

WHO CARES ABOUT INTERNATIONAL HUMAN RIGHTS?: THE SUPPLY AND DEMAND OF INTERNATIONAL HUMAN RIGHTS LAW

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* Professor of International Law, The Fletcher School of Law and Diplomacy. This paper is based on a chapter that will appear in my forthcoming book, *The Future of International Law: Global Government*. I appreciated the opportunity to present this paper at New York University School of Law in connection with the NYU Journal of International Law and Politics Symposium entitled “From Rights to Reality: Beth Simmons’s Mobilizing for Human Rights and its Intersection with International Law,” and at the Harvard International Relations and International Law Workshop. I am grateful for comments from participants in these discussions, including Gabriella Blum, Cosette Creamer, Hurst Hannum, Gerald Neuman, Jeswald Salacuse, and Beth Simmons, and for research assistance from Sanhita Ambast.

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INTRODUCTION

As we analyze international legal commitments that are symmetric in form, it is important to recognize that these commitments are often asymmetric in effect. By “commitment,” I refer to the smallest unit of international legal obligation—the promise to take a specific action or to refrain from taking a specific action. Treaties or groups of treaties may involve many different commitments, and these diverse commitments may balance the asymmetric effects of one another. It is also possible that entire treaties or groups of treaties may, on an aggregate basis, be somewhat asymmetric. The main point is that each decision about how to combine different commitments within a treaty, or among a group of treaties, or even between international legal obligations and non-legal forms of inter-national transfers of consideration, involves a complex weighing by each state party. Each state party must decide whether the package of commitments demanded of it is appropriately counterbalanced by the package of commitments granted to it: whether the combined effect of a particular set of commitments, as obligee and as obligor, is politically Pareto efficient as to that state. It does so by aggregating its domestic preferences through its domestic political system.

With respect to any particular commitment that is framed as a formally symmetrical obligation, it is likely that the commitment will be more politically costly for some states to accept and to carry out than for other states. With respect to any particular commitment, there will be “high depth states” and “low depth states,” with “depth” referring to the extent to which compliance with that commitment would cause the state

to take action or refrain from taking action inconsistent with its purely domestic preferences.¹

Some areas of human rights law exhibit broad asymmetry, for example where human rights obligations are framed in a way that is consistent with the purely domestic preferences of liberal democratic states, but that is inconsistent with the purely domestic preferences of authoritarian states. In liberal democratic states, which are no or low depth states with respect to these types of human rights, the domestic political equilibrium largely supports these rights, while authoritarian states may be understood as high depth states for these rights because their domestic political equilibrium would otherwise reject these rights.

For low depth states, entry into a treaty (“adherence”), and compliance with the obligations imposed by the treaty (“compliance”), is not very costly, either in an economic or in a political sense. For high depth states that by definition lack sufficient autonomous political support for human rights, compliance with a human rights treaty is politically, and perhaps economically, costly, and therefore entry into a human rights treaty is generally costly, assuming that they will comply or bear costs for failing to do so. However, there may be countervailing benefits. Of course, compliance is by no means certain, and violation is not necessarily costly. Where this is the case, the human rights treaty has little depth.

This scenario raises four critical questions.

1. Demand for Adherence and Compliance. Why do low depth states care about what happens in high depth states? More generally, what are the externalities or public goods, or other bases for international concern, regarding domestic human rights in other countries? What causes demand for international human rights law? I assume that, generally speaking, the same things that cause demand for compliance cause demand for adherence, provided that adherence causes compliance, although under some circumstances adherence by high depth states may ben-

1. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 419 (2000) (noting the variety of reasons affecting country compliance beyond legalization).

enefit low depth governments in their relationships with certain domestic constituencies, regardless of compliance by high depth states.

2. Supply of Adherence. What causes high depth states to adhere to these treaties, when they get nothing of value in terms of changed human rights performance from low depth states? What causes supply of international human rights law? This is a different question from the question of what causes high depth states to become low depth states. Acculturation, development, or other factors may cause high depth states to change, developing an indigenous demand for human rights that overcomes indigenous resistance. I am concerned not with changes in preferences, but with why states enter into international legal commitments inconsistent with their human rights preferences: why high depth states enter into international human rights treaties.

3. Supply of Compliance. What causes high depth states to comply with international human rights treaties? Again, this is different from the question of why states autonomously protect human rights: the question is how do international human rights treaties cause states to take actions that are inconsistent with their autarchic political equilibrium.

4. Strategic Barriers. How can supply meet demand? Focusing on commitment, assuming low depth states generally care about human rights performance in high depth states, how can they induce high depth states to enter into treaties? Can low depth states overcome the collective action problem of determining how to share the cost of inducing high depth states to enter into these treaties? Even when demand and supply can otherwise intersect, there may be strategic barriers to transactions.

This article reviews existing literature on these four questions, suggesting a preference-based analytical approach—an analytical approach based on the assumption that actors seek to maximize their preferences.

In *Mobilizing for Human Rights*, Beth Simmons rejects the power of reputation, retaliation, or reciprocity to cause adher-

ence to or compliance with human rights treaties—effectively rejecting the influence of international relations.² Focusing on the supply side, Simmons suggests that the main reason why states enter into human rights treaties as obligors is not reciprocity, but that they agree with the principles articulated. This proposition does not answer the question of why some states desire that other states enter into human rights treaties, or why states that agree with the principles feel the need to enter into a treaty articulating those principles.³ In *Mobilizing for Human Rights*, Simmons does not explain why states would accept an international human rights obligation at one time that will cause them to take unwanted action at a later time. If, alternatively, the requisite action is wanted, as opposed to unwanted, the treaty has no depth and is not interesting from a social scientific standpoint. Simmons's argument supports the possibility of autonomous human rights protection, but does not explain *international* commitments. *Mobilizing for Human Rights* fails to explain the use of international law to make commitments, by low depth states or by high depth states.

I. THE DEMAND FOR INTERNATIONAL HUMAN RIGHTS COMMITMENTS AND COMPLIANCE: WHY DO STATES CARE ABOUT THE HUMAN RIGHTS PERFORMANCE OF OTHER STATES, OR THEIR ADHERENCE TO HUMAN RIGHTS TREATIES?

It is a continuing puzzle to explain international human rights law, as opposed to domestic human rights law.⁴ If a human rights treaty binds low depth states, then it is largely superfluous, and we need an explanation of why other states requested the treaty. If the treaty binds high depth states, we need an explanation other than agreement with the principles, because by definition, high depth states do not agree.

Examining the possibility of reciprocity in this area, we might ask rhetorically “would Sweden really torture its citizens

2. BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* (2009).

3. Another way of making my point is that if a state agrees with the principles, then it is not a “bad guy state,” and therefore can be expected to implement human rights of its own accord.

4. See Dennis C. Mueller, *Rights and Liberty in the European Union*, 13 SUP. CT. ECON. REV. 1 (2005) (postulating that citizens write constitutions to further their collective interests and rights emerge as substitutes for the unanimity rule).

in response to torture by Syria of Syria's citizens?" Yet this question is analogous to the following question in the municipal realm: "would one parent beat his child in response to the beating by another parent of his children?" Of course not, but this type of narrow reciprocity is not seen as a condition for the existence of domestic law, and it is not a condition for the existence of international law. In fact, in most areas of international law, international legal rules are characterized by either explicit or implicit asymmetry: the commitments of different states are diverse. This is due to the different situations of different states. Even in the field of trade, which is often thought of as exhibiting narrow reciprocity, different states agree to liberalize market entry for some products in exchange for liberalization by other states with respect to *other* products. For example, Brazil might agree to reduce its tariffs on computers in exchange for China reducing its tariff on oranges. In the field of investment, although bilateral investment treaties are nominally bilateral, capital often flows largely in one direction, and only one of the states is expected to present significant barriers or risks to investment.

It is possible that there is reciprocity within particular human rights agreements, especially those largely among liberal democratic states. For example, one state might accept commitments with respect to the death penalty in exchange for another state accepting commitments with respect to religious freedom. The negotiation of a human rights treaty provides opportunities for this type of reciprocity. But even where human rights agreements lack reciprocity within the agreement itself, there is a possibility of more diffuse reciprocity, involving denial of foreign aid, exclusion from free trade agreements, refusal of military alliances, or other deleterious effects of non-adherence or violation.

In the following subsections, I review some of the leading preference-based reasons why one state might request another state to improve its human rights protections, and to confirm its commitment to improve in a treaty. There is little empirical work linking these possible reasons to actual human rights treaties, but some of the connections seem intuitively appealing.

It is true that human rights violations may cause significant international external effects, including refugee crises, ethnic or other conflict, certain types of regulatory competi-

tion as in connection with labor rights, and more diluted external effects in terms of reduced economic growth. Human rights violations may also certainly cause external effects through altruism: citizens of foreign states may suffer diminished utility by knowing of human rights violations in other states. This is certainly a large motivation for international human rights law: people care about the human rights circumstances in other states.

A. *Physical Externalities*

First, human rights violations may simply cause victims or those at risk to leave the perpetrating state. If this emigration is disorderly, excessively large, or politically unappealing in other ways, it may cause direct adverse effects outside the perpetrating state. The human rights violations may create conditions that would result in civil war or a threat to international peace and security. Other states may wish to avoid a situation in which they would be compelled to intervene at great cost. Security Council actions with respect to Libya,⁵ Somalia,⁶ Haiti,⁷ Rwanda⁸ and Kosovo⁹ may be understood in this way.

The recently formulated “responsibility to protect”¹⁰ may be understood as a proposal to address these types of external effects, as well as a proposal to give affected states some power to respond. It states that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” The international community may use diplomatic, humanitarian, and other peaceful means, and if those fail, may take “collec-

5. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (establishing no-fly zones over Libya).

6. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (establishing the Unified Task Force to create a secure environment to provide humanitarian assistance to the civilian population).

7. S.C. Res. 940, U.N. Doc S/RES/940 (July 31, 1994) (authorizing a United States-led multinational force to restore President Jean-Bertrand Aristide’s government).

8. S.C. Res. 872, U.N. Doc. S/RES/872 (Oct. 5, 1993) (establishing the U.N. Assistance Mission in Rwanda).

9. S.C. Res. 1244, UN Doc. S/RES/1244 (June 10, 1999) (authorizing an international civil and military presence in Kosovo).

10. See Rep. of the Int’l Comm’n on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), available at <http://www.iciss.ca/report2-en.asp>.

tive action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis” when “national authorities are manifestly failing to protect their populations” from these crimes.¹¹

Another type of direct externality would involve mistreatment of foreigners. A state may appropriate property of foreigners, or otherwise abuse foreigners in a way that causes a direct external effect. Of course, this type of externality might be addressed simply by providing “better-than-national-treatment” to the foreign persons. Internalization of these externalities would thus not necessarily require that broad human rights be accorded to residents.

B. *Demonstration Effects*

Another type of externality is ideational. That is, if one state abuses its citizens it may make it easier for another state to do so. International public opinion might not be so outraged, or its outrage might be diluted, by virtue of widespread violations. Concerns about responses to the 9/11 attack by the United States that reduce human rights protections might be understood in this way.¹² Thus fear of contagion—emulation by other states—would be one reason why citizens of one state would be concerned about human rights practices in another state. Conversely, it might be hoped that by spreading human rights protection more broadly, it would be more difficult for one’s government to engage in human rights abuses. This perspective supports Simmons’s argument that the reason why states adhere to human rights treaties is because they agree

11. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); Protection of Civilians in Armed Conflict, S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

12. For example, in 2004, Anthea Roberts argued that U.S. human rights policies in the aftermath of September 11, 2001, “involve discrimination against non-citizens and between non-citizens, both of which reflect a movement away from universal human rights.” She argued that these policies have diluted international human rights standards because other states have either assented to or emulated U.S. anti-terror policies. Roberts ascribed the United Kingdom’s enactment of the Anti Terror, Crime and Security Act 2001 (which curtailed civil liberties) to emulation of similar policies in the United States. Anthea Roberts, *Righting Wrongs or Wronging Rights: The United States and Human Rights Post-September 11*, 15 EUR. J. INT’L L. 721, 722, 733 (2004).

with the principles, but suggests why they agree with the principles *for others*, and support a treaty, as opposed to simply practicing human rights unilaterally. It is supported, to some extent, by Simmons's empirical finding that ratification by a particular country is often associated with ratification by other countries within that country's region.¹³

C. *Diaspora Externalities*

Where there are important ethnic or religious relations between citizens of one state, and related ethnic or religious groups in a second state, it is not uncommon for these related citizens of the first state to be concerned about the treatment of their ethnic group in the second state. This type of concern arises frequently, with examples including the concerns of the U.S. Irish community regarding the British treatment of Northern Ireland, Indonesian concerns regarding the Israeli treatment of Palestinians, or Chinese concerns regarding the treatment of overseas Chinese.

D. *Mobility*

A plausible economic approach to human rights sees them as distributive claims, in which the rights-holder is protected from certain types of majoritarian, or outside a democracy, authoritarian, impositions in the case of negative rights, or denials in the case of positive rights.¹⁴ In this model, proposed by Dennis Mueller, rights are established where the likely majoritarian concern is small relative to the likely minority interest.¹⁵ For example, the right to a fair trial means a lot to the accused, and might be seen as a relatively minor imposition for the majority.

Mueller's argument is premised on some degree of expected mobility; that is, on the expectation that a foreign citizen may move to the human rights obligor state, or may imagine himself in the position of a resident of the human rights obligor state. This approach does not suggest universality of human rights, but rather anticipates that different societies would develop distinct baskets of human rights based on their

13. SIMMONS, *supra* note 2, at 88.

14. Mueller, *supra* note 4.

15. *Id.* at 13.

own history and characteristics. Mobility, therefore, is not a complete explanation for why groups of states, such as the European Union or even a wider multilateral group, determine to harmonize rights, or to commit internationally to provide human rights. Another way of asking this question is to ask what is the optimal size of the regulatory unit for particular human rights? Interestingly, there is no reason to expect that the optimal regulatory unit would be the same for all rights, or for all states. Mueller's approach does not address most cross-border externalities due to human rights denial or provision.

E. *Altruistic Externalities*

Furthermore, the direct welfare of its own citizens does not necessarily exhaust the objective function of a particular state. Rather, it is entirely plausible, and common, for individuals and by extension for their states to have preferences regarding the welfare of others. For a domestic example validating the possibility of altruistic preferences, we need look no further than the preferences parents have regarding the welfare of their children. For international examples, we might look at private and public efforts to assist in the event of foreign natural disasters or famines. States and their citizens can cooperate for purely self-interested reasons, but we also observe more altruistic cooperation, where repetition is unlikely or where it is impossible to obtain reputational gains from cooperation.¹⁶

Indeed, Mueller suggests a kind of Rawlsian veil of ignorance-based virtual mobility, in which a citizen of one state imagines himself as a citizen of another state, as a basis for concern regarding foreign human rights.¹⁷ This is an argument for ethical concern arising from a thought experiment—the point is that individuals might develop ethical concerns that would induce them to lobby their governments to request human rights protections in foreign states.

Altruism may be accentuated by virtue of new information technologies that address the availability bias by which we feel greater concern for problems that are physically closer than for those that are farther away. Under the availability bias or

16. See SAMUEL BOWLES & HERBERT GINTIS, *A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION* (2011).

17. Mueller, *supra* note 4, at 1; JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

availability heuristic, people respond more irrationally to concerns that are present in their minds, either due to geographic proximity or perhaps due to temporal proximity, than to risks that are more distant, even if the risk is otherwise equal.

An availability bias may also highlight concerns for problems that are temporally or historically closer. It is not difficult to see the historical factors that led to the development of international human rights law after World War II in this light. The experience of the Holocaust, of the war itself, of the war's aftermath, of decolonization, and of the commencement of the Cold War all contributed to the development of international human rights treaties. Many of these developments began and were driven by the role of international human rights law in the U.S. domestic political scene.¹⁸

F. *Positive Externalities and Global Public Goods*

Another reason for foreign concern regarding human rights practices is the global public goods aspect of some of the results of human rights protection. High levels of human rights are conducive to economic growth and welfare.¹⁹ Economic growth and welfare in one state benefits other states, in particular through trade and finance channels. Therefore, the protection of human rights on a national level may confer positive externalities on foreign persons, or may be a partial global public good, insofar as its benefits are not all captured by the granting state. For this reason, it may be that human rights are under-provided, and an international cooperative regime would be useful to provide the optimal level of human rights. This may be especially true under national authoritarian governments, wherein the autocrat/kleptocrat can capture more personal welfare by denying human rights and enhancing his own power than by granting human rights that might increase total national welfare.

18. See ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005) (describing the Atlantic Charter, President Roosevelt's "Four Freedoms," and the New Deal as the basis for U.S. negotiations establishing the international human rights regime after World War II).

19. Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 *KYKLOS* 509, 510 (2007).

G. *Pecuniary or Competitive Externalities*

Some types of human rights violations—notably labor rights—may have an adverse effect through the price system, and thus would be understood as pecuniary or competitive externalities. For example, permission for slavery or child labor, or prohibitions on collective bargaining, or failure to set a minimum wage, may provide bargaining power to employers that would enhance their ability to pay a lower labor cost, and therefore be more competitive in the international market. These types of pecuniary externalities may be accentuated by globalization—by the reduction of other barriers to competition. This may be one reason why we sometimes see labor rights components to free trade agreements. Thus, competitive or pecuniary externalities may be expected to produce increasing pressure on certain domestic human rights as globalization advances.

H. *Conclusion Regarding Demand*

There is little data on the magnitude of the factors described above. However, this list of factors provides a plausible set of reasons why low depth states might demand human rights performance from high depth states. Of course, the level of demand will depend not just on the benefits described here, but on the costs. The costs to high depth states will determine the supply of adherence to and compliance with human rights obligations. The net benefits to low depth states will determine the price that low depth states would be willing to pay to high depth states to adhere to, and to comply with, human rights treaties. Similarly, the net costs to high depth states (we know that they are net costs by virtue of the definition of high depth states) will determine the price that high depth states would be willing to accept in order to adhere and comply.

We know that most human rights treaties have very limited mechanisms to ensure compliance, and perhaps this is because the low depth states are only willing to expend enough to secure a weak treaty, rather than a strong treaty. For example, while the ICCPR has 167 state parties, the Optional Protocol to the ICCPR (which strengthens the enforcement of the ICCPR by establishing an individual complaint mechanism) has just 144 state parties. However, in some particular con-

texts, we have seen low depth states willing to act to secure a strong treaty, conditioning important trade benefits on human rights performance.²⁰ For example, the United States has conditioned entry into a preferential trade agreement with Colombia on certain core labor rights protections.

II. THE SUPPLY OF INTERNATIONAL HUMAN RIGHTS ADHERENCE: WHY DO STATES ADHERE TO HUMAN RIGHTS OBLIGATIONS THAT REQUIRE THAT THEY CHANGE THEIR BEHAVIOR?

Analyses of why and when states commit to human rights treaties seek to explain why high depth states sign treaties they do not have to, when such treaties are costly by virtue of the fact that they curtail state sovereignty and may require costly domestic changes. Recent empirical research has examined several main causes of commitment and compliance.²¹

20. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 606 (2005).

21. See, e.g., Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1834 (2002–03) [hereinafter Hathaway, *Cost of Commitment*] (compliance costs); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RES. 588, 594 (2007) [hereinafter Hathaway, *Why Do Countries Commit*] (current human rights practices and strength of domestic institutions); Jay Goodliffe & Darren G. Hawkins, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358, 361 (2006) (international norms, domestic benefits, and sovereignty costs); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 220 (2000) (domestic political self-interest of national governments); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 881 (2002–03) (signaling to other states); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1389 (2005) (weak institutional enforcement and human rights legitimacy); Wade M. Cole, *Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966–1999*, 70 AM. SOC. REV. 472, 472 (2005) (costs of ratification); Beth Simmons, *Why Commit? Explaining State Acceptance of International Human Rights Obligations* 3 (Berkeley Law Sch. Working Paper Series, Paper No. 02-05, 2002), available at <http://www.law.berkeley.edu/835.htm> (regional normative cues and participation in treaty negotiations); Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001*, 23 SOC. F. 724, 726 (2008) (coercion, imitation, and normative compliance); SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE 12 (2007) (international and domestic human

First, states may commit to treaties because the benefits of commitment exceed the costs. The benefits may be categorized as reciprocity, reputation, or the avoidance of retaliation. There may be diffuse reciprocal economic benefits, or there may be more direct benefits in terms of entry into a preferential trade agreement or other trade preferences, foreign aid, or military alliance. The costs include the lost autonomy due to treaty constraints, which are dependent upon the extent to which the treaty will affect behavior, or will impose costs for violation. Importantly in the human rights sphere, to the extent that human rights violations are seen as useful for a government in keeping power, the possible costs of lost autonomy may be viewed by the government as very great.

Alternatively, the benefits may come from signaling, which might be considered a part of reputation, or which might be considered separately. According to signaling theory, states find it useful to expend costs in order to signal their “type” so as to induce certain treatment or cooperation from other states. As discussed in more detail below, Hollyer and Rosendorff have recently argued that governments may use the entry into human rights treaties to signal that they are willing to incur great costs—including the costs involved with response by other states to violation—in order to stay in power.²² According to Hollyer and Rosendorff, authoritarian regimes purposely make their human rights violations more costly in order to demonstrate their resolve.

Second, governments of states may commit to international human rights treaties in order to “lock in” a certain domestic political decision, protecting it from change under subsequent political equilibria.²³ Third, particular historical cir-

rights pressures); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 622 (2004–05) [hereinafter Goodman & Jinks, *How to Influence States*] (coercion, persuasion, and acculturation); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT'L L. 725, 726 (2008) [hereinafter Goodman & Jinks, *Incomplete Internalization*] (acculturation).

22. James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance* 3 (Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876843.

23. Moravcsik, *supra* note 21.

cumstances, such as those surrounding the end of the Second World War, or the decline of the empire of the former Soviet Union, may play an important causal role. Fourth, acculturation factors, such as how governments or states see themselves, or their desire to mimic other governments or states, or the adoption of new normative perspectives, may cause states to commit to human rights treaties.²⁴

A. *Minimizing Costs*

Oona Hathaway argues that states decide to ratify human rights treaties based on expected compliance costs—the higher the cost of commitment, the less likely it is that a country will sign a human rights treaty. This commitment cost is a function of both “the extent to which a country’s practices diverge from the requirements of the treaty and of the country’s expectations regarding the likelihood that the costs will be realized.”²⁵ This is a reference to the “depth” of the treaty. Hathaway argues that the decision to sign human rights treaties depends upon the cost of commitment, the enforcement structure of the treaty, and the nature of each country’s governance regime.

Hathaway finds that democratic and non-democratic countries have different commitment patterns because the former have stronger internal human rights enforcement measures. Because democratic states face internal pressures to abide by their treaty commitments, Hathaway infers that the further a democratic state’s human rights practices diverge from the treaty requirements, the less likely it will be to join.²⁶ However, non-democratic states face little analogous pressure

24. See Goodman & Jinks, *How to Influence States*, *supra* note 21, at 626 (identifying acculturation as a mechanism by which international law changes state behavior); Goodman & Jinks, *Incomplete Internalization*, *supra* note 21 (addressing criticisms of acculturation theory).

25. Hathaway, *Cost of Commitment*, *supra* note 21, at 1834. In this study, Hathaway looked at empirical data from 166 countries over a period of 40 years. See also a later publication making the same argument, in Hathaway, *Why Do Countries Commit*, *supra* note 21, at 594.

26. Hathaway, *Cost of Commitment*, *supra* note 21, at 1838. Hathaway argues that this is because democratic states enjoy a stronger rule of law and because democratic states provide ways by which those who object to government actions can make their views public and thus pressurize the government.

from their domestic constituencies. Therefore, Hathaway infers, the nature of their human rights practice is irrelevant to making international human rights commitments; non-democratic states whose human rights practices diverge from a treaty's standards will be no less likely to commit than non-democratic states whose human rights practices do not diverge from treaty requirements. However, these inferences fail to account for the demand side, under which democratic states may be subject to fewer demands for adherence than non-democratic states.

Jay Goodliffe and Darren Hawkins examine commitment to international human rights treaties in the context of the Convention Against Torture, and—like Hathaway—also focus on the costs of commitment.²⁷ They argue that states incur three types of costs when they commit to treaties: policy change, unintended consequences and limited flexibility, and consideration of these costs affects the decision to adhere.

B. *Maximizing Benefits*

Of course, a more complete approach to explaining the decision to adhere would focus not just on costs, but also on benefits: what inducements in terms of reciprocity, reputation, or avoidance of retaliation affect the decision to adhere? Transactions, and equilibrium prices, depend both on supply and on demand.

There are unlikely to be narrow reputational, reciprocal or retaliatory incentives—within the particular human rights commitment, or even within the broader field of human rights—for high depth states to make international human rights commitments. With respect to treaties that may include diverse commitments, it is possible that a degree of intra-treaty reciprocity may apply, but for simplification purposes, let us assume a circumstance in which there is no intra-treaty reciprocity. By assumption, high depth states lack sufficient autonomous incentives to take the action demanded by the commitment with respect to which they are defined as “high depth”. Assuming that they are consistent over time, and assuming that violation of human rights commitments is costly,

27. Goodliffe & Hawkins, *supra* note 21, at 359.

this suggests that they lack domestic incentives to enter into these human rights commitments.

So, why do states enter into treaties that are costly to them? Even if costs are low, unless they are zero, the only preference-based reasons relate to reciprocity, retaliation, or reputation. Assuming insufficient domestic demand for international human rights commitments, which seems validated by the fact that in a high depth state there is insufficient domestic demand for the relevant human rights, we would not expect high depth states to enter into these treaties without some *international* payoff.

However, one international-based incentive *within* human rights that may be available to high depth states is reciprocity with other high depth states. If there is a negative competitive (or pecuniary) externality in connection with human rights adherence or compliance, human rights treaties may present an opportunity for collusion among high depth states to avoid a race to the bottom in human rights. By inducing other high depth states to protect human rights at the same time, the negative pecuniary externality that might be imposed on a single high depth state moving alone to protection may be avoided. If the magnitude of these pecuniary externalities is great, this could be an important effect. Alternatively, if there is a competitive benefit that might be made available to high depth states in exchange for human rights adherence or compliance, such as preferential trade, then we might expect to see states that compete with a particular high depth state mimicking its adherence or compliance behavior in order to maintain a competitive position. This behavior would be consistent with Simmons's observation that regional adherence is a good predictor of individual state adherence.²⁸

One benefit appears in the form of payoffs, such as international respect or "soft power", availability of trade preferences or free trade agreements, or availability of foreign aid. This proposition is partially questioned by empirical work done by Simmons and Nielsen, suggesting overall that ratification of human rights treaties does not consistently produce significant payoffs for less developed countries.²⁹ Their work

28. SIMMONS, *supra* note 2, at 28.

29. Beth Simmons & Richard Nielsen, Rewards for Rights Ratification? Testing for Tangible and Intangible Benefits of Human Rights Treaty Ratifi-

controls for actual human rights performance, so it is a narrow test of the effects of ratification—of the effects of entering into treaties as opposed to simply improving performance. Furthermore, it would tend to exclude examples of successful adherence: adherence that causes better human rights performance. That is, by controlling for actual performance, they are in fact identifying circumstances where adherence was rewarded but did not result in improved performance. Importantly, their work also controls for free trade agreements and trade preferences under generalized system of preferences (GSP) programs, eliminating from consideration some of the most important possible means of rewarding high depth states for ratification.³⁰

Nevertheless, Nielsen and Simmons find some effect of ratification, for example on aid from European states, as well as aid in response to ratification of Optional Protocol 1 of the International Covenant on Civil and Political Rights, and acceptance of Article 22 of the Convention Against Torture.³¹ They find that for European donors, “ratification of Optional Protocol 1 is associated with a 20 percent increase in aid in the three years after ratification.” Perhaps even more interestingly, they find “evidence of long-term aid rewards, with all aid donors increasing aid in the four-plus years after ratification” of Optional Protocol 1 and the Convention Against Torture. These observations are consistent with a price-theory based approach that suggests that where real costs will be incurred, real payoffs are required. As Nielsen and Simmons state, “if we observe payoffs (tangible or intangible) to ratification, there is a

cation (unpublished manuscript, Jan. 11, 2012), available at <http://ssrn.com/abstract=1451630>, at 2.

30. See Hafner-Burton, *supra* note 20, at 593 (finding that trade agreements and GSP programs that condition trade preferences on human rights performance can cause improved human rights performance).

31. The Optional Protocol provides a system for individual complaint. International Covenant on Civil and Political Rights Optional Protocol 1 art. 2, March 23, 1976, 1966 U.S.T. 521, 999 U.N.T.S. 171. Similarly, Article 22 requires those accepting it to recognize the competence of the CAT “Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.” Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 22, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, as modified by 24 I.L.M. 535 (1985).

strong prima facie case for a reward-based ratification motive.”³² On the other hand, their interview data with representatives of European donor states suggests that these states do not practice aid conditionality with respect to treaty ratification. Thus, they ultimately state that “the slight European effect reported . . . is likely random noise and not the result of a policy of aid-for-ratification conditionality.”³³ Clearly more research is required in order to determine the reasons why high depth states adhere to human rights treaties.

C. *Giving Signals*

One specific benefit of signing human rights treaties is that they can be used by states to send signals to other states. David Moore develops a signaling theory of human rights treaty commitment.³⁴ He argues that countries enter into human rights treaties because governments wish to signal particular messages to other governments. For Moore, such messages include a government’s willingness to restrain the exercise of power in the medium term for benefits in the long-term (its discount rate). States with low discount rates are more likely to comply with their obligations. Other influential factors include the cost of the signal, the pay-offs of any signal, and the possibility of becoming a signal entrepreneur. Although signaling theory, to the extent that it does not include a full array of costs and benefits, may be limited in its scope, Moore seems to examine both the supply side and the demand side of the equation. Along similar lines, Geisinger³⁵ applies Guzman’s rational choice theory to human rights treaty adherence and compliance,³⁶ emphasizing the role of reputation in the decision to sign human rights treaties.

Emilie Hafner-Burton and Kiyoteru Tsutsui approach this question differently, but reach a similar conclusion.³⁷ They use statistical analyses of a comprehensive sample of government

32. Simmons & Nielsen, *supra* note 29, at 4.

33. *Id.*, at 27.

34. David Moore, *Signaling Theory of Human Rights Compliance*, 97 Nw. U. L. REV. 879 (2003).

35. Alex Geisinger, *Rational Choice, Reputation and Human Rights Treaties*, 106 MICH. L. REV. 1129 (2008).

36. ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2010).

37. Hafner-Burton & Tsutsui, *supra* note 21.

repression from 1976 to 1999 to understand why states commit to treaties they do not have to commit to, and often do not comply with. Calling this the “paradox of empty promises,” they argue that the institutionalization of international human rights creates a context in which “governments [have] strong incentives to ratify human rights treaties as a matter of window dressing,” reaping benefits without expecting to incur costs. For this type of dissimulation to be attractive to high depth states, there must be some international benefit that they expect to receive in response to commitment.³⁸

James Hollyer and Peter Rosendorff turn the conventional signaling approach on its head. They argue that authoritarian governments use the signing of the Convention Against Torture (CAT) as a costly signal to domestic opposition groups of their willingness to employ repressive tactics to remain in power.³⁹ They believe that this proposition is supported by their empirical findings that authoritarian governments that torture heavily are more likely to sign the treaty than those that torture less. Yet they do not control for the possibility that states that torture heavily are also subject to greater demands that they sign the CAT than states that do not: the differential could plausibly come from the demand side of the equation, rather than from the supply side. Hafner et al. find that “repressive states want the legitimacy that the human rights treaties confer on them more than non-repressive states because they are under tighter scrutiny for their practices.”⁴⁰

Furthermore, this type of costly signaling explanation can only be true if the costly signal brings benefits that are greater than the cost of the signal. In the CAT case, the costly signal of signing brings greater risk of cost to the government and its elites if it should be deposed, or if its elites travel to other states. On the other hand, Hollyer and Rosendorff suggest that, by signing the CAT, the government signals to domestic opposition its tenacity and willingness to incur great costs to retain power, with the result that domestic opposition reduces

38. *Id.* at 1373, 1378

39. Hollyer & Rosendorff, *supra* note 22, at 1.

40. Emilie Hafner-Burton, Kiyoteru Tsutsui & John W. Meyerm, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115, 132 (2008).

its activities, bringing increased benefits to the authoritarian regime.

Hollyer and Rosendorff do find reduced domestic opposition activity after signing the CAT, but some of this reduction could be caused by satisfaction with entry into the CAT or with other reforms—some of the opposition may reduce activity in response to reduced torture after signing. Hollyer and Rosendorff do not control for this, but discount it by arguing that the opposition would have no way to commit to diminished activity in response to signing, and therefore reduced opposition activity could not induce the government to sign the CAT. Yet this argument is dependent on the existence of an opposition determined to overthrow the government, rather than one that simply seeks improved human rights conditions. Different states will have different types of oppositions.

In fact, one proxy for domestic opposition that Hollyer and Rosendorff use, a calculation of battle deaths, could just as easily be appreciated as an indicator of reduced regime violence rather than reduced domestic opposition, plausibly caused by the same unobserved variable that caused entry into the CAT. The other measure that they use, a measure of riots, strikes, revolutions, demonstrations, and other anti-government activities, shows statistically significant negative correlation only in the case of strikes, and in any event is subject to the same alternative appreciation. Nor do they develop any process-tracing type evidence or survey evidence to suggest that the reason for reduced opposition is the effect that they claim.

The Hollyer-Rosendorff analysis also indicates reduced torture after signing the CAT. They suggest that the reason for this is reduced domestic opposition, but it is equally possible that the reduction results from the costs imposed on the regime by the CAT.

Without evidence that supports this creative but arcane interpretation, parsimony suggests that we revert to normal price theory, which suggests that authoritarian regimes sign the CAT because of inducements available to them, and comply with it because of the costs of violation. These propositions are supported by the work of Beth Simmons and Richard Nielsen, showing that entry into the CAT may increase foreign as-

sistance in the long run,⁴¹ and by the work of Emilie Hafner-Burton, showing that entry into preferential trade agreements with “hard” human rights requirements is associated with improved human rights performance.⁴²

D. *Lock-In*

International human rights law may be useful to low depth states in order to “lock in” reforms. In 2000, Andrew Moravcsik published a systematic study of binding international human rights law agreements in post-war Europe,⁴³ and argued that governments (especially newly formed democracies) often committed to international human rights treaties because such commitments helped them “lock in” credible domestic policies. According to Moravcsik, this “self-binding” helps new democracies stabilize the domestic status-quo and reduce the risk of non-democratic threats. The binding force is provided by adding the power of international relations and international law to the existing domestic incentives to maintain the targeted domestic policies. This theory assumes that international law may have power to lock in reforms greater than that of domestic law or constitutional restrictions. It thus depends on some underlying reasons why national governments would comply with international law, including concern for compliance on the part of other states.

Goodliffe and Hawkins find little evidence supporting the “lock-in” theory.⁴⁴ On the other hand, Simmons finds, in the context of the CAT, that there is some evidence that may support “lock-in” theory.⁴⁵

41. Simmons & Nielsen, *supra* note 29, at 17.

42. Hafner-Burton, *supra* note 20.

43. Moravcsik, *supra* note 21.

44. See Goodliffe & Hawkins, *supra* note 21 (using Polity Data to categorize states as New Democracies and Unstable Democracies, and finding that these variables are statistically insignificant for both signing and ratifying human rights treaties).

45. See SIMMONS, *supra* note 2, at 107 (using Polity Data to create models based on the length of democracy, the volatility of democracy and improvements in democracy across countries to test the lock-in thesis. Simmons finds that while the lock-in theory is logically compelling, particularly in the context of new democracies in Europe, other factors such as the average level of commitment in the region and the coalitional orientation of the government have greater explanatory power.).

Modern behavioral economics can supply a conjecture as to why states might accept human rights treaties to “lock in” certain reforms. To the extent that the formulation of rights is based on a considered or consensus-based philosophical formulation of the rights of individuals, that is, a formulation of rights based on deliberation and consensus amongst states, behavioral economics would suggest a “nudge” comprised of simply allowing the so-called “reflective system” (where decision-making is deliberate and self-conscious) to overcome the passions of the moment which might be described as the “automatic system” (where decision making is rapid and feels instinctive).⁴⁶ So, establishing human rights may be understood as a device that assists in restraining the “automatic system” and empowering the “reflective system.” In this sense, the formulation of human rights, in order to be legitimate (and not paternalistic) must conform to a reasonable consensus view of the content of human rights. Thus, human rights may be used as a device to assist in making decisions that conform to a consensus view of human rights, where behavior might otherwise follow the “automatic system” and thereby depart from this consensus. According to this explanation, international human rights law is a means by which states may constrain their own behavior in a way that is attractive to them *ex ante*: a form of “lock-in.”

E. *The Effects of Globalization and Global Law: Locking In Through Supplementary Human Rights*

States may also determine to engage in a type of “lock-in” in order to maintain a constant level of restraint on government despite the expansion of government powers under globalization. This is the converse of Mueller’s proposal that mobility causes greater concern for human rights abroad, insofar as it involves concern not so much for the practices of other states, but for the practices of one’s own state, where unattractive practices may be mobile.

Globalization has posed important challenges to human rights. One challenge is the question of which persons are owed human rights by which governments under circumstances of mobility of individuals and global effects of govern-

46. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

ment action. Under some circumstances, globalization can disrupt a stable domestic human rights equilibrium, resulting in a need to protect human rights internationally in order to maintain a pre-existing quantum of human rights.

For example, in the U.S. actions against terrorism after September 11, 2001, the question has arisen to what extent the human rights constraints on U.S. governmental action that takes place domestically apply to action that takes place abroad, or to action that has connections with different territories. To the extent that government action is only constrained territorially, but government action can take place extra-territorially, there may be a gap in human rights protections. This type of discontinuity between the broader-than-territorial scope of power and the territorial scope of rights-based constraint can leave a gap.⁴⁷ The gap may be filled by international human rights.

This potential marginalization of domestic human rights regimes by virtue of globalization may give rise to demand for international human rights law as a replacement. We might call this “supplementary human rights.” Perhaps the best way to understand supplementary human rights is as a way to maintain a steady equilibrium of human rights in the *domestic* setting, under globalization. In order to maintain such a *domestic* equilibrium, it sometimes becomes necessary to protect or promote human rights at the *international* level.

Subsidiarity implies that under some changes in technological or social circumstances, the vertical level at which it is appropriate to guarantee certain human rights may change. Supplementary human rights respond to gaps in the domestic human rights framework that are created or accentuated by globalization. These gaps may take the form of failure to apply domestic human rights to circumstances that are factually difficult to distinguish from those to which domestic human rights ordinarily apply but that are outside the jurisdictional reach of domestic human rights, conflicts between the laws, including human rights laws, of different states, or the possibility of unstable or inefficient competition between rules of different states. One response to these phenomena is to agree on rules

47. See generally Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579 (2006).

determining the scope of application of different states' human rights—we might call these “choice of human rights law rules.” An alternative response to these phenomena is to harmonize human rights, or to establish human rights at the international level.

Finally, consider various controversial U.S. actions in the war on terror that implicate transnational interests, including the extraordinary rendition of suspected terrorists to states accused of committing torture and the commission of human rights abuses against terrorist suspects by U.S. agents at sites outside the United States. As of this writing, the extent to which U.S. constitutional protections apply to these acts has not been definitively resolved.⁴⁸ If domestic courts ultimately determine that domestic constitutional protections do not apply to these sorts of fact patterns, we would expect renewed pressure for supplementary human rights in these areas.⁴⁹

48. See *Boumediene v. Bush*, 553 U.S. 723, 792, 795 (2008) (holding that § 7 of the Military Commissions Act unconstitutionally suspends rights of alien enemy combatants to petition for writ of habeas corpus); *El-Masri v. United States*, 479 F.3d 296, 300, 313 (4th Cir. 2007) (dismissing suit by individual allegedly detained as part of CIA's extraordinary rendition program and tortured on grounds that case could not proceed without disclosing state secrets); *Arar v. Ashcroft*, 532 F.3d 157, 162, 163, 192–93 (2d Cir. 2008) (dismissing suit by alien against United States and government officials that alleged he was mistreated and then removed to Syria, where he was tortured).

49. Disputes over the extraterritorial reach of fundamental rights and constitutional norms are not new. For example, the *Insular Cases* in the early twentieth century addressed whether the U.S. Constitution applies in territory that is not a state. See, e.g., *De Lima v. Birdwell*, 182 U.S. 1, 21–23 (1901) (discussing the circumstances under which various guarantees of the Constitution apply to territory held by the United States); *Downes v. Bidwell*, 182 U.S. 244, 249 (1901) (noting that the case raised the question of whether the revenue clause of the Constitution applied to the newly acquired territories). With globalization, increasing numbers of cases involving the extraterritorial application of fundamental rights are arising before international and domestic tribunals. See *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9) (“[T]he [ICCPR] is applicable in respect of acts done by a State in the exercise of jurisdiction outside its own territory.”); *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)* 2005 I.C.J. 168, 243 (Dec. 19) (noting that international human rights and humanitarian treaties apply to acts in occupied territories); *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 131 (concerning the overseas arrest by Turkish officials of a separatist leader); *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333 (concerning the legality of NATO bombing of Serbia); *Ben El Mahi v. Denmark*, 2006-XV Eur. Ct. H.R.

F. *Preference Modification Factors*

Preference modification factors underlie the constructivist approach developed by Thomas Risse and Katherine Sikink,⁵⁰ as well as the sociological approach developed by Ryan Goodman and Derek Jinks.⁵¹ The preference modification class of explanations suggests that states commit to human rights treaties because they agree, or come to agree, with the normative content of the instruments.

Of course, states that do so are no longer “high depth states,” so preference modification factors that cause agreement with the principles of the human rights treaty leave open the question of why other states might be interested in commitments from these states that are now low depth states. Indeed, under these circumstances, we would also need to ask why the obliged state would incur the additional administrative or other costs of entering into a human rights treaty. Preference modification that does not go far enough to convert high depth states to low depth states would, however, effectively reduce the cost of commitment to the high depth state, by reducing the extent of policy change required, thereby reducing the level of other inducements necessary to cause them to commit.

Goodman and Jinks have proposed acculturation as a distinct causal mechanism in connection with compliance, but it may also help explain adherence. By acculturation, they mean

(aliens abroad injured by hate speech in Denmark); *Munaf v. Geren*, 553 U.S. 674 (2008) (holding that the U.S. Constitution does not prohibit transfer of U.S. citizens detained by U.S. military in Iraq to Iraqi custody despite possibility of torture); *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007), *aff'd*, 524 F.3d 1320 (Fed. Cir. 2008) (rejecting alien’s claim for compensation when foreign government, with cooperation from U.S. government, took her land adjoining U.S. embassy).

50. See Thomas Risse & Kathryn Sikink, *The Socialization of International Human Rights Norms into Domestic Practice: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1* (Thomas Risse et al. eds., 1999) (analyzing the internalization and domestic implementation of international human rights norms through a five phase “spiral model” of norm socialization).

51. See Goodman & Jinks, *How to Influence States*, *supra* note 21 (analyzing mechanisms through which states and institutions influence the behavior of other states); Goodman & Jinks, *Incomplete Internalization*, *supra* note 22 (arguing that acculturation as a social process which influences state behavior can facilitate progress toward human rights reform).

the process by which actors assimilate beliefs and behavioral patterns of their culture. Acculturation is driven by identification with a reference group which generates cognitive and social pressures to conform with its behavioral expectations.⁵² Goodman and Jinks argue that neither coercion-based nor persuasion-based accounts of the influence of international law are sufficient to explain the pattern of isomorphism and decoupling that is observed among states. “Isomorphism” refers to a tendency of states to have similar structures and commitments, while “decoupling” refers to departures from this similarity.

Structural similarity exceeds that which might be explained by reference to the material incentives of target states, and yet persistent decoupling strongly suggests an ‘incomplete internalization’ inconsistent with persuasion-based explanations. The upshot is that coercion and persuasion-based accounts, however indispensable for a comprehensive theory of global social influence, require supplementation. The resultant, more comprehensive theory of global social influence further suggests several regime design principles that might guide the fashioning of more effective human rights law and institutions.⁵³

As noted above, Simmons, in *Mobilizing for Human Rights*, suggests that a primary reason why states enter into human rights treaties is because they agree with the principles therein.⁵⁴ Again, the preference modification or acculturation approaches have difficulty explaining the role of *international* commitments.

Goodliffe and Hawkins find support for norms as a motivation for commitment, on the basis that states within a regional grouping are more likely to sign and ratify the Convention Against Torture.⁵⁵ They do not seem to control for the

52. Goodman & Jinks, *Incomplete Internalization*, *supra* note 21, at 726.

53. *Id.* at 727.

54. SIMMONS, *supra* note 2, at 64. This argument is most clear in a working paper Simmons wrote in 2002, where she states that “there are clear cultural preferences, domestic legal traditions, and transitory political conditions that are associated with higher degrees of international human rights treaty commitment-making.” Simmons, *supra* note 21, at 3.

55. Goodliffe & Hawkins, *supra* note 21, at 365.

potential demand side of the equation, under which it might be that a particular region might be of more concern to low depth states than other regions. They also do not control for the possibility that states within a particular region might compete more directly with one another than with others for trade preferences, investment, aid, or other benefits. Thus, the demand side presents a source of potential unobserved variable bias.

Wade Cole rejects the preference modification approach. Cole examines the relationship between the content of a treaty and the costs associated with committing to it, when it comes to a state's decision to sign and ratify a treaty.⁵⁶ Cole uses data from more than 160 countries between 1969 and 1999 to analyze the explanatory power of three dominant theories of treaty ratification: rationalism (according to which treaty ratification is a function of the costs of commitment), world polity institutionalism (according to which states ratify treaties to signal agreement with the dominant values of the international community), and what Cole calls the clash of civilizations perspective (where states sign treaties because they agree with the values embodied therein).⁵⁷ Cole's analysis concludes that the rationalist and world polity theory are useful in explaining states' treaty behavior whereas the clash of civilizations theory is not.⁵⁸

To briefly conclude this section, empirical research and scholarly analysis has provided several reasons to explain the decision of high depth and low depth states to commit to human rights treaties—commitment may provide benefits, allow for signaling, lock-in democratic reform, and be a product of modified preferences. These provide some understanding of the supply-side of international human rights law—that is, why states accept obligations that will require them to change their behavior in the future. However, as the next section of this paper will examine, similar analyses focusing on international human rights compliance also provide insight into this question.

56. Cole, *supra* note 21, at 473.

57. *Id.*

58. *Id.* at 491–92.

III. COMPLIANCE: WHY DO OBLIGEES COMPLY WITH HUMAN RIGHTS COMMITMENTS?

There is a similarly rich body of literature on the relationship between human rights treaty commitment and compliance.⁵⁹ Some of these studies suggest that human rights treaties can cause better human rights conditions, though they proffer different mechanisms by which they work.

In *Mobilizing for Human Rights*, for example, Simmons suggests that international human rights treaties can produce behavioral effects because treaty ratification encourages changes in elite agendas, public law litigation, and civil society action that eventually improves human rights protection and treaty compliance in countries.⁶⁰ She argues that international human rights law has its effect through these domestic mechanisms, as opposed to reciprocal mechanisms that may be operative in other areas of international law. Of course, while all international legal compliance is proximately caused by a domestic political decision, the important question for students of international law is the extent to which international legal consequences in the form of reciprocity, reputation, or retaliation contribute to the domestic political decision, or the extent to which international law is an instrument of acculturation.

Simmons' work provides an important analysis and empirical validation of the proposition that international human

59. In her book on compliance, Sonia Cardenas discusses what constitutes state compliance and uses statistical analysis to determine what the domestic and international pressures for compliance and norm violation are. CARDENAS, *supra* note 22. See generally Lawrence J. LeBlanc, Ada Huibregtse & Timothy Meister, *Compliance with the Reporting Requirements of Human Rights Conventions*, 14 INT'L J. HUM. RTS. 789 (2010); Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. (2007) [hereinafter Neumayer, *Qualified Ratification*]; Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RES. 925 (2005) [hereinafter Neumayer, *Respect for Human Rights*]; Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation and Human Rights Treaties*, 106 MICH. L. REV. 1129 (2008) (reviewing ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2007)); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Linda C. Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* 36 J. PEACE RES. 95 (1999).

60. SIMMONS, *supra* note 2, at 125–55.

rights treaties can produce behavioral effects through these channels: changes in elite agendas, public law litigation, and civil society action. Her conclusion is buttressed by other studies. Eric Neumayer finds that human rights improvement after treaty ratification is a function of how democratic the country is and the number of international nongovernmental organizations in which its citizens participate. Conversely, in very autocratic regimes with weak civil society, ratification can be expected to have no effect and is sometimes even associated with more rights violations.⁶¹ Emilie Hafner-Burton, Laurence Helfer and Christopher Fariss study derogations from human rights treaties, and find that domestic politics—not international reciprocity, retaliation, or reputation—is the “crucial determinant of state compliance with international human rights law”. Their conclusions are based on comprehensive datasets of derogations and states of emergency around the world from 1976 to 2007.⁶² Cardenas comes to a similar conclusion.⁶³ Hafner-Burton and Tsutsui find that the impetus for compliance comes, not from the treaty regime, but from the “global legitimacy of human rights experts and independent global civil society.”⁶⁴

One concern with these works that suggest that reciprocity is not important, and that treaties have domestic sources and domestic channels of causal effect is the time inconsistency problem: these authors seem to assume that high depth state governments are ignorant of this effect of signing treaties, later causing them to do something they had wished to avoid.

On a somewhat different note, Hafner-Burton studies the impact of preferential trade agreements on human rights protection, and develops an incentive-based theory of human rights compliance. She argues that traditional human rights treaties are often not complied with because they rely on persuasion alone, which is often not enough. Reciprocity – in the form of human rights norms linked to preferential trade

61. Neumayer, *Respect for Human Rights*, *supra* note 59, at 950.

62. Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673, 676 (2011).

63. CARDENAS, *supra* note 21, at 13.

64. Hafner-Burton & Tsutsui, *supra* note 21, at 1373.

agreements (PTAs) – is far more effective.⁶⁵ She studies the experience of 177 states during the period 1972 to 2002, and validates three hypotheses: (1) state commitment to human rights agreements and (2) PTAs supplying soft human rights standards (not tied to market benefits) do not systematically produce improvement in human rights behaviors, while (3) state commitment to PTAs supplying hard human rights standards does often produce better practices.

Other studies are, however, skeptical of the relationship between treaty ratification and actual human rights protection. Linda Keith argues that data about ICCPR ratifications and actual state behavior suggests that signing the ICCPR has very little to do with better human rights practices. She examines data across 178 countries over an eighteen-year period (1976-93) and across four different measures of state human rights behavior. Her study suggests that “it may be overly optimistic to expect that being a party to this international covenant will produce an observable impact.”⁶⁶ A similar study by Oona Hathaway suggests that ratification of human rights treaties has little favorable impact on individual countries’ practices, and may result in worse human rights practices.⁶⁷

While the evidence regarding compliance is mixed, there seem to be some circumstances in which human rights treaties are associated with improved human rights performance: that they have some depth. This effect, if understood by high depth states, suggests that the high depth states receive some benefit from adherence.

IV. STRATEGIC PROBLEMS IN MATCHING DEMAND AND SUPPLY OF INTERNATIONAL HUMAN RIGHTS LAW

The analysis above suggests that in order to induce high depth states to adhere and comply, simple identical performance reciprocity will often not be sufficient. Rather, it will be necessary for the low depth states to expand the game through

65. Hafner-Burton, *supra* note 20, at 623–24.

66. Keith, *supra* note 59, at 112.

67. See Hathaway, *supra* note 59, at 2022–25 (offering suggestions for treaty design in the future, which include stronger monitoring and enforcement mechanisms). For criticisms of these conclusions, see Ryan Goodman & Derek Jinks, *Measuring the Effect of Human Rights Treaties* 14 EUR. J. INT’L L. 171 (2003).

linkage or side payments in order to induce adherence and compliance. As noted above, acculturation or other mechanisms for changing preferences in high depth states may reduce the price to be paid. To be clear, what is really happening under acculturation is that a high depth state is becoming a less high depth state, or perhaps even a low depth state. The need to provide some consideration will not be eliminated unless the high depth state is converted to a no depth state. For a no depth state, there seems to be little need for international law except to lock in reforms.

There are countless examples of linkage between human rights compliance and other arrangements, including preferential trade arrangements, foreign aid, and military cooperation. In order for this type of linkage to support human rights adherence and compliance, the low depth state must not have sufficient independent reasons for supplying the linked good: it must be individually rational, and therefore credible, that the low depth state would deny the high depth state the linked good. It may be that this is a matter of the structure of the domestic political interest groups in the low depth state: lobbies supporting preferential trade arrangements, foreign aid, or military cooperation might remove their support for these activities under weak human rights performance.

Let us examine a hypothetical arrangement in which a single low or no depth state (ND) and a single high depth state (HD) determine to enter into a PTA including hard human rights standards. Assume five lobby positions in the low depth state:

H_{nd} = human rights activists concerned about human rights in the high depth state

R_{nd} = realists who believe that the low depth state is better off if it avoids addressing human rights issues with the high depth state

C_{nd} = consumers interested in cheap imports from the high depth state

P_{nd} = producers who fear competition from cheap imports from the high depth state

E_{nd} = exporters interested in export opportunities in the high depth state

Assume mirror image lobbies in the high depth state (distinguished by the subscript $_{hd}$), except that instead of the real-

ists in the low or no depth state, R_{hd} is a “regime” interested in maintaining power, and in which the political salience of each lobby differs as set out below.

Assume that at an initial time, $R_{nd} < H_{nd}$ and $R_{hd} > H_{hd}$. Therefore, there is demand in the low depth state for human rights protection in the high depth state, and the high depth state is indeed a high depth state, without autonomous reasons to supply human rights protection. On the trade side, assume that $P_{nd} > C_{nd}$, with a protectionist equilibrium. However, if the interest of E_{nd} can be precipitated through reciprocity with the high depth state, assume that this will be almost, but not quite, sufficient, when combined with C_{nd} , to overcome P_{nd} such that we still have the outcome that $E_{nd} + C_{nd} < P_{nd}$. However, the coalition for trade can be made stronger by adding the strength of H_{nd} , as follows: $H_{nd} + E_{nd} + C_{nd} > P_{nd} + R_{nd}$. This follows from the assumption that $H_{nd} > R_{nd}$. The implication is that, under this assumption, linking the PTA to human rights in the low depth state, the low depth state coalition favoring the PTA is made stronger, and is able to overcome the combination of protectionist and realist interests.

Conversely, assume that in the high depth state, there is a strong coalition for free trade, but not for human rights. That is, while $R_{hd} > H_{hd}$, and even if $P_{hd} > C_{hd}$, $C_{hd} + E_{hd} > P_{hd}$ and $C_{hd} + E_{hd} + H_{hd} > P_{hd} + R_{hd}$.

Now there is a deal that can be done in both human rights and trade, whereas without linkage and cross-functional reciprocity, a deal between the high depth state and the low depth state could not have been made and policy in neither state would change. Note that without linkage, while ND was interested in a human rights deal, and HD was interested in a trade deal, neither deal could be made. With linkage, a combined deal can be made, assuming there is enough surplus political power for human rights in ND and for trade in HD.

What about compliance? The combined PTA/human rights treaty can be structured to establish continuing cross-functional reciprocity, protected by arrangements for cross-retaliation. This is what has been done in the Colombia-U.S. PTA. Cross-retaliation will allow ND to retaliate in trade if HD violates human rights, and, perhaps less realistically, will allow HD to retaliate in human rights if ND violates in trade. We might also assume that there is a generalized but weak general

incentive to comply with international law: once international law is made, government and other pro-international law groups add their weight to the decision to comply.⁶⁸ I hasten also to add that human rights treaties alone may have real constraining effect on high depth states: as discussed above, adherence generally seems associated with improved human rights performance in at least some fields.⁶⁹

Assuming that there is sufficient supply and demand for human rights law, as developed above, what may stand in the way of establishing increased international human rights? I illustrated above how a single low depth state might enter into a PTA/human rights treaty with a single high depth state.

But, as pointed out by Beth Simmons⁷⁰ and Eric Posner, there is another problem.⁷¹ The protection of human rights in high depth states is, in a sense, a public good for the class of low depth states. Low depth states might operate together to achieve this public good. However, empirical work by Raechelle Mascarenhas and Todd Sandler finds in connection

68. See Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHL. J. INT'L L. 127, 135 (2010) ("Compliance by any individual state with an international legal rule is . . . dependent on a political decision to comply made within that state's domestic political process. This domestic decision is both necessary and sufficient to result in compliance. While this decision is purely a domestic political decision, it is importantly influenced by international dynamics. These international dynamics will include the likely response by other states to a decision by the target state whether to comply.").

69. See SIMMONS, *supra* note 2, at 125 ("[T]reaties are casually 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.").

70. See SIMMONS, *supra* note 2, at 116 ("Many international agreements are self-enforcing: They rely on the interests of the parties themselves or the international community to keep the cooperation coming.").

71. See Eric A. Posner, *Human Rights, the Laws of War, and Reciprocity* (Univ. of Chicago Law Sch., John M. Olin Law & Economics Working Paper No. 537, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693974 (explaining that when the well-being of people in a high depth state improves, the low depth states are better off, in the sense that a "good" for which they have a preference and are willing to pay has been supplied; therefore, from the perspective of maximizing the joint welfare, each low depth state should contribute to the high depth state's well-being).

with donations of foreign aid, donors do not work together.⁷² Of course, multilateral or regional aid mechanisms implicitly constitute instances of donors working together. Furthermore, it is possible that human rights treaties present a different type of occasion for donors to cooperate. Finally, when the European Union confers trade benefits on third countries, it does so as a bloc, pursuant to its common commercial policy.

Most of the reasons for concern in low depth states are shared. If the high depth states protect human rights, the benefits to low depth states will be non-excludible, in the sense that all low depth states may enjoy the benefits, and will also be non-exhaustible, meaning that the enjoyment by one low depth state does not reduce the enjoyment by other low depth states. If this is the case, this public good would tend to be under-supplied, and the low depth states would need a mechanism by which to cooperate around the compensation of high depth states for entry into and adherence to human rights treaties. So, both games must be resolved simultaneously: (i) the high depth states must be induced to adhere and comply, and (ii) the low depth states must be induced to contribute. This type of public good contribution problem exists in a number of other contexts, such as environmental protection, public health, and other areas of global public goods.

Perhaps the most likely way to address a public goods problem of this nature is to have a coordinated signing, or to have a minimum number of ratifications before the treaty becomes effective. In this way, states that might otherwise attempt to free ride on the contributions of others may be induced to commit to contribute.

CONCLUSION

Especially in circumstances of asymmetry, international law can usefully be understood in terms of supply and demand, which highlights the costs and benefits to both the demanding state and the responding state. Human rights protection will often have this asymmetric character as between liberal democratic states and authoritarian states. It is not im-

72. Raechelle Mascarenhas & Todd Sandler, *Do Donors Cooperatively Fund Foreign Aid?*, 1 REV. INT'L ORG. 337, 356 (2006).

mediately obvious why liberal democratic states care about human rights in authoritarian states, but this article has tried to provide a taxonomy of bases for concern. It is also not immediately obvious why authoritarian states would enter into human rights treaties that constrain their actions. While they may have domestic reasons to use international law to “lock-in” certain behaviors, assuming that international law serves this purpose, or to signal to either external audiences or internal audiences what type they are, these types of reasons seem less plausible and general than a simpler exchange-based model under which other states provide some valuable consideration or refrain from taking harmful action in exchange for human rights protection.

International law can serve as a tool for exchange of consideration—for reciprocal and linked exchange—that disrupts existing political equilibria, allowing a superior political outcome for each state under asymmetry. International law may also address the collective action problem that may arise among liberal democratic states as they determine how to share the costs of inducing authoritarian states to protect human rights.