Constructivists in the field of international relations/international law (IR/IL) are obsessed with the question of whether, how and why international law matters. 1 For decades, IR scholars have treated international law as “epiphenomenal”, standing only as an instrument of political will. All that mattered to these thinkers were states, their material interests and their relative capacity to pursue those interests. Constructivists, by contrast, often insist that international law is a distinctive institution which exerts causal influence upon state behaviour by reconstituting their identities and interests. Constructivists argue that international law is law and that, even absent material-based sanctions or incentives, law-abiding states tend to presumptively favour compliance to non-compliance. Developing this idea, Harold Koh prefaced his path-breaking work on transnational legal process by defending the position that international legal scholarship is worthwhile. He argues that transnational legal process offers “an idea that has power”, e.g. the power to understand the ways in which international law influences state behaviour. 2 International law and international legal scholarship, it seems, are mutually self-supporting, with the former justifying the latter and the latter reinforcing the former.


To say that international law matters, however, is to say something which requires extensive clarification. “Matter” can mean any number of things, but two understandings are particularly salient. First, it may refer to that which is valuable; international law matters insofar as it is something about which people care. Second, it may refer to the hypothesis that international law is a variable in the occurrence of material events; international law matters because it makes a difference in how material life is played out. To say international legal scholarship matters is to say precisely the same thing; research matters either because it is valued by those who seek out the truth or because it helps materialize international legal rules and principles in concrete realities.

Interestingly, constructivism and transnational legal process in particular have been applied to international human rights as much, if not more, than to any other field of international law. To say that international law and legal scholarship matters means, in the fullest sense, that it improves the actual lives of the purported beneficiaries of human rights. As I have already mentioned, however, classical stands on the question of international law are that it does not matter or that it matters only to perpetrators of human rights abuses, since international law is nothing but a blunt instrument of political will. Realists, the typical ambassadors of this view, assert that all that matters are states’ material self-interests, reflected in military, economic and political power and measured in their capacity to determine the will and ultimately the physical behaviour of others; international law matters, not as a variable in the occurrence of events but, instead, as a post-facto consolidation of acquired power. Similarly, international legal scholarship can

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4 The following is a list of well-known, modern realists: Hans Morgenthau, E.H. Carr, Reinhold Niebuhr,
have little practical impact, since states pursue self-interest irrespective of what might be the truth. Should truth be serviceable, then it will be used, but politics is generally a high-stakes game which operates according to its own, internal logic.

These assumptions, constructivists point out, simply are not true. States, they argue, are not unitary, egoistic beasts let loose in a state of anarchy, but are corporate entities constituted by internal social relationships which are themselves structured in part by value sets. States are metaphors for complex organizations of individual people whose behaviour, while it may usefully be analyzed from exclusively “political” frameworks, is a product of socially constructed sentiments, beliefs, ideas and values. Interest, in other words, does not determine behaviour and reason is never deployed abstractly. Identity precedes interest, shapes desire and motivates behaviour which only then is imprinted with rational form.

But what does this observation mean to those who suffer human rights abuses and indeed to those who must decide whether, how and why to intervene? It is in this sense that we must ask: does international law and related scholarship matter? The value of acquiring greater insight into why states do what they do must be underpinned by results if the fullest sense of the term “matter” is to be realized. This is not a critique of the nature of philosophy, reflection or the love of knowledge, but an insistence that, contrary to Plato and Socrates, knowledge of what is good, right and true is not the same thing as doing what is good or right and, indeed, that sometimes truth and compassion can work at

Arnold Wolfers, George F. Kennan and Georg Schwarzenberger. Morgenthau is the most well known of the modern realists and is often credited with initiating IR as a distinct discipline. For relevant work, see Hans Morgenthau, Scientific Man vs. Power Politics (Chicago: The University of Chicago Press, 1946), Hans Morgenthau, Politics Among Nations: The Struggle for Power and Peace, 2nd edn., (Alfred A.Knopf. 1954).
cross-purposes. In the remainder of this paper, I will peruse some of the tensions between truth and compassion in constructivist scholarship on international human rights, observing how, most of the time, the value of international law and its scholarship is philosophical and not humanist. What is more, I will argue that, while constructivism provides us with valuable insights into why states do and do not obey international law, the uses to which this knowledge is put can run contrary to the values of truth if international human rights are to be realized. However, an increasing number of scholars seem to be conscious of this problem, and have focused on aligning the interests of truth and compassion in concrete settings. I will end by reflecting upon the potential of this literature.

The most frequent iteration of constructivist theory in the context of international human rights is transnational legal process. According to Koh, transnational legal process “provides the key… to understanding the critical issue of compliance with international law”. Although his initial interest is with questions of compliance, Koh quickly changes focus and inquires into why states obey international law. Compliance, as Koh seems to understand it, represents the objective correspondence of rational actors’ behaviour to directive rules. Three generalized features of this model may be identified. First, international law is conceived to be a closed system of objective rules. Second, states are conceived to be rational actors “with well-defined, complete and transitive subjective preferences over the relevant alternatives” which they are capable of identifying and pursuing. Finally, international law is a directive rather than responsive institution, operating as a socially transformative instrument of political will rather than as a way of

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facilitating the operation of autonomous social interactions.

Koh’s use of the term “obedience”, by contrast, seems to rests upon a conception of international law as part of a dynamic, process-based enterprise which responds to, more so than instrumentally directs, social behaviour where that behaviour is driven both by actors’ egoistic, rational pursuit of self-interest and by their ethical endorsement of social norms, values and institutions which not only direct but which constitute what they perceive to be in their interests. States, as one among a number of transnational actors motivated by law, feel as well as think, and think not abstractly, but in terms which they inherit through contingent traditions, experiences, expectations and assumptions. What is more, “states” either are not objectively existing entities (but mere composites of groups of individuals), or they are corporate entities whose behaviour is influenced as much by external stimuli as by their internal constitutions, histories, institutions and normative practices.

The principal hypothesis of transnational legal process is that states, among other transnational legal actors, can be persuaded to internalize international legal norms through three phases of social interaction. First, states and non-state actors interact, usually by identifying collective problems, desires, interests or goals. Second, they share in the enunciation, interpretation and/or application of a norm in order to address the

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8 Koh, however, is interested in what he calls “global” rules and norms, of which international norms are a sub-set; see Harold Hongju Koh, “Why Do Nations Obey International Law?” 106 Yale Law Journal (1997): 2645-2646. It is considerably vague what this global law is, whether it is a unified system, and if so, whether this is true by virtue of form, substance or process, as well as to what extent these various legal orders (or sub-systems) operate autonomously from each other. The boundaries separating (models of) international law, transnational law and global law are, I think, very confused (which has been problematic in other fields, such as legal pluralism) and are in need of serious, theoretical refinement.

9 It is important to note that, while Koh questions why nations obey international law, he expands his focus beyond states, much like he looks beyond international law, and studies transnational legal actors. He does not, though, specify whether different organizations (e.g., state, economic, civil society) interact with global norms in distinctive ways.

10 Koh, (1996): 203-205; a clearer articulation of each stage may be found at 264-6.
problem. Finally, states *internalize* the norm since, as co-authors, they have already ethically endorsed it and, in a sense, can call it their own. Other theorists add nuance to this model and examine additional or alternative stages within the overall process of norm-internalization. States here are similarly argued to move from grudging and self-interested *acceptance* of a norm they may have authored for self-interested reasons, to *internalization*, meaning they endorse it as legitimate, and, finally, to *institutionalization*, meaning that the norm is entrenched into established patterns of behaviour which become taken for granted and in which the norm is a principle the derogation from which tends not to arise as a possibility, much less as an actual practice; these models appear to expand the time-periods studied beyond internalization and utilize more explicitly “law and society” and less explicitly IR approaches than does Koh’s.

In any event, persuasion and rhetoric are central variables throughout all of these stages. Agents of international law target states’ identities and interests as members of relevant communities, including international society and communities of rights-respecting, law-abiding nations. This element of transnational legal process is deeply connected to the classical philosophy of Aristotle as well as to its modern revival characterized by the works of Chaïm Perelman. While truth and fact are important, the

11 Interestingly, the focus at this stage usually is on states, seemingly on the presumption that domestic social life is responsive to state law, and so the ultimate effectiveness of global norms as means of regulating social life depends upon its being encoded in state law. It would seem that transnational legal process serves as a means of facilitating states’ internalization of a norm, with the assumption being made that state law turned inwards will lead to changes in social life. This may well be a relapse, back into rationalist, state-centric thinking which constructivists have tried to escape. It also presents a picture of domestic, state law which has been roundly criticized by, for example, legal pluralists, critical legal theorists and proponents of “reflexive” law.


13 Chaïm Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame: University of Notre Dame, 1969). For one of the best accounts of this aspect of constructivist theory, including its theoretical origins and potential applications, see Friedrich Kratochwil, *Rules, Norms and*
objective is to direct one’s claims to the perceived biases, values and identities of an audience, framing the debate in terms they are familiar with and convincing them that one’s proposals are most in keeping with these terms.

Some constructivists argue that law is a distinctive mode of rational argumentation where persuasion is constrained by procedural rules which regulate the timing, form and content of persuasion.\textsuperscript{14} Timing is restricted through the introduction of stages of argument, from statements of claim, to pre-trial discovery and so on. Form is secured through precedent and analogy, whereby a novel fact scenario is analogized to a similar situation already dealt with and where the rules used in that latter case are argued to be applicable to the former, similar case. Content is restricted to the available rules, principles and doctrines of a given field. Contract, property and human rights claims, for instance, all require the application of norms from within each field.

This model is typically applied to two areas. First, it is applied to judges, with transnational legal process theorists arguing that judges’ use of international law is a valuable means of expanding the range of resources and members of the audience than would be available from within a purely domestic setting.\textsuperscript{15} International law improves judgement by exposing judges to hidden biases and assumptions and providing lawyers with a greater variety of resources to express their client’s interests. Second, it is applied to advocacy networks, which utilize international human rights to persuade states to give up their commitments.\textsuperscript{16} Examples include the activities of Amnesty International and

\textsuperscript{14} Brunnee & Toope, (2000): 56.
\textsuperscript{15} For an excellent example of this kind of thinking, see Knop, Karen, "Here and There: International Law in Domestic Courts," 32 New York University Journal of International Law and Politics (2000): 50.
\textsuperscript{16} For example, see Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Ithaca N.Y.: Cornell University Press, 1998)
Human Rights Watch in publicizing the complicity of Canadian oil companies in human rights abuses in Sudan. Here, international law served as a standard against which corporate and Canadian governmental (in)action could be assessed, and as a principled framework within which variously situated individuals could pursue common goals and values.

There is much empirical support for both of these sets of claims. Judges have been using international law far more frequently in Canadian, American and European jurisdictions. Advocacy networks seem to have succeeded in a wide variety of areas, including the activities of transnational corporations, national security and the rights of citizens and non-citizens, the environment and aboriginal rights, to name a few. However, a number of problems remain. Theoretically, the problem of causation looms large. Can it rightly be said that success are attributable to law, rather than morality, political will and social activism? How might one demonstrate that legal process has genuinely reconstituted state identities rather than served as an opportunity to consolidate control? A number of critics argue that states make a show of internalizing international human rights to shore up legitimacy in times of political crisis, and that formal changes to legal structures do not typically lead to marked improvements in material life.18

Related to these conceptual problems are a host of normative problems. Noticeably absent from constructivist accounts of legal process are ethical accounts of whether certain kinds of identities and interests are normatively more desirable than others. All that matters is that discourse be structured around rational argumentation, with

substantive issues being relevant to concrete reality but not to the operation of law. 

Though clearly post-modern in may ways, constructivism takes a curiously large portion of its conceptual resources from enlightenment thought, along with the reification of reason, truth and scientism. International law matters because it embodies rational discourse, while scholarship matters, in positivist fashion, because it is instrumentally useful. The hypothesis that identities and interests change goes a long way to infusing this decidedly objectivist narrative with a post-modern flair, but tellingly, this is the aspect of the theory which coheres least well with the constructivist’s scientific proclivities. It appears as a feature necessary to deflect post-modern critiques; yet, concerns about ideology, hegemony, false hope in truth and utopian visions of law remain.

Consider, for instance, what might be termed the “multicultural paradox”. This paradox refers to the logical impossibility of accommodating both individual rights and collective rights. Existing Canadian laws governing matrimonial property on Aboriginal reserves, for instance, ensure that property revert to the band upon marriage breakdown. The principle is that property in traditional Aboriginal cultures is collectively “owned”. In modern contexts, where “traditional” culture has changed and where existing laws are as much the product of Canadian government’s racist and sexist policies as the product of Aboriginal self-government, there is a clear case to be made that the interests of individual Aboriginal women should be protected through property rights.

Paradoxically, international law protects both of these sets of claims. Aboriginal group rights are protected through the Declaration of the Rights of Indigenous People, the International Covenant of Economic, Cultural and Social rights and others, and women’s rights through the Convention on the Elimination of Discrimination Against Women, the
International Covenant of Civil and Political Rights and others. Where is the truth here? Where is kernel of objectivity upon which a reasoned judgement may be made and what to do if pronouncements of this judgement are or are perceived to be biased, unprincipled and illegitimate? These sorts of examples are hardly exotic. They routinely occur in any fragmented, differentiated and individualized society constituted by a plurality of normative orders, each of which claim some measure of authority over members of a community and non-interference from those who stand outside the community. Whether one is talking about Sharia law, high school curricula geared towards racialized minorities, businesses’ employment practices, the rights and responsibilities of immigrants, national security and human rights, corporate social responsibility or whatever else comes to mind, the “solution” to conflicts, if there exists one, cannot, by the pure light of logic, reason or truth, satisfy all who have an investment in the dispute. To assume moral claims can be objectively true is one thing. But to think that this truth shines brightly, that all will fall under its light if we structure arguments in certain ways and that the rationality of these arguments, coupled with the intrinsic value of certain kinds of rights and interests, justifies coercion in the form of legal remedies is the cardinal sin of enlightenment thought which those who have taken the linguistic turn and who insist on process over substance and form must ultimately reject.

Further, while there may well be interests which we all share, and while there may well be clear cases of right and wrong, these are not the sorts of situations where reasoned discourse is needed. Taking more “fundamental” and less controversial or politically-charged rights as examples, it remains the case that one who does not see that, say, starving and torturing people is wrong is unlikely to be the kind of person who will
change his ways through persuasion rather than through the threat or use of sanctions. Persuasion, the key feature of constructivist visions of law, works only when already accepted principles are extended, by analogy, to new situations or where perpetrators act inadvertently; international law here serves as a resource of precedent and information. But in most other cases, where issues are not cut-and-dry and the right thing to do is not so intuitively clear or existentially present, truth never makes an appearance. There may well be an objective normative order which can tell us what is right and wrong, good and bad in all cases. But our inability to demonstrate this reality is what leads to protracted and potentially violent disagreements. To reflect upon and try and improve rational discourse is perhaps a necessary task in a post-modern era, where the best we have is our language and all the limitations this brings. However, to marry this with visions of law as a front of justice is, I think, to take one step forward and two steps backwards. We cannot hold, both, that law is principally procedural and that certain identities and interests are normatively more desirable within that framework. Applying constructivism to international human rights and holding that international human rights are presumptively desirable ethically, is both logically and normatively suspect and fails to internalize the lesson of post-modernism which is so essential within this particular, theoretical perspective.

All of this is not to say that constructivists have gotten it wrong. There is tremendous virtue in this project. International law does, I think, exert a distinctive and at times powerful influence. What I am arguing, however, is that this may never be, and certainly is not consistently, in the service of the purported beneficiaries of international human rights. To say that international law matters in this strong, causal sense, is
necessarily to take a detached, scientific view, which is one of strict observation. The attempt to use international law to actualize substantive goals may well be advisable on the basis of our knowledge of how, when and why international law matters in this sense; international legal scholarship matters for this reason and in this sense as well. But then international law becomes, from the activists’ standpoint, an instrument, just as the realist argues; it is no longer observation but involvement. The activist, not the state, becomes the political actor who tries to expand her power. It requires incredible faith, or arrogance, to believe that this political act is righteous and just, simply because it is advertised as being in pursuit of “international human rights”.