result", on the other hand, the breach of which is the subject of article 21 of the draft, predominate where the State is required to bring about a certain situation within its system of internal law. In such cases, international law naturally respects the freedom of the State and confines itself to informing the State of the result to be achieved, leaving it free to choose the means to be used for that purpose.

The provision of discretion to the state in carrying out its international obligations at the domestic level is similar to the that discussed earlier in relation to the margin of appreciation doctrine.²⁷⁶ It is an indication of the difficulty of international review at a distance from the site of action at the domestic level where local officials are having to make decisions balancing various issues. It is also a reference to the need to take the actor’s characteristics into account in determining its compliance or non-compliance with its international obligations.

The obligations in the two main human rights treaties, the International Convention on Economic Social and Cultural Rights²⁷⁷ (ICESCR) and the International Convention on Civil and Political Rights²⁷⁸ (ICCPR) are by their terms obligations of results. These obligations are as follows:

²⁷⁴ ILC 1977, p. 12.

²⁷⁵ ILC 1977, P. 13.

²⁷⁶ Refer to Section 3.2.1.2. Margin of appreciation.

²⁷⁷ 993 UNTS 3.

²⁷⁸ 999 UNTS 171.

Article 2(1), ICESCR: Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all *appropriate means*, including particularly the adoption of legislative measures.

Article 2(1), ICCPR: Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant ...

Article 2(2), ICCPR: Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as *may* be necessary to give effect to the rights recognized in the present Covenant. (emphasis added)

The obligations are to achieve a specific result, namely, in the ICESCR's case, 'to achieve progressively the full realization of the [recognised] rights', and in the ICCPR's case, 'to respect and ensure to all individuals ... the [recognised] rights'. But there is no requirement as to a 'particular course of conduct' or for the state to 'to perform or to refrain from a specifically determined action', although a preference for legislative means²⁷⁹ to achieve the mandated result is indicated. But while a preference for a particular conduct is stated, namely to enact some law, the state is free to proceed towards achieving the specified result by other means as opposed to a situation where the state is faced with an international obligation specifically stating that the state shall enact a law.²⁸⁰

²⁷⁹ ILC 1977, p. 20.

²⁸⁰ ILC 1977, p. 14.

Because a preference as to some conduct is specified in the obligations created in the ICCPR and the ICESCR such obligations are considered to be obligations of result conditional as to means²⁸¹ or conditional as to conduct.²⁸² In the view of the Committee on Economic, Social and Cultural Rights, Article 2(1) of the ICESCR includes both ‘obligations of conduct and obligations of result’.²⁸³ And further in connection with the obligation under the ICESCR, it has been observed that:

Where the texts of the various rights are silent on the concrete steps to be taken by states in fulfilment of their obligations with regard to the rights “recognised” by the relevant obligations can best be understood as hybrids between obligations of result and obligations of conduct. They are obligations of result in the sense that states must match their performance with their objective capabilities. They are loose obligations of conduct in the sense that states obliged to take active, though largely unspecified, steps toward their satisfaction. This hybrid mixture of obligation types is due to the fact that the concept of “progressive achievement” mandates the existence of an ongoing process of development [where] ... such a process or course of conduct is ... a necessary but not a sufficient element of the full satisfaction of state obligations under the Covenant.²⁸⁴

In using the phrase ‘course of conduct’ the observation just quoted recalls the ILC’s use of the same phrase in describing obligations of result as discussed in Chapter 1. There it was noted that the ILC described the means by which the state was to achieve the result required by an obligation of result as the ‘course of conduct’ to be undertaken by

²⁸¹ Oscar Schachter, ‘The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights’, 73 *American Journal of International Law*, 462 (1979), p. 462.

²⁸² Guy S. Goodwin-Gill, ‘Obligations of Conduct and Result’, in Philip Alston and Katerina Tomasevski (eds.), *The Right to Food*, Martinus Nijhoff, 1984, p.115.

²⁸³ CESCR, General Comment No. 3 on Article 2(1): The Nature of States Parties’ Obligations, (5th session, 1990), 14 December 1990, para. 1.

²⁸⁴ Philip Alston and Gerard Quinn, ‘The Nature and Scope of the Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, 9 *Human Rights Quarterly* (1987), pp. 156-229, at p. 185. (‘The Nature and Scope of the Parties’ Obligations under the ICESCR’).

the state²⁸⁵. It is submitted that the previous sentence conveys the full understanding of the obligations of states under the two primary human rights treaties. That is to say that the obligation is one of result and that the reference to or conception of a conditional obligation of conduct or a mixed obligation of conduct and result only provides a distinction without a difference. For however the obligations under the two treaties are conceived, the focus is on the course of conduct the state undertakes to achieve the result specified, namely that the recognised rights are fully realised (ICESCR) or ensured (ICCPR). And this idea of the respective obligations is fully conveyed by the concept of ‘obligation of result’.

While states have discretion as to how the specified result in an obligation of result is to be achieved, this does not mean that the state has absolute discretion as to the course of conduct to adopt under the ICCPR and the ICESCR.²⁸⁶ As noted already, the course of conduct adopted must lead reasonably to the attainment of the specified result for this obligation must be read in light of the *pacta sunt servanda* obligation under general international law whereby states parties to treaties must perform them in good faith.²⁸⁷ In addition, states parties will have to justify their conduct to the relevant human rights treaty body and before the United Nations’ Human Rights Council, thus militating against the state adopting a course of conduct that is objectively capricious.²⁸⁸

²⁸⁵ Report of the International Law Commission (1977) 2 *Yrbk. ILC* 13, para. 8.

²⁸⁶ For a view that it does mean that, see Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development*, Oxford University Press, 1995, p. 108.

²⁸⁷ The obligation has been codified in the Vienna Convention on the Law of Treaties (1969), entered into force 27 Jan. 1980, 1166 UNTS 331, as Article 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

²⁸⁸ See CESCR, General Comment No. 3 on Article 2(1): The Nature of States Parties’ Obligations, (5th session, 1990), 14 December 1990, para. 4, where the Committee on Economic, Social and Cultural Rights

The characterisation of states parties' general obligations under the ICCPR and the ICESCR as obligations of result is not to say that the two treaties do not refer to any obligations of conduct. Particular provisions, for example, of the ICESCR, do specify conduct the state must undertake. For example, Article 6(2) of the ICESCR states that '[t]he steps to be taken by a State Party to the present Covenant to achieve the full realization of this right [the right to work] shall include technical and vocational guidance and training programmes' (emphasis added). And at least seven other provisions of the ICESCR similarly specify conduct the state must undertake.²⁸⁹

But given that the general obligations are obligations of conduct, the main focus, as noted above, is on the state actor's course of conduct in relation to the human rights recognised in the treaties. And this is why the treaty bodies relating to the two treaties, the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC), in their guidance to states parties for compliance with their obligations under the ICESCR and the ICCPR respectively, consists largely of elements of the course of conduct to be adopted towards the end of achieving that compliance. So for instance, these treaty bodies identify the need for states to adopt legislative, administrative, judicial and fiscal measures to meet their obligations under their respective treaties, including to provide their officials with training on human rights awareness. Each of these elements of conduct will not meet the state's obligation on their

notes that it shall determine whether the measures adopted by states under ICESCR Article 2(1) are appropriate.

²⁸⁹ Philip Alston and Gerard Quinn, 'The Nature and Scope of the Parties' Obligations under the ICESCR', p. 185, footnote 106.

own. Instead they must be considered part of the course of conduct that moves the state towards compliance with its obligations under the applicable human rights treaty. In this sense, and as discussed in Chapter 1²⁹⁰, each element of the course of conduct so identified may be considered part of the actor's compliance requirements.

But the identification of an actor's compliance requirements does not only involve the identification of elements of the course of conduct that leads to compliance with a result specified in an international norm. For instance, the adoption of a relevant piece of legislation could be part of the course of conduct required of a state actor in compliance with its human rights treaty obligation. But how that legislation works in practice and its effectiveness would also be factors to be taken into account for the state actor seeking to comply with that obligation. Not only must these discreet aspects of the legislation be identified, but also the ways in which they interrelate needs to be taken into consideration.

As the discussion in Chapters 1 and 2 showed, the compliance requirements identified in relation to a particular compliance situation are likely to be dynamically interrelated and will be derived from elements of the course of conduct required, as just noted, as well as from elements of compliance considerations and aspects of the compliance theories, both discussed in Chapter 2. And these factors for identifying compliance requirements, which have led to the design of the Compliance Strategy and Framework in Chapter 2, must be considered in the context of the actor's characteristics

²⁹⁰ See Section 1.2. Compliance requirements.

given the specific features of the Compliance Situation. Taking the legislation example again, the adoption of the legislation would be an implementing activity for the state actor. But as discussed in Chapter 2, the concept of compliance has three stages. So it will be necessary to see how the legislation operates in practice, which is the application stage and if it was effective in achieving its goal in terms of respecting, protecting or fulfilling human rights. The identification of the actor's compliance requirements in other words, and as emphasised in the previous chapters, help to orchestrate the actor's course of conduct towards compliance and towards sustaining that compliance.

In identifying the appropriate and valid course of conduct for a state to adopt to comply with obligations in connection with applicable human rights treaties, state actors can have recourse to the respective human rights treaty bodies, as noted above. It is submitted that for non-state actors, indications of the expected course of conduct for compliance with any human rights commitments that have undertaken may be obtained from authoritative reports such as the Guiding Principles on Business and Human Rights for corporations, which issued from the Human Rights Council²⁹¹, or the International Law Association's report on the accountability of international organisations, which contained a study and recommendations of the accountability of international organisations in relation to international human rights norms.²⁹²

²⁹¹ Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, Annex, 21 March 2011.

²⁹² International Law Association, *Accountability of International Organisations: Final Report*, Berlin Conference, 2004.

Alternatively it is suggested it would be valid to identify the appropriate course of conduct for such actors by means of a functional analogy with the course of conduct human rights treaty bodies identify for states. Thus where for states the adoption of legislation would be an appropriate course of conduct, non-state actors may employ similar normative systems such as the formulation and promulgation of policies to inculcate awareness of human rights issues among its staff and employees.

Lastly it should be noted, as mentioned elsewhere, that the perspective taken in identifying an actor's compliance requirements is to produce and sustain compliance prior to any norm violation. On the other hand, the characterisation of obligations as obligations of conduct and result is to identify the conditions under which an international legal obligation is breached, thus potentially giving rise to the state actor's international responsibility. In this sense, the perspective this thesis is concerned with regarding obligations of conduct and result is not their legal effects or natures but their conceptual significance in focusing on the actor's course of conduct and its valid and authoritative identification in aid of identifying the actor's compliance requirements in the context of a particular compliance situation.

3.2.2.2. Obligation to respect, protect and fulfil human rights and to undertake institutional measures

In the previous section, the basic human rights obligations under the two main human rights treaties, the ICCPR and the ICESCR, were discussed. These obligations have been analysed by the UN's Office of the High Commissioner for Human Rights and the human rights treaty bodies in terms of a three-part typology under which an actor is required to

respect, protect and fulfil human rights²⁹³. The elements of the typology may be understood as representing different categorisations of the course of conduct an actor may adopt to comply with its human rights obligations or commitments. So the state actor may comply with its human rights obligations just by respecting the human rights of individuals within its territory. But that may not be enough to secure compliance and so it may also need to adopt the course of conduct relevant to protecting and fulfilling human rights.

The duty to respect human rights requires of the actor that it not interfere with individuals' enjoyment of their human rights or with self-help measures taken by people to secure their rights. In this sense the duty to respect requires a 'do no harm' attitude by the actor towards a human rights issue or that the actor refrain from violating human rights²⁹⁴. The respect component of an actor's human rights obligation or responsibility also requires that the actor considers and takes account of human rights consequences of any measures it proposes²⁹⁵. In the case of states, adopting human rights-based budgetary processes would be one way to reduce the likelihood that measures proposed by the government might negatively affect the enjoyment of human rights. Clearly to take this type of human rights-focused prospective view, the officials representing the actor must possess an adequate understanding of human rights. In this regard, the Human Rights

²⁹³ See for instance, CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), (20th session, 1999), UN Doc. E/C.12/1999/5 (1999), paras. 15-20. There are a number of developments of the respect, protect and fulfil typology, see Maria Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, pp. 157-248.

²⁹⁴ Human Rights Committee, General Comment No. 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 6.

²⁹⁵ Christine Chinkin, 'The United Nations Decade for the Elimination of Poverty: what role for international law?' *Current Legal Problems*, 54 (2002) 553-589, p. 576.

Committee has mentioned the importance of raising awareness levels about the ICCPR among public officials, other agents of the state and also among the general population²⁹⁶.

However, the requirement to respect human rights is also directed towards non-state actors and individuals²⁹⁷. As noted in Section 3.1., a consensus has emerged around the idea that corporations have a responsibility to respect human rights and that this entails the requirement not to violate human rights and to remedy situations in which such rights were transgressed. It also includes the corporate actor enacting and complying with its own human rights policies.²⁹⁸

Thus the requirement to educate officials and staff about the human rights aspects of an organisation's activity also extends to non-state actors like international organisations, private corporations and non-governmental organisations. The implications of the expanded reach of the duty to respect human rights to non-state actors means that the protection afforded for human rights is potentially very extensive especially considering that the duty is not simply to refrain from violating rights but also has a positive dimension.

The requirement to educate officials and staff is an example of this positive aspect of the duty to respect. Other examples include the passing of relevant laws or instituting

²⁹⁶ Human Rights Committee, General Comment No. 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.7.

²⁹⁷ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd Ed., Oxford University Press, 2008, p.187.

²⁹⁸ Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, Annex, 21 March 2011, p. 13, Guiding Principle 16.

measures to monitor the actor's human rights performance to ensure that any directives or guidelines issued concerning the need for employees to ensure human rights are respected in their organisation's conduct are followed or implemented.

The duty to protect human rights may be regarded as being primarily concerned with the control of third parties by the actor concerned so that they do not act in a manner that undermines human rights realisation. Under this duty, the actor can be expected to institute the relevant laws and mechanisms to regulate third parties and to ensure that these laws and mechanisms operate as intended.

The duty to fulfil human rights is concerned with the situation where individuals are unable to enjoy their human rights because of a lack of capability or entitlement. For instance, people living below subsistence levels will have to be given access to state aid. Again here the actor will have to ensure that the appropriate policies and mechanisms are in place to ensure the relevant assistance is provided in order to help individuals enjoy their human rights. This effectively involves the entire administrative apparatus of the state at various levels and extends to the requirement to monitor and evaluate the compliance-seeking measures being undertaken²⁹⁹.

The tripartite typology to respect, protect and fulfil human rights also applies to civil and political rights.³⁰⁰ So for example there would be a need to provide a well-trained police force, prosecutor's office and judiciary to respect the right to a fair trial.

²⁹⁹ See the case of *Grootboom* where this was discussed in relation to the right to housing.

³⁰⁰ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (adopted Maastricht 22–26 January 1997), para. 6; Draft Guidelines on Poverty.

And there would be a need to create and empower regulatory bodies to monitor the activities of private actors in order to protect the right to privacy. Finally, in relation to fulfilling human rights, there would be a need to create electoral laws and electoral machinery to fulfil the right to participate in public affairs by facilitating regular voting.

In furtherance of this typology, an institutional approach or perspective has been developed that asks 'what institutions would need to be functioning effectively in order for people generally to have secure access to what they have rights to?'³⁰¹ By this reasoning each right requires its own 'institutional machinery' for its realisation and though the specific nature of that machinery may vary according to the right, the obligation to 'create and operate ... institutions and processes' applies in relation to all human rights³⁰².

The focus on such institutional measures in fact provides a template for all human rights obligations in whatever form they are expressed because the addressees of those obligations, whether state or non-state actors are organised internally in terms of various institutions, both formal and informal, and it is change in terms of those institutions that the realisation of human rights is fundamentally concerned with.

But institutional effects can be determined by institutional culture. So in addition to the institutional aspects discussed, all of the component aspects of the human rights typology discussed here require a culture within the state or other relevant organisation of

³⁰¹ Henry Shue, 'Afterword', in *Basic Rights*, 2nd ed., Princeton University Press, 1996.

³⁰² Steiner and Alston, *International Human Rights in Context*, p.182?

respect for human rights and can therefore involve or extend to programmes for human rights training. In a sense this criteria asks, 'What is the organisation *not* required to do?' In addition to stipulating the need for effective institutions for the realisation of human rights, such analyses are not complete without also asking, 'what institutions need to be abolished in order to implement human rights?' Asking only which institutions 'need to be functioning effectively' does not therefore directly identify all aspects of institutional change necessary for the implementation of human rights.

Once the role of institutions and the need to institutionalise change is understood, the question of what type of institutional activity to include in the CSF arises. Almost all sources of human rights acknowledge three dimensions of institutional activity that are undertaken within most organisations, namely the legislative or law-making, administrative or law-executing or implementing, and enforcement activities . Thus one aspect of compliance requirements is whether the appropriate laws and policies are in place and are functioning as intended. In addition however, there is also a need to focus on issues of the training of personnel and staff development as well as of the level of familiarity with human rights and of changes in attitude and culture . The processes leading to those changes are dynamic and would likely have involved feedback mechanisms.

In conclusion, the typology of human rights duties and the subsequent focus on the institutional aspects of providing for human rights all speak to the fact that the actor with human rights obligations or commitments to comply with has to consider the course

of conduct it will adopt in order to comply. However, in relation to the CSF and the CF developed in Chapter 2, it may be observed that much of the conception of the actor's requirements relate to the implementation level. But as seen in Section 2.5.2., the CF covers all levels from Implementation to Effectiveness showing how conduct towards compliance at different levels interrelates. In that sense the CF will likely be able to guide the actor to identifying more compliance requirements than a reliance on the typology of respect, protect, fulfil. Still, an important observation can be made in relation to the respect typology. Because it emphasises the agency of the rights-holder securing its own rights, it supports the idea of the 'Stakeholder's actions' at the Application stage, as discussed in Section 4.2.2.4.

The duty to create institutions. Steiner and Alston, in their restatement, refer to the duty to create institutional machinery essential to the realisation of rights³⁰³. The other duties within this typology require the creation of institutions such as laws, machineries and policies and it useful to identify this requirement explicitly. In doing so however, what is equally important is to assess is that they function in practice according to their aim and purpose. This is a key factor to consider in designing the CSF.

³⁰³ Steiner and Alston, at 181.

3.2.2.3. Availability, acceptability, accessibility, adaptability and quality of compliance measures (AAAAQ)

The AAAAQ criteria or human rights elements, were conceived in the work of the Committee on Economic, Social and Cultural Rights³⁰⁴ and that of Katarina Tomasevski, the then UN Special Rapporteur on the Right to Education. The criteria have three dimensions of human rights compliance requirement for the actor in relation to its human rights obligations and responsibilities:

1. They inform the content of the actors laws, policies and other measures adopted in relation to those obligations. (Implementation level)
2. They represent requirements for compliance in relation to how the laws, policies and measures are operationalised or practically instituted. (Application level)
3. They represent the objectives and goals of those law, policies and measures and so provide the criteria for assessing if those objectives and goals were successfully met. (Effectiveness level)

The precise application of these criteria to a particular actor will depend on the best interest of the rights-holder³⁰⁵ given the prevailing conditions and context under which the actor's activities are being conducted³⁰⁶.

Availability – This element requires the actor to ensure its laws and policies in relation to a particular human right provide for the availability of a sufficient number of facilities,

³⁰⁴ General Comment on the Right to Adequate Housing, General Comment on the Right to Education, General Comment on the Right to Adequate Food, General Comment on the Right to Health and the Report of the Special Rapporteur, 1999 and 2000.

³⁰⁵ CESCR, General Comment 13, The right to education, E/C.12/1999/10, 8 December 1999, para.7.

³⁰⁶ CESCR, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000, para.12.

goods and services in relation to the human right in question³⁰⁷. It has implications for budgetary allocations and for the prioritisation of programmes by the actor within the context of the actor's mandate. A state's allocation of funds to its defence budget at the cost of healthcare spending could be likely to contravene the availability requirement. Even if laws and policies provide for the maximum availability of facilities within the actor's fiscal context, the facilities may not be built or provided as planned and the actor is required to assess whether the planned facilities are in fact provided so that if the facilities provided fall short of the number planned for, the discrepancy can be identified and remedied. Budgetary allocations may exceed the ability of the actor to provide the required facilities, in which case the actor may seek assistance whereas if the planned facilities are not provided because of misfeasance, the actor ought to ensure such misfeasance is not repeated.

Acceptability – The institutional arrangements in question must be assessed in terms of their suitability and appropriateness for facilitating participation and accountability. Institutional arrangements that, for example, go against cultural expectations and norms of the rights-holders would not be acceptable to them and should not be utilised.

Accessibility – Institutional arrangements for participation and accountability must be accessible to the rights-holders concerned. Thus assessments of the operational aspects of the relevant institutional arrangements must take into account the issue of their accessibility. Barriers due to physical or economic factors, the lack of information or

³⁰⁷ CESCR, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000, para.12(a).

because of other discriminatory factors ought to be identified and assessed as to whether they are unreasonable as a balance has to be struck in every case between the requirements of those wishing to participate and the requirement of society for systems of governance that are manageable and effective³⁰⁸.

Adaptability – The adaptability and flexibility of institutional arrangements for participation and accountability to suit a particular situation and context must be assessed. If such mechanisms are not adapted to particular situations, there will be a danger of applying them in a ‘one size fits all’ manner. Institutional arrangements that work in one context may not necessarily work in another.

Quality – It is necessary to assess the quality of the available institutional arrangements for participation and accountability. Arrangements of insufficient quality could result in deliberation and consultation procedures that are superficial and pointless in the eyes of rights-holders. This category of assessment allows for the distinction between de jure and de facto compliance to be captured and acted upon.

The typologies that together make up the rules of provision do not necessarily help to set the boundary of such obligations and so they are limited in the extent to which they, on their own, can adequately specify the requirements for compliance. Human rights, like

³⁰⁸ Factors that may be taken into account to determine if any restrictions on the right to participate may include whether the mechanism for participation allows all relevant opinion to be taken into account, the feasibility of having a decision-making process in which all those affected may participate directly and costs of participation in terms of resources available.

other types of rights evolve³⁰⁹, so their boundaries are never truly fixed. Nevertheless, for the purpose of compliance assessment, a determination of where human rights boundaries are fixed at any one point in time must be made. Specifying the requirements for human rights compliance involves an exercise of balancing the human rights of the individual or group concerned with the interests of the broader community affected by the particular human rights in question. Only when this element of balance is introduced into the consideration of what the requirements for compliance might be, is it possible to provide clarity as to the specification of such requirements. The element of balance is introduced with the second set of rules, the ‘rules of context’³¹⁰.

³⁰⁹ Steiner and Alston, p. 181.

³¹⁰ Henkin, at al. discuss the issue of balancing individual rights and community interests in their section on ‘Limitation on rights’, pp.194-224 in *Human Rights*, University Casebook Series, 1999.

3.2.2.4. *Progressive realisation*

The idea that human rights are realised progressively originally applied to economic, social and cultural rights but the fact that progressive realisation is a function of an actor's capacity to fulfil human rights obligations, means that the realisation of all human rights is progressive. Henry Steiner has shown this for instance in relation to the human right to political participation. One reason for this is, as Steiner mentions, is that the meaning of specific human rights evolve over time.³¹¹ Thus there is always future realisation of that human right as its meaning changes, in particular as the scope of that right expands.

The second reason is that the realisation of human rights involves the expenditure and distribution of resources and other issues relating to capacity such as capabilities in terms of knowledge and expertise. Hence, human rights treaties refer to international cooperation in terms of technical assistance, acknowledging technical limitations of states to fulfil human rights obligations. Social factors too can be limiting in terms of capacity for undertaking measures to comply with human rights requirements³¹². The allocation of resources has political implications and these can get in the way of the realisation of human rights, especially say for groups that are traditionally discriminated against. However, the resources of an actor at any point in time are finite and the realisation of human rights through measures taken by that actor will be limited by the amount of its resources at that time.

³¹¹ Henry Steiner, 'Political Participation as a Human Right' 1 *Harvard Human Rights Yearbook* 77 (1988).

³¹² These include for instance the level of trust within a community or the social capital it possesses with research indicating that the greater the level of trust or social capital, the better the level of human development, which in turn often shows a positive correlation with the realisation and enjoyment of human rights.

A distinction is still to be made however, between an actor's immediate obligation to fulfil its human rights obligations and the progressive realisation of those rights. For instance, the obligation to realise the right to freedom from discrimination or the right to freedom from torture are referred to as obligations of immediate obligation on the assumption that the state actor is not required to act positively but to instead desist from behaving in a biased manner towards certain groups, or from the use of torture. The assumption does not take into account the fact that the changes in attitude among the agents of the state may take time and will involve the dissemination of information and training and thus the expenditure of resources.

Even here the issue of capacity arises except that the liability on the state in relation to violations of the rights to freedom from discrimination and torture is strict. In cases not involving strict liability, immediate obligations in relation to human rights may be understood as obligations for the actor to adopt measures and make other changes without delay although the full realisation of the human rights concerned will be achieved in a progressive manner. In any case, the fact that there are immediate obligations in relation to human rights does not remove the actor's capacity from considerations of human rights compliance assessment and such capacity must be a feature of the CSF.

3.2.2.5. Minimum core obligation

Another feature of the international human rights framework that reflects the fact that the actor's capacity is a valid criterion for consideration in relation to compliance with human rights norms is the idea of minimum core obligations. Since the level of the realisation of human rights varies with the actor's capacity, the idea of a minimum core obligation in relation to each right is meant to ensure that actors with human rights obligations meet certain performance standards in terms of what they do to meet those obligations. However, the notion of maintaining minimum core obligations for actors to attain is more useful if at all, in theory than in practice.

First, the idea of minimum core obligations has been found to be of limited use in deciding specific cases, as decision-makers may not have access to all the data and factors to be considered to make the determination as to what the minimum level is³¹³.

Second, the idea of minimum core obligations must involve a race to the bottom as it is difficult to maintain, when deciding minimum international standards, that it is not the case that those standards are set by reference to the circumstances of, for instance, the poorest state. It may be argued that minimum standards can be set by an objective method and that those states too poor to attain the standards must be provided with technical assistance to be able to meet the standards. However, this is problematic because for as long as those states fail to meet the standards³¹⁴, the prevailing state of affairs will be one

³¹³ *Government of South Africa and others v. Grootboom and others*, 2000 (11) BCLR 1169 751-762.

³¹⁴ Within whatever time-frame that might be stipulated.

where “those that can do and those that can’t don’t”, effectively rendering the idea of minimum standards meaningless.

Third, the idea of minimum core obligations appears to reflect the idea that there is a limitation to deference paid to national authorities as to the measures to adopt in fulfilling their human rights obligations. This limitation already exists in international human rights law in relation to the idea of the margin of appreciation, which will be discussed next, so it is not apparent that the idea of a minimum core obligation for human rights realisation makes any contribution to the theory of international human rights law.

The limited utility of the idea of minimum core obligations for the realisation of human rights means it is difficult to apply for the purposes of human rights compliance assessment. Nevertheless, the formulation of this idea is another indication of the fact that an actor’s capacity is a relevant capacity in assessing human rights compliance.

3.3. Conclusion

In this chapter, the international regulatory framework for human rights was considered. Under that framework, state have international legal obligations in relation to the protection of human rights but non-state actors do not. Instead non-state actors are regarded as having to respect the human rights of individuals who may be affected by their operations. But the lack of legal obligation does not mean that non-state actors are likely to face any less pressure than state actors to comply with the international human rights norms applicable to them. As Chapters 1 and 2 indicated, compliance can be expected on equal terms of legal norms as well as of non-legal norms.

But for the purposes of identifying an actor's compliance requirements in relation to those norms additional concepts are required. These are the concepts that used in interpreting and applying the human rights norms that apply to state actors. It is submitted that based on their underlying rationale and purpose they are also applicable to the case of non-state actors.

Accordingly, the main part of the chapter related to the examination of the international law concepts and concepts specific to the international human rights regulatory framework that are used to interpret and apply human rights norms. The examination showed the relevance of an actor's context to the identification of its compliance requirements in relation to international human rights norms. The progressive nature of human rights also highlighted the relevance of the sustainability of the measures

undertaken to comply with an actor's human rights obligations or commitments to the issue of identifying the actor's compliance requirements.

Chapter 4 Human rights compliance: Requirements, strategy and framework

The aim of this chapter is to identify, describe and examine the requirements for compliance with norms of international law concerning internationally recognised human rights. Firstly, this chapter brings together and develops the key aspects of human rights compliance identified in Chapter 3. The first section outlines and discusses these key aspects and considerations in relation to identifying compliance requirements in relation to international human rights norms. These considerations are then used in the second part of this chapter to adapt the general Compliance Strategy and Framework (CSF) developed in Chapter 2 so that it can be used to identify compliance requirements relating to international human rights norms. Finally, the chapter concludes by explaining the uses of the CSF thus adapted to the human rights area.

The explanation of the adapted CSF will be from the perspective of the human rights practitioner from the compliance perspective. The human rights practitioner in any particular case could be internal or external to the actor. A human rights practitioner that is internal to the actor could be an official of a state, international organisation or of a corporation, depending on the actor concerned. And that official is interested to ensure that the actor complies with its applicable international human rights norms.

A human rights practitioner operating externally to an actor could be an official of the United Nations' Human Rights Council, or of the relevant human rights treaty body, of a human rights non-governmental organisation (NGO), or even an official in a judicial

or quasi-judicial body before whom comes the question of the actor's compliance with applicable human rights norms. For example, in Chapter 1, where the problem of fragmentation in international law was discussed, it was noted that in connection with human rights, a key issue was how to resolve the parallel international normative frameworks governing a state's conduct in relation to international investment protection and international human rights protection. Even here the use of the CSF can be relevant.

Since many international investor-state disputes are referred to international arbitration, international arbitrators are being asked to reconcile the two parallel international frameworks regarding international investment and international human rights. They are being asked to do so in the course of determining whether the investor's rights were violated, and if those rights were violated, whether the investor suffered damage that was compensable by the state. It is submitted that even in this scenario the international arbitrator may be regarded as human rights practitioner. He or she will be presented by claims on both sides, including arguments by human rights NGOs as *amici curiae*. In sifting through these arguments and deciding them, the international arbitrator is effectively occupying the role of a human rights expert and practitioner. And it is submitted that, even in this case, the human rights adapted CSF discussed in this chapter can help the international arbitrator think through or reason through the issues before him or her.

Conceiving the term human rights practitioner in this way highlights the objective nature of the CSF developed in Chapter 2 and of any application that may be made of it,

as for example, in this chapter in connection with international human rights norms. The CSF is objective because it is based upon a compliance considerations based upon an objective assessment of compliance theories, the concept of compliance, and the international normative framework governing the issue area in connection with which it is applied. So whether the CSF is applied by an official internal or external to the actor whose compliance is at issue, the mode of using the CSF and the compliance requirements identified by that use should, in large part though not wholly, be the same.

Where different human rights practitioners are using the CSF in relation to the same compliance situation, the compliance requirements identified using the CSF will not wholly be the same for a few reasons. One reason is that different individuals are using the same tool, where that tool is meant to guide their reasoning processes in connection with a particular issue, namely the identifying of compliance requirements in connection with a particular international norm. Such reasoning processes are subject to the idiosyncrasies of the individual and by definition since no two individuals see the same situation in exactly the same way in every single respect, that idiosyncrasy will result in different human rights practitioners identifying different compliance requirements in connection with the same compliance situation.

But absent any pre-existing bias, such differences should not be too great and should be reconcilable so that ultimately a commonly agreed set of compliance requirements can be identified and agreed upon. After all the identification of compliance requirements using the CSF is a process. But it is meant to be a transparent process based

on objective criteria. And, it is submitted, it is these attributes of transparency and objectivity that lend to the reconciliation of the varying compliance requirements that the personal idiosyncrasies of different CSF users will inevitably produce.

The other reason why different users of the CSF will produce different sets of compliance requirements in connection with the same compliance situation is that the normative underpinnings of the issue they are considering are unsettled, contested and so still under development. But even here the CSF can help to clearly identify the fault lines so a resolution of the divergent normative position can eventually be produced. In fact this thesis contends that one of the useful features of the CSF is that it allows users to undertake the balancing of different, sometimes conflicting, interests in a transparent manner and in an as valid a manner as the current state of the law allows. For example, through the identification of compliance requirements using a proportionality analysis, a principled balance among competing interests can be achieved. But deeper normative divergences and disagreements may exist that highlight areas where the law is yet to develop. Using the CSF can highlight, probably with some specificity, where fundamental issues of justice and fairness need to be addressed. However, it is suggested that in the meantime the CSF allows for a valid determination of an actor's compliance requirements given the current state of the law.

4.1. Human rights compliance requirements: key aspects

As noted above, from the examination of the concepts relating to international human rights norms discussed in Chapter 3, coupled with the features of the Compliance Strategy and Framework developed in Chapter 2, key aspects of requirements for compliance with international law norms concerning human rights can be identified. These requirements are referred to as ‘human rights compliance requirements’ and this section builds on Chapter 3 by bringing together and developing the aspects of human rights compliance requirements identified in that chapter.

Based on the explanation of compliance requirements in Chapter 1, human rights compliance requirements are acts, omissions and considerations an actor must undertake or take into account in order to be in compliance with international human rights norms³¹⁵. And the actor would be any actor that has made a commitment to comply with international human rights norms. As explained in the foregoing chapters, these requirements are not the same as requirements derived explicating the content of an internationally recognised human right, although there may be some overlap between the two categories of requirements³¹⁶.

³¹⁵ Cross reference to the relevant page in Chapter 1.

³¹⁶ For instance, non-compliance with compliance requirements need not necessarily result in an international wrong because (a) there is no international legal obligation to perform the compliance requirement and (b) there may be automatic compliance or coincidence, where compliance is achieved without any overt move by the actor to comply. In other words, the actor’s initial state is already a state of compliance. Hence the actual role and nature of compliance requirements is that they facilitate thinking through what an actor needs to do or needs to refrain from doing in order to achieve or maintain compliance.

The elements of human rights compliance requirements discussed here have both legal and non-legal aspects. The problem of compliance, it is argued in this thesis, relates both to legally binding and non-legally binding norms. So the legal aspects of human rights compliance requirements related to states while the non-legal aspects apply to non-state actors and to cases involving the application of non-legally binding norms. Accordingly, there is an element of transposition and adaptation involved in relation to the non-legal aspects. However, what the two aspects share in common, and the reason they are treated as one here, is their implications for the behaviour of the actor seeking to comply with the human rights norm in question.

Further, there is also an external perspective at work here, which is that of the external observer wishing to or required to assess the actor's compliance. This observer has to take into account considerations of fairness, justice and the allocation of risks, burdens and responsibilities. To help him or her, a framework for reasoning is needed and, it is argued in this thesis, that the CSF is such a framework. Legal principles and norms will guide that reasoning where an actor's legal obligations are involved. Where non-legally binding norms are involved, but the regulatory framework is the same as where legally-binding norms apply, such as in the case of human rights in relation to both state and non-state actors, then it is right to transpose the legal norms and principles to the case of the non-state actor. This then allows for the human rights compliance requirements relating to non-legally binding human rights norms to be derived from the transposed legal norms and principles. It is argued that this is a valid way to proceed and

provide guidance for reasoning about human rights compliance requirements where human rights norms apply but are not legally binding.

Proceeding in the manner outlined above also makes sense from the perspective of the legitimacy and coherence of the guidance for such reasoning where the issue is compliance with non-legally binding norms. First, the guidance relates to the same regulatory framework and so should be based on similar principles and understandings of the content and contours of the applicable human rights norms and the specific human rights at issue. Second, this can then ensure the service of, or facilitating of, the aim of behavioural coherence across actors. This must be the implicit aim where there is a single, unified, overarching framework for regulating and guiding the conduct of all actors whose behaviour can affect the realisation of the rights and interests underlying and safeguarded by that framework. So for example, since the regulatory framework under international law for the protection of human rights is concerned with the conduct of all actors that may undermine that protection, it is suggested that it makes sense to apply the norms and principles of that regulatory framework to the conduct of all such actors in a unified and coherent way. And where that involves the transposition of legal norms and principles to guide reasoning for compliance, whether internal or external to the actor concerned, then such is a reasonable and valid thing to do.

4.1.1. The applicable human rights norm

A key aspect of compliance is the question of the norm with which an actor is under an obligation or under an expectation to comply and the question of compliance is concerned with the degree to which the actor's behaviour matches that norm. In the case of the international regulatory framework concerning human rights, a number of such norms have been established. Identifying the applicable human rights norm matters because the CSF is applicable to all actors and it would be inaccurate to ascribe the same normative aspects concerning human rights to all actors. The issue of which general human rights norm applies to a particular actor will depend on the particular features of the compliance situation in question and will be one of the first aspects of the human rights compliance problem to be addressed in any case.

In any human rights compliance situation, which norm applies will vary depending on the actor concerned and the manner in which the actor's conduct may affect the human rights of concern. So to identify the applicable human rights norm for a particular actor, that actor's characteristics must be taken into account, meaning as discussed in Chapter 2 the actor's normative and operational aspects. And in the explanation of the CSF below, the manner in which the applicable norms are identified will be discussed.

4.1.2. Context, capacity and control

The relevance of considerations of context pertaining to a compliance situation, which includes the capacity and control characteristics of the actor, has been identified in the previous chapters. Chapter 1 discussed issues of context, capacity and control in relation to the actor's characteristics while Chapter 2 noted how the actor's context is taken account of in international regulation. In Chapter 3, the issue of context in relation to the international framework concerning human rights arose in the discussion on the doctrines or concepts of proportionality and the margin of appreciation. Considerations of context, capacity and control are therefore important for the identification of an actor's specific compliance requirements in a particular case.

But while gaps in the protection afforded for human rights gaps may therefore exist due to the actor's lack of capacity rather than lack of willingness to comply³¹⁷, from a human rights perspective there is another aspect to the issue of context and capacity. That is, the capability of the rights-holder will be factor for consideration alongside the capability of the actor occupying the role of duty-holder.

In the case of human rights, a balance often needs to be struck between the interests of the individual and the interests of the community. This is where issues of context arise and need to be taken into consideration. For instance, the concept of proportionality allows for a principled balancing of the individual's and the community's interests where situations change and due to public health reasons for example, the right of individuals to

³¹⁷ Katarina Tomasevski in Asbjorn Eide, Catarina Krause, Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Brill, 2001.

freedom of movement may be restricted. The measure restricting the freedom of movement must be appropriate and necessary³¹⁸ both being conditions that depend on the features of the case in question. Thus the concept of proportionality introduces issues of context in determining compliance with human rights in a particular situation. And while proportionality points to context as a valid consideration in identifying an actor's compliance requirements, the conditions of appropriateness and necessity will specify those requirements in a particular case.

Specifying compliance requirements by taking account of context in this way is part of the principled dialogue between rights-holders and their representative, and actors whose conduct can affect the enjoyment of human rights, that international norms on human rights make possible³¹⁹. It is important that such dialogue and balancing is done in a transparent manner, which it is submitted is promoted by using the CSF as adapted to identifying human rights compliance requirements below. That transparency will likely promote participation in the dialogue of those whose interests are at issue and will help facilitate accountability in the decision-making process and of the decision-makers to those whose interests are affected by the decision.

It is a requirement of human rights compliance that the actor's context and capacity be gauged so that the actor is able to formulate the appropriate policies to take to respect

³¹⁸ Olivier De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, p. 313.

³¹⁹ Christine Chinkin, 'The United Nations Decade for the Elimination of Poverty: what role for international law?' *Current Legal Problems*, 54 (2002) 553-589.

and ensure human rights³²⁰. Some of the contextual factors to assess would be the actor's governance systems (administrative, legal and political) and the level of social systems development (media and communications, education, health, science and technology, registration and census, economic and cultural) in relation to the population concerned. The actor's context matters not only for the policies or programmes it might develop to further the realisation of human rights, but also has implications for the benchmarks, goals, targets and indicators the actor develops to gauge its human rights performance; global benchmarks or indicators might be of little use³²¹.

The CSF is designed so as to be contextualised to the situation of the actor and specifically highlights the need to take the actor's context into account. Accordingly, in using the CSF different actors can be expected to develop different policies, benchmarks, goals and indicators with regards to their human rights responsibilities. Within states, local governments might be expected to exhibit variation in their human rights policies and goals. This variation could reasonably be expected to be more marked when the CSF

³²⁰ CESCR, General Comment 1, Reporting by States parties, 24/02/1989, para.8. 'A sixth objective is to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights. For this reason, it is essential that States parties report in detail on the "factors and difficulties" inhibiting such realization. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.'

³²¹ CESCR, General Comment 1, para.6. 'A fifth objective is to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc. In many of these areas, global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress.'

is used by global actors such as international organisations and multinational corporations³²².

There is a further reason why the CSF is designed to highlight the need to assess the actor's context. An assessment of the actor's context is needed to identify the level of human rights realisation or protection already in existence in the situation in which the actor is carrying out its activity. In other words, the CSF requires that the actor's context be assessed so as to establish the baseline measures of human rights realisation. The actor's human rights compliance is premised on its not making an existing human rights situation worse. Without a baseline measure of existing human rights realisation it could be difficult to establish if existing levels of human rights protection have declined and it would not be possible to measure the actor's human rights performance over time³²³. The need for baseline measures is also important as actor's may seek to impose permitted limitations on human rights protection. Without a baseline measure, it could be difficult to determine if the decline in human rights protection was too come within any of the justified grounds for restricting rights.

4.1.3. Sustainability

Sustainability is a consideration for human rights compliance and identifying compliance requirements in relation to international human right norms, and it arises from two concepts. One is the concept of the progressiveness of rights. Although actors must act immediately to meet their human rights obligations and commitments, the realisation of

³²² Interview with Philippa Birtwell and with John de Train.

³²³ CESCR, General Comment 1, para.7.

rights is a process that will unfold over time. So human rights compliance is an ongoing process and thus the question of its sustainability arises. Mechanisms for monitoring and for the publication of periodic reports can be adopted to ensure the process of human rights compliance keeps its onward momentum and does not stall. But the progressiveness of human rights realisation does mean that ensuring the sustainability of an actor's course of conduct to meet its human rights obligations or commitments is a human rights compliance requirement.

The other concept giving rise to the consideration of sustainability in relation to human rights compliance has to do with the causality element of the concept of compliance. So this is a more universal approach to the issue of sustainability and compliance requirements because it relates to all areas of international law and not human rights alone. The causality aspect of compliance was described earlier³²⁴ and refers to the fact that there can be compliance with an international law norm without causality, that is the actor is not conducting itself in the compliant manner because it is seeking to comply with the norm concerned. Compliance is purely coincidental in such cases. There the issue of sustainability arises because the actor wants to avoid falling into non-compliance or want to maintain its compliance and the added dimension the causality issue brings is that to sustain and maintain compliance it will be important to identify the norm to be complied with. That way situations are less likely to arise where the actor falls into coincidental compliance. If the actor falls into coincidental compliance, it is more likely to find itself to be out of compliance. In other words, by always linking

³²⁴ See Section 2.4.1. Compliance and causality.

the actor's conduct to the norm, which requires clearly identifying the norm and consciously acknowledging compliance with it, the actor's state of compliance is more likely to be sustained. And as noted above, given the progressive nature of human rights, this is an important human rights compliance consideration.

4.1.4. The indivisibility and interdependence of human rights

The nature of human rights is that they are all equally important for a life of human dignity. As such there is no hierarchy of human rights with some superior to others but instead human rights are considered to be indivisible³²⁵. The equal importance of human rights is also a function of the fact that they are mutually reinforcing. The protection of one right, say the human right to education, is also likely to have a benefit for the realisation of other rights, such as the right to health as it may be easier for people to gain access to more knowledge about health care and disease prevention. In this sense human rights, in addition to having the property of indivisibility, are interrelated and interdependent³²⁶.

This interdependent relationship does not always result in an overall human rights gain. As the discussion on the rules as to margin of appreciation and proportionality showed³²⁷, international law recognises that a balance exists between the protections afforded to the various human rights. Measures taken to respect or ensure individual human rights may necessitate the restriction of other human rights. In any one case, such

³²⁵ Vienna UN World Conference on Human Rights, UN Doc. A/Conf.157/24 Part One, Chap. III.

³²⁶ Polly Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored*, Oxford University Press, 2006, pp. 162-163.

³²⁷ See Section 3.2.1.1. Proportionality and Section 3.2.1.2. Margin of Appreciation.

restriction must not be such as to undermine the essence of the interests protected by the conflicting human rights. Accordingly the measures taken by an actor in respecting a particular human right must be assessed in terms of their potential and actual impact on the realisation or enjoyment of other human rights. Such an assessment would be a requirement of the actor's human rights compliance.

For the Compliance Framework, as discussed later, especially at the Application and Effectiveness levels the consideration of the indivisibility and interdependence of human rights plays an important role. Specifically it gives rise to the compliance requirement to assess whether actions taken to improve the realisation of one human right might be causing negative effects on other human rights and if so to take action to remedy the situation.

4.2. The Compliance Strategy and Framework adapted to identify compliance requirements relating to international human rights norms

Based on the discussion above, the following sections explain the adaptation of the CSF explained in Chapter 2 for the purpose of identifying compliance requirements in relation to international human rights norms. Diagrams 6 and 7 below show the CSF as adapted for that purpose.

Diagram 6 displays the adapted CSF. As discussed in Chapter 2, it is headed by the compliance topic with its normative aspects followed by a consideration of the actor concerned and its characteristics, both normative and operational. Taking account of the

compliance topic's normative aspects with the actor's characteristics yields the normative aspects of the compliance topic as they apply to the particular actor, which are signified as 'applicable norms' in the diagram's third box. As that box indicates, the 'applicable norms' are modified by the concepts relevant to their application and interpretation.³²⁸ In the final stage of the CSF, the compliance requirements relating to the applicable human rights norms are identified using the Compliance Framework (CF), which is represented in Diagram 7. Before discussing the CF as shown in Diagram, the first three stages of the CSF are discussed in more detail.

³²⁸ Recall that in Section 1.1. Compliance requirements, it was argued that obligations as applied and interpreted by States are defined by these concepts and where the obligations relate to the rights of individuals within the territory of the State, under either international human rights law or under the international law of investment protection, the application and interpretation of such obligations can define the rights of individuals under those two heads of law vis-a-vis non-State actors. This point was elaborated in Chapter 3, at the start of Section 3.3 'Concepts elaborating international human rights norms'.

Diagram 6. Compliance Strategy for identifying compliance requirements in relation to human rights norms under international law.

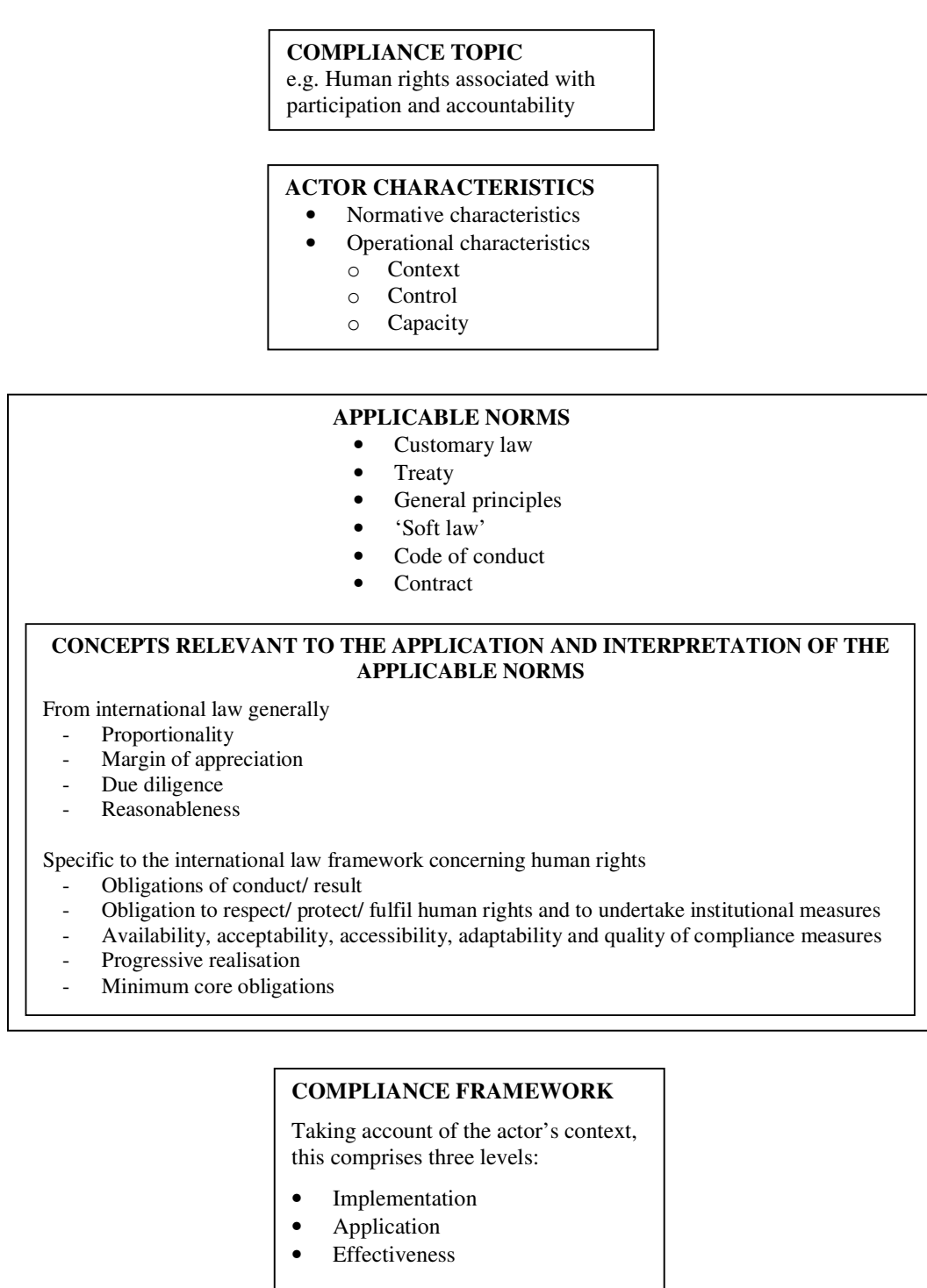
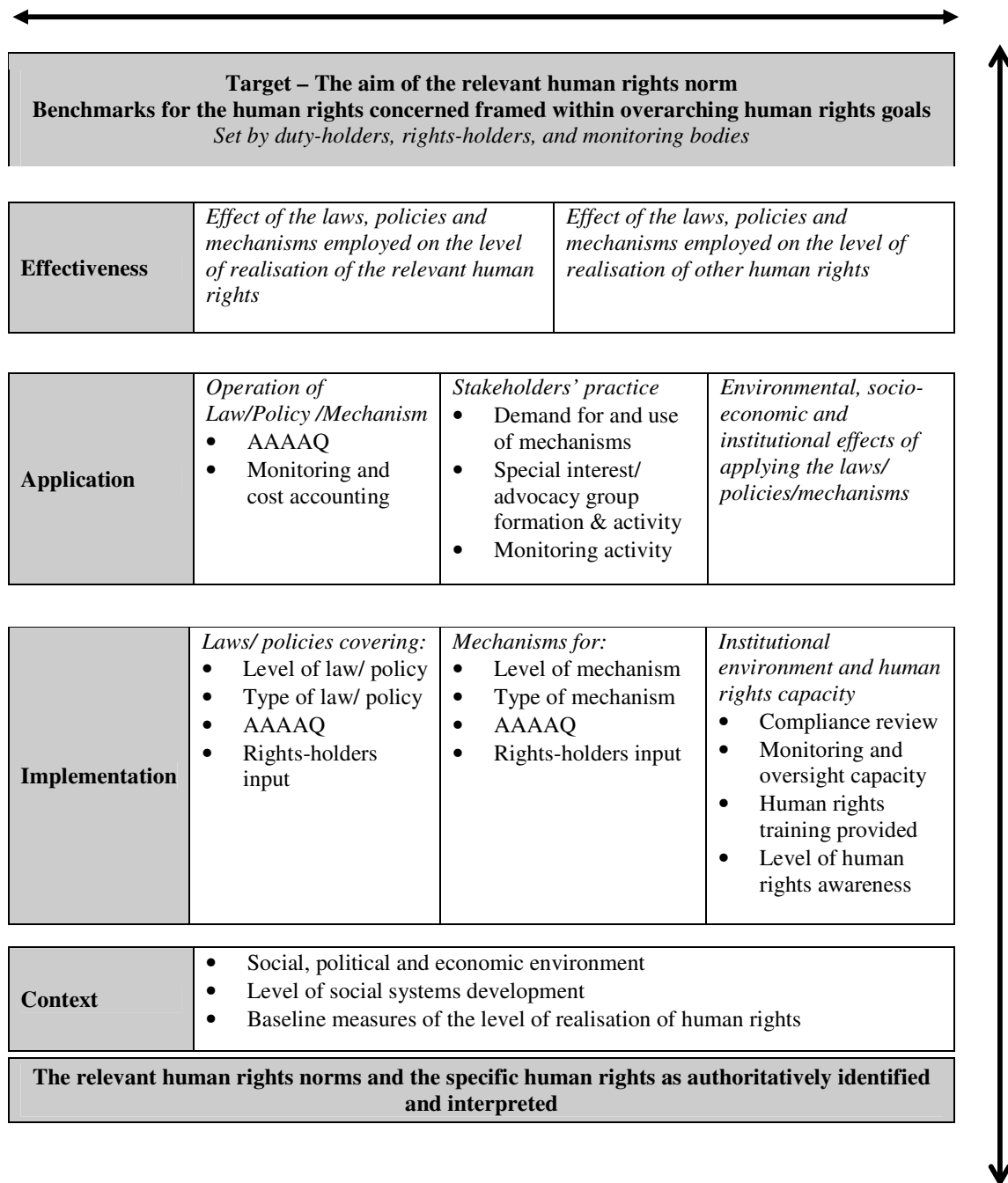


Diagram 7. Compliance Framework for identifying compliance requirements in relation to human rights norms under international law. The double-headed arrow signifies the non-linear, dynamic application of the CF.



4.2.1. The first three stages of the CSF

As mentioned in Section 2.5.1., the first three stages of the CSF comprise ‘The Compliance Topic’, ‘The Actor’s Characteristics’ and ‘The Applicable Norms’.

4.2.1.1. The compliance topic

The first step of the CSF is the identification of the issue the actor is seeking or expected to comply with. The problem of causality in relation to the concept of compliance was addressed in Section 2.4.1. and suggests that it is a requirement for compliance that the human rights norm or norms be clearly identified. This is so the actor’s compliance is always active rather than passive and accordingly the risk of accidental non-compliance is lessened.

In seeking to clearly identify the human rights norm involved, it is necessary to note that a single compliance topic can be related to a number of human rights norms and so the relevant norms have to be directly identified. In the case of the human rights issue area, this observation is of particular importance because of the interdependence of human rights, that is an actor’s compliance with a particular human rights norm can have implications for the enjoyments of other human rights.

The human rights norms identified in relation to the compliance topic will be the general norms concerning that issue under international law. They next have to be specified by taking into account relevant aspects of the actor’s characteristics.

4.2.1.2. The actor's characteristics

This section plus the previous one on the 'Compliance topic' considers the issues and factors that will provide the basis for the determination and characterisation of the applicable norms for which the compliance requirements need to be identified.

Actors' characteristics feature prominently in the consideration of compliance with norms of international human rights. For instance, although the rights of individuals are the key focus of international norms protecting human rights, the normative impact is directed at the conduct of the actors whose conduct can undermine the enjoyment of those rights. Thus in human rights treaties, the provisions setting out the duties of the state are key. International tribunals and the human rights treaty bodies are also focused on the state actor and its conduct as it relates to the protection and enjoyment of human rights within the territory of the state. So too is the state the focus of the mechanism of state reporting and review under human rights treaties. Discussion and commentary over the duty or responsibility of non-state actors in connection with the impact their activities may have on human rights are also naturally focused on the features and characteristics of those actors.³²⁹

This section discusses how the CSF addresses the issue of the actor's characteristics from the human rights perspective. The discussion is generally applicable to both state

³²⁹ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal*, 2001, pp. 443-545.

and non-state actors that are themselves seeking to, or that are expected to, comply with international human rights norms.

4.2.1.2.1. Normative aspects

The normative aspects of the actor's characteristics are obviously key considerations for identifying its compliance requirements in relation to a particular compliance topic. From a human rights perspective, the particular human rights norms governing the actor's conduct are of prime importance. However, the other norms operative and governing the actor's conduct are also relevant for they go to defining the actor's the range and scope of what activities the actor is free to undertake and to control. This in turn defines the nature and scope of activities that the actor may undertaken in order to comply with the relevant human rights norms concerning the compliance topic.

So the CSF points the user to making a comprehensive consideration of the actor's normative aspects. For instance, the actor's legal characteristics relate to its relations as a legal person at both the international and domestic levels. These relations have implications for the norms the actor's compliance is to be assessed against and its participation in creating those norms or in determining their interpretation. Thus depending on the actor, its legal character can be such as require consideration of any rules of customary law or general principles of international law that apply. And in certain other cases, otherwise non-binding norms may acquire legal effect. For instance, non-binding norms like guidelines, policies or codes of conduct may be incorporated into the actor's contracts or other forms of legal relations.

The actor's normative aspects will be a key factor in determining which categories of human rights norms to consider in relation to the actor. The categories concerned may extend beyond the legal relations the actor has entered into to include also other commitments made by the actor, such as those for instance, expressed in statements or its agreement to voluntary codes of conduct. Both entering into formal legal relations and undertaking commitments as to its future conduct generate expectations relating to the actor's conduct both on the part of the actor itself, its immediate counter-parties or relevant third parties, such as those affected by the actor's activities³³⁰.

To completely identify all the relevant prescriptions and so accurately define the actor's operative normative framework, its legal character at the domestic and international levels must both be considered. This is the standard position with regards to state actors but if the CSF is being applied to a non-state actor, it may be necessary to consider prescriptions aimed at it directly at the international level. For instance, corporations may undertake commitments to respect human rights and this arguably then means that international human rights norms that normally apply to states now also apply to such corporations.

In other cases, for non-state actor's, the relevant human rights prescriptions emanating at the international level, apply indirectly through the mediation of domestic incorporation by the laws of the state under the jurisdiction of which the non-State actor

³³⁰ Christine Chinkin, *Third Parties in International Law*, Oxford University Press, 1993, pp. 120-133.

operates. The provenances and effects of these different prescriptions must be taken into account when applying the CSF in any case.

So the question is, given the nature and characteristics of the actor, what particular norms apply to it and what is the nature of those norms. This is a question that would be asked by a user of the CSF in that the aim of the CSF is to take a user step-by-step through the process of identifying an actor's compliance requirements in relation to a particular international norm.

The observation that the actor's normative aspects determine what it can or cannot do in order to comply with particular human rights norms points to the capacity of the actor to comply with those norms or the extent of compliance it can undertake with regard to those norms. For example, in relation to the domestic level, a non-state actor may be faced with the situation that its requirement to comply with domestic law does not meet with human rights compliance requirements. The non-state actor may wish to comply or at least may wish not to contradict various binding or non-binding human rights norms, but its legal character subjecting it to the jurisdiction of a third party state may act as a restraint on efforts aimed at compliance or at non-transgression of the norms concerned. For example, a company may be required to take measures in a country that would ignore or violate the human rights of citizens of that country such as the case of Yahoo being required to provide the Chinese authorities with account details of Yahoo customers in China. Thus Chinese domestic law requires Yahoo to ignore or violate the right to privacy and to freedom of expression of its customers. In such cases it may be possible

that a non-state actor's aim of conducting its operations in a human rights positive or neutral manner will be defeated. At the same time, if a company like Yahoo pulls out of China, arguably the degree of enjoyment by Chinese citizens of the right to freedom of information would be reduced.

In a situation such as that described in the example concerning Yahoo, it could be argued that the non-state actor ought not to commence operations in countries where there is a risk of its operations leading to a negative human rights impact or ought to divest operations that have already been commenced. The issue of divestment or sanctions can however be complicated by the fact that such decisions in themselves have a greater cumulative negative human rights impact than decisions to invest or to continue operations in such countries. In every case, a balancing of competing human rights considerations will likely have to be undertaken. In any event, the legal character of a non-state actor as a resident within a country must remain an active consideration for the purposes of identifying its compliance requirements. Keeping in mind such a consideration has the benefit of at least exposing the decisions of non-state actors in the face of legal restraints on human rights compliance to some degree of scrutiny and transparency. It also allows for the distribution of responsibility for a negative human rights impact among all the relevant actors, possibly allowing for more effective strategies aimed at easing or correcting that negative impact that are aimed at the responsibilities of all relevant actors.

Finally, the actor's normative character will also have a bearing on the jurisdictions in which the actor's accountability will be in issue, including the court of public opinion, and the related issue of the extent of the actor's participation in such accountability mechanism.

4.2.1.2.2. Operational aspects

There are two elements to the operational aspects of an actor's characteristics. First, the manner in which the actor operates will largely determine the nature of its effect on the enjoyment of human rights in any particular case. Second, the operational aspects of the actor will determine its capacity to comply with applicable international human rights norms. As such, the actor's operational aspects will suggest the manner in which it ought to be regulated from a human rights perspective.

As mentioned, it is necessary to focus on the actor's operational characteristics to clearly determine the effect its operations may have on the enjoyment of human rights by the individuals affected by those operations. In this regard, it is necessary to consider all aspects of the actor's operations so as to get as complete picture as possible of them. This is the purpose of this aspect of the CSF. When the actor's characteristics are fully considered, three factors should emerge:

1. Those concerning an actor's capacity to comply with the applicable human rights norms and the margin of discretion that the actor may exercise in complying with those norms.³³¹
2. Those concerning other rights and interests that the actor needs to take into account in balance with the rights and interests protected by the human rights in issue.³³² The CSF, as emphasised elsewhere in this thesis, can facilitate thinking through these balancing issues in a systematic manner.
3. The organisational and operational features of the actor that determine what its specific compliance requirements would be. That is to say those requirements will be expressed in terms of the actor's organisational and operational features.

In relation to the issue of taking into account the actor's context and any competing rights or interests it may need to balance with the human rights in issue, it may be noted that these matters are addressed by the international law concepts of proportionality and the margin of appreciation. These concepts have developed in relation to the obligation of state actors. But they can be helpful in showing by analogy how factors like context, capacity and control can also be validly taken into account in identifying non-state actors' compliance requirements in relation to international human rights norms.

This section plus the previous section on the 'Compliance topic' considered the issues and factors that will provide the basis for the specification and characterisation of the applicable norms for which the compliance requirements need to be identified.

³³¹ See Section 3.2.1.2. Margin of appreciation.

³³² See Section 3.2.1.1. Proportionality.

4.2.1.3. The applicable norms

As discussed in Section 2.5.1. the applicable international law norms are those relating to the compliance topic as they are defined or contextualised given the actor's characteristics, that is its operative normative environment and operational details. The same applies here in connection with the applicable human rights norms. So once the relevant actor is identified the applicable human rights norms are identified from the categories of human rights norms that have a regulatory effect in relation to the actor concerned. These identified norms are then specified considering the characteristics of the actor concerned. And this is done with regard to their interpretation and application according to concepts of international law in general and to concepts relating to international human rights norms in particular.

4.2.2. The Compliance Framework

In this section the Compliance Framework (CF) designed and explained in Chapter Two is adapted to the purpose of identifying compliance requirements in relation to international human rights norms. The adapted CF comprises the factors for determining human rights compliance requirements in a valid and systematic manner and this section explains those factors and what their manner of application in a particular case might comprise of.

A key observation relating to the use of the CF concerns the principle of the interdependence of human rights, which holds that the protection of one human right must not be achieved at the expense of the enjoyment of other human rights. This is an

important consideration so as to avoid an intervention that on the face of it improves human rights in one area but actually negatively affects other rights. The issue of interdependence recurs throughout the CF, as does that of ensuring that any strategy for human rights compliance is inclusive and non-discriminatory. The norm of non-discrimination is a fundamental human rights norm whose consideration is required of any measure aimed at improving human rights compliance.³³³

4.2.2.1. The relevant human rights as authoritatively identified and interpreted

In Section 4.2.1.3. the applicable human rights norms were discussed. These now form the basis of the CF being adapted to identify the compliance requirements relating to those norms and the specific human rights relating to the compliance topic. In a sense, both the norms and the specific rights are now being applied having earlier been identified in the previous stages of the CSF.

Diagram 7 above accordingly refers to, in the lowest box, to the applicable human rights norms and specific human rights. The human rights are described as having been authoritatively identified and interpreted. That is to say, at this stage, in the application of the CF, the specific human rights at issue are expressly addressed and defined in terms of their content. In the earlier stages of the CSF, the task was to identify the specifically applicable human rights norms relating to the compliance topic given the actor's characteristics.

³³³ Actor can ensure the non-discriminatory nature of the measures undertaken for instance by ensuring data tracking the impact of any intervention is disaggregated according to the relevant categories, race and sex being among the most likely.

As noted in Section 2.5.2. when the general CF was being described, the causality aspect of the concept of compliance requires that the applicable human rights norms and human rights be clearly identified. This is particularly key in relation to the human rights area because these rights are of a progressive nature. Actors must act immediately to respect and protect human rights but the realisation of human rights takes time and the concepts of the rights themselves can change and evolve over time. So human rights compliance is an ongoing enterprise and to help sustain that compliance it is important that the norms being complied with are clearly identified as that will provide a clear frame of reference for the identification of the compliance requirements relating to those rights.

4.2.2.2. Context

The issue of taking into account of contextual factors was discussed in Section 2.5.2. and it bears emphasising here the importance of establishing a baseline to assess how the enjoyment of the subject-matter of the human right at issue changes over time as the actor undertake a course of conduct to comply with the applicable human rights norm. If the baseline condition is not improving according to pace set in the targets adopted as part of the CF, the actor's course of conduct and how it is being applied will need to be reviewed.

The actor's context also relates to its capacity to comply. That capacity can change over time. It can improve or decline and so as a compliance requirements relating to the human rights norms the CF is concerned with, the actor's capacity to comply with

those norms should be assessed over time and appropriate technical assistance provided to help improve that capacity as needed.

4.2.2.3. Implementation

At the implementation stage or level, the actor is required to have the relevant institutional and organisational structures in place by the adoption of appropriate legislative, judicial, administrative and educative measures³³⁴. These requirements are set out in the CF in terms of (1) the actor's laws and policies, (2) the actor's mechanisms for operationalising or implementing its laws and policies, and (3) the actor's institutional environment and human rights capacity. These requirements are what the normative framework for human rights requires of actors whose operations can have an effect on individuals' enjoyment of their human rights. The requirements may not only require adaptation of an actor's existing institutional and organisational aspects but could require new ones to be created. The actor for instance may not have policies of non-discrimination based on appropriately disaggregated data and would have to create such a policy in order to be human rights compliant. The presence or absence of these aspects can be gleaned from relatively readily available information obtainable from a survey of the actor's constitution, laws and policies. Thus there are three main compliance requirement issues or components to the implementation stage of the CF. They are (1) the actor's laws and policies, (2) the actor's mechanisms for operationalising or implementing its laws and policies, and (3) the actor's institutional environment and human rights capacity.

³³⁴ Human Rights Committee, General Comment 31, para.7.

Law and policy: Actors seeking compliance with an applicable human rights norm will likely have to pass laws and policies that protect and respect human rights as one of the first steps towards compliance with those norms. Whether they have done so and whether those laws and policies are applied in practice as intended are relevant considerations for human rights consideration. Lastly it is necessary to assess whether the aims of those laws and policies were appropriate and whether those aims were achieved. In addition to checking if such policies are present and cover all relevant aspects of the actor's operations, stakeholders and decision-makers should assess if existing policies unfairly restrict the enjoyment of human rights or are discriminatory.

An actor is likely to have to put in place various programmes and mechanisms as required by the laws and policies or otherwise to facilitate the enjoyment and protection of human rights. It is necessary to assess whether these actually have been designed, created and are in place and whether the institutions and mechanisms are used or implemented as intended according to the requirements of the international norms. As with the previous category on law and policy, it is also necessary to assess the outcome associated with having those programmes and mechanisms in place. It is necessary to assess laws and policies distinctly from their associated mechanisms because lack of human rights compliance may lie with issues relating to the mechanisms employed rather than the law or policy adopted. The mechanism may be contractual in nature as when government agencies or private corporations seek a commitment to their human rights policies from suppliers. On-site visits with suppliers would be another example of a mechanism designed to ensure human rights compliance.

Level of human rights awareness: For an organisation to adequately comply with human rights norms, the people who carry out its work must be aware of the human rights standards and what they require. Hence it is important to assess the level of human rights awareness and commitment of people in an organisation. Issues of monitoring, capacity building and level of technical knowledge are also key. Actors are expected to undertake their human rights commitments effectively and in good faith, implying that some system for monitoring policy implementation and a schedule for assessment should be in place covering all aspects of the CF. Such a monitoring system should be well-resourced and effective. In order for such review systems to fulfil their objectives, it is necessary for the staffs and officials concerned to have an adequate understanding of the human rights provisions and norms to be complied with. The availability of human rights education is thus a key structural consideration. Human rights awareness is also matter of organisational culture, an area for capacity-building in order to ensure measures aimed at human rights compliance are sustained and enhanced.

4.2.2.4. Application

The second stage is the application stage or level and concerns requirements relating to whether the laws, policies and mechanisms identified in the implementation stage are applied and used in practice in accordance with their designed purpose and for achieving that purpose. Many actors may have the appropriate laws, policies and mechanisms in place but it is in putting them into practice that mistake or oversights occur, leading to a failure of the law or policy. For example, it can be important to identify whether a policy for increasing human rights-based participation in the implementation stage of a

development project is not effective because it is poorly worded or because decision-makers at the local level are misapplying, ignoring or contravening the policy. The application level aspects of the CF help capture any such failures or oversight. An appropriate response can then be produced that will accord with other CF requirements to ensure those requirements are not ignored or contravened. There are three requirements for human rights compliance at the process level.

Operation of laws, policies and mechanisms: The first component of the application stage of the CF highlights the actor's requirement to assess whether the laws, policies and mechanisms it has to facilitate human rights enjoyment and protection are functioning as intended. Another requirement of this component of the application level is for the actor to assess that the relevant laws, policies and mechanisms are being applied in a manner consistent with human rights norms. For instance, the actor would be required to assess if the laws, policies and mechanisms are being applied in an equal and non-discriminatory manner. In this way the requirements of this application level component of the CF help monitor the progress being made by the actor's laws, policies and mechanisms towards their goals of improved or increased realisation of the human rights concerned.

In assessing how the actor's laws, policies and mechanisms are being applied, such assessment ought to be framed around the rights-holders' perspective. For many actors, including government agencies and corporations, in many cases this involves assessing how such policies and mechanisms are working within branches or subsidiaries. As mentioned earlier, as context varies, so local practices can be expected to be different.

By highlighting the potential for variations the application of laws, policies and mechanisms in practice, the CF offers the opportunity for different parts or units of an actor to learn from one another.

Stakeholders' practice: This component of the CF's application level is new and was not found in the general CF represented in Diagram 4 in Chapter 2³³⁵. It requires that the actor take account of the conduct or activity of rights-holders in relation to the practical implementation of the actor's laws, policies and mechanisms. As mentioned before, the issue of compliance with human rights norms can be dependent on the capabilities of the rights-holders as much as on the capability of the actor. For instance mechanisms may have been designed and applied that were in fact culturally inappropriate or inadequate³³⁶, causing them to be avoided or under-utilised. Alternatively, the mechanisms in question may require a capability on the part of the rights-holders, such as a certain level of literacy, that is lacking, resulting in the rights-holders not making use of the service provided by the actor.

The lack of response by rights-holders in such cases would not be because the level of human rights provision with regard to that particular human right was insufficient. Instead it would more likely be due to cultural inadequacy of the provision that was made. It is a requirement for human rights compliance that the actor assess the activity of rights-holders with regard to the operationalisation of the measures it has adopted so that if the activity is not what was expected or anticipated, the actor can be

³³⁵ See Section 2.5. The general strategy and framework for identifying and specifying compliance requirements with norms of international law.

³³⁶ CESCR, General Comment 12 on the Right to Food, E/C.12/1999/5, 12 May 1999, para. 7.

alerted to ascertaining the reason. If the reason is that the law, policy or mechanism was somehow inappropriate or lacking, the actor will be alerted to make any needed changes.

Environmental, socio-economic and institutional effects of applying the laws/policies/mechanisms: Finally, there is a component to human rights compliance requirements at the application level that involves the actor taking into account the consequences of applying the laws, policies and mechanisms at issue on the enjoyment and protection of other human rights or other interests. The application of those measures may have the effect of interfering with the realisation of other human rights, in which case the issue of balancing rights arises. Or they may have other negative, unintended effects that could affect the further application of those measures or that could have some deleterious societal or organisational effect.

Insofar as the effects on other human rights are concerned, this requirement arises in relation to the principle of the indivisibility, interrelatedness and interdependence of human rights, discussed earlier. As this component relates to the effects of the application of the actor's laws, policies and mechanisms on other interests, be they state or corporate interests, depending on the actor, these requirements arises in relation to the issue of fragmentation and the conflict of norms discussed in Chapters 1³³⁷. These interests will have been taken into account in defining the applicable norms through the CSF earlier. But the issue arises again here to remind the user of its ongoing obligations in relation to those interests so that the balance struck earlier is maintained.

³³⁷ Section 1.3.3. Fragmentation.

With reference specifically to the effect on other human rights, the requirement is for the actor to ensure that the enjoyment and protection of other human rights are not undermined by the application of the laws, policies and mechanisms it is employing to comply with the human rights norms at issue. The application of those laws, policies and mechanisms may result in changes to living, work and physical activity environments that may have an impact on the lives of people that could be an impediment on the enjoyment of other human rights. Thus, the principle of the interdependence of rights requires that human rights measures undertaken by an actor be assessed in terms of any negative impact they might have on the enjoyment of other human rights. The aim of this requirement is to direct the mind of the CF user to consider the effect of applying the law or policy on the enjoyment of other human rights³³⁸ so that the user can look to taking pre-emptive measures or remedial policy measures if they are needed. By making this assessment, the actor can avoid or mitigate a scenario involving unintended, negative human rights consequences. In other words, this CF component serves to remind the user to take these aspects of the application of its law, policies or mechanisms into consideration when determining whether they are being applied as intended.

So in requiring the CF user to consider the effects of its conduct in complying with a set of human rights norms, this component represents the locus of the actor's balancing the application of laws, policies and mechanisms for a set of rights against the effect of those measures on the enjoyment of other human rights or other interests. It is

³³⁸ The CF user would need to know the state of enjoyment of the other human rights at the start of the project – this would be part of the purpose of the baseline considerations in the 'Context' component of the CF.

suggested that this component is especially useful. For instance, it can help ensure the sustainability of the measures undertaken to realise the human rights in question. It also allows for a consideration of the effect the measures undertaken have on the sustainability of other activities of the actor that may not have an effect on the enjoyment and realisation of other human rights but may affect other interests.

Further, it is not only useful to the actor as CF user in helping it maintain awareness of the balancing issues at hand. It is also useful to alerting interested external parties so that the balancing of rights and other interests it represents can be undertaken and maintained in a transparent manner. By helping with transparency in this way, it is hoped the legitimacy of the balancing involved will be enhanced and that such deliberate consideration of the issues involved that is prompted by this component of the CF will contribute to the coherence of international law in general and the international law concerning human rights in particular.

4.2.2.5 Effectiveness

While the reasons why human rights compliance requires the assessment of the effectiveness of human rights interventions are clear, assessing those effects involves several complexities. The range of actors and factors that potentially influence human rights and socio-political effects make it difficult to determine the extent to which those effects are directly attributable to any specific actor, policy or process. Additionally, some effects may be evident immediately while others could take much longer to develop. Finding appropriate methods to assess the effectiveness of an actor's implementing activities can be difficult and assessment may involve considerable time

and resources. Despite these difficulties and limitations, it is still important that such effects be monitored and assessed. It is important for state and non-state actors to understand the effect of their policies, in relation to human rights as much as in relation to any other aspect of their operations. Identifying negative effects is in fact a key component of the duties to respect human rights and to act with due diligence. Whether the effects are found to be negative or positive, important lessons are learnt that otherwise might not have been.

The requirement for the actor to monitor its human rights performance relates in particular to the CF's effectiveness level, the third stage of the CF. First though the requirement that the actor monitors the effects of its day-to-day activity for any human rights impact has an implication for the implementation and application levels of the CF. In particular, the actor is required to have a policy for monitoring its human rights performance and an effective monitoring capability in relation to that policy. The requirement to monitor and evaluate that measures aimed at ensuring the respect for human rights also requires that policy and capability.

At the CF's effectiveness level, the compliance requirement is for an assessment of the extent to which steps taken by the actor in applying its implementing activities have resulted in improved protection for and enjoyment of human rights. This assessment must be carried out, from the rights-holder's perspective, to see how the respective knowledge systems, laws/policies and programmes/mechanisms have affected the rights-holder. As with assessments at the application level, assessments at the effectiveness

level can be used to assess the actor's progress over time towards achieving defined human rights targets or benchmarks. However, while application level assessment looks at the effort in terms of the level and manner of implementation and utilisation of laws, policies and mechanisms, effectiveness assessment is concerned with the effects of law and policy implementation and utilisation. The doctrine of the indivisibility of human rights means that it is important to ensure that the realisation of specific human rights does not occur at the detriment of other human rights.

4.2.2.6. Targets and benchmarks

While the outcome of the human rights regime is the improved realisation of the human rights of all, such realisation is progressive in nature in that the actual realisation of those rights involves social or organisational change which may take time depending on the circumstances and context of individual cases. In order for both duty-holders and rights-holders to monitor the progress of this change, it is also necessary to set reasonable benchmarks and targets for the duty-holder for achieving the desired outcomes. It is important that these benchmarks and targets are set with other stakeholders, especially rights-holders' representatives, both so that they are relevant to the rights-holders and to avoid setting them too low.

Two requirements for human rights compliance have to be borne in mind in using these benchmarks. First, is the requirement for disaggregating the measures used to ensure compliance with the human rights norm of non-discrimination. Second, is the recognition that the goal of respecting or protecting human rights is not time-bound but an ongoing effort. As such benchmarks are not targets to be met and set aside or

maintained as status quo but instead ought more accurately be understood as milestones in need of recalibration as the actor's and indeed society's capacities, contexts and circumstances evolve.

Although the issue of human rights indicators is not addressed in this thesis, an implication of the CF for developing human rights indicators, or other indicators, depending on the area of international law it is applied to, may be noted. That implication is that once the compliance requirements, that is the course of conduct, whether acts or omissions, according to the CF's considerations for identifying such requirements, are validly identified, then the appropriate indicators, and maybe benchmarks, can be specified accordingly for each of the boxes in the Implementation, Application and Effectiveness levels. This could be the subject for further research and analysis.

In concluding the discussion on the CF as applied to the identification of compliance requirements relating to human rights norms a few points are worth noting. First, as noted in Section 2.5.2., the CF's three main components representing the implementation, application and effectiveness stages of compliance are inter-related and so can have an effect on one another. Thus, for instance, a problem identified at the application or effectiveness stage may actually have to do with an issue at the implementation stage, which is where a correction may be needed. Also, lessons learnt in connection with one stage or level of the CF may have implications for improving performance in connection with other levels of the CF. In relation to the human rights area, this last observation, it is submitted, could have useful applications because it may not only allow lessons to be

transferred between the same category of actor but also between different categories of actors. So corporations with experience in identifying their compliance requirements in relation to their commitment to respect human rights, can share their lessons and experiences with the states in which they operate. This way it is possible to begin to imagine a coherent human rights regulatory regime across actors.

Second, and as noted elsewhere in this thesis, the application and use of the CF is iterative and this iterative aspect of the CF reflects the dynamic character of compliance and the process of international law itself³³⁹. This helps capture the fact that norms, their interpretation and content, evolve. This evolutionary character plus the fact that compliance is not complete in any field means that compliance is an ongoing, dynamic process.

³³⁹ See Section 2.3.5. Managerialism and Section 2.3.7. Transnational Legal Process.

4.3 Uses of the CSF in identifying compliance requirements concerning human rights norms

The CSF adapted for the identification of compliance requirements in relation to international human rights norms has various uses, which are discussed below. Some of these uses are based on uses of the general CSF that were discussed in Chapter 1.

Using the framework allows the range of requirements for compliance with the human rights norms relating to participation and accountability to be better defined. By setting out the various requirements systematically, and giving thought to each one, the human rights norms concerned are explained in more detail and understanding of them is deepened. As the understanding deepens, the definition of the human rights norms develops in a recursive manner.

Definition of norms  Deliberation and application of the framework

The framework can provide a common objective basis for dialogue. The various actors interested in increasing the levels of participation and accountability can use the framework as a vehicle to facilitate dialogue among themselves. The framework is composed of what are regarded as universal norms, and can be used as a starting point and facilitator of debates over the norms and what is required to operationalise them. Even if there is disagreement over the norms that were included in the framework or their requirements, the framework provides a basis for discussing those differences. The

framework can also be used to facilitate dialogue among different policy-making bodies³⁴⁰.

The CSF can help actors improve their capacity in terms of having the requisite level of knowledge about their compliance requirements to be able to improve their levels of compliance with international human rights norms and in relation to particular human rights. An analysis such as this, from the compliance perspective, will provide an idea of the operational requirements for human rights compliance. For instance, in relation to human rights treaties, it is normally observed that human rights compliance is weak, either because the number of states parties actively complying with their obligations is small, or because treaty-monitoring is deficient and problematic. It may be however, that low levels of compliance are due to a lack of knowledge as to what the operational requirements for human rights compliance are. By looking at compliance from the institutional or operational perspective, it is possible to get a clearer picture of what the requirements for human rights compliance are in operational terms. A compliance perspective may also help explain the boundary of human rights in terms of organisational efficiency, or at least explain how human rights considerations are balanced against other, competing interests.

Duty-holders and other interested parties can use the framework to identify which requirements for rights-based participation and accountability already exist within the duty-holder's organisational structure. This allows the duty-holder to demonstrate

³⁴⁰ See for example, Committee on Economic, Social and Cultural Rights, General Comment 1, para.2

where it is in compliance with the relevant human rights norms³⁴¹. By identifying what is being done, the framework highlights what needs to be done in order for the duty-holder to comply with the requirements set out in the framework, thereby identifying gaps in compliance. Once such gaps have been identified, investigations can be conducted to understand why they are there and their precise nature. Where the duty-holder is already in compliance with the requirements for rights-based participation and accountability, work can be done to understand the factors responsible for such compliance better with a view to replicating that compliance in relation to other aspects of the duty-holder's requirements. In this way, the framework helps to build on and strengthen the purposes of state reporting under human rights treaty regimes. For example, one objective of such reporting is to comprehensively review existing structures and processes within the state in relation to a particular human rights outcome, be it positive or negative. Having a framework that can systematically guide such a review, in the manner just described above, strengthens this objective. All duty-holders, not just states, need to carry out such reviews and identify gaps, if any, in their protection of human rights.

The CSF can help the actor analyse its compliance activities in terms of its institutional activity and this can help improve levels of compliance at the organisational level rather than in connection with one specific area of the actor's operations. In addition, by focussing on the degree of compliance, attention is drawn to the institutional activity of the actor concerned. That activity may be analysed in terms of law-making or rule-making activity, implementation activity and enforcement or adjudicatory activity.

³⁴¹ CESCR, General Comment 1, para. 4.

Each category of activity could be further analysed in terms of its process or output aspects, i.e. is the process compliant with human rights norms, or is the output human rights compliant. Seen from this perspective, the issue of human rights compliance may be identified not with the lack of violations alleged against an actor but the degree to which the actor complies with its obligations at the operational level. Improvements for compliance may also be more easily suggested at this organisational level than if each instance of violations was litigated individually.

The framework is a basis on which strategic planning of programs and policies can be conducted, in order to meet the goals of the human rights norms. By setting out the requirements for compliance with the relevant human rights norms, the framework systematically guides the process of deciding which programs and policies to carry out. Again, this objective facilitates one of the purposes of reporting under human rights treaty regimes which is to aid the ‘elaboration of clearly state and carefully targeted policies’, including how priorities should be set³⁴². The framework strengthens this objective.

For example, the framework identifies where the results are lacking in terms of the realisation of the human rights concerned. Where this happens, there is a likelihood that the measures adopted by the actor for the purposes of complying with the requirement of the particular human right concerned were not optimal from the perspective of that rights realisation. Although the content of the right itself is evolving

³⁴² CESCR, General Comment 1, para. 4.

and so the right may in their never be fully realised, nevertheless it is necessary to identify the case at any point in time where the measures taken in order to realise the right are not the best set of measures that could be adopted at that point in time.

The framework can be used to identify the methods that are needed to assess or measure the duty-holder's compliance with the various requirements set out in it, and to identify instances where new methods must be developed and tested. Assessing compliance with human rights norms is an interdisciplinary process as it draws on various fields from social science that can potentially range from anthropology to economics, each with specific research and evaluation methods. By systematically setting out the requirements for duty-holders' compliance with the relevant human rights norms, the framework can be used to identify the means for assessing compliance that may possibly be used. Using the framework to identify what needs to be measured and how best to do it may also reveal that the methods to assess compliance are lacking or underdeveloped and this can lead to a development of the methods needed.

In addition to using or developing methods of assessing compliance the development of human rights indicators is another area in which the framework may be used. According to Maria Green,

“[a] Human Rights Indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation”³⁴³.

³⁴³ Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement', *Human Rights Quarterly* 23 (2001) 1062-1097, p.1065.

The methods that are used to assess human rights compliance must operate with the use of human rights indicators. If political or social indicators are used without the necessary adaptation to be human rights indicators, it will not be possible to measure the state of human rights compliance by the duty-holder concerned. Designing human rights indicators can be complex because there are various issues involved.

As noted in Section 4.2.2.6. above, the CSF can be used to develop human rights indicators in relation to each of the categories or ‘boxes’ at the Implementation, Application and Effectiveness levels in Diagram 7.

Using the framework allows the interrelationships of the socio-legal process to be identified. This global perspective is important because it allows for an understanding of how the structural, process and outcome aspects of increasing rights-based participation and accountability are related and how they may influence one another. Such a perspective can be important from the perspective of strategic planning as well as monitoring. For example, it is important to identify whether a policy for increasing participation in the implementation stage of a development project is not effective because it is poorly worded or because decision-makers at the local level are contravening the policy. Appropriately designed human rights indicators can identify which is the case. An appropriate response can then be produced in the context of how it might influence the structural and other process aspects of increasing rights-based participation in project implementation as well as the outcomes themselves.

The framework allows for the identification of specific studies to be carried out on different aspects of the framework as applied to different contexts and cases. As the framework is an overarching framework, it does not provide all the details required for each aspect of the framework. Providing detail to such an extent would compromise the benefit of an overarching framework as described above. The framework provides a common basis for undertaking comparative work, for example, on specific aspects of the framework. Focussing on individual aspects of the overall framework allows for the deepening of understanding of the factors required for compliance with the human rights norms underlying participation and accountability.

The framework may be used as a menu/checklist of human rights norms. The assessment framework on participation and accountability is presented here could be used as a menu from which specific studies could select based on the assessment objectives, context and target audiences. Developing and using the full range of structural, process, and outcome indicators makes it possible for people and organizations, “from grass-roots activists and civil society to governments and the United Nations”³⁴⁴ to monitor progress towards the full realisation of rights, provide a common ground for dialogue and facilitate continuity of assessment, help identify gaps and barriers to rights realisation, and identify and hold actors accountable for failures to respect, protect, and fully realise human rights.

³⁴⁴ UNDP, *Human Development Report 2000*, p.99.

The framework can be used to assess how the duty-holder's internal governance and practice is being changed, or not changed, as a result of lessons learnt. It could thus aid compliance review in broader terms than with only specific project reviews. For example, within the Asian Development Bank, management has developed a practice of submitting non-project specific requirements to the Compliance Review Panel allowing the Panel to provide 'Advisory Opinions', as it were that could influence the ADB's practice across various projects³⁴⁵. The framework developed here could be used in that process.

The CSF might aid with Such a review of decision-making processes within the actor concerned to ensure the relevant compliance considerations were taken into account. It would also be concerned with ensuring that the outcome resulting from the course of action adopted by the actor in complying with the human rights norm helps to attain the purpose behind the norm and does not involve any regressive effects, either in relation to the human rights of concern or to other human rights³⁴⁶.

4.3.1. Challenges in using the CSF to identify compliance requirements concerning human rights norms

There may also be several challenges faced in using the CSF to identify compliance requirements in relation to human rights norms:

³⁴⁵ Interview with Mr Suresh Nanwani, ADB, at London, October 2005.

³⁴⁶ Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16(5) *EJIL* 907 (2005), p. 911.

Individual versus community rights or interests. Human rights are individual entitlements, but the usual methods of assessment, e.g. through sampling, often result in data that is in the aggregate or estimated, making it difficult to tie assessment in with individual entitlements ³⁴⁷. Further, that increasingly, there is a tension between individual rights themselves and between individual and community rights, the trade-off argued for by some between civil liberties and national security providing an example of this balancing act.

Lack of basic information for monitoring human rights. Basic data about populations is often lacking and estimates for individual or population data are resorted to. The usefulness of estimates to monitor the realization of human rights is be fairly limited³⁴⁸. The lack of relevant data itself is indicative that a situation is not being assessed from a human rights perspective and that the duty-holder concerned must develop its capacity in this regard. If there is lack of data because the duty-holder has not kept records, the duty-holder is remiss in its obligation to monitor the situation and ought to take appropriate remedial steps immediately. If there is lack of data because the duty-holder lacks the capacity to collect such data, the international community has an obligation to provide the relevant assistance and individual actors may be accountable to the extent that they fail to provide the required assistance³⁴⁹.

³⁴⁷ Katarina Tomasevski, 'Indicators', in Asbjorn Eide, Catarina Krause, Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Brill, 2001, p.537.

³⁴⁸ Katarina Tomasevski, 'Indicators', p.540.

³⁴⁹ Committee on Economic, Social and Cultural Rights, General Comment 1, para. 3. See also ICESCR, Arts.2(1), 22 and 23.

Systemic biases. Basic data collection processes such as registering births or classifying household data may be discriminatory³⁵⁰. For example, land reform programs in Latin America systematically excluded women from the process as land was allocated by household, but only through the ‘male head of the household’³⁵¹. Changing these biases and practices will have to take place for there to be meaningful human rights assessment. As discussed earlier, gender bias in the language used to formulate policies and whether participation is only at the political and not economic level. This may require changes but changes may be at the cultural, political and social levels which would be a major challenge.

Lack of evidence on costs and impacts. Currently it is unclear what costs are involved³⁵² in designing and implementing policies and mechanisms for participation and accountability in different contexts. The pathways by which human rights impacts or outcomes are achieved are also not fully understood. Given resource constraints this is an important area, given ubiquitous resource constraints, that requires further research. There is much work to be done to further define and validate human rights norms and to develop and test assessment methods and tools.

Definition of human rights assessment indicators. Defining and deciding on assessment indicators carry a certain amount of power e.g. in terms of influencing the focus and outcomes of assessment. Unequal distribution of power in assessment

³⁵⁰ Katarina Tomasevski, ‘Indicators’, p.537.

³⁵¹ Katarina Tomasevski, ‘Indicators’.

³⁵² Committee on Economic, Social and Cultural Rights, General Comment.

processes could be counteracted by ensuring that indicators are selected in as participatory a manner as possible.

Enforcement capacity of regulatory systems. A major challenge remains in terms of the enforcement capacity within the international human rights framework. Structural weaknesses within the human rights treaty-monitoring bodies is one reason for this. These bodies are for example, often poorly resourced. Structural weakness in terms of enforcement undermines the legitimacy of the international human rights regime and is a key challenge yet to be adequately addressed though progress has been made and it is more difficult for all international actors to maintain impunity when violating human rights.

Building capacity of filling gaps in regulatory systems. The international human rights framework acknowledges the responsibility of all actors to assist those that lack the capacity to protect human rights to build their capacity in that regard. Technical assistance provisions in the UN Charter and individual human rights treaties address this concern ³⁵³. The challenge remains however in translating such recognised responsibilities into sustained and effective capacity building operations.

4.4. Conclusion

The CSF developed in Chapter 2 was adapted to identify compliance requirements relating to international human rights norms. It is possible to use this framework for

³⁵³ UN Charter Arts. 55, 56; ICESCR Art.2(1).

identifying compliance requirements in relation to various human rights norms and in the next chapter, the framework will be detailed in relation to the human rights norms associated with the concepts of participation and accountability. Because the framework takes into account issues of an actor's context and capacity, which are key issues for identifying compliance requirements in any field and systematically sets out a method of identifying such requirements at the implementation, application and effectiveness levels, it is further submitted that versions of the CF can be suitably adapted for the purpose of identifying compliance requirements in other fields of international legal regulation besides human rights.

Chapter 5 – Illustrating the CSF: Participation, accountability and human rights

5.1 Introduction

This chapter seeks to illustrate the use of the Compliance Strategy and Framework, in particular the Compliance Framework developed in Chapter 4, to identify the compliance requirements in relation to the human rights associated with the principles of participation and accountability which are part of the human rights-based approach to development developed by the United Nations Office of the High Commissioner for Human Rights.

The concepts of participation and accountability are both key issues for development practitioners and for governance generally.³⁵⁴ The UN in its work has adopted a human rights based approach to development for which participation and accountability are two key principles expressed in the following term:

Participation and inclusion: Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.

Accountability and the Rule of Law: States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a

³⁵⁴ UNDP, Human Development Report 2000, Human Rights and Development; Governance: The World Bank's Experience, 1994.

competent court or other adjudicator in accordance with the rules and procedures provided by law.³⁵⁵

These principles have been further explained in terms of poverty reduction³⁵⁶, which is a key dimension of the UN's development efforts. Those two principles are explained as follows in terms of poverty reduction strategies:

Participation: [T]he human rights approach emphasizes the importance of ensuring the active and informed participation by the poor in the formulation, implementation and monitoring of poverty reduction strategies. It draws attention to the fact that participation is valuable not just as a means to other ends, but also as a fundamental human right that should be realized for its own sake. Effective participation by the poor requires specific mechanisms and arrangements at different levels of decision-making in order to overcome the impediments that people living in poverty, and marginalized groups in general, face in their efforts to play an effective part in the life of the community.

Accountability: The human rights approach to poverty reduction emphasizes the accountability of policymakers and others whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability. It is therefore an intrinsic feature of the human rights approach that institutions and legal/administrative arrangements for ensuring accountability are built into any poverty reduction strategy. While duty-bearers must determine for themselves which mechanisms of accountability are most appropriate in their particular case, all mechanisms must be accessible, transparent and effective.³⁵⁷

³⁵⁵ UN Common Understanding. The Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among UN Agencies, Attachment 1 of the Report of the Stamford Inter-Agency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform, Stamford, USA, 5-7 May, 2003, p. 14.

³⁵⁶ Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006.

³⁵⁷ Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, p. 5.

The principles of participation and accountability as expressed above may be considered the Compliance Topic. As will be seen they comprise a number of human rights. The CF will be used to identify the compliance requirements relating to those human rights.

This chapter shall first examine the human rights aspects of the principles of participation and accountability that are expressed above to identify the human rights associated with them. The content of those human rights will then be specified after which the CF will be used to identify their compliance requirements.

5.2. The human rights aspects of participation and accountability

The theory of human rights explains why the concepts of participation and accountability are such important aspects of the framework for human rights protection under international law. The international human rights framework is founded on the theory of equal human dignity³⁵⁸. Underlying dignity is the concept of human agency in that human rights protect the autonomy of an individual as a 'self-controlling, self-developing agent'³⁵⁹. In other words, human rights are recognised and protected at the international level so that individuals are not merely dependent on others or simply the passive recipient of the agency of others³⁶⁰. The basis of human rights on the idea of human

³⁵⁸ Oscar Schachter, 'Human Dignity as a Normative Concept', *AJIL* Vol.77, No.4 (Oct., 1983), 848-854, 849.

³⁵⁹ Alan Gewirth, 'The Epistemology of Human Rights', in *Social Philosophy and Policy*, Vol. 1 (1984), pp.22-24. See also, James Griffin, *Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights*, Meeting of the Aristotelian Society, Senate House, University of London, 9 October 2000, available at

³⁶⁰ *Ibid.*

dignity grounded in agency assumes the individual rights-holder will play the role of an active agent in seeking to control his life. In this regard, both participation and accountability are key aspects of the human rights framework, as both these concepts recognise the autonomy of the individual with regards to other agents in relation to the decisions that affects the individual. Participation, the idea that the individual can influence societal decisions affecting his interests, is a recognised human right at the international level³⁶¹. Accountability is a concept permeating the framework for the protection of human rights at the international level as that framework provides the basis for holding actors to account for the impact of their acts or omissions on the enjoyment and protection of human rights.

The centrality of the two concepts to human rights is recognised in rights-based approaches. Participation relates to participation in decision-making and the instrumental aspect of participation is also explicitly recognised within the international human rights framework where participation is regarded to be critical to the full realisation of other human rights, such as the rights to work, health and education³⁶². Accountability is understood in terms of power in the sense that it provides the means to control the exercise of delegated power³⁶³. There are two forms of accountability, namely *answerability* or the capacity to demand reasons or the provision of information where required (weak form) and *enforceability* or the capacity to impose sanctions and penalties (strong form). Accountability can be examined on different levels namely in terms of its

³⁶¹ Article 25 ICCPR.

³⁶² CEDAW General Recommendation 23 (Political and public life), A/52/38, para. 14.

³⁶³ Anne-Marie Goetz and Robert Jenkins, *Voice, Accountability and Human Development: The Emergence of a New Agenda*, 2002, UNDP, Human Development Report Office, New York, p.5

form, type, and time of operation. Accountability can also be distinguished by when it is sought. *Ex post* accountability is focused on the impact of an action, which, by definition, only arises after the event, as for example with the case of legal accountability since, as a general matter, an actor's legal accountability becomes an issue after its violation of a particular right.³⁶⁴ *Ex ante* accountability exists when a decision-making process is subject to inquiry before action is approved for example when a participant in a policy implementation exercise seeks answers before the policy is put into practice.

In arriving at an understanding of the human rights compliance requirements relating to participation and accountability, it may be noted that the description of those concepts in term of rights-based approaches is similar to their description in the areas of environmental law³⁶⁵, administrative law³⁶⁶ and with regards to the concept of good governance³⁶⁷. In these areas too, the theory underlying the concepts of participation and accountability are concerned with dignity, autonomy and the protection of the interests of the individual. In this fundamental sense, understandings of participation and accountability in these other fields mirror those in the human rights field. Though not recognised in human rights terms in these other fields, the concepts of participation and accountability have the same functional effect in that they bind the actor's concerned to act a certain way. They also create expectations of the actors on which individuals can base claims for performance.

³⁶⁴ Arguably, there could be said to be an exception in relation to the seeking of injunctive relief. In that case, the actor's legal accountability is determined before the event.

³⁶⁵ Dinah Shelton, 'Environmental Rights', in Philip Alston (ed.), *Peoples' rights*, Oxford University Press, 2001.

³⁶⁶ Paul Craig, *Administrative Law*, Sweet and Maxwell, 2008.

³⁶⁷ Hans-Otto Sano and Gudmundur Alfredsson (eds.), *Human Rights and Good Governance: Building Bridges*, The Hague, New York: Kluwer, 2002.

The concepts of participation and accountability are related. By participating in decisions affecting their lives, individuals are empowered to hold those in positions of authority, trust and power to account. Concomitantly the impetus for greater accountability has led to calls for enhanced participation by those whose rights and interests are at stake in the policy-making process³⁶⁸. In other words participation and accountability are instrumental in securing one another; by participating one holds to account, by holding to account one ensures participation.

The human rights framework encapsulates this symbiotic relationship between participation and accountability exists in each sphere where power is delegated. The application of the concepts of participation and accountability serves to ensure such power is exercised lawfully and thus underlie the framework of human rights, which is a check on the arbitrary exercise of power. Within that framework however, the concept of participation is itself a human right. As a consequence, a legal dimension is added to the symbiotic relationship between participation and accountability in the sense that legal accountability ensures the exercise and enjoyment of participation as a right. Underneath the legal dimension however, the symbiotic instrumentality of participation and accountability remains.

Hence within the human rights framework participation and accountability operate on two planes, one that is purely conceptual and the other relating to their legal dimension.

³⁶⁸ Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006.

For example, when a woman enjoys her right to participate in implementing government policy³⁶⁹, she enjoys the benefits of participation as a concept and can demand answers from state officials who are tasked to implement the policy if she feels the policy is not being implemented as it was meant to be. If the woman is not allowed to participate in the implementation of that government policy, she can exercise her right to participate by seeking legal accountability from the state for the violation of a human right. If she is successful, the legal accountability she has sought paves the way to ensuring her right to participate. If she then chooses to enjoy the *object* of that right, which is to participate in the implementation of a government policy, she again enjoys the right to participate in public affairs and thereby the concept of accountability by again being in a position to ask questions of state officials. The relationship between participation and accountability means that when the Compliance Framework is used to identify compliance requirements in relation to the human rights associated with participation and accountability, the compliance requirements identified can have implications and be relevant for the human rights aspects of both participation and accountability.

Thus human rights theory is concerned with issues of participation and accountability and those concepts have multiple human rights aspects as the next sections show. In seeking to identify the compliance requirements relating to the human rights aspects of participation and accountability, it is necessary to first identify the human rights associated with those concepts.

³⁶⁹ CEDAW Art. 7.

5.2.1. The human rights aspects of participation

The right of the individual to participate in decision-making in relation to issues regarding his or her interests is given protection by various human rights instruments. The understanding of the right to participation as the right to take part in decision-making processes affecting the interests of individuals is reflected in Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). That article refers to the right of women in the rural sector to participate in decision-making in relation to development-related activities³⁷⁰.

Whereas Article 25 of the ICCPR refers to the right to participate in decision-making processes in the public sphere, Article 14 of CEDAW arguably extends beyond that to the private sphere because it appears to cover situations where development-related activities in the rural sector are undertaken by private sector actors, for instance, a private sector project sponsor building a road near a rural village. Conceptually, such an interpretation of Article 14 of CEDAW accords with the human rights rationale underlying the right to participation, which is to recognise the autonomy of the individual in having some say in decisions affecting his or her life, there being no conceptual reason to restrict the right only to the public sphere³⁷¹.

³⁷⁰ CEDAW, Article 14(2)(a) in which the right to participation for women is expressed as the right to participate in the elaboration and implementation of development planning at all levels.

³⁷¹ Henry Shue, *Basic Rights*, 2nd ed., Princeton University Press, 1996. Indeed, such participation is being undertaken in the private sphere, for example, by companies, but without an acknowledgement that there are human rights obligations on the part of private actors to provide for such participation.

The right is also recognised in human rights jurisprudence. In Marshall v. Canada,³⁷² one of the few complaints brought before the Human Rights Committee on Article 25, participation in a national-level consultation on the constitutional rights of Canada's First Nations tribes was considered to be in the conduct of public affairs.

There are other human rights associated with the right to participation. General Comment 25 of the Human Rights Committee for instance, refers to the right to freedom of expression³⁷³ and to the rights of freedom of assembly and association. The internal dimension of the right to self-determination is also relevant to the right to participation as has been referred to in General Recommendation 21(4) of the International Convention against Racial Discrimination.

5.2.2. The human rights aspects of accountability

While accountability is not a human right *per se*, the international human rights regime represents a regulatory framework in which duty-holders are accountable to rights-holders for failing to meet obligations to respect and protect human rights or for the violation of human rights. One aspect of this framework of accountability is that duty-holders must establish systems for prosecuting human rights violations and to provide remedies to the victims of such violations³⁷⁴. The second aspect of accountability derives from the requirement that duty-holders monitor and review the state of human rights

³⁷² Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 (1991).

³⁷³ The right to freedom of expression does not explicitly refer to freedom of information although subsequent instruments have developed the concept of the latter.

³⁷⁴ ICCPR, Art. 2(3); Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24, para. 4; Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 1999, p.14.

realisation within their ambit of influence and control thus establishing internal and external scrutiny of their human rights record. This relates to the provisions within the international human rights regime for duty-holders to compile and submit reports concerning the human rights situations subject to their influence³⁷⁵. The substantive human rights provisions associated with the principle of accountability are the right to a remedy³⁷⁶ while procedurally the right of access to independent and impartial tribunals³⁷⁷, and the right to freedom from discrimination are important.

In addition to these provisions, the symbiotic relationship between the principles of participation and accountability means that the provisions from human rights treaties discussed above in relation to the principal of participation are also relevant to the principal of accountability. Participation is relevant to accountability because by participation in decision-making processes, the relevant decision-makers are held to account. In addition, there is also an overlap in that the degree to which a rights-holder is allowed to participate in accountability mechanisms is a factor in determining the efficacy of that mechanism. Accountability is relevant to participation in a like manner. By holding decision-makers to account, individuals are participating in the decision-making process.

³⁷⁵ See for example the regimes established under the ICCPR (Art. 40) and the ICESCR (Arts 16, 17). See also CESCR General Comment 1.

³⁷⁶ ICCPR Art.2(3), CERD Art.6, CEDAW Art.2(c)

³⁷⁷ ICCPR Arts.14(1), 14(3)(d),(f), CERD Art.5(a), CEDAW Art.15(2), CRC Art.40(2)(b)(iii)(v), ICRMW Art.18(1)

5.2.3. Specific human rights relating to participation and accountability

The human rights identified as being related to participation and accountability are discussed below. The specific relevance of the content of those human rights to participation and accountability is examined.

5.2.3.1. *Right to participation*

Participation as a right within the international human rights framework generally derives from, or is connected with, the right to participate in the conduct of public affairs³⁷⁸ where ‘public affairs’ is regarded as

a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.³⁷⁹

Participation is also an important aspect of the enjoyment of other human rights³⁸⁰, not least as a component of good governance³⁸¹ and democratic accountability³⁸². The right to participation protects individuals’ interests by ensuring they have an opportunity

³⁷⁸ ICCPR Art. 25(a). Another aspect of the right to participation is the right to take part in the cultural life of the community (UDHR, Article 27(1), ICESCR, Article 15(1)). Questions as to what constitutes culture and ability to express and enjoy’s ones culture are also political in nature and the level of participation by individuals and groups in the cultural life of their societies may also be indicative of their level of participation in public affairs.

³⁷⁹ This echoes the formulation of the right to participate in public affairs in CEDAW Article 7(b):
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions *at all levels of government*.

³⁸⁰ See Committee on Economic, Social and Cultural Rights, General Comment 14 for a discussion on participation as an important aspect of the right to health.

³⁸¹ Economic Commission for Europe, Draft Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums (‘Draft Guidelines’), UN Doc.

ECE/MP.PP/WG.1/2005/8/Add.1, available at

<http://www.unece.org/env/documents/2005/pp/wg.1/ece.mp.pp.wg.1.2005.8.add.1.e.pdf>, accessed on 11 July 2013, para.14. (‘Economic Commission for Europe, Draft Guidelines’)

³⁸² Charlotte Ku and Harold Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, 2003.

to influence the decisions that affect their lives. Such decisions may be taken in the private sector as well as the public sector and they may be made at the national level within state institutions or at the international level within the institutions of international organisations.

There are various ways in which people can directly participate in decision-making. For example, at the state level, people may participate as members of legislative bodies or of other elected bodies, through electoral processes or referenda, or through popular assemblies and public debate. There is also representative participation by which people participate in decision-making through elected or delegated representatives. This form of participation is more common at the international level where people may be thought of participating in decision-making within international organisations through state or NGO representatives.

The human right to participation is concerned with the identification and inclusion of relevant stakeholders, particularly those whose interests and rights will be directly affected, either positively or negatively, by the proposed law or policy³⁸³. Thus the right to participation is also concerned with public participation in review, compliance and dispute settlement mechanisms³⁸⁴ including in establishing those mechanisms³⁸⁵. In the case of representative participation, assessing compliance with the right to participation means assessing the legitimacy of the representatives³⁸⁶ concerned as well as the breadth

³⁸³ Henry Shue, *Basic Rights*, 2nd ed., Princeton University Press, 1996, p.71.

³⁸⁴ Economic Commission for Europe, Draft Guidelines, para.55.

³⁸⁵ Ibid.

³⁸⁶ Economic Commission for Europe, Draft Guidelines, para.27.

of representation in terms of being non-discriminatory and the level of coordination and consultation with constituencies.

5.2.3.2. Right to freedom of expression and information

The right to freedom of expression helps guarantee that the media and other organs of civil society can play a role in providing comment on public issues and informing public opinion. This right is broad in scope and requires that duty-holders respect and protect freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media³⁸⁷.

The right to information is not expressed as an independent right in human rights instruments. However, the obligation to provide access to information may be inferred as being correlative or derived³⁸⁸ from the right to participate³⁸⁹ or the right to a remedy³⁹⁰. Rights-holders must be provided access to adequate and relevant information in a user-

³⁸⁷ ICCPR Article 19.

³⁸⁸ See Henry Steiner and Philip Alston, *International Human Rights in Context*, Oxford University Press, 2001, p.181 for a discussion on inferring rights and obligations on the basis of the rights stipulated in the core human rights treaties.

³⁸⁹ The obligations relating to the right to participate extends to, for example, in relation to the ICCPR, taking the necessary positive steps “to give effect to the rights recognized in the present Covenant.” (Article 2(2) of the ICCPR). Such positive steps (Human Rights Committee, General Comment 31) must include steps to provide the institutional arrangements whereby those wishing to take part in the policy process can gain access to the relevant information.

³⁹⁰ In order to make a complaint against the relevant duty-holder that his rights have been violated, the individual would in certain cases need to have access to information in the possession of the duty-holder. Without that information, the individual may lack the basis for making a complaint and thereby may not enjoy his right to a remedy guaranteed under ICCPR Article 2(3) and related provisions. To derive a right to information in such a situation ought not to be difficult as ample evidence of such practice can be found in civil litigation where provisions for pre-trial discovery allow putative plaintiffs to have access to information in the possession of ‘suspected’ defendants.

friendly, clear and transparent³⁹¹ manner at different stages of the law or policy-making process,³⁹² such as information about voting procedures, candidates, and the rights of the voter³⁹³. The duty-holder must also ensure that participants are allowed sufficient time to gain access to and prepare for taking part in the relevant phase of the decision-making process³⁹⁴.

The right to freedom of expression and information carries with it special duties and responsibilities with respect to protecting the rights or reputations of others and with regards to the protection of national security, public order, public health or morals³⁹⁵. In addition a reasonable balance has to be struck, as Alistair Mowbray notes,

“between the interests of directly affected individuals and the correlative burdens on public authorities [in having to provide information requested].”³⁹⁶

5.2.3.3. Freedom of association and assembly

The rights to freedom of assembly and association may be understood in terms of the obligations of duty-holders to facilitate popular mobilisation. Freedom of association relates to the freedom to engage in public affairs and decision-making processes through political parties and other civil society organisations³⁹⁷. Freedom of assembly relates to

³⁹¹ Economic Commission for Europe, Draft Guidelines, para.28.

³⁹² World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review (Phase 1)*, Report No. 25332, 10 January 2003, p. 9. See examples of the types of information duty-holders must provide at Economic Commission for Europe, Draft Guidelines, n.74 above, para.29.

³⁹³ CEDAW General Recommendation 23 (Sixteenth session, 1997): Women in Public Life, A/52/38/Rev.1 part II (1997) 61 at para.20(a).

³⁹⁴ Economic Commission for Europe, Draft Guidelines, para.50.

³⁹⁵ ICCPR Article 19.

³⁹⁶ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing, 2004, p.193.

³⁹⁷ Human Rights Committee, General Comment 25,

the freedom of such organisations to hold peaceful demonstrations and meetings³⁹⁸. These rights and freedoms are important because they protect the formation and functioning of support groups through which people can participate for otherwise people may not feel empowered to participate in decision-making processes³⁹⁹.

The rights to freedom of assembly and association are not absolute. Duty-holders that proscribe civil society organisations or ban them from operating or restrict their operations such as organising meetings and demonstrations may still be in compliance with the relevant human rights norms provided such restrictions reasonable and proportionate⁴⁰⁰.

5.2.3.4. Right to an effective remedy

The right to a remedy is recognised in relation to both civil and political rights as well as economic, social and cultural rights⁴⁰¹. The right to an effective remedy imposes on the duty-holder the obligation to investigate the facts causing the violation of rights⁴⁰², to provide for injunctive and other measures to prevent violations, to end the violation of rights, to take measures to prevent a recurrence of the violation, to prosecute those responsible for the violations, and to provide financial or other compensation to the

³⁹⁸ Ibid.

³⁹⁹ Andrea Cornwall and Vera Schattan P. Coelho (eds.), 'New democratic spaces?', *IDS Bulletin*, Vol. 35 No. 2, April 2004.

⁴⁰⁰ ICCPR, Arts. 21, 22.

⁴⁰¹ Committee on Economic, Social and Cultural Rights, General Comment 3.

⁴⁰² And thereby to seek answers and explanations from duty-holders as to the manner in which they have discharged their obligations to realise substantive human rights under the respective human rights instruments.

victims of the violations⁴⁰³. Duty-holders must establish the appropriate administrative and judicial institutions and mechanisms to address claims of human rights violations, ensuring that such mechanisms are accessible to individuals, and that the remedies afforded by such mechanisms are adapted to the special circumstances of the victims, and are affordable and timely⁴⁰⁴.

5.2.3.5. Access to independent and impartial tribunals

The right to access to independent and impartial tribunals is key to the principle of accountability since without such access it would be impossible to protect one's human rights and other interests. The right of access to tribunals is also a feature of the right to participate in decision-making processes and guarantees such participation⁴⁰⁵. Often access to and participation in such tribunals is constrained by economic factors such as high legal and court fees and a lack of necessary information to allow people to adequately defend their rights or seek remedies. Duty-holders must ensure that these mechanisms are accessible⁴⁰⁶ to and adequate for the needs of the individuals concerned. In some cases, the criteria for the opportunity to bring a claim or complaint before accountability mechanisms, known as 'standing', may restrict access to such mechanisms⁴⁰⁷. Thus such criteria are a key consideration when assessing the duty-holder's compliance with its obligations in this regard. The duty-holder also must ensure

⁴⁰³ Human Rights Committee, General Comment 31, paras.15-18; Dinah Shelton, *Remedies in International Human Rights Law*, OUP, 2005, p.16.

⁴⁰⁴ Human Rights Committee, General Comment 31, para.15; Committee on Economic, Social and Cultural Rights, General Comment 9, para.9.

⁴⁰⁵ Economic Commission for Europe, Draft Guidelines, para.55.

⁴⁰⁶ ICCPR, Art.14(1). See also CEDAW, Art.15(2), CERD, Art.5(a) and CRC, Art.40 for the parallel provisions.

⁴⁰⁷ Economic Commission for Europe, Draft Guidelines, para.58.

that the mechanisms are impartial, independent, fair, equitable, open and transparent⁴⁰⁸ and that there are legal guarantees to this effect.

5.2.3.6. *Right to self-determination*

The right to self-determination has an internal and external aspect⁴⁰⁹. The internal aspect overlaps with the right to take part in the conduct of public affairs and reaffirms the status of that right as a group right as well as a right of individual. The external aspect of the right to self-determination relates to the right of peoples to freely determine their political status and economic, social and cultural development⁴¹⁰. This external aspect is based upon the principle of equal rights of all people and the prohibition against the subjugation, domination and exploitation of peoples⁴¹¹. Accordingly, a key issue relating to the right to self-determination is whether states or civil society organisations that are represented as members of, or accredited to, international organisations are able to participate equally in international decision-making processes. The question of whether all parties are treated equally in relation to the implementation of their obligations under individual international agreements is another consideration when assessing the degree to which a peoples' right to self-determination is realised.

5.2.3.7. *Non-discrimination*

All the above rights should be realised in a non-discriminatory manner, which is an overarching principle of the human rights framework. Non-discrimination refers to the

⁴⁰⁸ ICCPR Art.14, Economic Commission for Europe, Draft Guidelines, n.74 above, para.56.

⁴⁰⁹ Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 125 (1996), para.9.

⁴¹⁰ ICCPR Art. 1(1), ICESCR Art. 1(1).

⁴¹¹ Committee on the Elimination of Racial Discrimination, General Recommendation 21, para.9.

right not to be discriminated against on the basis of any kind of distinction, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁴¹². In addition, provisions may be required for temporary special measures or differentiated treatment⁴¹³ in favour of traditionally disadvantaged or marginalized groups⁴¹⁴ with differentiated capacity, resources, socio-cultural status, and political power. In the case of participation, this could include recruitment and training individuals from disadvantaged or minority groups for positions in public service. Duty-holders would have to ensure, for example, that laws and mechanisms facilitating participation and accountability are free of language-based, or other, bias against women or other disadvantaged groups⁴¹⁵.

In the context of representative decision-making for example, one issue is whether NGOs are allowed to participate on equal terms as business interests, and if not whether the process by which the distinction is made is fair in as much as they are ‘based on transparent and clearly stated norms which are established in advance’⁴¹⁶. In this regard, a further consideration is whether decisions restricting participation and the reasons on which they are based are made publicly available contemporaneously.

⁴¹² Universal Declaration on Human Rights, Article 2.

⁴¹³ Economic Commission for Europe, Draft Guidelines, para.19.

⁴¹⁴ As stipulated for example, in CEDAW Art. 4.

⁴¹⁵ Christine Chinkin, *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments. and Other Stakeholders*, Commonwealth Secretariat, 2001, p.50.

⁴¹⁶ Economic Commission for Europe, Draft Guidelines, para.20.

5.2.3.8. *The right to equality*

“The Council of Europe's Thematic Commentary on the Issue of Political Participation of Minorities ... locates the international legal entitlement to political participation within the wider context of the right to democratic governance. It also considers effective participation in relation to the right to full and effective equality, as well as the legal entrenchment of these provisions and implementation mechanisms. Individual chapters then consider each of the principal mechanisms aimed at enhancing political participation, ranging from procedures covering minority representation in political institutions to consultative mechanisms and autonomy solutions.”⁴¹⁷

To conclude this section, the rights identified above are constituent of the principles of participation and accountability in the human rights framework. Table 2 below contains a reference to the relevant provisions, which will be used to develop the relevant human rights norms. Not all the norms that are reviewed and explicated here will be relevant to all duty-holders and in all contexts. There may be particular issues for example in connection with aspects of other human rights such as the right to education or the right to health, as well as in relation to specific marginalized groups such as children, women, migrant workers and refugees. In addition, the rights themselves are not distinct in that they overlap in their scope and are mutually reinforcing, interdependent and interrelated⁴¹⁸.

⁴¹⁷ Marc Weller, *Political Participation of Minorities: A Commentary on International Standards and Practice*, (Oxford University Press, 2010).

⁴¹⁸ Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 5.

Table 2: International human rights provisions related to participation & accountability.

Human right	Human rights norms
Right to participation	UDHR Arts.21, 27(1), ICCPR Art.25, ICESCR Art.15(1)(a), ICERD Art.5(c), CEDAW Arts.7, 8, 14(2)(a)(f), CRC Art. 12(2), ICRMW Arts.41, 42, 43(1)(g), 45(1)(d)
Self-determination	ICESCR Art.1(1), ICCPR Art.1(1)
Freedom of expression and access to information	UDHR Art.19, ICCPR Art.19, ICERD Art.5(d)(viii), CRC Arts.12(1), 13, ICRMW Art.13(2)
Freedom of assembly and association	UDHR Art.20, ICCPR Arts.21, 22, ICESCR Art.8(1), ICERD Arts.4(b), 5(d)(ix), CEDAW Art.14(2)(e), CRC Art.15, ICRMW Arts.26, 40
Right to an effective remedy	UDHR Art.8, ICCPR Art.2(3), CERD Art.6, CEDAW Art.2(c)
Access to independent and impartial tribunals	UDHR Art.10, ICCPR Arts.14(1), 14(3)(d),(f), CERD Art.5(a), CEDAW Art.15(2), CRC Art.40(2)(b)(iii)(v), ICRMW Art.18(1)

Non-discrimination	UDHR Art.2, ICCPR Art.2(1), ICESCR Art.2(2), ICERD Art.2, CEDAW Art.2, CRC Art.2, ICRMW Art.7
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Having identified the human rights relating to participation and accountability, it is important to note that many of the rights are qualified. The permitted limitations on the enjoyment of these human rights define their content in particular cases and thus have implications for the identification of the related compliance requirements. The right to participation, thus framed is very broad but there are concepts from international law, and applied in the human rights area, that narrow down the content of that right, taking into consideration not least the logistical impossibility of guaranteeing that every individual takes part in every decision affecting his or her interests⁴¹⁹. What the broad formulation of the right to participation does however is signal the recognition at the international level of the importance of the principle of individual autonomy. Such recognition means for example that while there may be countervailing principles to that of the need to protect the autonomy of the individual human person, any decision that takes away from that protection must be made carefully⁴²⁰.

The importance of the principle of individual autonomy also means, as with other human rights, that effort and innovative thinking must be constantly undertaken to ensure

⁴¹⁹ These are rules that effectively balance the interests of the individual against those of society, taking into consideration, among other things, the cost of human rights provision, and are discussed further in Chapter 3.

⁴²⁰ By, for example, being subject to checks and balances such as the regulatory oversight provided by the international human rights regime.

that there is perpetual movement towards ever better and fuller realisation of the human rights in question. This will involve pressure from individuals, community groups and other NGOs because the interests of the duty-holders, whether state or non-state actor, are often not aligned to the interests of the individual rights-holder. In this sense, the realisation of all human rights, including the right to participation, is progressive in nature, requiring an ongoing drive for institutional and social change⁴²¹.

5.3 Outlining the Compliance Framework in relation to the human rights concerning participation and accountability

The Compliance Framework (CF) developed in Chapter 2 and adapted in Chapter 4 to help identify human rights compliance requirements is now applied, as represented in Diagram 8 below, to the internationally recognised human rights relating to participation and accountability. These human rights were identified and discussed above.

In the discussion, I cite examples relating to state and non-state actors. While the provisions of the international human rights treaties and the associated jurisprudence, serve as an indication of the human rights compliance requirements of non-state actors, these ought to also be read with soft law and other human rights initiatives associated with non-state actors such as the Human Rights Council's Guiding Principles on Business and Human Rights⁴²², the Tilburg Guiding Principles on World Bank, IMF and Human

⁴²¹ Henry Steiner, 'Political Participation as a Human Right' 1 *Harvard Human Rights Yearbook* 77 (1988).

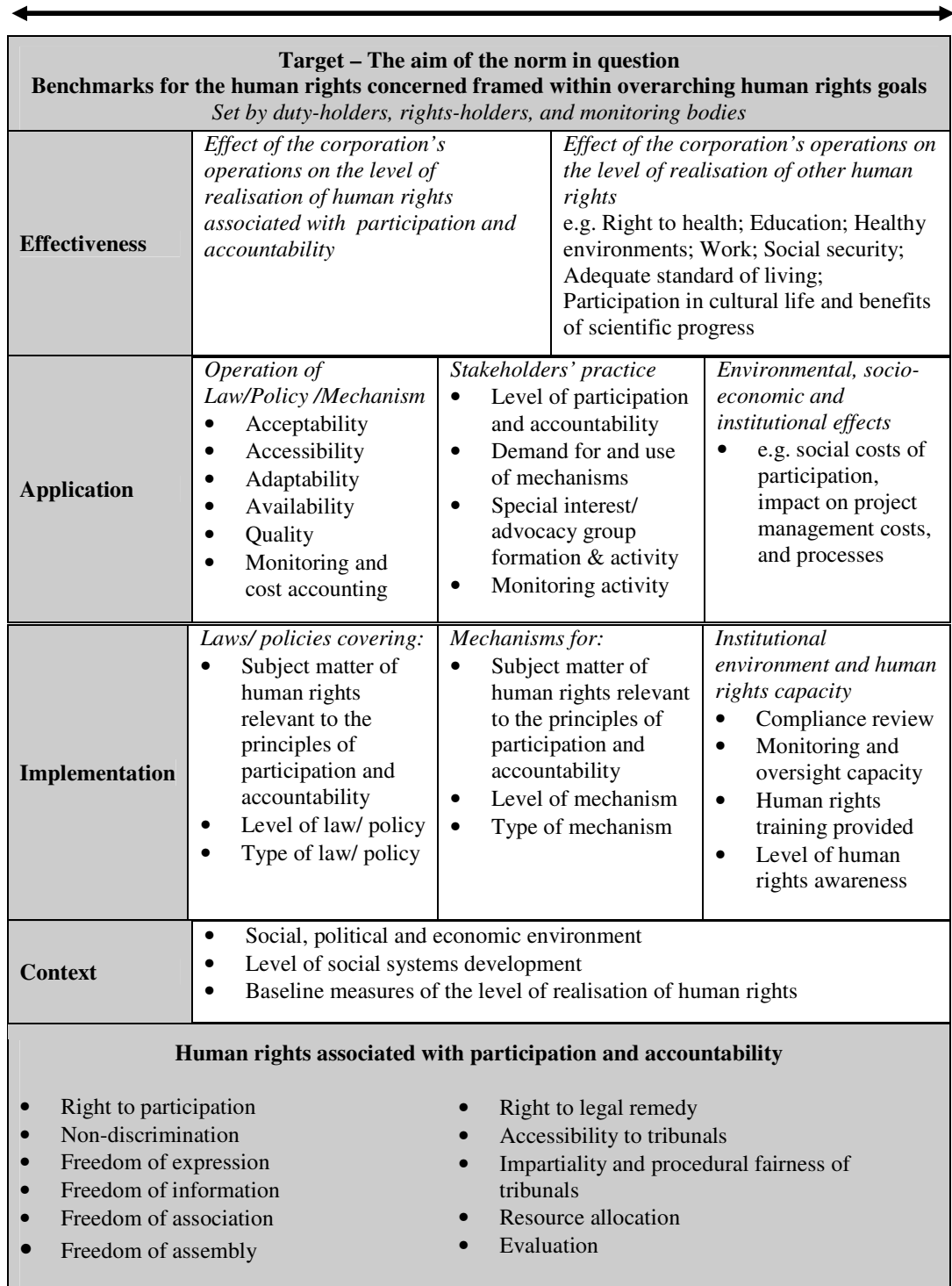
⁴²² Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, Annex, 21 March 2011.

Rights⁴²³ and the Equator Principles⁴²⁴, which aim to reduce the negative impact international projects can have on people's lives and livelihoods.

⁴²³ Willem van Genugten(ed.), 'The Tilburg Guiding Principles on World Bank, IMF and Human Rights', in *World Bank, IMF and Human Rights*, Willem van Genugten, Paul Hunt and Susan Mathews, (eds), Nijmegen: Wolf Legal Publishers, 2003, p. 247-255.

⁴²⁴ The Equator Principles: A financial industry benchmark for determining, assessing and managing social & environmental risk in project financing, available at <http://www.equator-principles.shtml>.

Diagram 8. Compliance Framework for identifying compliance requirements in relation to the human rights associated with the principles of participation and accountability. The double-headed arrow signifies the non-linear, dynamic application of the CF.



5.3.1. Implementation

The implementation level of the framework refers to requirements as to whether or not key structures and systems relating to a particular human right are in place. In addition to institutional arrangements such as legislation, policies and mechanisms, the implementation level also points to capacities such as knowledge of the law or civic literacy that facilitate the exercise of the right in question.

5.3.1.1. *Laws and policies for participation in decision-making and accountability*

The international human rights framework requires actors to have measures in place in terms of laws or policies that facilitate participation by individuals in decision-making concerning their interests⁴²⁵ and their ability to hold the actor accountable in relation to any denial or violation of their human rights⁴²⁶. This requirement relates to particular human rights, namely the right to participation in decision-making, the right to information, the freedom of assembly and association and the right to a remedy⁴²⁷. The requirement for the adoption of relevant measures is stated in terms of the general obligation in Article 2(2) of the ICCPR:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

⁴²⁵ HRC General Comment 25, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) (hereinafter '*Awas Tingni*').

⁴²⁶ OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (hereinafter '*the Guidelines*').

⁴²⁷ See Human Rights Committee, General Comments 25 and 31.

An effective and valid compliance assessment framework relating to the human rights associated with participation and accountability must therefore assess whether the actor concerned has the required laws and policies in place. Thus the actor would be required, as part of the course of conduct it adopts to comply with the general obligation, to enact the relevant legislation and institute appropriate policies.

Where the actor is a state party to a human rights treaty, such as the ICCPR, these laws and policies will be meant to ‘ensure that the existence and the exercise of [the human rights in question] are protected against their denial or violation’ not only in relation to state parties but also third parties⁴²⁸. Thus the compliance requirement will be for the state to have laws and policies relating to the human rights associated with participation and accountability in relation to its own activities and also those of its agents but also in relation to third parties.

Before discussing the laws and policies relating to the specific human rights in question, there are two general points to note concerning the compliance requirements at the implementation. Firstly, they are not only limited to laws or policies that require participation and accountability but also laws and policies that may restrict them. The human rights in question, as discussed earlier and in Chapter 3, are not absolute and may be restricted or limited in certain cases depending on the circumstances facing the actor concerned. While there may be restrictions or limitations placed on these rights, the compliance requirements are that the restrictions or conditions are based on objective and

⁴²⁸ Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27), para.6.1.

reasonable criteria⁴²⁹ and are necessary for a countervailing community interest that has precedence because of the greater human rights payoff it offers⁴³⁰. The balance between individual and community interest however can disfavour the individual as when the restriction is such as to deprive the individual of the substance of the right in question. It is possible that in many cases where the CF is applied, the relevant laws and policies do exist but contain limitations on the exercise of the rights in question. Hence it may be the case that the CF is used most often to ensure the restrictions are valid according to the criterion mentioned above.

The second compliance requirement is that the laws and policies must not be discriminatory. The principle of non-discrimination is a ‘basic and general principle relating to the protection of human rights’⁴³¹. Accordingly, the laws and policies that an actor has that relate to participation and accountability must not contain or comprise

‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (emphasis added).’⁴³²

Both these general points also apply with regards to the laws and policies relating to the specific human rights discussed below.

⁴²⁹ Human Rights Committee, General Comment 25, para.4.

⁴³⁰ See for instance Human Rights Committee, General Comment 10, para.4.

⁴³¹ Human Rights Committee, General Comment 18, para.1; Sarah Joseph, *The International Covenant on Civil and Political Rights*; Ian Brownlie, *Principles of Public International Law*.

⁴³² Human Rights Committee, General Comment 18, para.7.

In relation to the human right to participation in decision-making specifically⁴³³, the actor's compliance requirements are that there are laws and policies in place that respect and protect the enjoyment of this right⁴³⁴. These could range from procedural rules such as the notice and comments provisions in administrative law⁴³⁵ to whether the actor has laws or policies relating to the participation with regards to specific programs. For example, the court in the *Awat Tingni* case required this in its judgement, making reference to state programs that allow for the participation of indigenous people in all stages of the project concerned, including the monitoring and evaluation stage⁴³⁶.

Access to information is a key determinant of the ability of an individual to participate in decision-making or to hold duty-holders accountable⁴³⁷. As discussed earlier in this chapter, an individual's right to seek and receive information protects their access to information. In relation to this right, the compliance requirement is whether the state or non-state actor has in place a legal and policy framework that protects this right for example with freedom of information laws or through organisational policies on information disclosure⁴³⁸. The measure of compliance would be whether the request for information was reasonable⁴³⁹ in the circumstances and whether the information was available to the actor at the time such that it could be provided to the individual

⁴³³ The proof of this right is in Chapter 2.

⁴³⁴ *Marshall v. Canada*, para.5.5.

⁴³⁵ Benedict Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, 1999, p.325.

⁴³⁶ *Awat Tingni*, para.164. See also, the Guidelines, paras. 76-78, as well as the World Bank's Operational Directive on Involuntary Resettlement and the IFC's note on involuntary resettlement.

⁴³⁷ *A Call for Participatory Decision-Making: Discussion Paper on World Bank-Civil Society Engagement*; UNDP, *Access to Information Practice Note*, October 2003.

⁴³⁸ For example, the World Bank's Policy on Disclosure of Information, June 2002.

⁴³⁹ Ted McDorman, Access to Information under Article 9 of the OSPAR Convention (*Ireland v. United Kingdom*), *American Journal of International Law*, Vol. 98, No. 2 (Apr., 2004), pp. 330-339.

requesting it⁴⁴⁰ and whether the information was in fact supplied. What constitutes a reasonable request would be determined by the requirements for informed participation⁴⁴¹ and the relevance of the information sought for the purposes of seeking accountability. However, there are issues to consider in terms of who decides as to the fulfilment of these criteria. In addition, the criteria for compliance must also account for whether the individual rights-holder has the resources available for making the request for information in the first place. Finally, any restrictions on the availability of information should not be at the cost of the substance of the rights of the individual to participate in decision-making on matters affecting their interests or to seek accountability from the actors concerned.

As the ability to organise, assemble and meet are important for both the exercise of the right to participation in decision-making⁴⁴² and the ability to hold decision-makers to account, the CF also identifies compliance requirements such as that there are laws and policies to protect the freedoms of association and assembly. For example, it would be a compliance requirement not to unreasonably meetings or memberships of NGOs. Any such restrictions would have to be assessed to determine if they are reasonable within the context of the international human rights framework. Other relevant compliance requirements would be measures to facilitate the freedom to organise such as the presence of laws that allow for the registration of NGOs. In any case, restrictions on the

⁴⁴⁰ Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart, 2004, p.193.

⁴⁴¹ Commission on Human Rights, *The Realisation of Economic, Social and Cultural Rights: Expert seminar on the practice of forced evictions* (Geneva, 11-13 June 1997), E/CN.4/Sub.2/1997/7.

⁴⁴² Human Rights Committee, General Comment 25, para.8.

freedom to organise or of assembly must not be such as to deprive the individual of the substance of their rights in relation to participation and accountability.

Finally, in order to respect or protect the rights-holder's participation in decision-making and ability to hold decision-makers accountable, the actor has to provide avenues for rights-holders to seek remedy or redress if any rights-holder's interests protected by the international human rights framework have been adversely affected. Accordingly it would be a compliance requirement that the laws and policies enacted by the actor concerned provide for mechanisms for redress and that adequate remedies are provided for⁴⁴³. Thus the features of an actor's operations to assess are whether they provide the individual with internal institutional remedies, a right to a legal remedy, the accessibility of tribunals and their impartiality and procedural fairness⁴⁴⁴.

The availability of legal aid must also be considered⁴⁴⁵. The issue of legal aid is one of the availability of resources so the consideration of context does operate here⁴⁴⁶. The rules as to standing may be assessed to determine if they are so restrictive as to deny the individual concerned of a right of remedy. Likewise, the remedies provided must be assessed to determine if they are adequate or effective in repairing the harm caused by the

⁴⁴³ ICCPR, Article 2(3).

⁴⁴⁴ ICCPR Article 14

⁴⁴⁵ *Airey v. Ireland*, A.32 (1979).

⁴⁴⁶ Rabinder Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice*, Oxford, Hart, 1997, p.54.

actor's violations of the individual's human rights⁴⁴⁷. This may necessitate the provision for interim measures in order to avoid continuing violations⁴⁴⁸.

The ability of the actor to provide such measures may in many cases depend on the availability of mechanisms for monitoring how such measures operate in practice. The issue of mechanisms at the implementation level are covered in the next two sections but it is important to point out that the application of the CF will necessitate interaction among the considerations at various levels of the CF and also within the same level. One of the useful aspects of the CF may be the way it shows how the different aspects interrelate so that optimal human rights protection may be attained.

5.3.1.2. Mechanisms relating to participation in decision-making and accountability

In addition to laws and policies, there is also a requirement for mechanisms that facilitate participation and accountability. These mechanisms in effect allow for the operationalisation of the laws and policies discussed in the previous section. It is thus necessary to assess if the actor has the relevant mechanisms in place. The mechanisms must be impartial, independent, fair, equitable, open and transparent⁴⁴⁹ and include ombudsperson offices, complaints processes, peer review processes, mechanisms for NGO participation and consultation policies, among others.⁴⁵⁰ The mechanisms

⁴⁴⁷ The remedies may include compensation or reparation in the form of 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.' Human Rights Committee, General Comment 31, para. 16.

⁴⁴⁸ Human Rights Committee, General Comment 31, para.19.

⁴⁴⁹ ICCPR Art.14, Economic Commission for Europe, Draft Guidelines, para.56.

⁴⁵⁰ For a review of these and other relevant mechanisms, please see Centre for Global Studies, *Rethinking Governance Handbook: An Inventory of Ideas to Enhance*

themselves may vary depending on factors such as the type and nature of the forum, and the nature and phase of the decision-making process⁴⁵¹. It is necessary to assess laws and policies distinctly from their associated mechanisms because the failure to realise the relevant human rights may lie in the mechanisms employed rather than the law or policy.

Again, as in the case of assessing laws and policies discussed earlier, any limitation imposed by the mechanisms on the ability of individuals to participate in decisions affecting their interests or to hold actors to account must be assessed to determine if there is a reasonable and objective justification for it⁴⁵². This point is related to the issue of the individual's right-holder's right to determine the modality of the participation or accountability mechanism. Thus all the mechanisms mentioned earlier may exhibit some limitation in their operations. It is not the case that by failing to accede to the requirements of an individual or group of individuals that they specifically participate in the decision-making process, the actor is in violation of the human rights requirements relating to participation and accountability⁴⁵³. Rather such cases will have to be determined in terms of the justifications for the limitations and their effect in terms of the interests of the wider community. Factors that could be taken into account is how seriously the interest of the individual or group seeking to take part might be affected by the decision taken and how representative of their interests any accredited body to the decision-making process is.

Participation, Transparency and Accountability, University of Victoria, Canada, available at <http://www.globalcentres.org/html/docs/Inventory.pdf>

⁴⁵¹ Economic Commission for Europe, Draft Guidelines, para.48.

⁴⁵² *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, Forum? U.N. Doc. CCPR/C/70/D/547/1993 (2000), para 9.6.

⁴⁵³ *Marshall v. Canada*, para.5.5.

5.3.1.3. Monitoring, capacity building and knowledge

In addition to the actor's laws, policies and mechanisms, other compliance requirements at the implementation level are the actor's internal monitoring mechanisms and measures relating to its capacity to comply with its human rights obligations or commitments.

The general principle that an actor undertake its human rights obligations and commitments in good faith and effectively⁴⁵⁴ implies that the actor puts in place a strategy for monitoring policy implementation and a schedule for assessment. If such a strategy does exist, it ought to be assessed to see if it relates to individual laws and policies, and if it takes into account issues at the implementation, application and effectiveness stages of the CF, and whether the assessment includes measurable benchmarks and targets⁴⁵⁵. The actor also needs to have in place a mechanism for investigating allegations of human rights violations as a failure to carry out an investigation may itself be a violation of the actor's human rights obligations⁴⁵⁶. In relation to such a strategy, the CF would assess if the actor has an internal review mechanism in relation to its human rights requirements and how well-resourced and effective such mechanisms might be.

In order for such compliance systems to fulfil their objectives, it is necessary for the staffs and officials concerned to have an adequate understanding of the human rights

⁴⁵⁴ Alastair Mowbray, above n.34, CESCR, General Comment 1.

⁴⁵⁵ Committee on the Rights of the Child, General Comment No. 5, paras.1, 45-47.

⁴⁵⁶ Human Rights Committee, General Comment 31.

provisions and norms to be complied with. The availability of human rights education is thus a key consideration. Human rights awareness is also necessary to inform capacity building within the duty-holder institution when such compliance reviews identify gaps in human rights protection⁴⁵⁷. The CF would assess the actor's operational structure in relation to both these aspects.

5.3.2. Application

The compliance requirements at the application level of the CF concern whether the implementation activities undertaken at the implementation level are applied as intended. Accordingly, the compliance requirements elements identified at the application level provide information regarding the manner in which institutional arrangements for realising human rights are functioning in practice. One of the actor's compliance requirements at the application level is to monitor its progress towards defined policy objectives⁴⁵⁸; in this case the objective of ensuring the human rights aspects of participation and accountability in relation to institutional activity with regard to the decision-making process⁴⁵⁹. For assuring and maintaining the actor's compliance, the application level is key. If the actor's implementing activities do not work as they are designed to, it is unlikely the actor will be in compliance with the relevant human rights norms. And as noted in the earlier chapters, one factor that CF takes into account is the

⁴⁵⁷ RBA Guideline.

⁴⁵⁸ Paul Hunt, Interim Report, para.26.

⁴⁵⁹ Using process indicators inherently recognises that achieving desired objectives or human rights benchmarks usually requires time, as embodied in the concept of progressive realisation of rights. This should not detract from immediate legal obligations to respect, protect, and fulfil human rights standards.

actor's context and how this relates to its compliance requirements, including at the application level.

There are three compliance requirement elements at the application level. First, as mentioned, whether the implementing activities that have been put in place function as intended. For example, the Human Rights Committee requires that states report not only measures that protect against discrimination in law but also whether 'there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies',⁴⁶⁰. Second, there is a need to assess the behaviour of rights-holders to the measures taken by the actor. Is that behaviour one that indicates that the measures have successfully addressed the interests of the individuals? For example, in its General Comments, the Human Rights Committee notes that

State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.⁴⁶¹

Accordingly, one of the compliance requirements at the application level is to identify situations when the exercise of a right is being impeded and this requires an assessment of the practice or behaviour of the rights-holder. Only when the impediment is identified can the factors responsible for the impediment be identified, following which remedial

⁴⁶⁰ Human Rights Committee, General Comment 18, para.9. This also applies to remedies prescribed to remedy human rights violations. In General Comment 31, para.20, the Committee notes

'Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.'

⁴⁶¹ Human Rights Committee, General Comment 25, para.13.

measures can be prescribed. Third, it is necessary to assess whether the measures for compliance undertaken by the actor affect the social environment and ecosystems of the individuals concerned as this may affect the realisation and enjoyment of the human rights relating to participation and accountability as well as other human rights.

The aspects of the CF relating to the application level discussed below relate to the obligation or commitment on the part of the actor, for example the state as duty-holder, to monitor the human rights situation ‘with respect to each [human right] on a regular basis [so that the state is aware] of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction’⁴⁶². They in turn relate to the broader obligation to ensure that measures taken to realise human rights are effective⁴⁶³. In relation to non-state actors the CF’s application level compliance requirements are concerned with similar issues as those for states as adapted to the operations of the non-state actor in terms of the manner in which those operations affect the enjoyment of individuals affected by those operations.

It has been noted for instance by the Committee on Economic, Social and Cultural Rights that undertaking such monitoring can be costly and time-consuming and that international assistance can be sought for doing so⁴⁶⁴. In principle, non-state actors, through state parties, may also seek such assistance because either the time spent on such

⁴⁶² CESCR, General Comment 1, para.3.

⁴⁶³ Human Rights Committee, General Comment 31.

⁴⁶⁴ CESCR, General Comment 1, para.3.

monitoring impedes its effectiveness or the actor lacks sufficient experience with monitoring human rights-related issues.

5.3.2.1. Assessing how laws, policies and mechanisms function in practice

In assessing the how the laws, policies and mechanisms relating to the human rights aspects of participation and accountability function in practice, the realisation or the enjoyment of the human rights in question ought to be framed around the rights-holders' expectations. Accordingly, it is necessary to investigate if the institutional arrangements designed for realising human rights are functioning as intended with regard to the rights-holder's entitlement to the enjoyment of the subject matter of each right in terms of its *availability, accessibility, quality, acceptability* and *adaptability* as discussed in Chapter 3. To take the example of discrimination, it will be necessary to ascertain if local government agencies or subsidiaries of private sector non-state actors are carrying out their activities in discriminatory fashion in violation of state laws against discrimination. Though this may be difficult to do in practice, it may be a mitigating factor for the actor concerned if the issue of liability arises. It may also facilitate remedial action if the issue is already the subject of an internal assessment as opposed to the situation where the issue was never considered in which case a response from the actor concerned will likely take longer, compromising the right to a remedy⁴⁶⁵.

The CSF also assesses the actor's own compliance strategy and systems. These systems ought to be assessed in terms of their performance and their output in terms of

⁴⁶⁵ Human Rights Committee, General Comment 31, para. 15, '...A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.'

the reports to the relevant monitoring bodies, for example the Human Rights Committee, and their effectiveness in terms of the ability of such systems to improve the duty-holder's compliance record.

5.3.2.2. Assessing rights-holders' practice

The CSF requires an assessment of whether rights-holders are making use of measures and mechanisms created for participation in decision-making or for the purposes of accountability. For instance, although a duty-holder may have provided the appropriate institutional arrangements whereby rights-holders can participate in decision-making or hold actors accountable, the individuals concerned might not use the mechanisms. If the mechanisms are working as intended, it is possible that rights-holders may choose not to participate or to hold the actor to account⁴⁶⁶. However, there must be a monitoring of the situation to ascertain that this is indeed the reason why the rights-holders have not used the mechanisms. An important issue of practice that has to be monitored is whether all stakeholders regardless of gender, age and socioeconomic status use mechanisms for participation and accountability equally. For instance, poorer individuals may settle disputes without recourse to the courts because the access to the judiciary is time-consuming and beyond their means. Finally, such an assessment is required to ascertain the actor's level of compliance with its obligation to respect human rights. Thus this aspect of the CSF would assess if there have been positive measures adopted by the actor that interfere with rights-holders taking part in decision-making or in making use of accountability mechanisms.

⁴⁶⁶ The decline of voter participation in general elections in some countries is an example of rights-holders electing not to exercise their rights under ICCPR, Article 25.

5.3.2.3. Assessing the environmental effect of compliance with the human rights concerned

The possible impact that participation and accountability processes might have on living and work environments and ecosystems must be assessed.

Enabling environment

The implementation of laws and policies on participation and accountability may result in changes to living, work and physical activity environments that make these environments less or more conducive to participation and accountability. For example, as a result of laws and policies on participation and accountability, the legal environment may have changed to become a more supportive or restrictive environment for activities related to participation and accountability as assessed by stakeholders. In a seminar on the ‘Legal Dimensions of the Enabling Environment for Civic Engagement’, developing country and international NGOs, legal experts and practitioners, World Bank staff participated to examine the World Bank-commissioned Handbook on Good Practices on Laws Relating to NGOs. The participants cautioned that stipulations as to definitions of NGOs, taxation, funding, licensing provisions and liabilities of NGO officials could lead to restrictions on the activities of NGOs⁴⁶⁷. The effects of such provisions have to be assessed in case the legal framework created for the operation of NGOs within a country actually creates a more restrictive environment for NGO operations.

Ecosystems effects

⁴⁶⁷ World Bank, ‘A Progress Report To Civil Society Constituents’, The Hague, October, 2000.

Activity related to participation and accountability may have ecosystem effects or other operating environment effects that may have an impact on the lives of people that could be an impediment on the enjoyment of human rights by the people concerned. These ecosystem effects ought to be assessed to ensure that participation and accountability effects do not have a deleterious effect on the enjoyment of other human rights. For instance, the operation of participatory mechanisms may lead to the delay in planning approval for the development of infrastructure and amenities that affects the well-being of other community members. Such a situation would have to be identified to ensure that a proper balance is achieved between the rights of those wishing to participate in the planning process to prevent the development and those who wish the development to proceed. Where the balance finally rests might be subjectively determined but it is important that effects of the operation of the participatory mechanism, as in the example, are identified and transparently assessed in trying to achieve that balance.

5.3.3. Effectiveness

Outcome measures can be used to assess progress over time towards achieving defined human rights targets or benchmarks. While process level assessment is concerned with evaluating the effort in terms of the level and manner of implementation and utilisation of laws, policies and mechanisms, outcome assessments are concerned with evaluating the *results* of law and policy implementation and utilisation⁴⁶⁸. Thus in relation to a policy with the objective to increase overall participation of disadvantaged groups in policy-implementation for example, the outcome measure is the overall level of

⁴⁶⁸ Katarina Tomaševski, 'Indicators' in Asbjorn Eide, Catarina Krause, Allan Rosas (eds.), *Economic, Social and Cultural Rights* (hereinafter Katarina Tomaševski, Indicators), p.542.

participation of disadvantaged groups in policy-implementation. The outcome assessment in terms of participation and accountability in the decision-making process includes the extent to which human rights norms underlying participation and accountability are realised as well as an evaluation of the impact of increased participation and accountability on the realisation of other human rights, such as the right to education and the right to health.

Assessing outcomes involves several complexities. The range of actors and factors that potentially influence human rights and socio-political outcomes make it difficult to determine the extent to which those outcomes are directly attributable to any specific actor, policy or process. Additionally, some outcomes may be evident immediately while others could take much longer to develop. Finding appropriate methods to assess outcomes can be difficult and assessment may involve considerable time and resources. Thus there are debates about how far assessment can meaningfully evaluate outcomes. There are also discussions on who is responsible, or who is the relevant duty-holder, for ensuring longer-term outcome assessments given that policy and programme cycles e.g. in international organisations, usually occur in relatively short-term cycles, but outcomes could take much longer to develop and may occur totally unrelated to any particular programme or policy cycle.

The human rights position is clear; policies and policy activities cannot be considered as ends in and of themselves, but should lead to the full realisation of human rights. It is therefore essential to monitor outcomes. As duty-holders have the obligation to realise

human rights, they implicitly have a duty to monitor the outcome of steps taken to realise rights. Furthermore, a systematic approach to assessing outcomes is an important way to understand how and to what extent realising human rights actually affects certain outcomes. This in turn can inform future policy strategies and programme investments to more effectively and efficiently realise human rights benchmarks and targets. Conversely if adverse effects are apparent due to the misapplication or interpretation of human rights norms, the norms themselves may need to be reinterpreted.

Given the interdependent nature of human rights, it is imperative that realising the human rights related to participation and accountability must support the realisation of other human rights. Thus realising the human rights concerned with participation and accountability could have impacts on economic and social rights⁴⁶⁹ and therefore this linkage also needs to be closely monitored. Examples of linked effects could include impacts of participation on economic development, where trade union and civil society movements have sometimes been seen as a hindrance to such development. Impacts could also be assessed in terms of full and productive employment, where productivity may decrease in terms of workdays lost or increase as a result of satisfaction and motivation of being involved in decision-making processes. For instance, the impact of participation on social rights is increasingly being recognised. For example, empirical analysis indicate an association between the level of participation in public affairs and health and social capital outcomes where communities with lower level of participation

⁴⁶⁹ Specific indicators relating to these other human rights have been produced. For example see Katarina Tomaševski, Annual report of the Special Rapporteur on the right to education, submitted pursuant to Commission on Human Rights resolution 2001/29, E/CN.4/2002/60.

had lower levels of health outcomes⁴⁷⁰. While this positive association indicates a relationship between the realisation of the right to participate and the realisation of the right to health, the relationship is not a simple one and will depend on contextual factors and thus needs to be carefully monitored as it could have negative effects as well. Assessment of negative effects of participation could include considerations of whether inequitable exposure to social or political risks result from participation in the conduct of public affairs or seeking accountability.

5.3.4. Benchmarks and targets

As noted earlier targets are goals the actor seeks to achieve and benchmarks are markers on the way o achieving those goals. In relation to the human right to participation, possible targets might be the number of people attending meetings to update people about development projects. Of interest would be the proportion of those attending who are women or who belong to a minority group. The target might be to get 50% of attendees from minority groups. And the target may be time dependent in that it may be to 50% of attendees from minority groups within two years.

Appropriate benchmarks could be set in terms of seeing the representation of minorities at such meetings to increase in a progression of 10% every six months for example. The examples of benchmarks and targets are obviously very extensive. But the key thing is that they be designed to be fair and reasonable and that the targets not be set too low for otherwise the progress made would be too slow.

⁴⁷⁰ Lochner K, Kawachi I, Kennedy BP, 'Social capital: a guide to its measurement', *Health Place*, 1999 Dec, 5(4):259-70.

5.4. Conclusion

This chapter offered an example of the CF being used to identify compliance requirements in relation to particular human rights. The human rights were first specified and particular examples of compliance requirements in relation to them were described moving up through the levels of the CF from implementation to effectiveness. In the next chapter, these requirements are considered in relation to a World Bank project in Mumbai, India.

Chapter 6 A simple illustration of the Compliance Strategy and Framework in relation to a World Bank development project

In Chapter 5, the Compliance Framework (CF) portion of the Compliance Strategy and Framework (CSF) was used to work out the compliance requirements in relation to the human rights associated with the human rights-based approach to development principles of participation and accountability. This chapter develops that use of the CSF further by seeking to identify the compliance requirements in relation to the same set of human rights but in relation to a development project where such issues may arise in actual cases. The development project is a World Bank project in Mumbai, India and is called the Mumbai Urban Transport Project (MUTP).

The treatment here is basic in the sense that the various categories and levels of the CSF have been explained fully in Chapters 1 through 4 of this thesis so what will be done here is to simply identify the categories and make the relevant observations in connection to them. It is hoped this way, the CSF and the CF will be stripped bare to show their parts clearly.

Background to the project

The World Bank's preparation of the MUTP began in 1995⁴⁷¹. To secure Bank financing the project had to be appraised by the Bank, which involved Bank staff working with the Government of India and the state Government of Maharashtra and their agencies to ensure the project would be viable and would be implemented to the Bank's standards⁴⁷². The MUTP gained approval from the Bank in 2002 with the objective of facilitating 'urban economic growth and improve quality of life by fostering the development of an efficient and sustainable urban transport system including effective institutions to meet the needs of the users in the Mumbai Metropolitan Region (MMR)',⁴⁷³.

There are three parts to the MUTP, two infrastructure components and one concerning the resettlement and rehabilitation ('resettlement component') of people affected by the project. The infrastructure components concerned improvements to rail and road transport networks in Mumbai. These components were financed by an IBRD loan of US\$463 million. The resettlement component involved the resettlement of around 120,000 people; one of the largest such projects in an urban setting and was financed largely by an IDA credit of about USD 79.0 million⁴⁷⁴. At conception the resettlement component was planned as a separate project but it was merged with the transport components into a single project, the MUTP, in 1999⁴⁷⁵.

⁴⁷¹ World Bank, *India - Mumbai Urban Transport Project: Inspection Panel Investigation Report*, Report Number: 34725, 21 December 2005, ('Inspection Panel Investigation Report') para. 112.

⁴⁷² The Bank's standards, as discussed earlier, comprise environmental and social safeguards and the implementation of a project in accordance with those standards can give effect to the human rights of the people affected by the project or reduce the level of interference with those rights.

⁴⁷³ World Bank, *India - Mumbai Urban Transport Project Project Information Document: PID8175*, 16 January 2002.

⁴⁷⁴ World Bank, *Inspection Panel Investigation Report*, para. 62.

⁴⁷⁵ World Bank, *Inspection Panel Investigation Report*, para. 185.

Elements of the CSF

Compliance Topic:

The compliance topic are the human rights associated with the principles of participation and accountability under the human rights-based approach to development. This is the same topic as in Chapter 5 but the difference here of course is that it is being examined in relation to a specific actor, the World Bank.

Actor's characteristics:

(a) *Normative characteristics:*

The various normative frameworks governing the World Bank's conduct in this instance are the following:

International law

The World Bank is a subject of international law and so its conduct is governed by international law. Under this normative heading the views as to World Bank's human rights obligations are either that as a matter of customary law and of the fundamental norms of international law or peremptory norms (*jus cogens*), the Bank has an obligation to respect human rights⁴⁷⁶ or more expansively to respect, protect and fulfill human rights.⁴⁷⁷ This is a controversial area in which there is no authoritative determination.

⁴⁷⁶ Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund*, Cavendish, 2001.

⁴⁷⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

Additionally, international law is the applicable law governing the loan and credit agreements between the World Bank and the Indian government and the municipal government of Mumbai.

The national law of India

The national law of India governs the MUTP. India has ratified the ICCPR without reservations in relation to the articles associated with participation and accountability. Its national laws were not discerned to be a factor interfering with the human rights at issue. In fact India's freedom of information law actually helped the people affected by the MUTP to get relevant information.

The Bank's Articles of Agreement

The World Bank has challenged arguments that human rights considerations matter for its operations on the basis that concern for such considerations falls outside its mandate as defined by its Articles of Agreement⁴⁷⁸. However, as discussed below, the evolving scope of the Bank's development work now encompasses human rights issues, strengthening the claim and expectation that such issues, including its human rights compliance are taken into account in the Bank's operations.

⁴⁷⁸ The Articles of Agreement are the World Bank's 'constitution'. See Articles of Agreement of the International Bank for Reconstruction and Development, 22 July 1944, 2 UNTS 134, as amended, 606 UNTS 294 (the IBRD Articles). The Articles of Agreement of the International Development Association, 26 January 1960, 439 UNTS 249 (the IDA Articles) are also relevant and in the material terms similar to the IBRD articles. Financing for World Bank projects is provided both by the IBRD and the IDA so the respective Articles govern the issue of whether human rights considerations should be taken into account by the Bank.

The Bank has challenged assertions that it has to take human rights issues into account in its operations on the basis that doing so would involve basing its decision-making on political considerations, which is prohibited under the Articles. The relevant provisions of the Articles are⁴⁷⁹:

Article III, Section 5(b): The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

Article IV, Section 10: The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.

Thus the position of the Bank has been to ascribe a limitation on its ability to consider human rights issues in connection with its operations⁴⁸⁰. In other words, the Bank would be governed by the rule that its operations must give effect to human rights but for this limitation.

However, as the Bank came under pressure to make human rights guarantees conditions of its loans⁴⁸¹ and itself started to appreciate the human rights dimensions of its development work, it continued to develop its understanding of how the human rights

⁴⁷⁹ The IDA Articles contain exactly the same provisions in Article V, Section I(g) and Article V, Section 6 respectively.

⁴⁸⁰ The limitation applies in particular to issues concerning civil and political rights. See for instance, the remarks of the then General Counsel of the Bank, Ibrahim Shihata in a 1988 paper examining the role of the Bank with regards to human rights concerns: 'While the preceding remarks have shown that there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the Bank certainly can plan, and has played, within the limits of its mandate, a very significant role in promoting various economic and social rights'. Ibrahim F.I. Shihata, 'The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements', 17 *Denver Journal of International Law and Policy*, 39 (1988 – 1989), p. 48.

⁴⁸¹ See for instance, the controversy over the Bank's refusal to cancel loans to the then apartheid governments in South Africa, see Victoria E. Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 *Journal of International Law and Economy*, 113 (1978 – 1979).

situation in a country would be a political factor that could be counted in its loan risk assessment. As articulated in a 1995 legal opinion of the Bank's General Counsel, the Bank adopted the position that it could take into account 'an extensive violation of political rights which takes pervasive proportions'. Such a factor could be relevant to its loan decision-making where 'the violation had significant economic effects, or if it led to the breach of international obligations relevant to the Bank, such as those created under binding decisions of the UN Security Council.'⁴⁸² This was the point arising from Article 103 of the UN Charter discussed earlier in section 2.2.1.

On this interpretation of its Articles, the Bank would be able to withhold or suspend loans⁴⁸³ from governments that are involved in large-scale human rights violations. Thus human rights consideration can play a role in the Bank's decision-making. However, that role is not limited to loan decision-making at the country level; it can also be relevant at the local, project level. While country level human rights considerations were said to matter to the Bank in terms of their macroeconomic effects, the local level considerations are instrumentally concerned with their effect on the operational success of the project. In the same 1995 legal opinion, the Bank's General Counsel posited the following scenario in which the Bank may legitimately promote

⁴⁸² World Bank, *Prohibition of Political Activities in the Bank's Work*, Legal opinion of the General Counsel, 11 July 1995 (SecM95-707, July 12, 1995), in Ibrahim Shihata, *World Bank Legal Papers*, Boston: Martinus Nijhoff, 2000, p. 235.

⁴⁸³ World Bank, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006, p. 8: 'However, in egregious situations, where extensive violations of human rights reach pervasive proportions, the Bank should disengage if it can no longer achieve its purpose.'

individual political rights in the interest of a project's needs and withhold funding if such rights were not protected⁴⁸⁴:

The Bank, benefiting from its experience in development finance, seeks participation of affected people in the design and implementation of many types of projects it finances, and requires consultation with local communities and local NGOs in the preparation of the 'environment assessment' of projects with significant impact on the environment. Such participation and consultation, to be useful at all, require a reasonable measure of free expression and assembly. The Bank would, in my view, be acting within proper limits if it asked that this freedom be insured when needed for the above purposes. Its denial of lending for a given project in the absence of this requirement where it applies cannot be reasonably described as an illegitimate interference in the political affairs of the country concerned, just because the rights to free expression and assembly in general are normally listed among political rights.

The Bank's own operational policies

The Bank's staff are required to comply with its own operational policies in connection with the Bank's projects. A number of Bank operational policies applied to the MUTP including OD4.30 the operational policy on involuntary resettlement. None of the operational policies interfered with the human rights at issue.

The practice of involuntary resettlement relates to the relocation of people, in some cases entire communities, to make way for the development of infrastructure or resources. OD 4.30's objective is 'to ensure that the population displaced by a project receives benefits from it', that the displaced people are 'assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or

⁴⁸⁴ World Bank, *Prohibition of Political Activities in the Bank's Work*, Legal opinion of the General Counsel, 11 July 1995 (SecM95-707, July 12, 1995), in Ibrahim Shihata, *World Bank Legal Papers*, Boston: Martinus Nijhoff, 2000, p. 235.

at least to restore them’ and that resettlers ‘should be integrated socially and economically into host communities so that adverse impacts on host communities are minimized’,⁴⁸⁵.

Although OD 4.30 does not refer to the implications of resettlement for the enjoyment and realisation of the human rights of the people being resettled and of the host communities where the resettled people are moved to, there is clearly a human rights dimension to resettlement. If the stated objectives of the policy are realised, the affect on the enjoyment of certain human rights such as those concerning housing, health, education, the family and work may be minimised. Conversely, if the policy objectives of OD 4.30 are not realised the enjoyment of those rights may be negatively affected. Even if the policy objectives are realised, the resettlement process itself involves matters pertaining to the exercise of human rights such as the right to participate in public affairs and in decision-making affecting the rights-holder’s interests, the right to freedom from discrimination and to freedoms of expression and assembly as well as the right of access to remedies⁴⁸⁶.

The process of involuntary resettlement is theoretically meant to allow the people affected to participate in decision-making regarding the resettlement programme⁴⁸⁷. In addition, the contractual and administrative framework under which involuntary resettlement takes place also theoretically means there are procedures available for

⁴⁸⁵ OD 4.30, Involuntary Resettlement, para. 3.

⁴⁸⁶ See Chapter 5 for the discussion concerning the relations between these set of rights.

⁴⁸⁷ See also World Bank Operational Directive 4.30, paras. 3(c) and 5(b).

holding the actors involved⁴⁸⁸ accountable to the people who have to move. The extent to which involuntary resettlement programmes are participatory or accountable will likely vary from project to project and any claims as to lack of participation or accountability are likely to be contested. However, the presence of features of participation and accountability in such programmes make it potentially appropriate to apply the CF from Chapter 5 with regards to the human rights relating to participation and accountability to such cases.

The Bank's understanding that the realization of human rights is relevant to its mandate

The relevance of human rights considerations to the Bank's mandate was noted in a 2006 legal opinion of the Bank's General Counsel⁴⁸⁹ that stated:

development is no longer confined to economic development narrowly defined, but encompasses broad areas of human development, social development, education, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity. ... Many of these areas relate directly to the realisation of human rights, in being either preconditions for such realisation, or the subjects of human rights themselves. Indeed, human rights and development share important conceptual and practical affinities and are fundamentally linked with one another

The manner in which the Bank's purposes and mission are now understood makes consideration of human rights essential. Human rights relate substantively to many of the activities of the World Bank. They are deeply interconnected with the purposes outlined in Article 1 [of the Bank's Articles], in large measure because they are directly relevant to the Bank's mission of poverty alleviation.

⁴⁸⁸ These can include the host government, international development banks, private-sector banks or the infrastructure or extractive industry companies involved in the project.

⁴⁸⁹ World Bank, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006, p. 3 – 4.

The Counsel went on to note that the Bank's role is not that of an enforcer of human rights obligations but instead that it understands its role to be 'one of supportive cooperation with its members in the realisation of human rights' or of facilitating 'the realisation of human rights in partnership with its members'.⁴⁹⁰ Subsequently a programme called the Nordic Trust Fund was launched to train and inform 'Bank staff on how human rights relate to the Bank's core work and mission of promoting economic growth and poverty reduction'.⁴⁹¹

On the basis of these developments, it is possible to posit that the Bank has an informal policy of respecting human rights or not undermining the human rights of the people affected by its projects. And for the purposes of the showing how the CF might be applied, such a normative position would be sufficient as it indicates human rights considerations are being taken account of within the Bank. There is no incongruity between the statements of World Bank officials, the fact that a human rights awareness programme has been launched at the Bank, and the proposition that the Bank would be interested to learn what its human rights compliance requirements would be in relation to its projects from a 'do no harm' perspective. The compliance requirements are accordingly thought through on that basis using the CF. For the reasons given, it is suggested this would be a valid and legitimate use of the CSF.

⁴⁹⁰ World Bank, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006, p. 7 and 8.

⁴⁹¹ World Bank, *Human Rights Indicators in Development*, 2010.

(b) *Operational characteristics:*

Once the World Bank approves a project loan, implementation of the project is the responsibility of the borrower, while the Bank supervises the borrower's implementation⁴⁹². In the case of the MUDP, the resettlement component⁴⁹³ was implemented by 'the Mumbai Metropolitan Region Development Authority (MMRDA) on behalf of the Government of Maharashtra (GoM) and the Borrower, [the Government of India] (GoI). MMRDA is the coordinating agency and is responsible for implementing the resettlement and rehabilitation component on behalf of all the implementing agencies.'⁴⁹⁴

While MMRDA has overall responsibility for implementing the resettlement aspect of the project⁴⁹⁵, individual segments of the resettlement work has been contracted out to local NGOs with the Bank's approval⁴⁹⁶. The involvement of NGOs in planning, implementing and monitoring resettlement projects is provided for in OD 4.30⁴⁹⁷. However, the appointment of such contractors, almost inevitable in large projects, adds a further layer of administration and potential complexity in the translation of the Bank's policies into practice. The effect can be to weaken the Bank's control over the project and its operation. This does not mean however, a diminution of the Bank's accountability for

⁴⁹² OP 13.05, para. 1.

⁴⁹³ The transport components are implemented by other borrower agencies.

⁴⁹⁴ World Bank, India - Mumbai Urban Transport Project Project Information Document: PID8175, 16 January 2002. Other Maharashtra state government agencies implemented the transport components of the MUDP, namely the Mumbai Rail Vikas Corporation (MRVC); the Municipal Corporation of Greater Mumbai (MCGM); the Brihanmumbai Electricity Supply and Transport Undertaking (BEST); the Maharashtra State Roads Development Corporation (MSRDC) and the Mumbai Traffic Police.

⁴⁹⁵ OD 4.30, para. 6: 'The responsibility for resettlement rests with the borrower.'

⁴⁹⁶ World Bank, Inspection Panel Investigation Report, p. xvii.

⁴⁹⁷ OD 4.30, para. 6. See also OD 14.70, *Involving Nongovernmental Organisations in Bank-Supported Activities*.

the conduct of the project. As discussed below, the Inspection Panel established by the Bank to ensure project compliance with Bank policies takes the Bank's project management staff to task for policy non-compliance. It is the job of the Bank's management to then get the borrower's implementing agencies in line so as to ensure policy compliance. The Inspection Panel investigation will produce its recommendations that add a further layer of compliance requirements for the Bank's project management team to work with the borrower to satisfy. The assumption here is that the Bank's management gets full cooperation from the borrower's implementing agencies and its contractors. That is probably not a realistic assumption given the complexity of such projects, indicating a further limit on the control the Bank has over the project.

The NGOs appointed were headed by the Society for the Promotion of Area Resources Centre (SPARC) and the National Slum Dwellers Federation (NSDF), which had experience with some of the slum-dweller communities affected by the project, particularly those living along Mumbai's railway tracks⁴⁹⁸. As Bank supervision missions were to learn, both MMRDA and the NGOs lacked sufficient capacity to implement the resettlement component⁴⁹⁹. The large scale of the project was one issue but so was the lack of relevant expertise on the part of MMRDA and the NGOs. In fact, one reason that MMRDA contracted out the work to the NGOs was that it lacked the capacity for doing it. The lack of capacity also related to a particular feature of the MUTP, which was that it affected two different groups of people, slum-dwellers affected by the railway component of the project and slum-dwellers and middle-income shopkeepers affected by the road

⁴⁹⁸ World Bank, Inspection Panel Investigation Report, p. xx – xxi.

⁴⁹⁹ World Bank, Inspection Panel Investigation Report, para. 238.

component of the project. The NGOs only had experience working with the former group⁵⁰⁰.

The Bank's accountability body, the Inspection Panel, criticised the Bank's management over the lack of capacity of the MMRDA and the NGOs since that incapacity caused problems in implementing the resettlement component and so affected the rights and interests of the people being resettled. In the case of the MUTP, there were institutional failings on the part of the Bank, in particular the decision in 1999 to merge the resettlement component with the transport components that resulted in responsibility for the resettlement being given to MMRDA instead of the government of Maharashtra's Urban Development Department that had been identified by the Bank team preparing the project as better suited for the task⁵⁰¹. It is possible that in some other cases, issues of incapacity may arise despite the Bank's best efforts in exercising its control over the project to ensure appropriate agencies undertake the required tasks. The exercise of due diligence by the Bank in such situations should then mean that the responsibility for the lack of human rights realisation or protection should fall to the borrower as the lack of capacity could not be attributed to the Bank's exercise of control over the project.

So in operational terms, it is relevant to note that the Bank exerts more control over the project before it commences. The project is implemented by the borrower country and once it gets underway, exerting control over the project is more complicated. But while

⁵⁰⁰ World Bank, Inspection Panel Investigation Report, p. 59 – 61.

⁵⁰¹ World Bank, Inspection Panel Investigation Report, para. 147.

the borrower country implements the project, the Bank's staff supervise it and in that way are able to exert some say over the project.

Applicable Norms

The applicable norm thus would be that in relation to the MUTP, the Bank would not operate in a manner that would undermine the enjoyment of human rights by the people affected by the project.

Elements of the CSF

The applicable human rights norm and the specific human rights authoritatively identified and interpreted

As mentioned in earlier discussions of the CF, this category essentially overlaps with the previous one 'Applicable norms' and provides the basis for identifying the compliance requirements using the CF. Here in addition to the norm 'not to undermine the enjoyment of human rights', the specific human rights are identified and their content specified. This was done in Section 5.2. of Chapter 5. In terms of authoritatively interpreting and identifying these human rights, reliance would be placed on the human rights treaty bodies' interpretation of the rights and on the United Nations' agencies understanding and explication of the human rights-based approach to development and its principles of participation and accountability. For instance, a World Bank publication relates to that approach and the two principles as follows:

A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established under international law. This helps to promote sustainability of development work, empowering people themselves—especially the most marginalized—to participate in policy formulation and accountable those who have a duty to act.⁵⁰²

and

The concept of a human rights– based approach is therefore broadly identified according to five basic principles:

- An anchoring of development efforts in human rights norms and standards and obligations
- A perspective that emphasizes analytical as well as operational approaches
- A perspective that focuses on participation and empowerment of rights-holders and on accountability of duty-bearers
- A focus on marginalized groups and on legal instruments that are especially relevant to them
- Assumptions about the centrality of inequality and discrimination as constraints on development progress⁵⁰³ (emphasis added)

Baseline and context

The World Bank undertakes environmental and social development analysis of the communities in the vicinities of its projects. With regards to involuntary resettlement

⁵⁰² OHCHR (Office of the High Commissioner for Human Rights), 2006. *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (Geneva; New York, United Nations).

⁵⁰³ World Bank, *Human Rights Indicators in Development*, 2010, p.

Operational Policy OD 4.30 provides for the affected people to be restored to conditions similar to the ones they had to leave. So the environmental and social development analysis done by the Bank, and which was done for the MUTP as well, allows the Bank's staff to determine that the affected people are able to enjoy similar conditions in the place they were moved to.

From a human rights perspective, the ideal baseline analysis would be to determine the level of human rights enjoyment prior to any intervention. Only that way will it be possible to tell at the end of the intervention whether human rights enjoyment was affected, and if so whether the effect was positive or negative. Such an overt assessment was not done by the Bank in the MUTP case and would be unlikely to be carried out in any case as it would be seen as too overt a human rights-related activity. But proxy indications can be obtained such as the level of literacy and level of gender equality in the affected population. Such information would help in the design of policies and mechanisms to help ensure that the rights associated with participation and accountability could be enjoyed in relation to the activities of the MUTP project.

Implementation

Starting at the implementation level of the CF, the human rights compliance requirement is for the Bank to take measures with the aim of not undermining the human rights of concern. The measures relate to the laws, policies and mechanisms concerning the MUTP and the associated institutional capacities of both the Bank and the project's

implementing agencies, namely MMRDA, the state government's implementing agency. and its affiliates. The measures to be taken by the Bank are at two levels; the Bank's own policies, mechanisms and capacities and by the Bank working with the borrower and its implementing agency, the MMRDA, concerning their laws, policies, mechanisms and capacities. An example of the specific requirements identified using the CF is first provided in relation to the laws and policies governing the MUTP.

Laws and policies

The Bank would be required to have a policy that gives effect to the human rights of the people being resettled by the MUTP to participate in its resettlement process. As mentioned, OD 4.30 *prima facie* does so by providing for the participation of the people being resettled in the planning, implementation and monitoring of the resettlement process. The key requirement however is for the Bank to work with the MMRDA to ensure that this aspect of OD 4.30 is effectively translated to MUTP's resettlement policy. Until OD 4.30 is translated to the MUTP resettlement policy, it has no effect on the resettled people's human right to participate in the resettlement process. Translating OD 4.30 into the MUTP resettlement policy would be done under the various provisions of OD 4.30 that provide for the review of the borrower's laws and policies and for working with the borrower to produce a resettlement policy. For instance, the MMRDA's resettlement policy did in fact make provision for active community participation in both the development and implementation of the details of the resettlement program⁵⁰⁴.

⁵⁰⁴ MMRDA, Resettlement Action Plan, p. 22.

The MMRDA policy states that the mode of participation would be ‘by establishing links with community based organisations’, which raises questions about how ‘active’ the participation might actually be. As it turned out, some of the people being resettled felt they were not allowed to participate in the planning or the implementation of the resettlement plan, lodging a complaint with the Bank’s Inspection Panel alleging that their rights to participation and consultation had been denied⁵⁰⁵. The manner in which participation policies operate in practice is the subject of the CF’s application level. However, since the mode of participation is through local organisations, the issue of the capacity of those organisations to adequately provide for the participation of the people concerned, is the subject of another compliance requirement at the structural level, that concerning ‘institutional capacity’.

In the case of the MUTP, the Bank’s policies were applicable and in working with the Borrower, in particular the Government of Maharashtra, the Bank was able to ensure that the appropriate policies were in the resettlement policy with regards to provisions for participation, information disclosure and grievance mechanisms. The resettlement policy was adopted in 1999, three years before the MUTP loan and credit were approved. It takes into account gender discrimination and provides for appropriate measures if indigenous people are affected but does not make provision for any other vulnerable or marginalised group.

⁵⁰⁵ World Bank, Inspection Panel Investigation Report, para. 22.

Giving effect to the right to participation will involve more than just the provision of a policy for doing so. The Bank should be concerned that the borrower also has the laws and policies in place that would support the enjoyment of the human rights related to participation and accountability. In case such rights will be interfered with the Bank should be concerned that the Borrower has the laws and policies that would minimise such disruption. As the Bank's General Counsel noted, participation issues also involve the protection of the freedoms of expression and assembly, so the Bank would also have to work with the borrower to ensure that those protections are part of the law. The Bank should also be concerned with the level of protection of the freedom of expression and assembly on their own, as these freedoms would be important for the proper functioning of the project⁵⁰⁶. The Bank would also be concerned to assess that all the relevant laws and policies provide for the enjoyment and protection of the human rights concerned without discrimination.

However, there is no record that the Bank made any assessment of the adequacy of protection of the freedoms of expression and assembly under Indian law and it is noted that the requirement for assessing the availability and extent of such protection is not part of any Bank operational policy.

There is also a requirement for those laws and policies to provide for the equal access of all resettled people⁵⁰⁷ and also, where necessary, to be adaptable to the needs of

⁵⁰⁶ Shihata, 1995 Opinion, in *World Bank Legal Papers*, p. 235.

⁵⁰⁷ Refer to General Comment 25, para. 5.

the rights-holders. The Bank's policy on involuntary resettlement for instance provides for particular attention to ensure that vulnerable groups are adequately represented in participatory mechanisms⁵⁰⁸. This list is not exclusive and so would allow the Bank to influence the borrower's policy to include other groups as the project's characteristics may require. The critical issue of course is whether having gained representation in such mechanisms, members of vulnerable groups can effectively take part or make their voices heard. Ensuring that the views of vulnerable groups are actually taken into account is a matter of seeing how this policy is implemented in a particular case and so is an issue covered at the application level.

The Bank of course has had experience of many projects all over the world that involved population resettlement. This raises the question of the extent to which the Bank is able to transfer lessons learnt between projects where those lessons enhance participation and accountability levels of the people affected by these projects. But the requirement of adaptability is a difficult one for the Bank to deal with. The Bank is conscious that the adequacy requirement might be used by states as a way to water down the resettlement policy requirements of their implementing agencies. While the Bank would seek to ensure the same resettlement policies are adopted in all its projects, even if from the perspective of utility if doing so simplifies the project's preparation and supervision, variation of local conditions, in particular capabilities of state implementing agencies would make that impossible. A comparison of the resettlement policies for the various Bank projects will show a variation in the policies around the mean provided by

⁵⁰⁸ OD 4.30, para. 8. Also refer to Harlow and Rawlings' discussion on the varieties of participation.

the relevant Bank policy, OD 4.30 for instance. Not all of the variation will be due to different project conditions. There is also likely to be variation as a result of learning within the Bank, institutional failure by the Bank, and staff turnover within the Bank to name a few reasons. However the variation also represents an assertion of control by the borrowing state over the project that is a reality of all Bank-financed projects. Perhaps one can acknowledge that and try to work around it.

Mechanisms

The Bank also needs to ensure that the appropriate mechanisms are instituted in order that the relevant laws and policies may give effect to the human rights relating to participation and accountability. These include the mechanisms that the Bank can institute on its own accord because they fall within the Bank's direct responsibility as well as the mechanisms that the Bank can influence the borrower to institute under the loan or credit agreement. With regards to its projects, the Bank would have in place a mechanism that operates as a review body for project decision-making that people affected by the project can participate in. It would also be required to institute an accountability mechanism that allows people to seek redress if their rights are or have been threatened. In order for both types of mechanisms to function as needed, the Bank also has to provide people with all relevant information concerning the issue the mechanism is required to deal with. In the case of the MUTP for example, the people affected by the project were able to avail themselves of the Bank's Inspection Panel process and seek redress for some of their complaints.

In the case of the borrower, the user of the CF would identify that the Bank would have to work with the borrower to ensure that appropriate mechanisms are in place to ensure the enjoyment, realisation and protection of the human rights related to participation and accountability are not undermined. Specifically, there would be required mechanisms for participation by the project affected people in various stages of the resettlement process from planning to implementation. To facilitate both the participation of individuals in such mechanisms and in accountability mechanisms, there should be mechanisms for the disclosure of information. There would also be required mechanisms for accountability should members of the resettlement population take issue with any aspect of the resettlement process. This could include a situation in which the individual's enjoyment of human rights is being interfered with. Such mechanisms ought to be accessible and their procedures made known through the dissemination of information.

In the case of the MUTP, the accountability mechanisms provided were the first and second tier grievance mechanisms. These mechanisms would have to be accessible, adaptable, adequate, available⁵⁰⁹ and impartial, whichever of these attributes were applicable. In the event, the MUTP's grievance mechanisms lacked these attributes in that they were found by the Inspection Panel to be inaccessible, inadequate, effectively unavailable because the resettled people were not adequately informed about them, and not impartial. The details of these shortcomings are discussed in relation to the application level as they came to light when the mechanisms were put in practice. However, it is worth noting here that the Inspection Panel's findings led to an

⁵⁰⁹ See Section 3.2.2.3. Availability, acceptability, accessibility, adaptability and quality of compliance measures (AAAAQ).

acknowledgement by the Bank that aspects of the grievance mechanisms would be changed. The changes in effect would bring the mechanisms in line with the attributes of accessibility, adequacy and availability; the issue of impartiality was dealt with by replacing the MMRDA and NGO staff sitting on the grievance mechanisms with independent officials. Thus the human rights attributes are relevant to the Bank's project requirements and the Bank may have been able to avoid an Inspection Panel investigation by ensuring the grievance mechanisms did have those attributes. It is also worth noting that the Inspection Panel's findings plus the Bank's practice in acknowledging the validity of those findings has the effect of replicating the human rights compliance requirement of ensuring the Bank's operational policy-related mechanisms have those attributes. In other words, in using the CF, the user would want to ensure that the grievance mechanisms under OD 4.30 did not have the deficiencies pointed out by the Panel.

Institutional environment, culture and capacity

The user concerned with human rights compliance must also give consideration to issues of institutional environment, culture and capacity for both the Bank and the borrower and its implementing agencies. This includes consideration of the human rights culture and capacity of both sets of actors. The CF would be used to identify the relevant institutional capacities for the purpose or from the perspective of human rights compliance.

For the Bank, the human rights compliance requirement would be to ensure its own institutional capacity to establish appropriate implementation of the components of its resettlement projects that are relevant to the human rights relating to participation and accountability. These, as mentioned previously, are three-fold: measures related to participation, information disclosure and accountability. In the MUTP case, this was not done because the Bank authorised a merger of the resettlement component of the project with the transport components. The merger violated the Bank's own practice and its operational policy. As a result, the Bank was unable to secure the appropriate implementation of the measures related to participation, information disclosure and accountability⁵¹⁰.

In addition to the above, the Bank has to ensure it has adequate supervision capacity to supervise and monitor the borrower and its implementing agency. Finally, the Bank has to provide human rights training for its staff. Without such training, the Bank's staff may have difficulty assessing the human rights requirements needed for the purposes of the participation and accountability components of its projects⁵¹¹.

The CF would also be used to identify the need to ensure that the borrower's implementing agency has the capacity to implement and to supervise those components of the resettlement project that are relevant to the human rights relating to participation and accountability. Lastly, the CF would be used to identify the need to understand the

⁵¹⁰ World Bank, Inspection Panel Report.

⁵¹¹ See Shihata, Legal Opinion, in *World Bank Legal Papers*, p. 235.

level of human rights protection provided by the borrower concerning the human rights related to participation and accountability and the level of human rights awareness among the staff of the borrower's implementing agency.

Application

As noted in earlier discussions of the CF, at the application level, there is a requirement to ensure that the steps taken by the actor to respect and give effect to human rights actually work in practice as they were designed to. Thus in the MUTP case, the Bank would be required to determine that the people having to be resettled are in fact making use of the mechanisms concerning participation and accountability that were designed for the project at the implementation level. Finally, the Bank is required to ensure that the steps taken at the implementation level and put into practice do not adversely affect the enjoyment or realisation of other human rights, either of the resettled individuals or of other individuals in the community. Together with that, the Bank is also required to determine if the steps taken adversely affect its institutional capacity to continue applying them in practice.

Application of laws, policies and mechanisms

In case actions at the implementation level are not being applied as designed, there is a requirement to rectify the matter, which may involve actions at the application or implementation levels. At the application level, if the implementation measures are not being carried out as designed there is a requirement to rectify that with the borrower and its implementing agencies. However, if they are not being carried out as designed

because of the way they have been designed, there is a requirement to return to the implementation level and rectify the problem with the borrower and its implementing agencies as to the design of the law/policy. Existing procedures concerning OD 4.30 allow the Bank to do this in two ways; through the MMRDA's own monitoring and reporting as well as through the Bank's own supervision of the MMRDA and its affiliates.

The application of the MUTP's grievance mechanisms in practice illustrates this aspect of the CF. So too does the next example concerning the monitoring of rights-holders' practice. Although these mechanisms were designed as part of MMRDA's resettlement policy and approved by the Bank, the Inspection Panel's investigation 'revealed a lack of common understanding of how the mechanism works and what its major duties are' among MMRDA's staff⁵¹². The lack of 'clear responsibilities, procedures and rules'⁵¹³ concerning the MUTP's grievance mechanisms contributed to their lack of accessibility and effectiveness as well as the lack of timeliness of the response of the mechanisms to people's complaints⁵¹⁴. The lack of clear rules and procedures is an implementation level issue, since it concerns the design of the mechanism. However, the problem was revealed at the application level when the issue of how the mechanisms worked in practice was examined. Thus the human rights compliance requirement would be to monitor how the mechanisms are working in practice, and if they are found to be working improperly due to implementation level

⁵¹² World Bank, Inspection Panel Investigation Report, para. 405.

⁵¹³ World Bank, Inspection Panel Investigation Report, para. 415.

issues, to make the necessary correction to the mechanisms at the implementation level, if that is where the problem is, as in this case.

Rights-holders' practice

There is a requirement to identify what the practice of the rights-holders is concerning the measures, the policies and mechanisms, adopted to give effect to their human rights relating to participation and accountability. If the practice is not what is intended, that is the rights-holders are not participating in the participation and accountability mechanisms that may be an indication that the laws/policies for participation and accountability are not properly designed or that the mechanisms to implement those laws/policies are not properly designed. In that case, the CF would direct the user back to the implementation level, or perhaps to another category at the application level, to make the necessary adjustments to the law/policy or to the mechanism.

In the case of the MUTP's grievance mechanisms, the Inspection Panel found that a number of rights-holders were not making use of the grievance mechanisms. The reason was found to be that they had not been adequately informed about the mechanisms⁵¹⁵ and that the rights-holders felt that the mechanisms were not independent. The two grievance committees were manned by MMRDA and SPARC staff and since many of the grievances referred to alleged malpractice by MMRDA or SPARC staff, there was a lack of recourse to those mechanisms by the people affected by the project⁵¹⁶.

⁵¹⁵ World Bank, Inspection Panel Investigation Report, para. 407.

⁵¹⁶ World Bank, Inspection Panel Investigation Report, paras. 412-417.

In the case of the MUTP, the mechanism used by the NGOs to engender participation by the people affected by the project was ineffective. It would be necessary to identify this so that the situation might be remedied and a proper mechanism used to ensure those rights were not undermined.

The associated effects

Here the requirement of the Bank would be to ensure that the laws/policies/mechanisms adopted in relation to the human rights related to participation and accountability do not undermine the enjoyment, realisation and protection of other human rights. Specifically the requirement would involve the Bank's assessing if the laws/policies/mechanisms adopted in relation to the human rights relating to participation and accountability have undermined the enjoyment, realisation and protection of other human rights of those affected by the project in terms of the resettlement and those affected by the project because the project affected their (living and working) environment. This is the requirement arising from the interdependence and indivisibility of human rights. If there are such effects, then the follow-up requirement would be to make the determination that the effective restriction of the other human rights was reasonable in the circumstances. However, if there are such effects, but they are not reasonable in the circumstances, to make the necessary rectifications either to the design of the laws/policies/mechanisms or the manner in which they are being implemented.

In identifying the Bank's compliance requirements in relation to the applicable human rights norm relating to the human rights relating to participation and accountability, the key focus is at the application level. This is the case for all actors with

human rights obligations or commitment, but is particularly pertinent in the case of the Bank as the Bank operates in various contexts throughout the globe. The context-specificity of human rights compliance is therefore especially relevant to actors with global operations. The different contexts in which the Bank operates creates variation in performance of project requirements as provided by the Bank's operational policies. How to take into account of such variation in assessing human rights compliance is a key question. It will require that the use of any compliance strategy be dynamic and flexible. In addition, as the Bank has different capabilities in different countries, it should be recognised that one thing that the identification of human rights compliance requirements in the case of the World Bank must do more than in the case of other actors is to highlight the different capabilities so that steps may be identified that can be taken to compensate for those differing capabilities.

Effectiveness

The effectiveness level concerns whether the actions taken in connection with the requirements of the Bank to ensure that the human rights associated with participation and responsibility in relation to the MUTP were not undermined. Since compliance is the factual matching of the actor's behaviour with the norm concerned, this level of the CF is concerned to determine whether the MUTP operations were conducted in a manner that did not undermine the enjoyment of the human rights of the people affected by the project, particularly those rights concerning participation and accountability. From a human rights perspective however, the effectiveness of measures taken to respect human rights, or not to undermine human rights, is not determined only with regard to the human

right or rights of those being resettled but also with regard to the human rights of others affected by the project whether directly, for instance the host communities, and those of the broader community in which the resettlement operations are being conducted.

Level of realisation of rights related to participation and accountability

The requirement for the Bank would be to determine whether the MUTP gave effect to the human rights related to participation and accountability of the people being resettled. The requirement is to take the measures undertaken to see to it that the MUTP did not undermine the human rights of concern and determine whether they were effective. If they are found to be ineffective then remedial steps can be taken at the implementation and application levels. Further if the effectiveness level shows that the measures taken did not prevent the undermining of the human rights of concern:

1. Redress might be made to those who rights were not given effect to (the consequence of non-compliance), and
2. The measures may be rectified if the project is long-term and ongoing (also the consequence of non-compliance but also a means of ensuring compliance)
3. The lessons learnt may help prevent such rights not being given effect to in future projects (the consequence of non-compliance).

Level of realisation of other human rights

The requirement would be to assess if the laws/policies/mechanisms adopted in relation to the human rights relating to participation and accountability have undermined the enjoyment, realisation and protection of other human rights of those people affected by

the project in terms of the resettlement and those affected by the project because the project affected their (living and working) environment.

Targets and benchmarks

These were not addressed by the Bank in the MUTP context. And arguably, the length of Bank projects may not be such as to make it sensible to establish any other targets than to aim for the goal of zero negative impact on human rights enjoyment over the course of the project. Benchmarks in such a case would be required to be designed as warning indicators so the Bank could be alerted if a situation involving the restriction of human rights enjoyment is developing. So for example, there could be a benchmark in terms of the expected occupancy or use levels of grievance mechanisms in relation to a project. Then if the expected level is seriously undermet, the Bank could seek to determine if there is a problem to do with an interference to people's enjoyment of their rights to access remedies.

In conclusion, this simple illustration of the use of the CSF and the CF extends the example of the CF's use that was undertaken in Chapter 5. It is an example in broad strokes aimed only at providing some idea of the use of the CSF in practice. Clearly, the compliance situation is a very complex one as all real world situations would be. For instance, there are dealing between the World Bank and different levels of government in India. There will be rotations of staff both from the World Bank side and from the side of the implementing agency in Mumbai. The circumstances, in other words, against which the compliance requirements would have to be identified would be subject to quite a degree of change. Still,

it is suggested that those are some of the reasons that can make the CSF and CF useful templates for use by actors concerned with issues of compliance – either their own compliance or the compliance of others. In a situation of substantial nuance and complexity, having a simple to understand template can be useful in helping all the people involved focus on a few key things. And it can be useful for structuring otherwise chaotic situations.

Chapter 7 Conclusion

The aim of this thesis was to identify, describe and examine requirements for compliance with norms of international law, and in so doing to suggest a strategy and framework as a solution for the identification of such requirements for use in specific cases.

The motivation to address this issue arose from the observation that in certain instances, and for various reasons, there was uncertainty over what an actor was supposed to do to comply with a norm of international law. The idea of an actor's compliance requirements as a systematic approach to helping an actor determine what to do to achieve compliance was a proposed solution.

Next, the idea of compliance requirements with norms of international law was explained by analogy with the idea of the course of conduct and actor was obliged to undertake in order to comply with an obligation of result under international law. And this led to the conception of the compliance requirements as being defined by the actor's course of conduct given the compliance topic the actor had to address plus considerations regarding compliance derived from compliance theories and considerations arising from the concept of compliance itself.

These considerations involved a focus on the sustainability of an actor's compliance especially where its compliance was an ongoing process and was a matter of degree. In addition, the compliance process was conceptualised in terms of three stages or levels: Implementation, Application and Effectiveness. Other considerations included

taking account of the actor's context and characteristics and the importance of clearly identifying the norm in relation to which compliance was expected.

At the end of the investigation of compliance theories, the concept of compliance and the idea of the actor's course of conduct, the conception of compliance requirements was that compliance requirements orchestrated an actor's course of conduct in complying with a norm of international law. By organising the elements of compliance requirements that were identified or conceptualised into a framework, a strategy for achieving compliance and a framework for identifying compliance requirements to orchestrate an actor's course of conduct was produced. The whole strategy was represented by the Compliance Strategy and Framework (CSF) and the framework identifying the actor's compliance requirements was the Compliance Framework (CF).

The description, application and use of the CSF and the CF in identifying an actor's compliance requirements was provided as well as a simple illustration in relation to a collection of human rights.

It is submitted that the CSF and CF will help actors identify their compliance requirements with norms of international law. One helpful feature of the CSF and CF is that they are universal templates that can be used in relation to both state and non-state actors and in relation to both legally binding and non-legally binding norms. In this way it provides a template for the exchange of learning between various categories of actor in relation to what works when seeking to comply with international norms.

The idea of compliance requirements itself is useful as it focuses attention on the reality of compliance with international law norms, namely that compliance is not a binary affair but a process of negotiation, iteration, and trial and error. And that the main issue in dealing with international law and with international norms is to change an actor's behaviour so that it complies with the international norm.

The CSF and CF can facilitate that transformation of behaviour because they are objective frameworks that operate in a transparent manner. Accordingly there is an element of fairness and legitimacy to the CSF and CF that will, it is hoped, facilitate compliance with international norms by those using them.

7.1. Possible uses of the CSF

In Chapter 1, the potential uses of the CSF were highlighted. Here some of those uses are re-emphasised and others are highlighted in light of the theoretical basis for the CSF that was unfolded in this thesis and of some of the practical considerations identified along the way.

1. The CSF can facilitate the transposition of international law norms from one actor, most likely a state, to other actors, such as non-state actors. This 'use' applies to the CSF as a whole not just the CF.

2. The CSF, with its emphasis on taking account of causality, that is the link between the norm and the conduct conforming to the norm, can help the empirical study of compliance and compliance phenomenon.
3. The CSF can help in the analysis of how norms are interpreted and applied in particular instances.
4. The CSF allows the user to identify gaps in the law
5. The CSF allows the user to identify, contemplate and decide on the trade-offs in balancing competing interests and facilitates making that trade-off transparently.
6. The CSF facilitates the development of international law through structuring the practice of actors in terms of the CSF elements.
7. The CSF allows for questions of justice to be incorporated into international law. Users making trade-offs will have to address issues of justice. Similar issues will have to be addressed in closing gaps in the law revealed using the CSF. In this way, issues of justice can be worked into the development of international law.
8. The CSF facilitates compliance by allowing actors to map their operational activities onto the CSF template, or conversely allows actors to see where and how the CSF relates to their existing operations. Then the actors can easily see what changes might be need to improve their compliance.

9. The CSF facilitates:
 - a. Better coordination between actors.
 - b. Better analysis of a compliance situation.
 - c. Learning among actors if they share a single, simple template.
 - d. The conceptualisation of the normative requirements of non-binding norms and soft law norms where authoritative interpretation is not on hand.
- The CSF can be used as part of an actor's risk management and risk mitigation strategy.

7.2. Further steps

The following developments could be further steps building on the idea of compliance requirements with norms of international law and the CSF and the CF:

1. To see if the idea of compliance requirements can make a contribution to compliance theories.
2. To apply the idea of compliance requirements, the CSF and the CF to other areas of international law such as environmental law and international investment law.
3. To see whether the idea of compliance requirements, which in this thesis, tried to deal with the fragmentation of international law can creditably address issues of norm conflict involving a broad range of international law areas.
4. In relation to the last point, an immediate further step could be to review the CSF and CF to ensure any kinks are worked out and then to apply it to the case of the conflict

between human rights norms and international investment protection norms. This issue was mentioned in Chapters 1 and 4 of this thesis and a full treatment of the issues involved together with the application of the CSF and CF could be undertaken.

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