

Targeting Refugees Rather Than Terrorists: the Processual Determinants of Compliance with the Refugee Convention in Heightened Security Climates

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Abstract

In recent years, particularly in the wake of 11 September 2001, many states have perceived an increased terrorist threat, which has led them to adopt new and unprecedented security postures. This has in many cases led to a surge in anti-terrorism legislation. Due to the restrictive and preventive purpose of these laws, immigration and asylum policy is frequently implicated, and refugee protection is harmed. The UK and the US are two countries which have experienced terrorism crises which in turn provoked the passage of such legislation. In both cases the effect of the laws was in many cases to restrict and block access to bona fide refugees. This situation brought the US and the UK out of compliance with international refugee law, namely, the 1951 United Nations Convention relating to the Status of Refugees. Before long, however, the UK courts intervened to reconcile government action in this area with its international refugee obligations. The US courts did not. This thesis compares these cases in order to discover the cause of the divergent compliance outcomes. Drawing insights from the literature and applying them to the cases, it is found that the degree of embeddedness in relevant transnational legal regimes as marked by membership and iterative processes of interaction is highly determinative of whether a state will maintain compliance with the CRSR in spite of the demands of a changing security agenda.

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INTRODUCTION

The rise of international terrorism in recent years, particularly following the attacks in New York, Pennsylvania and Washington on 11 September 2001, has led many states to develop and implement far-reaching counterterrorism strategies. Such strategies regularly implicate border security and the regulation of foreign nationals within, or seeking entry to, a state. A common consequence of these measures is to restrict or frustrate access to asylum for genuine refugees in the effort to keep out those individuals who pose real security threats. To the extent that states exclude individuals otherwise eligible for asylum on grounds beyond those set out in the 1951 United Nations Convention relating to the Status of Refugees (hereafter CRSR or 1951 Convention), they stand in breach of international refugee law.

Following a terrorist attack, states are under an expectation, if not obligation, to pivot to a security footing and take action to address the threat and prevent future attacks. It is also expected that those steps, whether acts of the legislature or the executive, will result in restrictive border measures, among others, that may adversely affect asylum seekers. This thesis takes this as a starting point and asks why some states, such as the United Kingdom, despite the demands of their security agendas, find a way to reconcile their counterterrorism measures with their international legal obligations under the CRSR, while other states, such as the United States, ever impelled by their security agendas, remain persistently noncompliant.

Considering that by 2009 at least 18,000 asylum seekers had been directly affected by the overreaching American anti-terrorism laws,¹ this is a timely and important topic to scholars and practitioners alike. It sheds light generally on the drivers of continuity and change in global refugee regimes, and particularly on the unexpected role terrorism plays in shaping refugee policy. Understanding why the UK sustains an acceptable level of compliance in the face of changing security conditions, while the US does not, is of both practical and theoretical value. Practical in that knowledge of the sources of compliance in a given instance enables policy actors to take steps toward a more generalized pro-compliance posture, in this way limiting the potential for negative refugee outcomes; theoretical in that, to date, relatively little attention has been given to the forces militating in favor of sustained compliance despite the heavy non-compliance pulls of a security agenda.

An examination of the compliance literature is instructive in this case, but falls short of producing a satisfactory explanation. One part of the literature looks at enforcement mechanisms designed to encourage compliance, such as inducements which work by conditioning a benefit on the performance of some corresponding duty, or by threatening a harm in the event of breach. Another part of the literature looks at broader drivers of compliance located in the relative legitimacy of an agreement, or in a state's desire to maintain its reputation as a good partner, or even in the general force of the international normative system itself. The best insights from the compliance literature for explaining the divergence between the UK and the US in this instance, however, stem from explorations of the roles of institutional and regime environments. Harold Koh's theory of transnational legal process (TLP) takes this focus, broadly setting out that states which are more enmeshed in transnational legal processes, institutions and regimes are more likely to comply than states

¹Anwen Hughes, 2009. *Denial And Delay: The Impact Of The Immigration Law'S "Terrorism Bars" On Asylum Seekers And Refugees In The United States*. (New York: Human Rights First, 2009): 1

which are not. Drawing heavily on elements of TLP, I construct a pre-theoretical framework through which the processual determinants of the divergent compliance outcomes in these two cases may be fleshed out.

I begin with a survey of the compliance literature, touching upon interdisciplinary developments in international relations and international law scholarship, concluding with an elaboration of TLP theory. This is to set the stage for the pre-theoretical framework which follows. As the first case study, I then turn to an examination of American governmental action, whether legislative or executive, which is taken in response to terrorist attacks, and which operates by intent or effect to exclude bona fide refugees from asylum on grounds beyond those set out in the CRSR. In the case of the US, this includes primarily anti-terrorism legislation, but also the adoption of tenuous legal positions unduly prejudicial to asylum seekers. Cumulatively, the interaction of these measures has seriously undermined the asylum protections and guarantees commanded by international law. The courts have been largely permissive of these developments, evincing a general reluctance to intervene. The second case study explores British governmental action taken in response to terrorist attacks, which has jeopardized the performance of its refugee obligations. In contrast with the American case, however, the UK courts have interposed to shield refugees from the zealous, blunt and collaterally damaging tools of reactionary security policy. The final section applies the framework and identifies several key, *but not exclusive*, sources of compliance.

This thesis takes Mill's method of difference as its approach, which, in brief, starts with similar situations that yield divergent outcomes. The approach investigates the situations seeking to identify the variable or variables which account for the divergent outcomes. The justification for the choice of these comparative case studies flows from the empirical puzzle

that motivates this research project. There is a divergent outcome *in spite of* the high degree of comparability between the cases. The US and the UK are both Western, democratic, rule-of-law and common law countries, who have suffered terrorist attacks originating from a common ideology. The two countries have come to perceive the threat similarly and have both developed their counterterrorism strategies around a logic of prevention. US and UK courts are generally empowered to review government action, including legislation and executive initiatives. The courts in both countries are tasked with serving a special countermajoritarian function, as judicial protection of fundamental rights challenges electoral majorities and tests governmental outcomes against constitutional standards. From this it follows that courts are perhaps the best situated to rein in overweening government action, and strike an appropriate balance between, say, the provision of security and preserving an acceptable or adequate level of compliance with the CRSR.² But, as noted, the American and British courts part company on this issue. This thesis asks why.

² For a thorough treatment of the role of domestic courts in influencing compliance with IL see Anne-Marie Slaughter (1995) "International Law in a World of Liberal States," *European Journal of International Law*, Vol. 6, No. 4, pp. 503-38, and see Beth Simmons (2009) *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press).

CHAPTER 1

1.1 TOWARDS AN OPERATIONALIZATION OF COMPLIANCE

The CRSR charges its states parties with providing refuge to any person fleeing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.³ However, it permits the exclusion from protection of any person guilty of certain serious offences enumerated in Art. 1(F).⁴ When states ratify the CRSR, they agree to be bound by its provisions and to fulfill the obligations it sets out. That said, there is a high degree of heterogeneity within the international refugee regime in terms of procedures, definitions and outcomes. Given the absence of a binding source of higher authority, each state party interprets for itself the provisions of the Convention. While most take cues from the UNHCR, international human rights law and other relevant legal instruments, refugee cases are adjudicated primarily by reference to the respective municipal legal system under which they are heard. All municipal legal systems have qualitatively different relationships with international law, and thus are capable of producing highly divergent outcomes.

It follows that inherent in the international refugee regime is a principle conceptually akin to the ‘margin of appreciation’, which acknowledges and accepts a degree of variation from state to state in the implementation, interpretation, and application of the Convention. This is

³United Nations High Commissioner for Refugees (UNHCR) “Convention and Protocol relating to the Status of Refugees” (CRSR) July 28 1951 <http://www.unhcr.org/3b66c2aa10.html> (accessed 2015/05/17); full Convention definition of refugee is “any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it...”

⁴ Ibid., CRSR, Art. 1(F) states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations

a pragmatic necessity given the great disparities of condition across the many states parties. And this leads to the notion of a tolerable or acceptable range of compliance, where optimally a state exceeds the requirements of the Convention, and pessimally it does not systematically violate them. In this sense, compliance is not so much binary as it is spectral. However, to engage meaningfully with the concept requires some amount of purposive reduction, which is attempted below.

The interest here is to identify instances where a state disapplies the protections of the Convention to individuals entitled to them, i.e. refugees, as part of its effort to keep out terrorist elements. “Terrorists” and “terrorism” are terms not used in the CRSR, however, and individuals may not be permissibly barred by virtue of that label alone. To be excludable from the Convention protections, a person must fall within one of the Convention’s enumerated grounds for exclusion. Individuals otherwise satisfying the refugee definition are liable to exclusion under Art. 1(F) for having committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations.⁵ Furthermore, Art. 33(2) permits the withdrawal of the Convention protections from individuals which are believed to represent a danger to the security of the country of refuge, or which have been convicted of a particularly serious crime and pose a danger to the community of that country.⁶ States, therefore, may only exclude asylum seekers for conduct covered under the CRSR exclusion grounds; and, given the exceptional nature of the exclusion grounds and the gravity of the consequences of exclusion, they must be applied restrictively and with considerable deliberation.

⁵ Ibid.,

⁶ Ibid.,

Accordingly, for the purposes of this thesis, any state action resulting in the exclusion of a refugee for reasons beyond those set out in the CRSR exclusion grounds constitutes noncompliance.⁷

The counterterrorism campaigns launched or reinvigorated by the US and the UK in response to the 1993 World Trade Center Bombings, the 9/11 attacks, the 2005 London Bombings, among others, have in many instances led to noncompliance with the CRSR under this definition. This has most often taken place by the enactment of new legislation: broadening statutory definitions of crimes such as terrorism; expanding the range of acts that may constitute complicity; and adopting rules which clarify particular provisions of the Convention for purposes of exclusion.

1.2 IDENTIFYING THEORETICAL TOOLS

Many reviews have been written in hopes of doing justice to the vast body of compliance literature. However, it serves little purpose here to reproduce a detailed accounting of the numerous sources of compliance and the elaborate theories which describe them. What is necessary rather is to provide a broad overview which converges on select theories and principles particularly applicable to the case studies under investigation. I separate the literature review into two sections. In the first I identify the compliance puzzle followed by some of the observable interrelational mechanics underlying (non)compliance. The second section then touches upon developments in IR/IL interdisciplinarity and surveys some of the literature's more conspicuous theories of compliance. Selected insights, concepts, and

⁷ This is functionally similar to Maryellen Fullerton's operationalization of compliance in "Stealth Emulation: The United States And European Protection Norms". In *The Global Reach Of European Refugee Law*, 1st ed., (New York: Cambridge University Press. 2013):5

principles gathered from the review are synthesized into a theoretical toolkit used to analyze and explain the case studies.

1.2.1 INTERRELATIONAL MECHANISMS OF COMPLIANCE

To be sure, the compliance literature is vast and diverse, and still in most cases the point of departure is some or other variation of the question: is international law (IL) really law at all? IR scholars of the realist school argue that IL is merely a species of “cooperation” between states that has over time come to adopt the misnomer of law.⁸ Others contend that although the international normative system is admittedly less elaborate than municipal legal orders, it is in form and content no less “legal” -- it is merely different.⁹ Henkin famously opined that “it is probably the case that almost all nations observe almost all principles of IL and almost all of their obligations almost all of the time.”¹⁰ Nevertheless, to many it remains a puzzle that states comply at all. If there is no higher authority over states exercising an enforcement function, then what motivates compliance? Some suggest that compliance is probable when it serves a state’s immediate interests, and that agreements between states are possible only when interests overlap. If this is the case, however, one wonders why an agreement is found to be necessary at all.

Analysts have identified numerous sources and mechanisms of compliance, all of which are broadly related to a state’s pursuit of its interests, involving in most cases the imposition of costs, the bestowal of benefits, or some combination both.

⁸Hans Morgenthau, *Politics Among Nations: The Struggle For Power And Peace*. (New York: McGraw-Hill, 1948)

⁹ Prosper Weil, “Towards Relative Normativity In International Law?” *The American Journal Of International Law* 77 no3 (1983):413

¹⁰ Jana Von Stein, “The Engines Of Compliance”. In *Interdisciplinary Perspectives On International Law And International Relations.*, (New York: Cambridge University Press, 2013): 477

Inducements are one of the primary tools at a state's disposal for acting to ensure that another state is compliant with particular obligations. If ensuring compliance is deemed important enough, then bearing the costs associated with an inducement may be seen as acceptable. Broadly, inducements can be said to come in two forms: positive and negative. Examples of positive inducements include offering of aid packages, assurances, concessions and so forth, while negative inducements include aid cuts, sanctions and, in some cases, military intervention.

Of course, inducements follow a self-help logic. Wealthy and powerful states may dole them out at will, while weaker states are more limited in their ability to influence compliance. Susceptibility is also a crucial component; powerful states are less susceptible to inducements, while weaker ones may be easily swayed by them. It is at base an instrument of the strong and an irresistible force for the weak.

A further source of compliance is found in the elemental principle of all interrelational behavior: reciprocity. Broadly, aspects of reciprocity could fall under the rubric of inducements, but in the context of mutually ensured compliance it remains a distinct source. This is reciprocal non-compliance, wherein each party would face a harm traceable to the noncompliance of the other party. This relational structure can be a good guarantor of continued compliance. By analogy, consider the cold war specter of "mutually assured destruction." Naturally, however, the content of the agreement determines whether this kind of reciprocity will play a role.

Hafner and Burton point out that reciprocity does not operate in human rights agreements.¹¹

A similar logic prevails with regard to many international agreements, such as those that make provision for emission caps; the prospect of reciprocal noncompliance in such a case poses no direct and immediate harm to the parties involved. In contrast, agreements which regulate, say, trade and capital flows may be more amenable to reciprocity-based enforcement.

Issue linkage is another important technique states employ to prevent defection. It typically functions by conditioning continued receipt of a benefit on compliance with either a related or entirely unrelated obligation. Linkage, for instance, has become a common means by which Western countries oblige more repressive regimes to respect human rights norms. These agreements very often include favorable trade provisions which, in the event of noncompliance, are withdrawn. Such built-in compliance incentives in effect render an agreement self-enforcing.

The detection of violations is another important issue. When a clear-cut government decision or action marks the violation, detection is simple. When individuals and other entities are in the fray, detection and attribution become more problematic, and in turn may impact resort to reciprocity-based or other forms of enforcement or retaliation. For instance, determining whether the improper actions of an asylum adjudicator amount to a one-off case, or whether it is part of a pattern of impropriety can be quite difficult. Most violations of international refugee law do not, however, result in tangible sanctions. Anticipated reputational costs may affect behavior but, as a generality, state fulfillment of CRSR obligations is less susceptible to the kinds of interrelational compliance mechanisms discussed here.

¹¹Ibid., 480

Ultimately, whether and to what extent these various forces and mechanisms are in operation depends on the substance, purpose and context of an agreement, and on the identities of the parties consenting to it.

1.2.2 THEORIES OF COMPLIANCE

“At times the two disciplines interact dialectically; at other times they speak past each other. Increasingly, IR and IL scholars are working collaboratively.” -- Anne-Marie Slaughter

Legal scholars Anne Marie Slaughter, Jeffrey Dunoff and Mark Pollack, among others, have written extensively, with hopeful expectations, and with great insight, on the disciplinary cross-pollination of legal studies and international relations.¹² The two fields had for decades remained set apart, and seemed oppositional in many respects, in terms of theory, methodology and research agendas. While legal scholars often maintained as grounding assumptions that international law (IL) was indeed *law*, and that it was in its own right a force in the international system, driving change, governing developments, and in turn gradually reshaping the paradigmatic structure, there remained serious skepticism among many international relations theorists as to its significance. Often taken to be a misnomer, many in the realist school see at the core of IL little more than the incidental alignment of state preferences that give rise to state cooperation. And, of course, cooperation among polities is scarcely a novel phenomenon. Can codification and a legal veneer really change the underlying dynamics of state cooperation? Can they in some way override or even dampen the basic prerogatives of sovereignty? These kinds of considerations have long formed the

¹² see in particular Raustiala and Slaughter, “International Law In A World Of Liberal States”. *European Journal Of International Law* 6 no1 (1995): 503-538

basis of the realist understanding of IL: as an incidental surface feature, rather than a determinant structure; epiphenomenal rather than constitutive. Such a position, though, seems imprudently dismissive of the manifest salience of the international organizations and legal regimes which regulate the sweeping ambit of global interchange. Are such intricate and unprecedented webs of interdependence, and the vast corpus of IL underlying them, reducible to a mere question of state cooperation? If international law is of little consequence, why do states invest so much energy and time in its development and implementation? Without question, there is an expectation that such expenditures will influence other actors on the world stage, and, indeed, empirical evidence increasingly bears this out.¹³

In response to these questions, the liberal school of IR, operating as a foil for realist claims, precipitated a series of institutional and, later, constructivist theories, which ultimately dealt a blow to the “intellectual hegemony of realism.” Unfortunately, the realist position has at times also been mischaracterized by its opponents, which has had a significant and unwarranted discrediting effect. Realist theory has certainly downplayed the role of IL as a determinant but *not* as an instrument. Steinberg argues that Waltz’s structural realism, as mapped onto international regimes by Krasner, states merely that IL may not run afoul of the basic structures of the international system.¹⁴ But it scarcely suggests that IL has no effect on state behavior or international developments. It nevertheless came to be widely represented this way. The original realist line rather regarded IL as an expression of the convergent

¹³ Cited from Guzman 2001: “See, e.g., Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 Yale J. Int’l L. 323, 327 (2000) (presenting an empirical study of state compliance with IMF obligations and concluding that “international law has a significant impact on governments’ behavior.”); Stephen M. Schwelb, *Commentary, in Compliance with Judgments of International Courts* 39, 39 (M.K. Bulterman & M. Kuijer eds., 1996) (arguing that states tend to comply with the decisions of international tribunals.); Ronald B. Mitchell, *Compliance with International Treaties: Lessons from Intentional Oil Pollution*, 37 Environment 10 (1995).”

¹⁴ Richard Steinberg, “Wanted - Dead Or Alive: Realism And International Law”. In *Interdisciplinary Perspectives On International Law And International Relations.*, (New York: Cambridge University Press, 2013)

interests of powerful states in some cases, and as rules that powerful states could foist on weaker states in others.¹⁵ Yet, in all cases, states through the lens of power were seen as the locus of importance. This power-based conception of the politics of state cooperation (or imposition) is discordant with traditional notions of law, whence one of the key rifts on the subject between realists and liberals.

Generally, however, it remains that realist theory gives short shrift to the role of IL. Instrumental though it may be, it has undeniable constitutive properties, and it is precisely these properties which present a puzzle (at least a variant of the same puzzle) to many IR and legal scholars. How is it that IL reshapes structure? In an anarchic, self-help-based, state-centric system, rooted in the principle of sovereignty, that states comply uncoerced with international rules and obligations when it is inconvenient to do so, or when seemingly it runs counter to immediate interests, is revealing of a cyclic causality between states and the international legal plane. To make sense of this picture, one needs to begin to rethink the nature of the purportedly “anarchic” system, and shift attention to the role of cross-border cleavages and linkages. Once the dense and sprawling web of global interrelation comes into view, old axioms about anarchy and sovereignty seem to fade in relevance. Or, to borrow from Alexander Wendt, perhaps anarchy is, in the end, truly what states make of it. One needs to look within the black box of the state, and one needs to consider the interactive and mutually constitutive roles of sub-state, trans-state, non-state actors, institutions, and processes and the ideational and perceptual factors which sustain them. These considerations begin to emancipate us from the analytical blinders of realism, and enable us to recognize international law *qua* law. The processes of law and of legalization have become centerpieces of globalization. The rapid proliferation of international law in past decades has pulled a

¹⁵ Ibid.,

litany of new domains into transnational regulatory schemes, and participation in these schemes alters incentive structures, socializes actors, and changes behavior. In the long run, these iterative processes of interaction yield common understandings which trickle down into the domestic spheres. All of this has important implications for the compliance question.

The small sampling of the traditional middling approaches and theories of IR/IL scholarship below can be located within the broadly overlapping borders of constructivism, liberal institutionalism, and their many constituent theories which foreground the kinds of considerations discussed here.

1.2.2.1 CHAYES AND CHAYES - MANAGERIAL MODEL

Chayes and Chayes very cautiously set out that states have a default inclination to comply with their international obligations for three basic reasons.¹⁶ The first is that immediate resort to compliance eliminates the cost of conducting a cost-benefit assessment of compliance in any given instance. They find support for this efficiency argument in both economic analysis and organization theory. That both approaches independently reach the same conclusion is seen as lending the claim greater validity. The second is that international obligations are consent-based. The formulation and conclusion of treaties are complex and designed to accommodate the varied interests and foreseeable shifts in interests of the parties agreeing to be bound. It follows that in the great majority of cases, compliance aligns with interests, and is thus the rational choice. Finally, the third reason rests on the force of norms more generally. The scales of state behavior tip in favor of compliance because of the existence of a presumption of compliance. As individuals generally understand that they are bound by

¹⁶ Abram Chayes and Antonia Handler Chayes. "On Compliance". *International Organization* (MIT Press) 47 no2 (1993): 178-187

law, so do states. The authors illustrate that normative systems represent a force in their own right. Even absent a supervening authority or other more coercive enforcement mechanisms, norms themselves can induce a relatively high degree of compliance. In the cases this thesis examines, this last insight is particularly relevant: states have a sense that they are bound and act on that belief. Even in instances where there is a clear desire to derogate, steps are often taken to justify, and where those justifications fail, the derogation is reversed. One of the key elements is being linked to fora *in which* justifications must be given, and to interlocutors *to whom* justifications must be given. These managerial aspects are critical, and will be picked up again below.

Ultimately, Chayes and Chayes offer only a piece of the puzzle in suggesting a general state propensity for compliance. They go some way in discrediting the realist position that instances of compliance merely reflect what a state would have done anyway, but they fall short of explaining instances of breach. While defaulting to compliance may well reduce transaction costs in most cases, Guzman suggests that these savings are not significant, and that a more suitable strategy would be to “invest in information gathering until the marginal cost of additional information is equal to the marginal benefit of that information in terms of its effect on the probability of making the correct choice and the cost of a mistake.”¹⁷

Guzman’s proposal misunderstands the nature of the original question, however, and attempts to map the complex behavior of the state - comprised of competing and disparate institutional logics and interests - into a purely rationalist formula. Rather, the model Chayes and Chayes propose takes as background assumptions that since international agreements are consensual, greater compliance is desirable—and this does not lead them to envisage states as rationally

¹⁷ Andrew T. Guzman “A Compliance-Based Theory Of International Law”. *California Law Review* 90 no6 (2002): 7

calculating and recalculating the costs and benefits of any given treaty-implicating decision. As against a logic of coercive enforcement which pervades the discourse of international agreements, the spirit of their work centers around management of compliance based on self-interest.

1.2.2.2 GUZMAN - A RATIONAL ACTOR MODEL

Guzman develops a quite elaborate game-theoretic explanatory model of compliance. It focuses primarily on the role of reputation building and maintenance. Unlike much of the related scholarship, which centers on the drivers of compliance, Guzman's work partially orients itself toward the other end of the compliance spectrum, seeking to predict instances of breach, as well. When compliance with an international rule in a given instance appears to be at odds with state interest, Guzman suggests that states will weigh the reputational cost of a breach against the gains such breach will yield. When the gains outweigh the costs, noncompliance can be expected. He qualifies this formula by emphasizing that its inputs and calculation can differ substantially from state to state and case to case. States conceive of their reputations in different ways. Some place a premium on their image, and sometimes only with respect to certain other actors. A state's position relative to others in the reputational matrix matters for this model. North Korea has different reputational concerns than, say, Switzerland, and thus the parameters/terms of their cost-benefit calculations will be dissimilar—and therein lies the problem. While the model correctly comingles rationalist and constructivist notions of reputation, it cannot possibly capture the breadth of meaningful nuance that distinguishes self-perceptions of reputation across states in certain type-areas where compliance is at issue. To operationalize and test it would involve a highly simplified coding of reputation that would skew, if not entirely undermine, its predictive power. While he goes a long way to advance theory on instances of breach and to articulate the important

role of reputation, for all of Guzman's dissatisfaction with the indeterminacy of other scholar's approaches, though, his own proves no more amenable to the rigors of empirical inquiry.

And yet it remains that reputational concerns go to the heart of the compliance question. Reputation and reputation maintenance feature prominently in all interrelational activity. They serve important signaling functions and work to reinforce expectations. Adherence to certain legal regimes may impute a cooperative reputational status to its participants. It may also impute an issue-specific reputation. Maintaining reputation—at the very least, not damaging it—vis-à-vis other actors is crucial, especially actors which are co-enmeshed in the same regime environments, legal-political cultures, and other systems. The notion of states and other actors as embedded in common transnational systems affecting reputations, and the decisions which flow from and in response to them, is a helpful tool to make sense of the divergent outcomes of the case studies examined in this thesis.

1.2.2.3 FRANCK - A LEGITIMACY MODEL

Thomas Franck advances a compliance theory premised on legitimacy. States have a sense of obligation to honor international rules and agreements when they have been established according to the right process -- the legitimate process.¹⁸ The four key elements of Franck's theory are determinacy, symbolic validation, coherence, and adherence to secondary norms.¹⁹ Each is an indicator of the "compliance pull" any given rule will have. He posits a correlation between a state's inclination to comply and the degree to which these key elements are

¹⁸ Thomas Franck "Legitimacy In The International System". *The American Journal Of International Law* 82 no4 (1988): 706

¹⁹Boldizar Nagy, "Treaties In Context I. An Interdisciplinary Contribution To The Course On The Law Of Treaties Why Are Treaties Binding? Why Are They Obeyed?". Presentation (PPT), (Vilnius, Lithuania, 2014) Slide 6

satisfied in respect of the rule in question. One limitation is that it fails to fully develop why legitimacy is the main impetus behind compliance and particularly why states become noncompliant with rules they had once been compliant with.²⁰ But importantly he interlinks the consideration of the nature of the rule, the audience the rule addresses itself to, and the process by which the rule came into being.

Individuals are willing to observe rules they do not like, he contends, and this is chiefly because they have been established via legitimized and authoritative pathways. In part, his argument suggests a similar dynamic operates at the international level. But, if as Joinder writes, international law is more akin to the “house rules of the club”²¹ than commands from the sovereign, what room does that leave for the role of legitimacy? This, though, would be to take us back to a more anarchic conception of IR which, as noted at length, has been found wanting. Acknowledging instead the entrenchment of an increasingly rule-based or normative logic in the international system, those rules which possess more legitimacy may well be expected to command better compliance. In this sense, to what extent rules are construed as more or less legitimate bears importantly on the case studies under examination here.

1.2.2.4 KOH - TRANSNATIONAL LEGAL PROCESS

Harold Koh narrows in on the role of transnational legal regimes and institutions in influencing compliance. Drawing on elements of regime theory, liberal institutionalism and principles of constructivism, he depicts a scene in which participation in international legal

²⁰ Guzman also makes this criticism

²¹ Christopher Joyner, review of *The Power of Legitimacy among Nations*, by Thomas M. Franck. (New York: Oxford University Press, 1990): 283
<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8749182&fileId=S0003055400087918>

fora and processes results in an increasingly fine-grained articulation of international norms and rules. These norms and rules then permeate the domestic realm and become subsumed into domestic law or practice. When common international norms and rules have been internalized by the states, they are said to have become “transnationalized.” Succinctly, the TLP formula is as follows: an *interaction* compels an *interpretation* which is then *internalized*. The routinization of this process coupled with its layered production of more clearly articulated norms establishes more well-defined expectations among regime partners. Cumulatively, this weighs in favor of compliance.

1.3 SYNTHESIS

While the theories and concepts examined above take different foci and illuminate different aspects of the compliance picture, rather than alternatives, each can be seen as complementary, if not co-dependent, in any effort to provide a more comprehensive explanation of a given empirical case. There is much common ground across the various theories discussed above and, after a fashion, each touches upon the special role of ‘process’ in its own terms. Chayes and Chayes write, “The fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.”²² Thomas Franck elaborates a legitimacy theory in which compliance flows from rules established by the right process; he writes elsewhere that “states perceive themselves to be participants in a structured process of continual interaction that is governed by secondary rules of process...”²³ Guzman asserts that IL “is most likely to affect outcomes when there are many repeated interactions.”²⁴ From this,

²² Harold Hongju Koh, Abram Chayes, Antonia Handler Chayes, and Thomas M. Franck.”Why Do Nations Obey International Law?”. *The Yale Law Journal* 106 no8 (1997): 2601

²³ Franck, 753

²⁴ Guzman, 3

process moves into focus as an important component of the compliance question.

Participation in process of any kind has socializing effects, and it is through a process of socialization that actors are inducted into a common normative system -- a culture. This is the starting point of Harold Koh's theory of Transnational Legal Process, which suggests compliance is associated with the degree to which states and institutions are enmeshed in transnational legal processes, institutions and regimes. The degree to which this is the case for both the US and the UK offers one of the strongest contrastive features across the two case studies and hints at its causal significance. Finally, drawing on the insights highlighted throughout the review and on the principles of TLP, we have developed a useful frame of analysis through which to make better sense of the divergent outcomes of the cases. This will reveal the processual determinants of compliance.

CHAPTER 2

2.1 US CASE STUDY

This chapter examines how the US fell foul of its obligations under the CRSR. It traces the process by which terrorist attacks stimulated a counterterrorism response which led the US into a state of noncompliance vis-à-vis international refugee law. It details the anti-terrorism provisions which operated to expand the CRSR exclusion grounds and impermissibly deny and revoke asylum protections to those entitled to them. Applying the theoretical tools identified in chapter one, it then examines and analyses the muted and restrained role of the courts.

It is useful first to contextualize the subject with a brief historical overview of American refugee and immigration-related legislation. The US, it should be remembered, is a country born of refugees; its earliest European inhabitants, often fleeing religious and other kinds of persecution, sought refuge in the New World. In time, the fledgling nation came to build its identity on, among others, the migrant experience and the promises of “manifest destiny” -- available to all and sundry willing to seize it. In this way, it is not without a sense of irony that the current state of American refugee protection (is so discordant with) is falling so short of its early ideals.

Immigration has been uniquely central to the history of the United States. It has been the source of its rich diversity which, on the one hand, has interacted to yield unparalleled progress, and yet, on the other, has laid the foundation for enduring tensions. Its long history of legislation in this area in many ways reflects this duality, as will be shown below.

2.1.1 HISTORICAL OVERVIEW OF US ASYLUM LEGISLATION

It was not until World War II and the fray of the postwar years that the contours of the modern understanding of refugees were etched, and the pressing need for an international refugee regime truly emerged.²⁵ In parallel with international developments, in which the US also of course played an important part, a range of domestic initiatives to address refugee and immigrant issues were launched. In 1948, the Displaced Persons Act was passed, authorizing the absorption of 400,000 refugees from Eastern Europe. President Truman who spearheaded the legislation was a progressive with a staunch humanitarian orientation. The passage of this act was in lock step with the US leadership role in developing and establishing the 1951 Refugee Convention, and in contributing to the postwar stabilization of Europe and, indeed, of the globe.

While it would be nearly two decades before the US would accede to the Convention by signing its 1967 protocol, it nevertheless held to the general spirit of the undertaking. Indeed, the Immigration Act of 1965 opened the doors of asylum to persons of all origins and nationalities, where previously only Europeans had access. However principled the motivations behind codifying expanded access, in practice though it served to further advantage individuals of European extraction over other regional and national groups. Provisions favoring family reunification operated at the expense of admitting applicants from other parts.²⁶ The Refugee Act of 1980 subsumed into domestic law the 1967 Protocol's definition of a refugee,²⁷ thereby taking a step toward attuning US language and policy to

²⁵ This is not to misstate the significance of earlier refugee flows, but the World Wars of the first part of the twentieth century, and all of the developments associated with them, ushered in refugee and IDP crises on a scale theretofore unknown. *see* Guardian article: History's Refugees (25 July 2013)

²⁶ Carleen Barkdull, et al. "The Changing Context Of Refugee Resettlement Policy And Programs In The United States" *Journal Of International Social Issues* 1 no1 (2012): 108

²⁷ Refugee Act of 1980, Pub. L. No. 96-212 94 Stat. 102 (1980): TITLE II, SEC. 201
<http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>

international standards, and in so doing reinforcing that international standard. The act went a long way in bringing uniformity and coherence to American refugee policy. It inaugurated a resettlement framework and also expanded the quality and quantity of asylum support services.²⁸ That framework functioned and remained largely unchanged for 16 years until, at the prompting of the 1993 World Trade Center bombings, the 1996 ‘Illegal Immigration Reform and Immigrant Responsibility Act’ (IIRIRA) was passed. Under IIRIRA, expedited removal procedures were instituted at ports of entry leading to a significant reduction in asylum applications, creating in this way a relief valve for the backlogged asylum system. The act also had the effect of substantially raising the likelihood of subjecting genuine refugees to illegal refoulements.²⁹ The events of 11 September 2001 were to mark another turning point in the evolution of American refugee protection, setting in motion powerful currents of change that would strikingly reshape immigration and refugee policy and practice. The lens through which these policy areas were regarded had at last shifted from one of humanitarianism and international obligation to one of national security and sovereign prerogatives.

2.1.2 ANTI-TERRORISM LEGISLATION

Detailed below is the array of legislation enacted in response to terrorist events (primarily in response to 9/11) which has directly or indirectly affected access to, and the quality of, the American asylum system. The consequences have been adverse in almost cases, and reflect on all parts of the establishment a continuing disregard for the collateral human effects of the anti-terrorism campaign unleashed in the months and years following 11 September 2001.

²⁸ Acf.hhs.gov, “The Refugee Act | Office Of Refugee Resettlement | Administration For Children And Families” August 29 2012 <http://www.acf.hhs.gov/programs/orr/resource/the-refugee-act>

²⁹ Jennifer Holmes, and Linda Camp Keith. “Does The Fear Of Terrorists Trump The Fear Of Persecution In Asylum Outcomes In The Post–September 11 Era?” *PS: Political Science & Politics* 43 no03 (2010): 432

While there is no doubt that the US government would be under an expectation, if not an imperative, to pivot to a security footing in the wake of such an attack and would implement a range of measures designed to prevent further attacks, it is not expected that such measures would substantially impair the performance of its duties under the 1951 Convention. Much of the anti-terrorism legislation in question has proven incompatible with US obligations under the Convention insofar as Convention protections are disapplied in otherwise deserving cases. In effect, these domestic laws have substantially broadened the range of grounds for exclusion and, to the extent that new grounds have been introduced, have brought the US out of compliance with the Convention. The principle pieces of legislation in question are, *inter alia*, the ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001’ (hereafter the PATRIOT Act), the ‘Intelligence Reform and Terrorism Prevention Act of 2004’ (hereafter the IRTPA), and the ‘REAL ID Act of 2005’. Key counter-terrorism provisions of these acts, several of which recast from earlier statutes, operate to restrict access to international protection for *bona fide* refugees and to impose more obstacles for those already granted refugee status. In addition to these legislative measures, the US government has in many instances adopted new and exceedingly unconventional positions on refugee-related issues by relying on novel reinterpretations of statutory language. The courts have been largely acquiescent to the government’s change of course through a combination of asserting non-justiciability, issuing narrowly scoped rulings and, under the US Supreme Court’s discretionary authority, simply denying grants of *certiorari*. A more thorough treatment of the role of the judiciary will be set out in a subsequent section.

While the following enactments each implicated the American asylum system in a multitude of significant and, also, less obvious ways, two key legislative provisions have played a

particularly important role and therefore warrant special attention. Those provisions relate to the operational definition of a terrorist organization, and to what has become known as the “material support bar”, which targets individuals who have purportedly provided material support to persons or groups engaged in terrorism. The crux of the matter which makes these provisions particularly problematic is their extreme overbreadth. What constitutes a terrorist organization and material support for the purposes of these provisions sweeps in a spectrum of activities and conduct so eclectic and vast as to utterly defeat both the meaningfulness of the categories and the purpose of articulating definitional limits at all. These expansive provisions are at the root of American noncompliance with the 1951 Convention.³⁰

2.1.2.1 THE AEDPA, PATRIOT ACT, AND REAL ID ACT

The PATRIOT Act is a federal anti-terrorism statute signed into law in the wake of 9/11. Its passage has had broad and far-reaching effects on numerous areas of American policy and conduct, not least border control and the regulation of alien nationals within the country, or seeking entry. It introduced a three-tier taxonomy of terrorist organizations.³¹ Designation of first-tier groups follows a process set forth in the 1996 Antiterrorism and Effective Death Penalty Act³² (AEDPA), which stipulates that the Secretary of State is to identify: (1) foreign groups; (2) engaging in terrorist activity (as defined by statute); which (3) pose threats to American national security.³³ These minimum criteria must be met to warrant the designation. All designated tier-one groups are added to an official published registry,

³⁰ It is important to remain mindful of the purpose and scope of the Convention exclusion clauses (detailed in chapter 1). The Convention does envisage individuals who have a well-founded fear of persecution and yet in respect of whom the protections of the Convention are not applied. Refer as necessary to footnote 4.

³¹ INA, s. 212(a)(3)(B)(vi)

³² Antiterrorism and effective death penalty act of 1996, Pub. L. 104-132 110 Stat 1214, April 24 1996
<http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/html/PLAW-104publ132.htm>

³³ Uscis.gov, “Terrorism-Related Inadmissibility Grounds (TRIG) | USCIS”. October 1 2014
<http://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissability-grounds-trig>.

whereupon they have no more than thirty days to challenge the action in federal court.³⁴ As these decisions are liable to review in the courts, the designations must be well substantiated and rely on available and objective facts. Such groups include, among others, al-Qaeda, Boko Haram, Hamas, and the Islamic State.³⁵ If unchallenged or in the event that the challenge fails, penalties include the freezing of assets and a criminal prohibition on providing them with material support. What constitutes material support is of particular relevance, and will be detailed in a subsequent section.

Tier-two specifically pertains to immigration policy and seeks to exclude terrorists from entering and staying in the US through otherwise legal channels. Upon a finding of fact that a group engages in terrorist activities as defined by statute, the Secretary of State in Consultation with the Attorney General submits the group's name to the terrorist exclusion list (TEL), that is, the second-tier category. All known members or associates of these groups are banned from entry to the United States; however, the penalties attached to the first-tier grouping do not automatically attach to the second-tier.³⁶ Generally, second-tier groups are regarded as posing less of threat than first-tier groups; their designation stems from a desire to keep out terrorist elements of any kind, even those which have no quarrel with, nor target, the US.

Finally, the third-tier category provided for in the PATRIOT Act is altogether novel, not arising in amended form from earlier statutes as do the first two tiers. It encompasses a broad range of individuals, groups and organizations, even stretching to its limits the very definition

³⁴ Maryellen Fullerton, "Terrorism, Torture, And Refugee Protection In The United States" *Refugee Survey Quarterly* 29 no4 (2010): 12

³⁵ U.S. Department of State, "Foreign Terrorist Organizations" <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

³⁶ Fullerton, 2010:14

of an “organization.” The statutory language reads, “a group of two or more individuals, whether organized or not, which engages in...” terrorist activity.³⁷ These groups remain undesignated until an immigration or refugee-related benefit is sought, triggering an evaluation of the applicant. The third-tier designation in this way amounts to an instrument the sole purpose of which is to contrive legal grounds for excluding all manner of individuals seeking either entry to the United States or support from the US government. This has operated to disproportionately and adversely affect refugees and asylum seekers, the majority of whom have no connection to terrorism and pose no reasonable threat to American national security.³⁸ The definition requires no criminal wrongdoing and has no regard to intent. Refugee lawyer Anwen Hughes describes the law’s construction of terrorist activity as “any unlawful use of a weapon against persons or property, for any purpose other than mere personal monetary gain”,³⁹ and has facetiously branded it the “two guys and a gun” category.⁴⁰ Illogically, this captures groups and individuals who acted in furtherance of US policy, in some cases in concert with US troops and personnel in places such as Iraq and Burma, among others. Barkdull *et al* characterize the tier-three classification as attaching to “any person taking up arms against any government under any circumstances.”⁴¹ Commentators have remarked that this would sweep in such disparate figures as George Washington, or the Jews of the Warsaw ghetto.⁴² In some cases, the designation can set in motion a prolonged procedural morass, and in others it can result in a prompt denial and expatriation. There is no official registry of tier-three groups or of the reasons for which

³⁷ Uscis.gov, “Terrorism-Related...”

³⁸ Hughes, 11

³⁹ Ibid, 3

⁴⁰ Human Rights First, *Overly Broad Immigration Provisions Redefine Thousands Of Legitimate Refugees, Asylum Seekers As "Terrorists"*. Human Rights First. November 11 2009

<http://www.humanrightsfirst.org/2009/11/11/overly-broad-immigration-provisions-redefine-thousands-of-legitimate-refugees-asylum-seekers-as-terrorists>

⁴¹ Barkdull et al, 109

⁴² Rcusa.org, “Refugee Council USA - Statement By Hebrew Immigrant Aid Society (HIAS)” September 19 2007 <http://www.rcusa.org/statement-by-hebrew-immigrant-aid-society-hias>

particular designees are found to qualify for it. Moreover, unlike the tier-one and -two categories, where highly placed officials make public and reasoned designations subject to judicial review, tier-three designations, made in most cases by low-level adjudicators, are for all intents and purposes irrebuttable.

Beyond the PATRIOT Act's controversial, tiered classification system is another overbroad provision which proscribes providing material support to terrorist organizations. Provision of material support constitutes terrorist activity in itself and sweeps those charged with it within the statutory definition of terrorist.⁴³ The material support bar finds its origins in the 1990 Immigration Act,⁴⁴ stipulating that knowing and deliberate provision of material support to those who have committed or plan to commit a terrorist attack is a ground for inadmissibility. Going further, in response to the World Trade Center bombings of 1993, the 1996 AEDPA criminalized material support and explicitly defined it as an exclusion ground for purposes of asylum.⁴⁵ This step constituted a clear-cut instance of a terrorist attack inducing an overreaching response on the part of the government injurious to its legal obligations under the 1951 Convention to the extent that its effect was to exclude genuine refugees on grounds beyond those set out in the Convention. To compound the problem, the 2001 passage of the PATRIOT Act with its expansive definitions of terrorism had the effect of extensively broadening the parameters of the material support bar. Importantly, the bar remains operative in cases where there was no intention -- perhaps indeed quite the opposite -- to provide materially support. A 2007 Washington Post article gives an account of a Liberian woman who was raped and made to watch the murder of her father by a rebel group. The violent invasion and occupation of her home and theft of food and other resources by rebels was

⁴³ INA, s. 212(a)(3)(B)(iv)(VI)

⁴⁴ Immigration Act of 1990, Pub. L. No 101-649 104 Stat 4978 (1990)
<http://www.uscis.gov/iframe/iLink/docView/PUBLAW/HTML/PUBLAW/0-0-0-2593.html>

⁴⁵ INA, s. 208(b)(2)(A)(v); 8 USC s. 1158(b)(2)(A)(v)

deemed to constitute material support, which resulted in her refugee resettlement process being placed on indefinite hold.⁴⁶⁴⁷

The 2005 passage of the REAL ID Act further aggravated the situation by expanding again the definition of a terrorist organization to include a group of any kind which has a “subgroup” involved in “terrorist activities.”⁴⁸ Moreover, not by its effects but by express intent, the act deemed the following categories of individuals automatically ineligible for asylum: those who endorse or espouse terrorist activity; have received training of a military nature from a terrorist group; qualify as a tier-three terrorist; or are the spouses or children of inadmissibles.⁴⁹ Furthermore, and perhaps most egregious, due to the interlocking nature of the many anti-terrorism provisions, those barred under the material support statute are deprived by extension of non-refoulement protection.⁵⁰

These provisions operate cumulatively to bar an expansive array of individuals who may otherwise satisfy the definitional requirements of a refugee. From the perspective of international refugee law, these individuals are being impermissibly excluded and in some cases subjected to refoulement. For those instances of refoulement where a refugee is at risk of facing torture, other areas of international law become implicated, namely, duties imposed on states under the Convention Against Torture (CAT).⁵¹ Individuals in these circumstances have found some relief by invoking the CAT ban on refoulement, which suggests that the US

⁴⁶ Darryl Fears “Conservatives Decry Terror Laws' Impact On Refugees” *The Washington Post*. January 8 2007 <http://www.washingtonpost.com/wpdyn/content/article/2007/01/07/AR2007010701144.html>

⁴⁷ Hughes, 30

⁴⁸ INA, s. 212(a)(3)(B)(vi)(III)

⁴⁹ INA, s. 212(a)(3)(B)(V-VII)

⁵⁰ INA, s. 241(b)(3)

⁵¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

government feels more constrained by this instrument than it does by the CRSR. However, despite protection from refoulement, their status remains tenuous, amounting to little more than a narrow grant of leave to stay.⁵²

Cognizant of the burgeoning number of unjust and illegal outcomes produced by these measures, and under pressure from various civil society and international groups, the government instituted an *ad hoc* waiver procedure designed to provide relief for individuals and groups wrongfully or collaterally targeted by these laws.⁵³ The waiver process, however, is inadequate. Beset with procedural complexity and delay, as well as a lack of transparency and reviewability, it is onerous to navigate and promises a low probability of success. Those waivers which *are* finally issued only affect a relatively narrow subgroup of the many refugees caught in the broad dragnet of the anti-terrorism laws.⁵⁴ The US has remained therefore largely noncompliant with the CRSR.

2.1.3 ROLE OF THE US COURTS

On balance, the interposition of the US courts has been tepid and restrained. While it is one of the key roles of the courts to scrutinize government action and to weigh it against legal standards -- thus making them an important bulwark against overreaching governmental action -- there has been substantial reluctance to serve this function. Where the courts have stepped in, they have been largely deferential to the government position, except when there have been efforts to sideline the role of the courts. They have been somewhat protective of

⁵² Fullerton, 2010: 28

⁵³ INA, s. 212(d)(3)(B)

⁵⁴ Hughes, 8

maintaining their prerogative to intervene. Below is a sampling of cases which are demonstrative of the general disposition of the US judiciary on this subject.

In 2010 the breadth of the invigorated material support bar was upheld in the Supreme Court case *Holder v. Humanitarian Law Project*.⁵⁵ It was established that provision of material support may encompass pure speech which advocates only non-violent, lawful activity.⁵⁶ In oral arguments Solicitor General Kagan (now Justice Kagan) conceded that under the government's interpretation it would be a crime to provide expert advice or services to any organization falling within the three-tiered terrorism classification scheme. This would go so far as to criminalize writing an *amicus* brief to the US Supreme Court on behalf of such an organization, or writing an op-ed for the benefit of such an organization.⁵⁷ The high Court affirmed that interpretation. The plaintiffs in the case specialized in going into conflict zones to dialogue with warring parties about how to reach non-violent conclusions to their conflict, how to achieve their political aims through non-violent means, and advise on human rights monitoring as well as how to present human rights claims to the UN or other international organizations.⁵⁸ Following this decision, the group heavily curtailed their work as serious criminal liability would thereafter attach. While the decision focused rather on the criminal liability that attaches to material support than its restrictive effects on access to asylum, it demonstrates the Court's permissiveness toward the sweeping breadth of the provision.

⁵⁵ *Holder v Humanitarian Law Project*. 2010, [2010] SCOTUS. 130 US Sup. Ct 2705

⁵⁶ Cole, David. 2012. 'The First Amendment's Borders: The Place Of Holder V. Humanitarian Law Project In First Amendment Doctrine'. *Georgetown Public Law And Legal Theory Research Paper* No. 12-047 (2012):147-177.

⁵⁷ *Ibid*

⁵⁸ *Holder*, 2010

In 2006 the Board of Immigration Appeals (BIA) handed down a judgment in the *Matter of S-K*-⁵⁹ which goes to the core of the confounding injustice worked by the expanded anti-terrorism provisions. The case concerned a Burmese refugee seeking asylum in the US. She had been a donating member of a US-supported political opposition group called the Chin National Front (CNF). This group's armed wing protected its members from the repressive actions of the military regime, which is widely considered illegitimate. Despite an acknowledgement of the claimant's well-founded fear, the tribunal found that her donations triggered the material support statute, since the CNF fell within the expansive definition of terrorist organization, and thus amounted to terrorist activity. She was barred from asylum and subjected to refoulement. The text of the decision itself recognizes the preposterousness of the outcome the antiterrorism laws require:

[The claimant] is ineligible to avail herself of asylum in the United States despite posing no threat to the security of this country. [...] [W]hen the [material support] bar is applied to cases such as this, it is difficult to conclude that this is what Congress intended.⁶⁰

A report published by Human Rights First⁶¹ details many similar cases resulting in the same outcome: excluded on account of paying ransoms, being victims of robbery, and providing services under duress.

US appellate courts have upheld the expansive application of the material support bar and other anti-terrorism provisions, rejecting the idea that there must be a minimum threshold of

⁵⁹ *Matter of S-K*-, Respondent, 23 I&N Dec. 936 (BIA 2006) U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals

⁶⁰ *Ibid.*, 946 (Osuna, J., concurring). Cited in Fullerton, 2010:18

⁶¹ Hughes

support to trigger the material support bar, and additionally, rejecting the idea that conduct may not be deemed material support if it does not further a terrorist goal or purpose.⁶²

Despite this, according to research conducted by legal scholar Maryellen Fullerton, the US Courts have been as yet unwilling to infer any exceptions to the CAT's ban on *refoulement*.⁶³ As mentioned, this fact has provided some degree of protection to those who meet the more narrow qualifying criteria.

Finally, to date, the Supreme Court, with its largely discretionary docket, has opted to deny *certiorari* for cases which challenge the anti-terrorism statutes based on the illegal asylum outcomes they generate. So, in summation, while the courts have generally allowed claimants to seek review, appellate-level decisions have sided with the government position to interpret and apply these statutes fully, broadly and without encumbrance of any kind.

2.1.4 CONCLUDING ANALYSIS

The US in its response to terrorism instituted measures which brought it out of compliance with the CRSR. The courts, whose task it often is to steady the hand of the elective branches, did not intervene to reconcile the new security program with US obligations under international refugee law. If we apply the theoretical tools and principles identified in chapter one, we can go some way in shedding light on the drivers of US noncompliance in this instance. While the US is perhaps the most conspicuous actor on the world stage, it is extremely wary of making binding international legal commitments. Paradoxically, it usually takes a leading role in the initiation and development of international law, but often fails to

⁶² Charangeet Singh-Kaur, *Petitioner v John Ashcroft Attorney General United States of America*, Respondent. 2004, [2004] United States Court of Appeals 385 F. 3d 293 (3rd Cir)

⁶³ Fullerton, 2010: 25

see it through to ratification. There is a deep-seated reluctance to forfeit sovereignty and limit future freedom of action in most areas, in particular as concerns the realm of national security. This sensibility goes back to the very inception of the country with George Washington's famed admonition: "The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop."⁶⁴ This set the broad tone of American foreign engagements for many years to come. While it certainly cannot explain the history of American foreign policy, it contains a seed of insight about an enduring feature of the political culture. American exceptionalism fueled in part by the great material success it has enjoyed and its leadership position in world affairs has created a domestic political-legal climate which chafes with the notion of subordination to outside sources of authority, which in turn frustrates the potential for exogenous norm infusion. In many ways, the assumption is that American norms are to diffuse out. These political-legal discursive patterns are transmitted and sustained by institutions of legal education, which contributes iteratively to the dualist orientation of American law. If we engage with the concepts set out in chapter one which predict that participation in international legal process, regimes, and institutions will by force of repeated interactions create a climate conducive to compliance, then we can see that American reluctance to participate in transnational legal regimes on a roughly equal footing and in a give-and-take fashion stilt the process of socialization by which it may be fully inducted into the common normative system. Thus its minimal degree of peer-based enmeshment in these processes plays a causal role in the compliance question. The US courts' failure to realign domestic actions with international obligations was not due to institutional constraints. It failed to intervene because by relative absence from transnational

⁶⁴ Washington's Farewell Address, 1796

legal processes, it acted in greater measure by reference to the municipal legal system, whose normative logic is not perfectly attuned to the international system's, or that of relevant transnational regimes or regional blocs. Thus the protective purpose of the CRSR was read down in light of the changing security climate; and since the US courts did not rely on other international instruments – as prescribed in the CRSR – to inform its interpretation and application, the protections of the Convention were displaced by changing domestic law. Being mindful of the principle that domestic law may not be invoked as an excuse for the nonperformance of international duties, the US position is one of manifest noncompliance, as operationalized here. This is in stark contrast to the UK case explored in the next chapter.

CHAPTER 3

3.1 UK CASE STUDY

This chapter broadly proceeds along the same lines as the last. However, due to the different natures of the cases, this chapter will develop and take shape somewhat differently. While the US case focuses on the persistent and numerous violations of international refugee law, and on the weak role played by the courts, the UK case gives greater attention to the decisive intervention of the courts in response to overreaching government action. Accordingly, the section detailing those overreaching actions, commensurate with the facts, is more brief, while that detailing the response of the courts is more extensive. This is by no means to misstate the fervency of the UK push to bar entry to individuals -- refugees, migrants, or otherwise -- within the context of a burgeoning preventive logic of counterterrorism. And yet, despite the impetus of this restrictive security agenda, the UK has been considerably less successful in establishing a terrorism-related bar to entry. Notwithstanding forceful parliamentary efforts to deny asylum based on a blanket definition of terrorism, the courts have interposed to strike a happy balance between pragmatism and principle, pointedly narrowing the conditions under which terrorism would result in exclusion.

The chapter begins with a condensed overview of UK asylum history and legislation. It then turns to the post-9/11 heightened-security climate and examines the counterterrorism steps the UK took that affected access to, and the protections of, asylum -- in particular those actions which, under the operationalization of compliance set out in the first chapter, constitute a violation of the CRSR. Following this is a close examination and analysis of the role of the courts using the theoretical tools identified in the first chapter.

3.1.1 UK ASYLUM HISTORY

Naturally, the British experience with refugees extends considerably farther back in time than the American, yet the lessons to be gleaned from this long narrative are more often than not marginalized by the periodic rise of xenophobic and irredentist discourse. In historical perspective, refugees have made profound and lasting contributions to the development of the British economy, society and culture.

Spanish persecution in the late 16th century forced Dutch Protestants to take flight, finding refuge along the coast of eastern England. In the 17th century, Jews from various parts, ever fleeing persecution, found a comparatively more tolerant home in England.⁶⁵ The 1685 Revocation of the Edict of Nantes spurred an exodus from France of some 100,000 Huguenots, who predominantly resettled in the British Isles. Later, the upset and turbulence wrought by the French Revolution, and then subsequent revolutionary movements across mainland Europe, drew many more to seek sanctuary in a more stable and accepting England. It was not until the 19th century, upon the arrival of Russian and Eastern European Jewry fleeing the pogroms and intolerance of their native lands, that the UK finally saw some movements to limit the entry of migrants, exiles and refugees. The years preceding and spanning the World Wars gave rise to the beginnings of contemporary UK asylum law. While many hundreds of thousands found refuge there during this period, a polemical discourse began to rear its head decrying the “asylum invasion.” Over the ensuing decades, various refugee crises saw the UK play a role in resettlement. These episodes provoked some public debate over the desirability of taking in certain groups, but on balance, and as historian Robin

⁶⁵ This, despite a requirement to convert to Christianity

Cohen has observed, “[i]t is often asserted and widely believed that Britain has an exemplary record of offering hospitality to those fleeing from political and religious persecution.”⁶⁶

The 1980s, however, saw a change of course as the number of individuals seeking asylum began to surge. The gradual securitization of “economic migrants” and “bogus asylum seekers” led to the passage of the restrictive 1993 Asylum and Immigration Appeals Act and the 1996 Asylum and Immigration Act.⁶⁷ The Home Secretary from 1993 to 1997, Michael Howard, publicly articulated a link between maintaining rigid limitations on migrants and maintaining good race relations in the UK.⁶⁸ In time, the terms ‘asylum-seeker’ and ‘refugee’ began to conjure increasingly negative images in the public mind, and began to connote criminality and parasitism.⁶⁹ In the wake of the events of 11 September 2001 and the subsequent launching of the War on Terror, British perceptions of refugees continued to suffer. Refugee scholar, Tony Kushner, characterized it in the following way:

In Britain at the start of the twenty-first century, the government, state, media and public have intertwined in a mutually reinforcing and reassuring process to problematise and often stigmatise asylum-seekers. It is through this combination of anti-asylum sentiment finding legitimacy from the top down, alongside the sustenance provided by the daily press campaign and the encouragement of ordinary people from the bottom up, that enabled a poll carried out in February 2003 for The Times to

⁶⁶ Robin Cohen, *Frontiers Of Identity*. (London: Longman, 1994)

⁶⁷ Evan Smith, “Defining And Demonising Asylum: A Brief History Of UK Refugee Discourses”. *Hatful Of History*. July 2 2013 <https://hatfulofhistory.wordpress.com/2013/07/02/defining-and-demonising-asylum-a-brief-history-of-uk-refugee-discourses/>

⁶⁸ *Hansard*, 20 November, 1995, col. 335; col. 338

⁶⁹ The Information Centre about asylum and refugees in the UK (ICAR), *Media Image, Community Impact: Assessing The Impact Of Media And Political Images Of Refugees And Asylum Seekers On Community Relations In London*. (London: ICAR International Policy Institute King’s College London. 2004): 35

suggest that the number of asylum-seekers was ‘the most serious problem in Britain at present’.⁷⁰

Parallel developments in UK anti-terrorism legislation, driven by a rationale of exclusion and prevention, were very much reflective of these attitudes. The new security agenda the US was foisting on the international community was soon finding a new protagonist in the UK. The 2005 London Bombings brought home to the British the devastation it had sought to avoid when enacting the 2001 Anti-Terrorism, Crime, and Security Act, triggering in turn a new round of anti-terrorism legislation, designed in important part to bar entry to terrorist elements. To what extent these and other enactments ran afoul of the CRSR will be explored below.

3.1.2 2001 ANTI-TERRORISM, CRIME, AND SECURITY ACT

The 2001 Anti-Terrorism, Crime, and Security Act (ATCSA) is a comprehensive statute addressing itself, under the broad banner of security, to a sweep of issue areas, ranging from finance to infrastructure to asylum. The legislation was conceived in rapid and direct response to the attacks of 11 September of that year, dramatically building upon the existing anti-terrorism framework enacted the year prior. While it contains a broad array of restrictive provisions, its section titled Part IV on immigration and asylum is to the purpose here.

Notably, it confers unprecedented authority on the Home Secretary to detain without trial any foreign national he suspects of terrorism. The detention must be with a view to deportation, yet where deportation is barred pursuant to other constraints, indefinite detention becomes potential. To overcome the European Convention on Human Rights (ECHR) Art. 5 detention

⁷⁰ Tony Kushner “Meaning Nothing But Good: Ethics, History And Asylum-Seeker Phobia In Britain”. *Patterns Of Prejudice* 37 no3 (2003): 261

bar in this case, the UK formally filed to derogate from the ECHR citing—extraordinarily—“threat to the life of the nation.” While this provision was ultimately used sparingly, and was invalidated by 2005, it epitomized the intensity of the feverish impulse to restrict entry to all those collaterally and illogically subsumed into the expanding threat group.

Part IV Section 33 and 34 provide for limitations on asylum appeal and the applicability of the CRSR. In cases where the Secretary of State issues a certificate to the effect that a particular individual does not merit the protections of the CRSR and whose removal would be conducive to the public good, only a specially constituted immigration appeals commission is granted authority to review the designation, an authority whose scope is narrowly specified and readily superable. Under the provision, the courts are barred from “entertain[ing] proceedings for questioning” any aspect of the certification process or rationale or any decision or action of the Special Immigration Appeals Commission.⁷¹ Furthermore, the text is silent on the source of the authority to circumvent the courts and to empower the Secretary of State to apply at his own discretion the CRSR exclusion clauses in an opaque and unreviewable fashion.

The combined effect of these provisions contravened the 1951 Convention in very fundamental ways and, under the operationalization of the term in this thesis, would constitute noncompliance; however, the inconsistencies of the act with other areas and sources of transnational law led to actions of process that pulled the UK back into compliance before negative asylum outcomes were generated. The House of Lords declared the ATCSA

⁷¹ Anti-Terrorism, Crime and Security Act (2001) Part IV, Sec.33(8)

incompatible with the ECHR,⁷² and thus also the domestic implementing legislation (1998 Human Rights Act).

3.1.3 PREVENTION OF TERRORISM ACT AND THE IMMIGRATION ASYLUM AND NATIONALITY ACT

To deal with the declaration of incompatibility, Parliament passed the 2005 Prevention of Terrorism Act, which repealed the incompatible provisions of the ATCSA. This corrective legislation made new provisions for detention more consonant with UK human rights obligations, but imposed in the same Act unprecedented restrictions, for example doing away with the 790-year-old principle of *habeus corpus* in some circumstances.⁷³ While these particular legislative measures relate less directly to refugee protection, they opened the door significantly for potential abuse and they encapsulate the willingness on the part of the government to forgo important international obligations in furtherance of the new security agenda. Ultimately, the 2005 Act was found to have its own incompatibilities with the ECHR and, too, went the way of repeal.

The 2005 London Bombings reenergized the zero-sum emphasis on security and ushered in another round of measures designed to safeguard the UK from this ostensibly *sui generis* terrorist threat.⁷⁴ The 2006 Immigration, Asylum, and Nationality Act (IANA), in tandem with the 2006 Terrorism Act, was crafted in the wake of that crisis and sought to inaugurate new and restrictive asylum rules, reflecting to what extent the anti-terrorism program had

⁷² Primarily for its prejudicial singling out of foreigners—the amended version applies to both foreigner and UK nationals

⁷³ Jean-Claude Paye, “The End Of Habeas Corpus In Great Britain”. *Mon. Rev.* 57 no6 (2005)

⁷⁴ Satvinder Singh Juss provides an insightful discussion of terrorism and political violence, writing that “acts of terrorism are a narrative of normal historical conflict” and “the War on Terror compels us to forget that at our peril.” It threatens the very institution of refugeehood which itself was conceived in political violence.

been grafted onto immigration and refugee policy among other issue areas. Section 54 provides that “terrorism” constitutes grounds for exclusion, coming now within the ambit of Art. 1(f)(c) of the CRSR.⁷⁵ The definition of terrorism to be employed was the one set out in the Terrorism Act of 2000.⁷⁶ It specified, like its American analog, an extensive range of activity. In essence, it qualifies as terrorism any action injurious to anyone or anything, motivated by political, religious, racial or ideological reasons, designed to influence or intimidate an audience. Moreover, the use of guns or explosives is deemed terrorism regardless of whether there is intent to influence or intimidate an audience.⁷⁷ Also like the American legislation is a section on prohibited groups. Any action taken for the benefit of prohibited groups constitutes terrorism.⁷⁸ The Secretary of State is granted broad discretionary power to make additions to the list of prohibited organizations.⁷⁹ Those organization or people affected by the proscription may make an appeal to the Secretary of State. The latter is empowered to establish and regulate the appeals process. If denied, there is the possibility of further review, but one which is encumbered with procedural complexity and delay.⁸⁰

The effect of these provisions in interaction with Sec. 54 of the IANA results in a legal situation that roughly approximates that seen in the US case study. Refugees posing no conceivable threat to the security of the UK, but who may have a distant and minor connection to individuals or activities implicated by the broad anti-terrorism provisions, stand to be deprived of CRSR protections. Below is an examination of the role of the UK courts in

⁷⁵ CRSR Art. 1F (c)

⁷⁶ Terrorism Act, 2000, c. 11 (Eng.) http://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf

⁷⁷ Ibid.

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

reining in the imperious missteps of parliament and the executive. This marks the divergence between the US and the UK cases.

3.1.4 ROLE OF THE UK COURTS

As noted, one of the key functions of the courts is to keep the state anchored in its constitutional confines. This is not always an easy role, especially in the face of changing circumstances or during periods of social and political transformation. The courts are called on to balance competing interests and to make important normative and authoritative determinations. The courts are also meant to position themselves between governments and individuals when the give-and-take between the imperatives of government and the rights of the governed runs too far askew. This is often a fine line to discern. The UK courts in recent years, in sharp contrast with US courts, have deftly navigated this line in regard to refugee protection on the one hand, and the provision of security on the other.

Running up against the effects of the anti-terrorism laws, a number of cases began to work their way through the courts, drawing increased attention to the application of the CRSR exclusion clauses.⁸¹ Since 2002, the controlling precedent set by *Gurung*⁸² was that voluntary membership in a proscribed terrorist organization amounted to an excludable offense under Art. 1(f)(a). This practice made little distinction between those with clear and personal liability for excludable offenses and those who were by association deemed complicit and thus liable. The UK Supreme Court in *JS (Sri Lanka)*⁸³ found this rule to conflict with other requirements, namely Art. 12(2-3) of the Qualification Directive, which stipulates that the

⁸¹ Satvinder Singh Juss, Sarah Singer, Mark Henderson and Alison Pickup have conducted extensive research on this topic and a reading of their material is very instructive (*see bibliography*)

⁸² *Indra Gurung v. Secretary of State for the Home Department*, [2002] UKIAT 04870

⁸³ *JS (Sri Lanka) v Secretary of State for the Home Department*, [2010] UKSC 15

exclusion grounds may be applied only against “persons who instigate or otherwise participate in the commission of the crimes or acts” enumerated in Art. 1(f) of the Convention. Thus it was held that exclusions were being applied too liberally, discordant with the purpose of the CRSR. This move by the Court signaled not only that it feels bound in this area by EU law, but that when it comes to considering questions of construction, in this case at least, it privileges EU law over domestic. In that same vein, the Court also held that the Rome Statute should take priority in considering how to apply the Convention exclusion grounds. Together, these two considerations informed the move to overturn *Gerung*. The *JS (Sri Lanka)* case therefore established the requirement that any decision to exclude is to be supported by a showing of unambiguous personal responsibility for the offense in question. Complicity was no longer sufficient. The focus of the rationale was on protection. The decision reads “because of the serious consequences of exclusion...the article [Art. 1(f)] must be interpreted restrictively and used cautiously.” In the opinion, Lord Brown sets out no less than seven important factors which are to be weighed in combination and in the light of the protective purpose of the Convention, reiterating the extraordinary nature of the exclusion clauses. The heightened threshold for exclusion is characterized thus:

I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organization’s ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.⁸⁴

This development pulled the UK back into compliance as operationalized here. No longer was it leaving the exclusion question to the suspicions of the Secretary of State, and no longer

⁸⁴ Ibid

was it excluding asylum seekers on the tenuous, extra-Convention ground of complicity. This ruling has already generated a line of progeny that has reinforced and further elaborated the principles set out in *JS (Sri Lanka)*. Going a step further, in *DD (Afghanistan)*⁸⁵ the Court of Appeal acknowledged that armed actions carried out against a government by members of a proscribed group does not *automatically* equate to an excludable offense. In the case of *MT*,⁸⁶ the Upper Tribunal considered whether an asylum seeker should be denied for two instances of participation in torture and possibly murder in her capacity as a police officer. In considering what constitutes a crime against humanity for the purpose of Art. 1(f), the Tribunal looked solely to the Rome Statute, setting aside any consideration of domestic authority on the topic—which assuredly would have suggested exclusion. Finally, in *Al-Sirri*, the Supreme Court rebuffed the notion that domestic definitions of terrorism could apply in asylum determination, noting “it is clear that the phrase ‘acts contrary to the purpose and principles of the United Nations’ must have an autonomous meaning. It cannot be the case that individual Member States are free to adopt their own definitions.”⁸⁷

Together these cases show a jurisprudence of restraint and caution which rely heavily on sources of authority beyond national borders. It recognizes that the institution of asylum is focused on the protection of the *individual* -- echoed by the tenet of individual refugee status determination -- which cannot be casually rescinded by the affixing of a taboo label or by connections with a taboo group. This approach has re-individualized the adjudication of cases where exclusion is considered. It follows the letter and spirit of the CRSR more closely, and reflects a propensity to comply with international obligations *in spite of* what the heightened security climate dictates.

⁸⁵ *Secretary of State for the Home Department v. DD* [2012] EWCA Civ 1407.

⁸⁶ *MT (Article 1F(a) – aiding and abetting) Zimbabwe* [2012] UKUT 00015 (IAC).

⁸⁷ *Al-Sirri v. Secretary of State for the Home Department* [2012] UKSC.

3.1.5 CONCLUDING ANALYSIS

The UK in its response to terrorism instituted measures which ran afoul of the CRSR protection guarantees. Unlike the American case, however, the courts interposed to restore those guarantees, bringing the UK back into compliance with international refugee law. Applying the theoretical tools and principles identified in chapter one, greater light can be shed on the source of UK compliance in this instance. The UK is a country deeply embedded in transnational legal processes, regimes and institutions, and its actions must therefore be understood in the context of, and as part of, the broader legal, political, institutional and social landscape in which it lies. In the aftermath of World War II, and in recognition of the dire need to redress the conditions in Europe that led it so frequently to war, a succession of efforts were made to connect the states of Europe in a deep cooperation. In time, many European states came to participate in these intricate and overlapping frameworks. The Council of Europe was established in 1949 to advance cooperation in several domains, including human rights, the development of common legal standards, and others. The European Coal and Steel Community and later the European Economic Community gave way to the European Union, which has taken enormous strides in the integration of a diverse community of states, and now whose *acquis* binds them together under a common legal architecture.

The UK in all of this has been subjected to “a structured process of continual interaction”⁸⁸ which, as Guzman suggests, is a necessary condition for international law to begin affecting outcomes.⁸⁹ The routinization of these interactive processes has worked to more deeply

⁸⁸ See treatment here of Franck at page 12

⁸⁹ Ibid., 12

integrate the UK judiciary into the regional legal-political culture with its pronounced emphasis on human rights, the rule of law and minority protection. As the effects of the anti-terrorism laws enacted in the wake of 9/11 and the 2005 London Bombings began to challenge prevailing standards and practice, the UK courts saw fit to intervene, in no small part due to the internalization of norms articulated by transnational institutions via an established and legitimized process of rulemaking. The first intervention noted in the chapter was for the Supreme Court to declare the ATCSA incompatible with the ECHR, evincing a posture of deference to the Council of Europe position.⁹⁰ The second intervention was to declare *Gurung* incompatible with the Qualification Directive, evincing a posture of deference to the EU position. And the third intervention was to overlook domestic law to recognize that the CRSR Art. 1(f) language must have an “autonomous meaning” beyond what Member States legislate. This had particular regard to the Rome statute as the primary referent for interpretation. These moves together reflect that, by virtue of UK participation in these particular transnational legal regimes, and its socialization into that common normative culture, it has developed a greater compliance propensity—at least in respect of the issue-areas addressed by those regimes. Finally, we see that through the dialectical development of these regime environments, the UK has imprinted on that community even as that community imprints on it. This process has led to the internalization of articulated norms, which are then adhered to.

In summation, while the UK pivoted to a security footing in the wake of terrorism crises, and set out on a path that began to jeopardize the performance of its international obligations, the courts were able to intervene to set the country back on a course of compliance with its international obligations.

⁹⁰ More precisely the European Court of Human Rights’ position

CONCLUSION

This thesis began with the puzzle that some states, despite the demands of their security agendas, find a way to reconcile their counterterrorism measures with their international legal obligations under the CRSR, while other states, ever impelled by their security agendas, remain persistently noncompliant. Finding that the US and UK were uniquely comparable as western, liberal, democratic, rule-of-law and common law countries, which have suffered terrorist attacks originating from a common ideology and which came to perceive that threat similarly, the thesis searches for the cause of the sharply divergent asylum outcomes observable in these countries. It explores the compliance literature and identifies important theoretical tools which prove particularly well suited to shedding light on the cases under investigation. These tools and insights constitute a theoretical frame through which the cases may be approached and unpacked.

It is found that the degree of embeddedness in relevant transnational legal regimes as marked by membership and iterative processes of interaction is highly determinative of whether a state will maintain compliance with the CRSR in spite of the demands of a changing security agenda, or whether it will sideline those obligations in pursuance of that security agenda. It is found that US non-participation engenders an inward orientation, which leads to adjudicatory practices guided by disproportionate regard for municipal law, even as that law manifestly changes and corrupts the object and purpose of, in this case, the CRSR. Contrapositively, it is found that UK participation in numerous transnational legal processes has had a direct and positive effect on its compliance decisions.

The thesis does not purport to have uncovered the primary or exclusive cause for the divergence seen in the cases. Indeed, further research may seek to identify two or more states which are equally as enmeshed in issue-relevant TLP as the UK and yet which have sharply divergent compliance outcomes. If sharply contrasting cases can be identified, then the theory developed here will need to be revisited for further qualification, or, should more compelling evidence counter its premises, be discredited altogether. In this case, it will have at best served as a foil for the development of stronger theories. Therefore, the key contribution of this thesis has been to flesh out and highlight the salient role of processual factors in driving the compliance outcomes observed in the cases.

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