

ERSATZ TREATIES

EDWARD T. SWAINE*

I. INTRODUCTION	833
II. THE RELATIVE VIRTUES OF OTHER MECHANISMS ..	836
A. <i>Agenda-Setting</i>	837
B. <i>Courts and Litigators</i>	841
C. <i>Domestic Mobilization</i>	842
III. COMPETITION, COMPLEMENT, AND SEQUENCING ...	844
IV. CONCLUSION: PERSPECTIVES ON HUMAN RIGHTS TREATIES	849

I. INTRODUCTION

Beth Simmons's illuminating book repeatedly poses two questions: why international law, and why treaties in particular? These questions might have been ignored, I suppose; she would have contributed to the field simply by establishing more definitively that treaty ratification is associated with increased compliance with human rights norms (or, as she more precisely claims, behavioral changes in the direction indicated by a treaty) while leaving the causal mechanisms unresolved. Going further, as she has, permits engaging with larger issues. If international law matters, we move toward an explanation as to why states allow meddling in internal matters that they sometimes regard as sacrosanct (and that other states are just as often content to disregard). If treaties in particular matter, we have a better idea why self-enforcing agreements don't suffice, why states put up with substantial transaction costs at the international and domestic levels, and why they bear still greater sovereignty costs than we associate with customary international law or less binding (but still reciprocity-reflecting) types of norms.

The particular pathways she identifies, however, revive these same questions in unexpected ways. For a book that winds up attributing unmistakable significance to human rights treaties, and will quite reasonably be embraced by many in the human rights field, Simmons's perspective on human

* Professor, George Washington University Law School. Thanks to Savannah Norvell for research assistance.

rights may be surprising. The core of her argument eschews the conventional mechanisms typically invoked by international relations theorists and, even more, by international lawyers. Her test for treaties' significance is agnostic as to how local actors are empowered,¹ but she pointedly downplays expectations for international influences. While observing that "a theory of compliance with international human rights treaties is difficult to develop *purely* in the context of international politics,"² her analysis would discourage anyone from developing a theory even *primarily* on the international plane. Other states are incentivized to turn a blind eye to violations, such that "[t]he real politics of change is likely to occur at the domestic level"; international human rights treaties "are negotiated internationally but create stakeholders almost exclusively domestically"; perhaps most conclusively, "international human rights treaties engage practically no important interests among states in their mutual relationships with each other."³ While she does not dismiss the prospect that the processes spurred by ratification can change preferences, the dominant argument is that ratification is mediated through the opportunities it creates for local actors.⁴

The limits on international politics are but half of the story. The theoretical mechanisms for exercising positive influence are, as she recounts, "theories that privilege domestic political actors as agents in their own political fate," in principle "all possible without the contributions and the interference of outside actors."⁵ Just so, treaties enable governments (particularly executives) to overcome inertia and set pro-rights agendas; provide fodder for courts and litigators to promote rights; and result in domestic mobilization by potential rights claimants, influencing both their objectives and the ease of realizing those objectives—by, *inter alia*, precommitting (or at least predisposing) the government toward those objectives, at-

1. "[T]reaties are causally meaningful to the extent that they empower individuals, groups or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties." BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 125 (2009).

2. *Id.* at 125 (emphasis added).

3. *Id.* at 126 (emphases removed).

4. *E.g., id.* at 127, 129.

5. *Id.* at 126.

tracting more adherents and resources, and improving the range of potential strategies.⁶

The domestic concentration of this analysis thus revives, indirectly, the perennial question: precisely what function is performed by the *international law* aspects of human rights treaties? That is, what does the catalytic force of human rights treaties have to do with their character as treaties? Consider three alternative mechanisms for expressing and establishing fundamental norms⁷ of the kind presently captured by a human rights treaty:

- (1) home-grown statutory or constitutional provisions;
- (2) transplanted statutory or constitutional provisions borrowed from another state or derived from a transnational process;
- (3) statutory or constitutional provisions that track the substantive content of an international human rights treaty, but without the state assuming any international obligations.

This brief comment will evaluate these alternative mechanisms by posing three questions. First, to what extent do such mechanisms achieve the advantages attributed to international human rights treaties, and which serve as predictors of their success? Second, are these other mechanisms competitive or complementary to international human rights treaties, and is their order of adoption significant? Third, do the answers to these questions depend on whether we assume a global welfare perspective, or the narrower, rational actor perspective of a potential ratifying state?

At first blush, at least, what I am calling ersatz treaties—these substitutes for the international form that human rights agreements actually take—may fare well enough in terms of

6. *Id.* at 127–48.

7. Following Gerald Neuman, I confine the use of “human rights” to rights in the form of a human rights treaty, use “constitutional rights” and “statutory rights” to describe rights in the form of domestic constitutions and domestic statutes (respectively), and use “fundamental norms” to refer neutrally to the kind of rights that might be captured in any of these forms. As will be apparent, nothing in the form of the fundamental norms dictates its content, and for the most part I assume that the content is constant among the forms. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1865 (2003).

Simmons's pathways. It does not follow, as the label implies, that they are fully fungible. The answer, in all likelihood, lies back in the neighborhood of more traditional internationalism, as augmented by Simmons's considerable contributions.

II. THE RELATIVE VIRTUES OF OTHER MECHANISMS

Mobilizing for Human Rights confronts the influence of domestic law in a variety of ways. For example, it considers certain key indices—like whether a given state is a common-law or civil-law jurisdiction, and its domestic ratification process—as explanatory variables potentially affecting whether a state is likely to ratify a human rights treaty or, for that matter, comply with it.⁸ In other instances, it considers shifts in domestic law—like the degree of religious freedom—as the dependent variables that human rights treaty ratifications might themselves affect.⁹ These measures, based primarily on others' data, are inevitably crude;¹⁰ for immediate purposes, the lack of detail concerning the preexisting—or co-varying—status of constitutional and statutory rights makes it difficult to distinguish the empirical effects of ratifying human rights treaties from parallel measures aimed at securing fundamental norms.

This brief essay does not seek to improve on Simmons's data or her model. My objective, rather, is to consider how the ersatz treaties fare on the causal pathways that the book identifies, to determine whether they might, under the right condi-

8. *E.g.*, SIMMONS, *supra* note 1, at 86–87, 382–85.

9. *Id.* at 171, 386.

10. From a legal perspective, at least, a four-category characterization of ratification processes misses important nuances in constitutional structure, and employing variables of that generality to help explain simple dichotomous measures of religious freedom (in which states are either restrictive or free) seems unlikely to provide a basis for calculating whether fundamental norms improve or why. This is not, however, a problem unique to her approach. Simmons notes previous attempts to test empirically progress in civil rights practices. *Id.* at 165. Such studies have depended heavily on Freedom House data, which is probably no better at measuring normative outputs. *See, e.g.*, Carolyn Evans & Simon Evans, *Evaluating the Human Rights Performance of Legislatures*, 6 HUM. RTS. L. REV. 545, 555 n.29 (2006) (quoting Robert J. Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 35, 48 (Thomas B. Jabine & Richard Pierre Clark eds., 1992)) (noting criticism of data as “entirely impressionistic,” along with modest defenses).

tions, supply an alternative explanation for progress—perhaps warranting consideration by uncommitted states—or whether they hint that there is more to human rights treaties than meets the (domestic) eye.

A. *Agenda-Setting*

Almost all domestic law, however constituted, is susceptible to change. The relevant question is whether some set of conditions makes change more likely. Simmons explains that international human rights treaties provide an exogenous shock because the timing and content do not lie within any particular state's control, and the "need to consider ratification can therefore rearrange a country's priorities, if not its preferences."¹¹ On this view, what international human rights treaties accomplish is to jump-start local politics.

There is much to commend this explanation, but the sweet spot for successful agenda-setting seems fairly small. If a human rights treaty overlaps substantially with the preexisting domestic agenda, it does little work, and the advantage over a domestic initiative seems minimal. If, on the other hand, a treaty is fundamentally inconsistent with the domestic agenda, either in terms of timing or content, it will be too revolutionary to have any purchase. So the agenda inspired by a human rights treaty must lie within a political standard deviation or two of local priorities—a margin of appreciation, if you will.

Assuming, though, that an exogenous shock falls within that margin, Simmons's theory more or less assumes that international human rights treaties are the only vehicle for delivering such a shock—when it is not clear that they are even the best such vehicle. Presumably the first ersatz alternative noted here, home-grown statutory or constitutional provisions, is too captive to local circumstance—although no contemporary home-grown human rights provision is truly free of foreign influence and, at least to that degree, the capacity of ideas to shock and disrupt local priorities.¹²

11. SIMMONS, *supra* note 1, at 127.

12. It seems unlikely that any set of fundamental norms was ever entirely indigenous, as though it sprang full-grown from the brow of a Founding Father; even eighteenth-century France was influenced by the development of rights in the United States (and vice-versa).

The second alternative, transplanted statutory or constitutional provisions, is more evidently of a kindred spirit—at least to the extent that borrowing from another state is concerned.¹³ One can even observe a kind of passive competition among states to export their constitutional models. The United States was once the leading exporter (and, considering its reticence to take instructions from others, still runs a positive balance of trade), but a recent study suggests that its influence has declined; Canada is proving more influential, at least among common law countries, while contenders like Germany, South Africa, and India have less direct effect.¹⁴ As to the third alternative, the received wisdom is that international and regional human rights treaties have greatly influenced written constitutions,¹⁵ but the same study suggests that some of the principal human rights agreements are emulated less and less, and that the apparent emulation of the International Covenant on Civil and Political Rights (ICCPR) is more likely because it aped preexisting constitutional trends or simply reinforced them.¹⁶

Regardless of where the trend lines actually lead,¹⁷ it is not obvious—as a matter of domestic logic—why one or more

13. There is at present no particularly influential transnational process for developing model domestic law that rivals the efforts of the international community to promote ratification and implementation of human rights treaties; even general rule of law initiatives aim more frequently at propagating international human rights standards, or simply assume them as a baseline. See, e.g., AM. BAR ASS'N CENTRAL EUR. & EURASIAN LAW INITIATIVE, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) LEGAL IMPLEMENTATION INDEX (July 2003), available at http://apps.americanbar.org/rol/publications/iccpr_legal_implementation_index_2003.pdf.

14. David S. Law & Mila Versteg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. (forthcoming 2012).

15. *Id.* at 61 & n.182.

16. *Id.* at 64.

17. Simmons and coauthors have previously reached somewhat different conclusions as to the influence of human rights treaties. See, e.g., Zachary Elkins, Tom Ginsburg & Beth Simmons, *Constitutional Convergence in Human Rights? The Reciprocal Relationship Between Human Rights Treaties and National Constitutions* (Dec. 2008) (unpublished conference paper), available at <http://www.globallawforum.org/UserFiles/File/paper1.pdf>. As suggested in the text, however, the rate at which treaty terms are emulated is in any event a somewhat distinct question from the question whether that emulation flows from an international obligation; states may in theory be jump-started by the appearance on the international scene of a

of these alternative mechanisms could not spur normative agendas as effectively as international human rights treaties. To be sure, one can speculate about ways in which treaties may have a natural advantage. Relative to some other forms of law-making, engaging in treaties is a punctuated process. States may engage at the international level in the negotiation and conclusion of the international instrument; they can sign the instrument, and incur the interim obligation not to defeat the treaty's object and purpose; they can ratify by taking the requisite domestic acts and depositing the instrument of ratification; they should then take any acts necessary to implement the treaty domestically, which may or may not be regarded as self-executing.¹⁸ In the optimal case for treaties, these steps progressively assist the ratifying state in transforming its domestic agenda, gradually producing greater alignment in terms of content and timing and assisting domestic actors in overcoming inertia.

It seems doubtful that foreign or internationally-inspired—but not legally binding—processes can simulate anything precisely like the ever-tightening noose of international legal obligations. But there may be countervailing disadvantages. The iterative process of treaties also permits plateaus, where states achieve some international accommodation without producing a change in domestic law. The United States took something like forty years to move from signing the Genocide Convention to actually ratifying the Convention; it likely secured some international benefits from maintaining its status as a “mere” signatory during that period that dampened any push to secure final ratification.¹⁹ If and to the extent that

negotiated treaty regardless of whether it is one they themselves have ratified.

18. See generally ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2d ed. 2007).

19. Signing states assume an interim obligation not to defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, art.18, May 23, 1969, 23 U.S.T. 3227, 1155 U.N.T.S. 331. That formal obligation is surely not the equivalent of ratification, and thus does less to assure potential treaty partners of full compliance; that said, it may go further to achieve the symbolic and reputational benefits of ratification, which often loom large in the human rights context. It was notable, for example, that U.S. government officials became convinced that signing the Rome Treaty would benefit the United States even in the absence of any likelihood that it would become a party in the foreseeable future. See, e.g., David J. Scheffer,

iterative steps have political or legal significance, they may constitute a way station for partially committed states, and it would be a mistake to focus merely on the successes.

Simmons also notes that treaties speak distinctively to the executive branch, and finds the most transformative effects in presidential systems—given the potential shift from standard, legislature-dominant domestic processes toward executive-led international processes.²⁰ This, too, explains the distinctive circumstances in which treaties *may* be agenda-shifting, without establishing any reliable advantage. Some of the same political features, as Simmons explains, can increase the barriers to ratification. More generally, the agenda-shifting thesis suggests a tension between enhancing the probability that states will gravitate toward and assume an international commitment and the likelihood that their more conventional mechanisms will later keep faith with it.

Purely domestic theories, naturally, face the opposite conundrum: their compatibility with preexisting preferences is much greater, but the potential for an exogenous shock to national priorities is substantially reduced. The added value of international *commitments*, though, remains unclear. The potential agenda-shifting force of transnational ideology—regardless of whether it is captured as binding legal obligations, as soft law, or as extra-legal change—is at least suggested by events like the collapse of Communism or the so-called Arab Spring. Just so, foreign or international legal provisions seem a perfectly credible means of inspiring less momentous changes in fundamental norms, even absent treaty ratification; and to the extent they find local expression via constitutional reform, those processes, whatever their inspiration, deviate from ordinary politics just as much as (or more than) any treaty ratification.²¹ If exogenous shocks and extraordinary politics are required, yet other mechanisms—like the civil administration of Kosovo, which imposed from on high the

Staying the Course with the International Criminal Court, 35 CORNELL INT'L L.J. 47, 58–59 (2001–02) (enumerating advantages of signature).

20. SIMMONS, *supra* note 1, at 127–29, 149–50.

21. For an extension of his thesis regarding constitutional moments to the velvet revolution in Eastern Europe, see BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

terms of international obligations, at least on an interim basis—are more extreme than anything Simmons postulates.²²

At bottom, it seems plausible that most paths to internationally-inspired reform in fundamental norms may be executive-led, or require equally unorthodox means of revising domestic law. How much ground something like a popular referendum, constitutional conventions, or some other kind of fundamental reform gives to multilateral human rights conventions in terms of agenda-setting may require nuanced and highly contingent comparisons.

B. *Courts and Litigators*

The possibility of litigating claims under international human rights treaties, needless to say, is an issue of keen interest to lawyers. Because Simmons is not content with explanations on the international plane, she seeks to distinguish treaties from customary international law and soft norms not merely in terms of international commitment,²³ but also in terms of domestic enforcement.²⁴ Human rights treaties matter, again, because they speak distinctly to domestic institutions, to courts and litigators and not just to presidents.

This argument is only partly convincing on its own terms. For example, customary international law has played an important part in the U.S. legal system, particularly when combined with congressional enactments like the Alien Tort Statute, and many other states are more generous than the United States in according custom equivalent status to treaties for purposes of domestic law. The more salient question for immediate purposes is whether treaties are particularly susceptible to legal enforcement as against their ersatz alternatives. The limits imposed on the domestic enforcement of treaties by dualism, non-self-execution, and doctrines relating to the implication of individual offensive and defensive rights are too sub-

22. Special Representative of the Secretary-General, *Regulation 2001/9, A Constitutional Framework for Provisional Self-Government in Kosovo*, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001), available at <http://www.unmikonline.org/regulations/2001/reg09-01.htm>.

23. SIMMONS, *supra* note 1, at 118–21.

24. *Id.* at 129–35.

stantial to be readily dismissed.²⁵ Even when these are overcome, I am aware of no basis for crediting treaties with a domestic legal status that otherwise comparable constitutional or statutory provisions would lack, and one can just as easily speculate that the greater experience of advocates and judges with domestic law means that domestic enforcement prefers domestic form whenever possible. The far more evident advantage is on the regional and international plane, where a right's international status opens up potentially important avenues for redress, but that is not where Simmons's argument rests.

C. *Domestic Mobilization*

Simmons describes, astutely, the ways that treaty ratification can help domestic constituencies mobilize toward the effectuation of human rights,²⁶ but it is again somewhat difficult to perceive predictable differences between the capacity of treaties to mobilize and the capacity of the ersatz alternatives to do so. Rights consciousness might be heightened by a statute or constitution, as her examples from the U.S. civil rights movement suggest.²⁷ Constitutions (at least those that are not too easy to amend) are better devices to achieve the pre-commitment she extols—or may even be said to transcend pre-commitment—while statutes, on the other hand, are most likely inferior. This said, all may be coequal in Simmons's relatively elastic account of rule commitment, in which legal rights and rights-talk are roughly equivalent—manifested, for example, in the cited example of an NGO's attempt to express privacy concerns for U.S. citizens in terms of treaty rights, something certainly of limited political or legal value.²⁸

What is notable about Simmons's thoughtful discussion of other factors bearing on mobilization—the capacity of international treaties to engage the interests of the legal profession, to

25. See Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 555, 603–06 (David Sloss ed., 2009) (highlighting several case studies on the domestic legal recognition of individual rights as defined in international treaties and questioning the enforceability of such rights).

26. SIMMONS, *supra* note 1, at 144.

27. *Id.* at 134, 142.

28. *Id.* at 145.

confer legitimacy and other resources, and to increase the range of strategies available to social movements²⁹—is how frequently her analysis sneaks in sidelong looks at the international plane. Internationalists within a country may support pro-rights movements, and the need for compliance with an international obligation, because (as she observes) “even a small probability of [international] enforcement is a serious worry for domestic groups that depend heavily on good political relationships with the outside world.”³⁰ Treaties confer legitimacy because they represent a global agreement shared by others in the international community;³¹ left unacknowledged is the pivotal role that international community can play in exhibiting and demonstrating that agreement. And while it is fair to note that treaties increase the range of possible strategies for social movements, including where (domestic) courts “are unlikely to be accessible or reliable”³²—every additional means of vindicating a fundamental norm helps, including soft law—it is odd to underplay the value of international and transnational strategies, abetted by the status of international obligations, in this regard.

Another matter that seems under-explored in the introductory chapters is the precise function of international NGOs, which nonetheless feature prominently in some of the case studies. NGOs have been quite critical, for example, in advancing the rights of women, but the relationship between their achievements and the actual ratification of human rights treaties—as opposed to the adoption of relevant domestic laws—is sometimes obscure.³³ In Japan, domestic supporters of women’s equality were apparently spurred by CEDAW’s emergence on the international plane; even so, the need for Japan to answer “the question of Japan’s position on CEDAW” does not necessarily suggest the need for Japan to *ratify* CEDAW as opposed to, say, adopting statutory or constitutional provisions that incorporated its fundamental norms.³⁴ In Colombia, the increase in internationally active women’s organizations was associated with CEDAW ratification, but the as-

29. *Id.* at 146–48.

30. *Id.* at 146.

31. *Id.* at 147.

32. *Id.*

33. *Id.* at 216.

34. *Id.* at 240.

sociation was “[e]ven more stunning” with the revision of the Colombian constitution to include provisions that mirrored parts of CEDAW.³⁵ Key to that constitutional revision was the fact that those principles were “framed as internationally recognized human rights provisions,” but *not* their incorporation in an international instrument that bound Colombia in particular.³⁶

To reiterate, the point of this discussion is *not* to deny that international obligations make a difference. In Japan, for example, the CEDAW Committee apparently played a “crucial role,”³⁷ and that function would likely have been different were Japan to have simulated CEDAW through some ersatz means. The point, to the contrary, is to ask whether the difference is made exclusively, or even primarily, on the domestic plane, such that the conventional puzzles of international obligations may be bypassed.

III. COMPETITION, COMPLEMENT, AND SEQUENCING

The mistake, perhaps, is in thinking of the fundamental norms alternatives that have been mentioned—local statutory or constitutional provisions, transplanted statutory or constitutional provisions, or statutory or constitutional provisions that track an international human rights treaty without the international obligation—as *alternatives* to treaties. When it comes to rights, maybe the more the merrier. Certainly some of the conventional concerns seem less pertinent in this circumstance. Even if, as is sometimes alleged, rights proliferation risks conflicts among entitlements, or inhibits other objectives, like economic development, redundancy in terms of the same rights—relating to their density rather than their breadth—likely sidesteps these objections. And the value of redundancy seems self-evident when the tenuous purchase of any fundamental norms, adopted at any level, is acknowledged.³⁸

35. *Id.* at 247.

36. *Id.* at 249–50.

37. *Id.* at 243.

38. In such circumstances, parallel or redundant rights may vault into new prominence. Cf. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that Supreme Court decisions narrowing federal civil liberties should prompt renewed interest in parallel state provisions protecting individual rights).

Even so, there is cause to pause. If the various means of establishing and vindicating fundamental norms involve trade-offs—for example, in terms of agenda-setting, or mobilization resources—more caution may be required. It is plausible, for example, that ratifying a human rights treaty begets replication and alternative versions of those rights, but also that ratification of a treaty will diminish the appetite for constitutionalizing (or otherwise cementing domestically) those rights.³⁹ It is unclear, in other words, whether alternative forms of fundamental norms are substitutes or complements.

We can be reasonably confident that when states already secure liberties through adequate domestic structures, their need for human rights treaties decreases—albeit without necessarily decreasing their appetite for ratification. From the standpoint of compliance, such states are a potential second set of “false positives,” in that they may ratify for reasons other than due to a normative commitment to the treaty *per se* or a desire to achieve compliance with it (that commitment preexisting the treaty, and the achievement of those norms already being well in hand) and in that it would be mistaken to attribute their high satisfaction of human rights objectives to treaties *per se*.⁴⁰ We expect, too, that such states may well ratify at a high rate. Their “hazard” ratio is high, in other words, and happily that means that the hazard they pose to their populations is low.⁴¹

Suppose, though, there is a state that is somewhat back on the rights curve, yet primed for transformation. There is “an opportunity to influence a country’s rights future,” because the state is neither a stable democracy (yet) nor a stable autocracy (yet).⁴² It has a constitution, one that does not have content equal to that of the fundamental rights protected else-

39. Law & Versteeg, *supra* note 14, at 64–65 & n.192.

40. This is clearly distinct from the “false positives” identified by Simmons, who is concerned instead with states that ratify human rights treaties insincerely, and which do not particularly desire to arrive at compliance—and overlaps only insofar as both sets cast doubt on the causal relationship between ratification and compliance. See SIMMONS, *supra* note 1, at 18, 77 (describing and explaining the “false positive” phenomenon).

41. *Cf. id.* at 82 (describing hazard ratio as “the proportion by which the explanatory variable [there, democracy] is estimated to raise or lower the probability of ratification”).

42. *Id.* at 360.

where, but which could be amended. There are local actors, in government and elsewhere, who want to change this state of affairs, and who perceive an opportunity to achieve it—they are plausibly mobilize-able, but they are not already mobilized. Should such a state pursue constitutional change (or, failing that, statutory change), or should it ratify human rights treaties? Assuming the default answer is “both,” is that answer stable if mobilization resources are low, and there is a risk that mobilization won’t snowball from one form of achievement to another—at least in the short term? If the answer remains “both,” is there nonetheless a proper order?

Simmons’s book does not specify answers to these questions. But several conjectures are possible. One is that, *ceteris paribus*, one would prefer that rights be ossified in the form of constitutional provisions—if one could assume the same content and degree of detail. Constitutional rules typically do as well or better in terms of domestic legal hierarchies,⁴³ are harder for subsequent governments to amend, and are a perfectly adequate basis for engaging with foreign and international authorities.⁴⁴ On the other hand, Simmons’s suggestion that it is easier to mobilize in support of human rights treaties is not implausible, particularly in impoverished states with relatively passive civil society sectors—unless domestic actors prefer indigenous movements or abreact to foreign intrusion. A third factor, legal feasibility, may be a closer call than might be

43. There are some exceptions, like the Netherlands, where treaties seem hierarchically superior—but these still seem to be exceptional. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 215 (1998).

44. For example, the Foreign Assistance Act of 1961 requires that the U.S. Department of State produce annual reports on “the status of internationally recognized human rights” in foreign countries. 22 U.S.C. § 2151n(d) (2006). The rights concerned have been understood to approximate those covered by the Universal Declaration of Human Rights, as opposed to those required by any binding international agreement. U.S. Department of State, 2010 Country Reports on Human Rights Practices, Overview and Acknowledgements 2, available at <http://www.state.gov/documents/organization/160514.pdf>. In determining the status of those rights in any given country, the State Department will examine not only treaty participation, see *id.*, app. C, available at <http://www.state.gov/documents/organization/154738.pdf> (for an examination of human rights treaty participation by country), but also provisions of domestic law. *E.g.*, *id.*, China Report at 56, available at <http://www.state.gov/documents/organization/160451.pdf>.

reckoned. That constitutions are hard to change may make them appealing as harbors for individual rights, but that very fact of course makes ensconcing those rights in the first place relatively difficult. By the same token, the rigidity of constitutions also makes it hard to change the treatment of international law in a given state's domestic scheme—and if domestic law treats international law as second-class, or inhibits the ability of individuals to sue on its basis, or confounds the import of a treaty's progressive development at the hands of treaty-monitoring bodies or other states, both treaty and constitution-based forms of fundamental norms may face serious obstacles.

To make this slightly more concrete, consider some of the most dramatic recent transformations. States adopting new constitutions during the 1990s appeared, on the whole, to favor a belt-and-suspenders approach to fundamental norms. For example, former Soviet bloc nations developed new constitutions with new constitutional rights, aided and abetted by western constitutional entrepreneurs, but they did not ignore human rights treaties or the place of such treaties in the domestic hierarchy.⁴⁵ Post-apartheid South Africa, too, went all in, becoming party to several significant human rights treaties, adopting an interim constitution that enhanced civil and political liberties, and adopting a final constitution that articulated these rights more clearly and also guaranteed the standing of international human rights.⁴⁶

One takeaway from these reforms might be that there is no inconsistency among alternative approaches. That seems too hasty. For one thing, states undergoing regime change are special, not least because they start afresh in a fashion much

45. The Czech Constitution of 1992, for example, made all treaties on human rights and fundamental freedoms superior to domestic legislation. Neuman, *supra* note 7, at 1891.

46. See generally John Dugard, *International Human Rights*, in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 171, 191–95 (Dawid van Wyk et al. eds., 1994); Heinz Klug, *Constitution-Making, Democracy and the “Civilizing” of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 WIS. INT'L L.J. 269 (2007); Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67 (1999); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1U. PA. J. CONST. L. 176 (1998). Numerous other states, of course, do likewise—Austria and Sweden, for example, are among many states that privilege the European Convention on Human Rights.

different from that of states considering more marginal changes.⁴⁷ These episodes also reveal a rather strong conviction that treaty rights did not by themselves suffice, as the states went to some extraordinary lengths to ensure domestic resonance in constitutional form—and not merely for purposes of redundancy. South Africa adopted its interim constitution in order to ensure adequate domestic legitimacy first. Argentina, to choose another example, amended its constitution in 1994 not only to make treaties superior to statutes, but also to give constitutional rank to eleven specific human rights instruments, and allowed the legislature by supermajority vote to add other human rights treaties—while limiting the power of the executive branch to denounce those treaties as well. The constitution's reference to particular treaties seemingly ensured permanence even independent of Argentina remaining a party to them.⁴⁸

International human rights treaties, in many of these cases, served as a critical inspiration to states that had inadequate rights structures in place. It is more difficult to substantiate, however, that a particular state's subscription to that treaty was essential to galvanizing domestic support for the adoption of fundamental norms. One might easily imagine the treaty's ratification elsewhere—in a neighboring state, for example, with similar structure and norms—and the importation of that state's domestic commitment to fundamental norms (perhaps not even involving the treaty), or the direct emulation of the treaty's norms without undertaking the international commitment. Once the necessary domestic adjustments were made, treaty ratification might be pursued as a final, rather than an initial, step, or it might be dispensed with altogether. Lest this all seem too fanciful, consider the case of Taiwan: unable to deposit the instrument of ratification for the ICCPR due to its lack of recognized statehood, it has for

47. And there are “marked differences” among those states as well. Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1265 (2008).

48. See Neuman, *supra* note 7, at 1891–92 & n.85 (describing the instruments to which Argentina accorded constitutional status). See generally Janet K. Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1999).

the time being contented itself with pursuing domestic implementation without the international obligation.⁴⁹

IV. CONCLUSION: PERSPECTIVES ON HUMAN RIGHTS TREATIES

For these reasons, choosing among the various means of advancing fundamental norms proves complicated. Looking solely at domestic virtues suggests that much of what Simmons claims for treaty ratification might be secured by ersatz treaties as well. The more decisive advantage of human rights treaties may well lie with the effects on the international plane—the enabling of international institutions, the reaction of other states, and so forth—that Simmons rightly regards as controversial and difficult to establish. Those interested in pursuing this inquiry will find that her case studies concerning civil rights, the rights of women and children, and the right to humane treatment contain within them narratives that support accounts of international mechanisms as well.

Unavoidably, a relative assessment of norm options will turn to some degree on the perspective assumed. One perspective might be that of a rational state actor. Assume, for starters, that it makes sense for a sufficient number of domestic actors (and here a unitary actor model already begins to slip) to seek some kind of legal commitment to fundamental norms. Does it make sense for the average state to prefer the route of ratifying human rights treaties, as opposed to some ersatz treaty that might achieve legal status for highly similar fundamental norms?⁵⁰ The state would have to decide whether it wanted to grasp the nettle of external, rather than internal, legal constraints. International lawyers are adept at constructing accounts—involving power, reputation, risks of regime change, errors in calculation, and so forth—to justify such a choice. Simmons is skeptical of these arguments; by disaggregating the state, and suggesting agenda-shifting and mobilization dynamics, she makes it somewhat more plausible

49. Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4 NAT'L TAIWAN U. L. REV., no. 3, 2009 at 203, 210; David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 542 n.77 (2011).

50. A powerful state may have a very different perspective, of course, and may prefer treaty promulgation for much the same reason it would be preferred as a matter of global welfare.

that a state's rational interests will point toward ratification. At bottom, though, the account involves critical assumptions about the affinity between domestic interests and an international template.

From a global welfare perspective, on the other hand, things may look quite different. It seems more efficient to promulgate fundamental norms globally, and there are network returns to promoting one instrument. To be sure, some potential adopters will be lost, and for some the instrument will fit poorly, and the terms will be watered down to reflect the lowest common denominator—and states will still attempt to carve their own bargains through reservations, understandings, and declarations. Even so, the ease of achieving global change, not to mention the appeal of pursuing internal and external compliance measures, seems to tilt in favor of human rights treaties over alternative mechanisms.

Barring the exclusive embrace of one perspective or the other, two conclusions may yet be possible. First, and most important, Simmons's analysis should help reduce the gulf between these perspectives: by explaining the appeal of human rights treaties in primarily domestic terms, her argument might reduce resistance by states less willing to adopt a broader frame.

At the same time, any persistent gulf between these perspectives might cause us to reexamine the premises of the global welfare perspective—to test the idea that human rights treaties are an essential or particularly efficient means of propagating fundamental norms. Overweighting the international might help conceal rather than separate false positives and false negatives. At least where states are unable for political reasons to ratify human rights treaties, or might do so insincerely, domestic movements might mobilize toward the adoption of fundamental norms—even mirroring those stated by the ICCPR, ICESCR, CRC, CEDAW, the Convention Against Torture, and the like—without first ratifying those treaties, and perhaps in the form of constitutional rather than conventional law. What may be surprising, and maybe even inspirational, is how nearly these arguably second-best strategies might succeed via the mechanisms identified in Simmons's exceptional book.