Mobilizing *for* Human Rights

INTERNATIONAL LAW IN DOMESTIC POLITICS

Beth A. Simmons

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Mobilizing for Human Rights

This volume argues that international human rights law has made a positive contribution to the realization of human rights in much of the world. Although governments sometimes ratify human rights treaties, gambling that they will experience little pressure to comply with them, this is not typically the case. Focusing on rights stakeholders rather than the United Nations or state pressure, Beth A. Simmons demonstrates through a combination of statistical analyses and case studies that the ratification of treaties leads to better rights practices on average. By several measures, civil and political rights, women's rights, the right not to be tortured in government detention, and children's rights improve, especially in the very large, heterogeneous set of countries that are neither stable autocracies nor stable democracies. Simmons argues that international human rights law should get more practical and rhetorical support from the international community as a supplement to broader efforts to address conflict, development, and democratization.

Beth A. Simmons is Clarence Dillon Professor of International Affairs at Harvard University and has also taught at Duke University and the University of California at Berkeley. Her book *Who Adjusts? Domestic Sources of Foreign Economic Policy During the Interwar Years, 1924–1939*, was recognized by the American Political Science Association in 1995 as the best book published in 1994 in government, politics, or international relations. Her article "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs" won the Heinz Eulau Award for the best article published in the *American Political Science Review* in 2000. Her research also regularly appears in such journals as *International Organization*, *World Politics*, the *Journal of Legal Studies*, and the *Journal of Conflict Resolution*. She was elected to the American Academy of Arts and Sciences in 2009.

Dedicated to Robert O. Keohane – scholar, mentor, friend

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Theories of Compliance

> I believe the decision by totalitarian states to formally (if not practically) recognize these shared values results in part from the international program of support for human rights movements around the world. These legal commitments serve both as the encouraging fruit of efforts to force observance of human rights and as a useful tool by which to transform totalitarian governments into more democratic ones.
>
> Leonid Romanov, member of the St. Petersburg Legislative Assembly and chairman of the parliament's Commission on Education, Culture, and Science[1]

Human rights have been one of the most powerful normative concepts of the past half century. They have been championed by groups and individuals disgusted by the oppression of which some governments have shown themselves capable. They have been supported by governments genuinely eager to set a pro-rights example as well as by cynical governments for purposes of international posturing. Cynical ratification was theorized to be rational only under certain narrow conditions – for instance, when information is thin and autocratic leaders' time horizons are short. Much of the evidence presented in the previous chapter followed patterns consistent with these expectations. Democracies have tended to be at the forefront in the process of ratification, while nondemocratic regimes have fairly consistently lagged behind. There is also evidence of strategic ratification in the form of social camouflage, but really only during the Cold War years, where the news media were under the governments' tight control, and in regions with wider dispersions in actual rights practices. In these cases, governments with little intention of actually improving their practices might rationally have assumed that they could avoid criticism while enjoying the approval of the international community in the short run.

1 Power and Allison 2000:64.

But what happens after the making of a formal commitment? Improved behavior is far from an instant or even a consistent result of treaty ratification. A ratifying government may have intended to comply, but an election could inaugurate leadership with differing priorities. Coups, sectarian or class violence, and civil wars have even more serious consequences for rights protections. Unanticipated events – from terrorist attacks to serious economic crises – could further disrupt progress toward the implementation and observance of agreements. Nor is it a foregone conclusion that governments that were essentially false positives at the time of ratification will never reform or be replaced. Pinochet did not anticipate that the CAT, which his own government ratified, would be used by future governments to hold him accountable a generation later. The totalitarian states referred to in the quote by Leonid Romanov may have underestimated in the 1970s and 1980s the extent to which formal agreements might become a "useful tool" of political liberalization.

This chapter continues the argument developed in Chapter 3. One of the major themes developed there is that some governments ratify human rights agreements sincerely, fully intending to comply with their commitments, while others ratify strategically, hoping for credit or relief from criticism at least in the short run. Certainly, we should expect the former group to have better rights practices than the latter. But in order to argue that the ratification of international treaties affects policy and rights practices, we need a theory of how treaties might matter in the politics of both willing and resistant states. In both cases, treaties potentially influence domestic politics. Even among the sincere ratifiers, treaties can change the priorities of governing leaders, the reasoning of courts, and the demands of groups of potential rights beneficiaries. Among the more resistant ratifiers (plausibly among the false positives discussed in Chapter 3), treaties will have their most important influences through the effects they may have on political mobilization. Mobilization, in turn, is a function of both the *value* that potential rights claimants place on the rights in question and the *likelihood* that mobilization will succeed in realizing them. The central argument developed here is that ratified treaties can influence agendas, litigation, and mobilization in ways that should be observable in government policies post-ratification. *Treaties change politics* – in particular, the domestic politics of the ratifying country. While their enforcement internationally tends to create collective action problems that state actors have few incentives to overcome, the consequences locally can be profound.

This chapter begins by justifying a theoretical focus on the domestic consequences of treaty ratification. Despite the fact that governments toward the end of the twentieth century have accepted a higher degree of peer accountability than ever before, they are still largely reluctant to enforce international human rights agreements in all but the most egregious cases, and only when it

serves their broader political purposes. Moreover, in stark contrast to agreements based on mutual gain and state-to-state reciprocity, international human rights agreements are essentially not self-enforcing. So, how should we construct a robust theory of compliance? By thinking about the influence of treaties on domestic politics. Treaties influence the national policy agenda, they influence legal decisions, and they influence the propensity of groups to mobilize. These three mechanisms in the aggregate should lead us to expect at least some positive impact to the making of a treaty commitment on human rights outcomes – a proposition that is tested in the following four chapters.

INTERNATIONAL TREATIES AND INTERNATIONAL POLITICS

Scholars of international relations are often pessimistic about the ability of international law to influence human rights practices because they are largely looking in the wrong direction: *outward* at interstate relations rather than *inward* at state–society relations. The interstate vantage point does not provide a lot of reason for optimism. The international legal system – while improving – is still one of the most underdeveloped legal systems in the world. Despite the proliferation of treaties and monitoring mechanisms, there is no central lawmaking body, no international tribunal broadly accepted as a legitimate interpreter of legal obligations, and no global "law enforcement" corps to enforce the rules. Many commentators have even wondered whether we should speak of the international legal system as such. What (if anything) drives compliance in such an effete legal environment?

The Common Wisdom

The most common answer is simply state power and state interests. Treaties reflect the power and the interests of the states that take part in their negotiations and add little to an understanding of why governments behave the way they do post-ratification. Governments may comply with agreements only because the treaty does not engage a national interest, or if it does, only if the treaty is consistent with that interest. Compliance against the grain of interests is interpreted as the result of coercion on the part of more powerful states or other actors.

These views are well represented among academic realists.[2] Even as Eleanor Roosevelt and the new UN Human Rights Commission sought to elaborate international rights principles, a spate of extended critiques of international law appeared in response to the legal idealism perceived to have pervaded the interwar years. The decentralized nature of the international legal system was typically presented as its prime defect. International agreements lacked restraining power, as Hans Morgenthau argued, since governments generally retain the

2 See, for example, Bork 1989/90; Boyle 1980; Mearsheimer 1994–5.

right to interpret and apply the provisions of international agreements selectively. While Morgenthau was ready to admit that "during the four hundred years of its existence international law ha[d] in most instances been scrupulously observed," he thought that this could be attributed either to convergent interests or prevailing power relations.[3] Governments make legal commitments cynically and "are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests. . . ."[4] The suggestion of the British school – that all law rested ineluctably on politics and international law on the balance of power – did little to encourage inquiry into the role of law in ordering international politics.[5] The analytical move by neo-realists to strip the essential political structure down to the bare bones of power relationships among states[6] set the study of international law and institutions back a further decade. Certainly, neo-realism has done much to fuel skepticism that international institutions have much influence on important international policy decisions and outcomes.[7]

Realists have primarily provided a critique of international law as a way to enhance international peace and stability, but their arguments have a direct parallel in the human rights area: *Governments will not honor international human rights treaties when it is not in their interest to do so*. Some domestic settings approximate international anarchy: competitive and brutal, with little but power to back government policies. Governments have no incentive under these conditions to hand rights to their political or cultural opponents. And in the absence of an international will to enforce these rights, the domestic balance of power – with whatever regime of repression that implies – will hold sway. For most rights violations, international enforcement simply will not be forthcoming. Foreign governments face severe collective action problems when it comes to paying the military, economic, or diplomatic costs of enforcement. Each government will be driven by its own political agenda, firmly tethered to its particular understanding of its nation's interest.[8] In most cases, such an

3 Morgenthau 1985:295.

4 Morgenthau 1985:299. In the realm of high politics, realists have been especially skeptical about the rule of law and legal processes in international relations (see Bulterman and Kuijer 1996; Diehl 1996; Fischer 1982; Fisher 1981). Raymond Aron (1981:109) put it succinctly: "International law can merely ratify the fate of arms and the arbitration of force." For the most part, realist perspectives have focused on the fundamental variables of power and interest, rarely feeling compelled to inquire further into states' compliance with international agreements.

5 Bull 1977; Carr 1964.

6 Waltz 1979.

7 Mearsheimer 1994–5.

8 George F. Kennan (1951) and other "applied" realists made the normative case that this was the only way to properly formulate foreign policy, as have current government officials. John Bolton (2000:9), for a short time George W. Bush's ambassador to the UN, has written that any claims that international law had binding and authoritative force ultimately ring either hollow or unacceptable to a free people.

understanding will not include pressing for the prosecution of paramilitary personnel for extrajudicial killings in Colombia, ridding the Sudanese military of children, or intervening to improve the treatment of prisoners and detainees in Turkey.

The key realist insight comes down to this: Treaties have little purchase over government behavior because they are not likely to be meaningfully enforced. "High compliance rates" should not be mistaken for important treaty effects, since most treaties just reflect the easy commitments governments were willing to implement even in the treaty's absence.[9] Treaties "screen" but they do not constrain;[10] they separate willing compliers from resistors, without much effect on either. Or alternatively, they are signed symbolically or even cynically in the anticipation that external enforcement will not be forthcoming,[11] often resulting in "radical decoupling" of principle and practice.[12] Jack Goldsmith and Eric Posner represent the mainstream realist view: "Most human rights practices are explained by coercion or coincidence of interest."[13] If we are looking for empathetic enforcement from other countries, we will be looking in vain for a long time.

Self-Enforcing Agreements

If the key explanation for compliance is enforcement, it raises the question of *how* and *when* agreements are enforced. The lack of central authority or the fickle application of brute power is not the end of the story. Many international agreements are self-enforcing: They rely on the interests of the parties themselves or the international community to keep the cooperation coming.

A self-enforcing agreement is one in which two or more parties adhere to the agreement as long as each gains more from continuing the agreement than from abrogating it. These types of agreements are not without sanctions; rather, the sanctions they do involve flow from the nature of the agents' interaction itself. Self-enforcing agreements do not depend on third parties to enforce their terms: The nature of the agreement itself provides incentives for the actors to stick to it even in the absence of external enforcement mechanisms. The expected long-term benefits outweigh the present value of violating the agreement. The agreement is "enforced" by shutting down or reducing that future flow of benefits.

The most obvious mechanism of self-enforcement is for a treaty partner to quit the agreement and refuse future cooperation in that issue area. *Reciprocity* is thus a key aspect of self-enforcing agreements. The risk that another player or players will exit the agreement rather than tolerate cheating can deter a

9 Downs et al. 1996.
10 Von Stein 2005.
11 Hathaway 2002.
12 Hafner-Burton and Tsutsui 2005.
13 Goldsmith and Posner 2005:134.

would-be violator from cashing in on the short-term benefits of defection if that actor places enough value on future interactions. *Reputation* is an additional mechanism for self-enforcing agreements. Quite aside from the specific issue and party involved in a given incident, a reputation as an unreliable treaty partner can potentially influence the willingness of others to negotiate mutually beneficial agreements in a broader range of issue areas. Self-enforcing agreements can be bolstered by community sanctioning, which would raise even further the costs of noncompliance. Enforceable levels of cooperation may vary over time, but they can be altered by the possibilities for reciprocity and the importance of reputation.

Much of the early thinking of cooperation theorists relied on the logic of self-enforcing agreements. The transactions costs literature explains the demand for cooperative international arrangements, but once in place, these rules were theorized as largely self-enforcing. In Robert Keohane's formulation, governments comply with their agreements because they want to benefit from ongoing cooperation. Accordingly, he cites "reasons of reputation, as well as fear of retaliation and concern about the effects of precedents" as the major reason egoistic governments follow the rules and principles of international regimes, even when it is in their short-term interest to renege.[14] As long as the parties expect the cooperative arrangement to extend long enough into the future (the discount factor is low), self-interest can result in a high degree of agreement compliance.[15]

Self-enforcing agreements are stable over time because they imply costs of abrogation that counterbalance any short-term temptation to deviate unilaterally from the terms of the agreement. The rules regarding trade provide a good example. The market access rules of the WTO are largely respected, arguably, even in the absence of WTO enforcement power, because the parties basically have an ongoing interest in free trade. Reciprocity means that a government's violation or compliance will be returned in kind. The prospect of being denied market access by a trade partner lessens the temptation to defect now. The risk that others will infer from the observed infraction that a state is an unreliable trade partner strengthens the self-enforcing nature of the contract.

There are limits, of course, to the ability of reputational considerations to support self-enforcing agreements. Reputational considerations will not be very important among parties that barely interact with each other and within communities that the would-be violator does not much value. A reputation is difficult to establish in those cases where the behavior in question is difficult to observe. Reputations may be somewhat easier to establish where behaviors are transparent and in more homogeneous communities where the behavior of

14 Keohane 1984:106.
15 Telser 1987.

individuals is common knowledge.[16] Moreover, the ability of actors to regulate the exact message they want others to infer from their behavior may be limited, as governments often cultivate multiple reputations.[17] In trade, for example, a government may want to cultivate a domestic reputation for responsiveness to constituency interests but an international reputation for cooperativeness. Finally, "reputational sanctions," like any other kind of sanction, may be suboptimal if the community does not find a way to overcome collective action problems in its supply.[18] There is simply no guarantee that non-third-party enforcement can generate reputational costs that exceed the present value of opportunism.

Compliance with agreements is explained in this approach by the ability to structure incentives in such as way as to make noncompliance too costly to consider *in the absence of third-party enforcement*. Hence the attractiveness of this approach: Self-enforcing agreements would seem to be the only stable agreements in an anarchic setting. Many people who have never uttered the word "realism" would come to conclusions similar to those outlined previously: In the absence of external enforcement, an agreement must be self-enforcing – neither party has any incentive to defect – if it is to have any credibility. Compliance with self-enforcing agreements – unsurprisingly – should be high. Compliance with all other agreements will be problematic.

Treaties as Commitment Devices

What most discussions of self-enforcing agreements do not do, however, is to answer the question, *why treaties?* International treaties are one of the oldest forms of communication among sovereigns, and some 3,000 multilateral and 27,000 bilateral treaties are in effect today.[19] It is hard to imagine why this is the case if they do not perform some kind of useful function among sovereign governments that is difficult to achieve in some other way. What do formal legal agreements add to the calculus to defect that we have been exploring? Why do states use this kind of instrument to support their international cooperation, and what difference – if any – does it make to outcomes we might care about?

One possibility is that treaties support higher levels of international cooperation by enhancing states' ability to make credible commitments to one another, even if they have incentives to misrepresent their true intentions. If states are able to send costly signals of their intentions, the messages they send should ultimately be far more credible. Two kinds of costs are distinguished in the literature: ex ante (or "sunk") costs that have the effect of credibly

16 Landa 1981.
17 Keohane 1997.
18 Guzman 2002.
19 John Gamble, based on Wiktor's Calendars, Rohn's indices, and *Treaties in Force*.

distinguishing a sincere government from an opportunistic one and ex post costs that are paid if a violation takes place.[20] High ex ante costs send a credible signal of intentions: No rational government would pay a high "down payment" on a cooperative enterprise if it did not intend to abide by the agreement. When a government pays high ex ante costs, others can reasonably draw the conclusion that this government will follow through with its agreement. High ex ante costs screen governments by type, revealing their true nature. Their interest in ex post compliance does not change; rather, they signal how much the government values compliant behavior in the first place.

Costs paid ex post work in a different way. If ex ante costs can screen, then ex post costs can *constrain*. Ex post costs are simply the consequences of noncompliance, which can range from trivial to monumental. When ex post costs are high enough, they can effectively tie a government's hands; noncompliance can in some cases be too costly to contemplate. The seriousness of these consequences has the effect *of changing* a government's interest in compliance. In the absence of consequences, the government might have preferred to defect; ex post costs make defection much less attractive. Essentially, we are back in the world of enforcement, broadly understood. Credible commitments that involve ex post costs increase the range of self-enforcing agreements with which the parties have an incentive to apply.

How do *treaties* assist governments in making credible commitments to behave – or refrain from behaving – in particular ways? Let's begin with the sunk costs that allow a government to signal credibly its intent to comply. In many polities, treaties are unique among interstate agreements in that they require domestic ratification. In contrast to other forms of international agreement – memoranda of understanding, executive agreements, or other political announcements – treaty ratification generally involves the assent of a legislative or at least a cabinet-level body. As discussed in Chapter 3, ratification procedures are usually spelled out in a country's constitution, and can range from executive approval to legislative majority to legislative supermajority to national referendum.[21] These procedures require varying levels of government effort to secure domestic political support for the agreement in question. In some countries, there is practically no political difference between ratifying a treaty and signing an executive agreement. But in a great many others, the government has to expend significant political capital to assemble a coalition in favor of treaty ratification. The more hawkish the legislature in these cases, the greater the political resistance the government can expect to ratification and the less likely such a government would be to pay these ex ante ratification costs.[22]

20 Fearon 1997.
21 See my Web site at http://scholar.iq.harvard.edu/bsimmons/mobilizing-for-human-rights.
22 Evans et al. 1993; Milner 1997.

The ratification process helps governments to send a credible signal primarily because of the screening effects of relatively high ratification hurdles. In the face of high up-front domestic political costs, the willingness of a government to expend political capital on ratification sends a credible signal that the government in question attaches a high value to the contents of the treaty.[23] Committed types are likely to secure ratification, while uncommitted types are not. In these cases, treaty ratification can be thought of as a separating equilibrium, in which only the committed are likely to pay the steep political costs of ratification.

Ratification is the only clear ex ante cost associated with treaty making. A much more varied set of arguments has been developed that treaties – in comparison to other kinds of international agreements – impose significant ex post costs in the event of breach. All of these arguments are consistent with viewing treaties as enhancing the self-enforcing qualities of the agreement. Moreover, practically all of these arguments extend the reputational analysis of self-enforcing agreements discussed previously. Andrew Guzman captures the logic of all of these arguments very well when he writes that treaties "represent the complete pledge of a nation's reputational capital."[24] Treaties somehow *put it all on the line in the diplomatic world*. The ex ante cost of violation, in this context, is a severe loss of diplomatic stature and credibility as a contracting party.

The first reason many offer for the credibility of a treaty commitment is its status as law. Among all forms of international agreement-making, treaties have a fairly unique feature: They are clearly embedded in a broader system of interstate rule-making, normatively linked by the principle of *pacta sunt servanda* – the idea that agreements of a legally obligatory nature must be observed. Unlike political or other kinds of agreements, treaties are not free-standing; they gain status from their mutual recognition as legally binding. The link to the underlying principle of good faith fulfillment leverages the commitment made in any one case by linking it with other agreements of a similarly obligatory stature. By embedding an agreement in a broader principle of good-faith compliance, treaties allow actors to draw better inferences about the law-abiding nature of other governments. Normative linkage justifies the inferential round trip from specific violations to the broader reputation for legality back to expectations about future compliance with otherwise unrelated treaty commitments. Violating a legal agreement, in this view, provides information on both the government's attitude toward the contents of the treaty and respect for law itself.

The notion that treaties are embedded in the broader international legal *system* (weak though that system may be) informs a good deal of legal thinking

23 Martin 2000. Lisa Martin tests this argument for the United States by comparing treaties with executive agreements. She finds that U.S. presidents typically choose the treaty form for high-value agreements, which is necessary to assure other countries that the United States intends to comply. See http://www.wcfia.harvard.edu/node/815 (accessed 12 August 2008).

24 Guzman 2002:65.

on the compliance question. This linkage implies that a country can develop a good reputation for law-abiding behavior that has value and meaning across issue areas. Oscar Schachter, for example, has written about a country's "reputation for legality" and suggests that treaty violations are costly to this reputation, even for powerful states.[25] Roger Fisher uses a similar logic to argue that treaty violations are generally deterred by governments "engaged in an expensive effort to create a favorable opinion."[26]

Arguably, treaties also allow for a more complete reputational commitment because of their capacity for clarity. They can be used as a mechanism to enhance the precision of a commitment, making it clearer just what compliance requires. Treaties are well suited to focusing expectations by reducing ambiguity about what behavior is required, permitted, or proscribed. Precision reduces the scope for plausible deniability of violation; it "narrows the scope for reasonable interpretation" of the parties' intentions.[27] Of course, when drafting a treaty, governments are faced with familiar problems of incomplete contracting, or the difficulty of foreseeing and clarifying every conceivable contingency. This is why there has been a strong move to codify rules for treaty interpretation,[28] which further narrow the range of agreed-upon responses when governments disagree over the substance of their treaty obligations. Although precision is neither inherent in nor unique to treaty agreements, when governments want to be precise about the nature of their obligations, treaties are typically the instrument of choice.[29]

Normative as well as rational theorists have explored the quality of law precision as an influence on compliance. In a normative vein, Thomas Franck has theorized that precision, or "coherence," increases the legitimacy of a rule and increases its "compliance pull."[30] In James Morrow's rationalist interpretation of the laws of war, the relative precision of treaty arrangements supports reciprocity between warring states by clarifying prescribed and proscribed behaviors and by limiting the permitted range of responses to violation.[31] In both accounts, compliance is enhanced, ceteris paribus, by rules that are clear – or can readily be clarified – to all parties concerned.

Human Rights Treaties: A Continuing Theoretical Puzzle

None of these theoretical approaches are very satisfying for understanding treaty compliance in the human rights area. Many of the realist insights are

25 Schachter 1991:7.
26 Fisher 1981:133.
27 Abbott et al. 2000.
28 Vienna Convention of the Law of Treaties. Part III, section 3, Arts. 31–33.
29 Lipson 1991.
30 Franck 1990.
31 Morrow 2002.

correct (although, as I will argue, they reach the wrong conclusion): Governments are quite unlikely to comply with their international treaty obligations with respect to human rights if it is not in their interest to do so. Governments are likely to repress political opposition when opponents pose a challenge to national "peace and stability" (or, more likely, the ruling coalition's hold on political power). Governments are likely to engage in various forms of coercive interrogation if they want intelligence from individuals who are considered threats. They are likely to turn a blind eye to the use of child soldiers if that is what it takes to raise a fighting force during wartime.

Furthermore, skeptics are right that peer enforcement is likely to be weak.[32] Foreign governments simply do not have the incentives to expend political, military, and economic resources systematically to enforce human rights treaties around the globe. Even if they value respect for the international legal system and human integrity, states face tremendous collective action problems in organizing potential enforcement efforts. Governments would face these collective action problems even if enforcing international human rights were their top foreign policy priority, but, of course, in most cases it simply is not. Punishing foreign governments for their human rights violations is likely to come into conflict with other foreign policy objectives. For a number of reasons, international punishment is quite likely to be underprovided compared to some optimal level of enforcement.

Governments will have especially weak incentives to enforce international human rights agreements involving their important trade partners, allies, or other strategically, politically, or economically important states. Empirical studies of U.S. foreign policy, especially during the Cold War period, support the point that U.S. administrations have tended to provide aid on the basis of foreign policy exigencies rather than human rights performance.[33] A few studies have drawn similar conclusions for the United Kingdom.[34] The targets of these enforcement efforts are generally small countries whose sanctioning imposes no important costs for the would-be enforcer. For example, countries that are the target of trade–human rights linkage are typically *much* smaller markets than those that are not: Countries with preferential agreements including human rights clauses in 2000 were on average less than a quarter of the size of those

32 See, for example, Dai 2005.

33 In an early study, Schoultz (1981) found that U.S. aid was disproportionately distributed to countries with repressive governments. Carleton and Stohl (1985) similarly found that human rights were ignored by policymakers during the Cold War. Blanton (2005) has found that the amount of military assistance the United States provided during the Cold War was unrelated to political rights, though there is some evidence that this situation has changed since the end of the Cold War.

34 Barratt (2004:59) found that "When all potential recipients were examined together, states with worse human rights records were actually more likely to receive aid than the ones with better human rights records. . . . UK policymakers only take human rights into account in the case of potential recipients with which they will not be endangering and [sic] important export market."

without such linkage clauses.[35] Multilateral institutions also have serious political biases when it comes to the enforcement of human rights standards. The UN Human Rights Commission, for example, has traditionally been one of the most politicized institutions with the authority to officially denounce a government's human rights policy. In terms of the supply of external enforcement, then, we should expect it to be undersupplied as well as "inappropriately" (that is, highly politically) supplied.

Whether theories of self-enforcing agreements and credible commitments greatly increase our understanding of international human rights compliance is also doubtful. In crucial ways, this family of theories is simply an uncomfortable fit for explaining human rights compliance. We can begin with the opening assumption of contracting for *mutual* gain.[36] In the human rights area, of course, a country can generally realize its desired level of rights without the cooperation of any other state. Why contract at all?[37] In fact, from the government's point of view, it would be most efficient to determine the optimal level and type of rights unilaterally. Joint gains from this perspective would predict a conspiracy to mutual silence. The contracting approach is misplaced from the outset: If a government places a high value on the protection of its citizens' rights, it is hardly necessary to contract with other states to do so.

The external enforcement mechanisms implied by rationalist theories are also an awkward fit for the human rights area. The most common mechanism of self-enforcement that these theories posit is responding to violation by terminating the treaty – a mechanism that is not realistically available in this context. Human rights regimes do not involve *reciprocal* compliance (as is the case with trade agreements).[38] No government is likely to alter its own rights practices to reciprocate for abuses elsewhere. Short of a policy of linkage (better rights for economic aid, for example), reciprocity is difficult to invoke.

35 Based on data provided by Emilie Hafner-Burton. See Hafner-Burton 2005. The 125 countries that had some form of human rights linkage built into their preferential trade agreements in 2000 had an average GDP of only about $102 billion, while the 44 countries that had no such riders in their trade agreements had an average GDP of $469 billion. The difference in mean GDP is highly statistically significant ($p = .007$).

36 Mutual gain is an assumption made by all functional theories of international regimes and international law that credit the value governments place on reciprocal compliance by other governments and the expected future stream of benefits with overcoming the temptation to defect from an international agreement in the short run (Keohane 1984).

37 One possibility is that poor rights elsewhere create negative externalities via refugee flows, as in the case of Haitian flows to the United States in the early 1990s.

38 Canada respects its North American Free Trade Agreement (NAFTA) trade commitments with the United States because the expected value of future cooperation between these two countries is so high. Were Canada to repeatedly violate the agreement, it would risk the United States doing the same, and potentially would make it more difficult to conclude other potentially valuable agreements with the United States and possibly trade agreements with other countries.

Nor is it as straightforward to identify the consequences of a bad reputation with respect to human rights treaty compliance as it is in other areas of interstate contracting.[39] First, compliance with human rights treaties takes place domestically, and despite the widespread development of the accountability mechanisms discussed in Chapter 2, many violations are truly difficult to detect, to observe, and even more difficult to verify. In all but the most headline-grabbing cases, it is likely to be too costly for outside actors to collect, assess, and disseminate the kind of information that can inform strong reputational judgments.

Second, even if it is possible to get the right kind of information, it is not obvious why a government would be too concerned to develop a positive international reputation in the human rights area in the first place. What is the instrumental value of such a reputation? What do governments infer from a state's compliance or noncompliance with international human rights treaties? Does noncompliance in human rights make a government an unreliable trade partner or military ally? George Downs and Michael Jones argue that unless whatever compliance costs have led to noncompliance in one issue area are correlated with noncompliance in another issue area, there is no good reason for other countries to draw reputational inferences for other issue areas.[40] There is no reason to suspect that a country that violates a human rights agreement will break out of an arms control treaty. Downs and Jones view the costs of complying with human rights agreements as very weakly correlated with the costs associated with compliance in other issue areas. From this they conclude that, "reputation promotes compliance with international law most in trade and security and least in environmental regulation and human rights."[41] In practice, reputations are highly segmented; a reputation for respect for law is difficult, if not impossible, to develop across issue areas with very different logics of cooperation.

Third, enforcing reputational consequences is subject to collective action problems in the same way (though possibly not to the same degree) as are other kinds of sanctions.[42] States may disagree in their assessment of the gravity of the violation; they may also differ in the value they place on a positive relationship with the alleged violator. On the one hand, if official criticism is publicly issued, it is likely to inject some resentment into two countries' relationship. On the other hand, costless criticism cannot provide effective enforcement. Costly criticism is just that, and many governments will wait for others to step up and provide it.

39 In the monetary area, see Simmons 2000.
40 Downs and Jones 2002.
41 Downs and Jones 2002:S112.
42 On collective action problems in sanctioning, see Martin 1992. Andrew Guzman (2002) argues that for this reason, reputational sanctions are likely to be undersupplied.

"Joint gains" and "reciprocity" (as these terms are usually understood) are fairly beside the point for interstate interactions in the human rights area. Reputation works – at best – very weakly in this area as well. For these reasons, "signaling" theories are also orthogonal to the analysis of human rights compliance. Signaling theories are interesting only because they allow actors to realize joint gains that they cannot easily reach because of the risk of defection by the other party. International human rights agreements, I have argued, do not produce such joint gains. Hence, there is no reason to send a signal of one's type to other governments in the first place. Moreover, signaling theories predict but do not explain compliance. Ratification procedures, for example, may impose ex ante costs that only a compliance-prone government would pay. But if we observe such a government refraining from torture, we are likely to agree with George Downs and others that it was likely to have complied anyway. Signaling is superfluous to an understanding of human rights treaty effects. In the absence of joint gains, there is simply no reason to send a signal in the first place.

For a number of reasons, a theory of compliance with international human rights treaties is difficult to develop purely in the context of international politics. States (and their agents, intergovernmental organizations) have very little interest in enforcing these agreements, which tend to impose costs on the enforcers without hope of commensurate gains. Many of our theories of international cooperation – self-enforcing agreements, credible commitments – fall flat because these agreements do not involve either joint gains or reciprocity. Reputations are difficult to develop because information is largely internal (although this is changing), because it remains difficult to draw useful behavioral inferences across issue areas, and because even reputational punishment is fraught with collective action problems.

This does not mean that international human rights treaties are useless. It just means that international relations theorists have been analyzing their effects with the wrong analytical tools.

A DOMESTIC POLITICS THEORY OF TREATY COMPLIANCE

If international human rights treaties have an important influence on the rights practices of governments that commit to them, it is because they have predictable and important effects on domestic politics.[43] Like other formal institutions, *treaties 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*. I have argued that external enforcement mechanisms – whether material or reputational – are likely to be undersupplied and quite weak in securing compliance with

43 For an excellent study that privileges domestic international law enforcement primarily through electoral mechanisms, see Dai 2005.

international human rights accords. Peers cannot act as reliable enforcers of the regime. They have incentives to ignore violations, either because they are essentially unaffected by practice elsewhere, or because other foreign policy objectives swamp the concerns they have in a particular case, or because they hope that someone else will pay the costs of enforcement. *The real politics of change is likely to occur at the domestic level.*

International human rights treaties have a singularly unusual property: They are negotiated internationally but create stakeholders almost exclusively domestically. In the human rights area, intergovernmental agreements are designed to give individuals rights largely to be guaranteed and respected by their governments. Treaties of this kind have a potentially dramatic impact on the relationship between citizens and their own government, creating a huge pool of potential beneficiaries if the treaty is given effect. State–society relations, or "the relationship between governments and the domestic and transnational social context in which they are embedded,"[44] should be the most important context for shaping compliance. By sharp contrast, international human rights treaties engage practically no important interests among states *in their mutual relationships with each other*. Most of these agreements simply do not have the capacity to alter international politics in important and predictable ways. The same is not true of politics at home.

This section suggests three theoretical mechanisms through which treaties can influence domestic politics in very positive ways. These are theories that privilege domestic political actors as agents in their own political fate. External actors can certainly facilitate some of these processes, but in principle, they are all possible without the contributions and the interference of outside actors. This approach is an important complement to many others that have emphasized transnational actors as primary change agents.[45] The mechanisms to be discussed view local actors not as voiceless victims to be rescued by altruistic external political actors, but as agents with some power selectively to choose tools that will help them achieve their rights goals. My argument is that for each of the mechanisms to be discussed, an official commitment to a specific body of international law helps local actors set priorities, define meaning, make rights demands, and bargain from a position of greater strength than would have been the case in the absence of their government's treaty commitment. Treaties are potentially empowering, and both those who would use them to repress and to achieve liberation should be assumed to have a good appreciation of this potential.

The following discussion is organized from the perspective of actors who may want change in rights policies and practices. I consider the role of the executive, the judiciary, and citizens.

44 Moravcsik 1997:abstract.
45 Keck and Sikkink 1998.

Executive Powers: Treaties and Agenda-Setting Influences

Treaties can have important influences in countries even when governments are basically supportive of their purposes. Some might object that these are the conditions under which treaty-consistent behavior cannot be attributed to the treaty itself, but rather to underlying preferences. To the extent that governments adopt policies that are treaty consistent, some would conclude that such behavior would easily have occurred in the absence of an external commitment.[46] The conclusion often drawn is that positively disposed governments would have complied in the absence of the treaty. The treaty itself has no independent effects on behavioral outcomes.

As a general rule, this conclusion is too hasty. It ignores the power of an internationally negotiated treaty to alter the domestic agenda and to empower particular branches of national policymaking.[47] Even when treaties reflect the preferences of particular governments, they can be independent influences on outcomes (laws and practices) by influencing a country's policy agenda.

For most countries, an internationally negotiated treaty is an exogenous event in the flow of national policymaking and legislation. Very few countries have both the political power and the will to fashion an international human rights agenda that matches exactly their own legislative agenda. Not only are concessions made to other countries, but as the following chapters demonstrate, priorities are critically shaped by international bodies and nonstate actors with an interest in the substance of particular human rights agreements. It would be an amazing coincidence were a treaty that emerged from global political processes to match exactly the legislative agenda of any particular government. This is not to say that these governments oppose the treaty; rather, it is to appreciate the extent to which the timing and precise content of global treaties are exogenous to most individual countries' policy agendas.

The need to consider ratification can therefore rearrange a country's priorities, if not its preferences.[48] A sympathetic government might not have wanted to spend the political capital to raise the issue of the death penalty, but the existence of the second optional protocol of the ICCPR raises the question of whether the government wants to go on record in this regard. A government might wish to join in an international ban on the use of children in the military, but would not have made this a high priority were the CRC's Optional Protocol Relating to

46 Downs et al. 1996.

47 Christina Davis (2004) argues that treaty negotiations have largely empowered foreign relations officials over special interest groups that otherwise might dominate trade talks. She argues that this has had an important effect on the agenda of the international trade regime.

48 While this is an elite-focused argument, it differs significantly from more constructivist arguments about the conditions under which elites become persuaded and change their preferences; see Checkel 2001. I am not arguing, of course, that elites cannot be persuaded to change their minds about the value of rights protections. Rather, this argument focuses on how the institution of treaty-making can empower an executive to initiate reform given constant preferences.

Children in Armed Conflict (OPCAC) not presented for consideration by the international community. One way to think about this issue is by considering the costs associated with delayed rights reform. Arguably, these costs are higher on the margin when a treaty that the government has participated in negotiating is on the table than when it is not. It is one thing not to *initiate* policy change on the national level and quite another not to *respond* once a particular right is made salient through international negotiations. Silence is ambiguous in the absence of a particular proposal, but it can easily be interpreted as opposition in the presence of a specific accord. The ratification decision affects the set of policy options facing a government, potentially shifting rights reform to a higher position on the national agenda than it might otherwise have occupied.

Treaties can influence national legislative priorities in both parliamentary and presidential systems. In the former, a prime minister may be encouraged by international negotiations (and externally generated expectations) to ratify and implement the agreement in good faith. The party in power might simply decide to insert the item into the normal flow of legislative business, over which the government has fairly clear institutional control. In presidential systems, treaties can have even more significant independent agenda-setting effects. As other scholars have noted in very different substantive contexts, in presidential systems in which legislatures have more power to initiate the lawmaking process, treaty-making uniquely empowers an executive vis-à-vis the legislature.[49] Practically every constitution in the world gives the prerogative to negotiate international treaties to the executive branch of government.[50] This gives an executive an important way to take the initiative with respect to the legislative agenda. Where legislatures have strong institutional agenda-setting powers – the United States, for example – the ability of an executive to insert an externally generated agenda item can be especially significant.

Treaties also influence the national agenda by creating a focal point to minimize the problem of legislative cycling. A particular political party might have a general preference for rights reform but might be hampered in making legislative progress by multiple proposals over which legislators have intransitive preferences. A treaty gives the executive a fairly clear proposal to discuss as an alternative to the status quo. Despite the fact that most treaties can be implemented in a number of ways, the existence of an authoritative text reduces the range of options and reduces the possibility of cycling through votes on a number of reform programs – none of which may gain a legislative majority – by

49 See, for example, Rachel Brewster, who argues in the U.S. context that one important thing international law does is to give significant agenda control to the executive: "The executive can oversee the development of substantive rules internationally and then use international organization decisions to constrain subsequent legislative action and oversight" (2003:4). She develops this argument for the case of trade policy liberalization.

50 For example, U.S. Constitution Article II(2). See http://www.law.cornell.edu/constitution/constitution.articleii.html#section2 (accessed 13 August 2008).

giving the executive a clear set of guidelines for proposing policy changes. The treaty itself reinforces the executive's ability to set the agenda under such circumstances.

If treaties really do influence national politics through their agenda-setting capacity, then we should expect the strongest positive treaty effects in domestic institutional settings that tend to privilege legislatures. This argument implies that treaties should have their greatest impact where governments are otherwise constrained in their ability to initiate legislative reforms to protect rights. Note that this is not an argument that executives have stronger preferences for rights than do legislatures. Rather, it is an argument that because the conduct of foreign policy (including the ratification of treaties) typically resides in the executive branch of government, treaty ratification provides a unique opportunity for the executive branch of government to place what otherwise might have been a legislative item on the national policy agenda. To be sure, legislatures could decide to legislate rights protections, and many, of course, do. In such cases, the influence of the treaty per se may be minimal. But the more constrained a national executive is in proposing legal innovations, the more important the agenda-setting power associated with the foreign policy prerogative implied by the power to conclude treaties is likely to be.

The ability of treaties to impact national agendas is a highly conditional claim. It operates on the margins within some states with a proclivity to embrace rights anyway. This is a mechanism that is available only within the sincere ratifiers. It is also only a claim that international treaties can change national *legislative* agendas; it does not speak as such to deeper problems of implementation or enforcement on the ground. Still, it is not trivial. It implies that pro-rights legislative changes may be taken that would not have been in the absence of the exogenously generated legislative agenda shuffle.

If the agenda-setting function of treaties is important, then some observable implications should follow. It should be possible to turn up cases in which the rights issue was not otherwise on the national agenda, but a legislative debate to change national law was prompted by the need to consider treaty ratification. Furthermore, it might be possible to infer that treaty effects are related to shifts in agenda control if positive change in rights legislation is greater in systems where the executive tends to be more constrained vis-à-vis the legislature. We might, for example, expect more legislative innovation upon ratification in presidential systems than in parliamentary ones. It is in the former that treaties significantly enhance the power of the executive to propose legislative rights reforms.

Courts: The Leverage of Litigation

The potential agenda-setting influence of treaties has a subtle influence on relationships between the executive and legislative branches of government, redistributing the power of initiating legislation to the former. Ratified treaties also have implications for the role of the judiciary. In many instances,

international legal obligations form an important part of the body of law on which judicial decisions may (or must) be based.

Litigation based on international law is certainly nothing new. "[L]awyers have been trying for over a century and a half to utilize international law material in human rights cases," according to Roger Clark.[51] In the United States, in the early nineteenth century, Francis Scott Key appealed to foreign and customary international law to free the humans imported aboard the *Antelope* (1820); John Quincy Adams did likewise in the *Amistad* case (1841). The rise of explicit treaty law has made awkward appeals to customary international law and foreign practice much less necessary.[52] Increasingly, individuals and groups who use the courts and explicit treaty commitments to leverage their rights claims are holding governments accountable for their human rights behavior. The possibility of litigation changes a government's calculation with respect to compliance. Interfering with or ignoring a ruling of a duly constituted national tribunal greatly raises the political costs of noncompliance. Subject to several important caveats, treaties raise the costs of noncompliance when the international legal system is used to authenticate an individual's complaint.

Treaties make litigation possible because they are (or they give rise to) domestically enforceable legal obligations. In monist legal systems – those that do not distinguish between international and domestic law – ratified treaties are an integral part of the domestic legal system. In such systems, international law has a primary place in a unitary legal system, whether or not national lawmakers take steps to implement international law through specific domestic legislation. In such systems, international legal obligations are directly enforceable in domestic courts. The constitution of the Netherlands, for example, not only recognizes treaties as part of national law; it also states that whenever a statute conflicts with a treaty obligation, the former is void.[53] There is a good deal of variance across countries, but in systems that are monist in conception, there is a strong presumption that international law is directly enforceable in national courts.[54] Many postcommunist countries' constitutions, for example, include provisions incorporating treaties as enforceable domestic law and as superior in constitutional status to statutory and administrative law.[55] In other legal

51 Clark 2000:191.

52 In common law systems, customary international law has typically been assumed to have direct effects on national law (consistent with the evolutionary approach to law that these systems evince; see Chapter 3; see the discussion in Ginsburg et al. 2006). The awkwardness in common law systems is not the status of international rules but, as always, determining precisely the content of international custom itself.

53 See the discussion in Ginsburg et al. 2006:4–7. Possibly for this reason, the Netherlands tends to enter a lot of reservations to its treaty ratification. See also Goodman 2002:547.

54 Ginsberg, Elkins, and Chernykh (2006) note that systems can vary in their treatment of treaty law versus customary international law and have developed a number of approaches to conflict-of-law issues.

55 Ryan Goodman (2002:541) lists Armenia, Bulgaria, the Czech Republic, Estonia, Georgia, Kazakhstan, Moldova, Poland, Romania, Russia, Slovakia, and Tajikistan as examples.

systems, typically referred to as "dualist," the influence of international law on the legal system involves the additional step of passing implementing legislation. In these countries – often, though not exclusively, common law countries concerned to preserved parliamentary supremacy and the development of localized legal precedent, as discussed in Chapter 3 – international legal obligations must be "translated" into domestic law in order for their provisions to be enforced in domestic courts.[56] Whenever treaties have direct effects or give rise to implementing legislation, they can provide new tools for litigation that might not have existed in the absence of treaty ratification.

Litigation in national courts is one of the best strategies available for creating homegrown pro-rights jurisprudence.[57] Treaties can be an especially helpful element in this regard. If treaties are cited in a legal case, judges have to think about how they are to be interpreted. One place they may look for interpretive guidance is the reports of the UN implementing committee designed to oversee treaty implementation. Another is decisions of other countries whose courts have already cited the treaty in their decisions. Litigation over rights contained in international treaties increases the opportunity for national courts to engage in the (rather elite) process of transjudicial dialog described by several international legal scholars.[58] Cases with international legal components provide opportunities for judges to import international norms into domestic jurisprudence. In the United States, for example, courts have made a concerted effort to interpret federal statutes in a fashion consistent with U.S. international treaty obligations.[59]

The existence of a tool does not guarantee that it will be used, of course. The availability of treaty law certainly does not ensure that litigation will take place.

56 Local implementation does not, however, affect the nature of the *international* legal obligation (the obligation to other states to observe treaty commitments). Some countries are neither monist nor dualist, but have more complicated rules that specify whether a treaty is automatically incorporated into the domestic legal system or whether, to be enforceable in domestic courts, it must be implemented through domestic law. In the United States, for example, some treaties are considered self-executing, and hence enforceable in U.S. courts, while others are considered non-self-executing and requiring implementing legislation to be enforceable in this way. For a discussion of U.S. law in this area see Stone 2005:332. In some cases, the United States has explicitly tried to reduce the possibility of domestic enforcement by entering reservations upon ratification that specify particular articles as non-self-executing. In the case of the ICCPR, the United States stipulated its understanding that Articles 1–27 of the convention were in fact non-self-executing (Article III(1)). U.S. reservations to the ICCPR can be found at http://www1.umn.edu/humanrts/usdocs/civilres.html (accessed 12 August 2008). According to some eminent scholars, the monist/dualist distinction does not matter for the way states actually engage international law. Louis Henkin claims that "Differences between monism and dualism, I emphasize, were theoretical, conceptual; they appear not to have inspired significant differences between states in their application of international law" (1995:65).

57 Osofsky 1997. On transnational public law litigation generally, see Koh 1991.

58 See, for example, Slaughter 1995.

59 Brewster (2003:21) discusses in the U.S. context "rules that construe other federal law to be consistent with our treaty obligations," citing the case of *Murray v. the Schooner Charming Betsy* (1804).

Potential litigants must be aware – or be made aware – of their rights under international law (or under the implementing legislation it has inspired). A certain degree of "legal literacy" is required if individuals are to access the courts. Rights organizations are crucial actors in this regard. Sally Engel Merry has recently documented many efforts of various rights organizations to enhance legal literacy and encourage individuals to cast their complaints in terms of legally enforceable rights. In Fiji, for example, the local women's rights movement has worked since the early 1990s on legal literacy campaigns, focusing on CEDAW and women's rights.[60] Legal literacy has been an important part of certain NGOs' strategy to encourage women to claim their rights in Africa,[61] suggesting the possibility of converting cultural resistance into a rights framework potentially pursuable in the courts.

The existence of a new legal tool also does not mean that it will be fairly employed. One of the most important conditions for litigation to be a potentially useful strategy to enforce rights is judicial independence. For courts to play an important enforcement role, they must be at least somewhat free from political control.[62] The government or one of its agencies, representatives, or allies is likely to be the defendant in rights cases, and unless local courts have the necessary insulation from politics, they are unlikely to agree to hear and even less likely to rule against their political benefactors. Anticipating futility, individuals or groups may decide to avoid the courts altogether.[63]

It is important to put these limitations on litigation in their proper perspective. Certainly, thousands of violations go unlitigated because individuals do not have the resources or the information to mount a court case. Undoubtedly, law operates in its traditional fashion only by institutions prepared to interpret and apply it fairly and independently. But as I will argue, much research suggests that litigation's power resides not so much in its ability to provide every victim with a decisive win in court. Litigation is also a *political* strategy, with the power to inspire rule revision and further to mobilize political movements. It can often be used strategically not only to win cases, but also to publicize and mobilize a cause.

Examples of litigation involving rights guaranteed by ratified treaties can be found in every region of the globe. Human rights litigation is burgeoning in some parts of the developing world, notably in Latin American countries with fairly recent histories of severe rights abuses.[64] Several African countries have

60 Merry 2006:172.
61 Hodgson 2003.
62 Frank Cross (1999) finds judicial independence to be crucial to the enforcement of domestic human rights, such as freedom from unreasonable search and seizure. La Porta et al. (2004) find that countries with greater judicial independence also have higher levels of freedom.
63 See, for example, the model developed by Powell and Staton 2007.
64 Lutz and Sikkink 2001.

used international treaties to shape their own jurisprudence on civil and political rights. Namibian courts have referred to the ICCPR to provide guidance in the determination of national discrimination law.[65] Botswanian courts have made reference to international instruments to determine reasonable criteria for a fair trial.[66] The Russian court has used international law to support its decisions in criminal justice cases as well, instructing the rest of the judiciary to apply the ICCPR over domestic legislation in cases involving petitions about the lawfulness of detentions.[67] In Japan, women have used the courts to realize their right not to be discriminated against in employment, and in Israel, the Supreme Court has ruled that certain interrogation practices do, in fact, constitute torture as understood by the Committee Against Torture.[68] Cases filed in the Indian Supreme Court in 1994 "asked the Court to order the government to show what steps were being taken to end discrimination in the personal laws consistent with the principles of CEDAW," thus effectively forcing the government to articulate the extent of its compliance with its 1993 ratification commitment.[69]

Litigation has grown in importance in many countries because of a growing network of "cause lawyers" with the interest and the expertise to push human rights cases through the courts. Cause lawyering – or legal work that is "directed at altering some aspect of the social, economic, and political status quo"[70] – is traditionally associated with the litigation campaigns of the NAACP in the case of the civil rights movement of the United States. In many parts of the developing world, it has evolved into a broader conception of "alternative lawyering," which Stephen Ellman describes as legal work emphasizing "working with and organizing community groups rather than simply taking a random set of individual cases," at times even deemphasizing litigation in favor of working with governmental agencies and using alternative dispute resolution methods, but almost always emphasizing legal literacy at the grassroots level.[71]

The question remains whether litigation is an effective way to achieve a real improvement in rights practices. Certainly, a strategy of using courts has its limits. Because it proceeds on a case-by-case basis, the absolute number of cases one could cite to illustrate this mechanism is bound to be small. Even where judiciaries are relatively independent, as in the United States, rules that restrict

65 Tshosa 2001:110.
66 Tshosa 2001:172.
67 Danilenko and Burnham 2000:43.
68 These and other examples of successful litigation based on human rights treaties are collected by a variety of NGOs. See, for example, http://madre.org/articles/int/hrconv.html (accessed 12 August 2008).
69 Merry 2006:167.
70 Sarat and Scheingold 1998:4.
71 Ellmann 1998:359.

access to the courts have been shown to be important barriers to successful legal mobilization.[72] Courts typically do not have the resources to enforce their decisions against branches of government – including a conservative bureaucracy – determined to resist.[73] Gerald Rosenberg views litigation as a "hollow hope" for furthering social change, even in the United States, where courts tend to be independent and legal resources relatively plentiful.[74] He argues that litigation contributed marginally to the civil rights movement in the United States. The movement was succeeding in any case, Rosenberg argues; winning in court was not decisive in influencing rights outcomes.[75] Some researchers conclude that litigation is such a cumbersome way to proceed that some social movements are better off pursuing other, less status-quo-preserving tactics.[76]

A spate of research (largely centered on litigation in the U.S. civil rights case) has hotly contested Rosenberg's conclusion, noting that litigation influences the way issues are "conceived, expressed, argued about, and struggled over."[77] By mechanisms familiar to constructivist theorists, litigation contributes to the reframing of political demands in the legitimizing framework of rights. Moreover, litigation can be mounted with relatively few participants, thus helping to overcome the collective action problems[78] that often make it difficult to mobilize a broad coalition for "justice." Thus, Robert Glennon's analysis of the history of the U.S. civil rights movement concludes that successful litigation provided a "shot of adrenaline" during the Montgomery, Alabama, bus boycott that helped to consolidate the gains resulting from direct protest.[79] Alan Hunt holds out the "possibility that [even] litigation 'failure' may, paradoxically, provide the conditions of 'success' that compel a movement forward."[80] Social movement leaders often choose to litigate strategically,[81] and often *after* favorable laws have been passed, precisely in order to sustain the movement and to ensure favorable interpretation and enforcement.[82]

72 Frymer 2003:486–8. On the potential for human rights litigation in the United States, see Tolley 1991. The point is that the potential exists, but it is relatively limited. Individuals' access to courts varies greatly. The Supreme Court of India, for example, has decided that cases can be taken up on behalf of those in poverty who are unable to file for themselves and that such cases can be initiated simply by letter. See Ellman 1998:358.

73 James Spriggs (1996) finds, for example, that a number of parameters influence the ability and willingness of administrative agencies effectively to overturn U.S. Supreme Court decisions.

74 Rosenberg 1991.

75 See also Rosenberg's response to his critics (1992). With a similarly skeptical view that "legal mobilization" has a decisive impact on social movements or the rights they have espoused, see Brown-Nagin 2005.

76 On the case of the environmental movement, see Coglianese 2001–2.

77 Hunt 1990:320.

78 Zemans 1983:698.

79 Glennon 1991:61–2.

80 Hunt 1990:320.

81 Including somewhat "fringe" groups, such as animal rights groups in the United States. See Silverstein 1996:227.

82 Burstein 1991; Burstein and Monaghan 1986.

International treaties, as part of domestic law, provide another opportunity for individuals (usually in cooperation with activist legal advisers) to claim, define, and struggle over a right that might not have a well-defined or well-tested counterpart in domestic law. The risk, of course, is that litigation risks loss and potential delegitimation, but even a loss can be useful publicity to a movement under some circumstances. A favorable ruling by an authoritative judicial body carries a great deal of weight in many countries. Such decisions can be ignored, but at a greater political cost than would be the case in their absence. Legislatures can often craft or recraft rules that denigrate the rights treaties are designed to protect, but this comes at a price as well. The Israeli Supreme Court, for example, ruled that interrogation practices allowing for moderate physical pressure contravened that country's obligations under the CAT, but the court also held that the Knesset was free to legislate a specific intent to override those obligations. Were it to do so, however, the Knesset would have to endure criticism for making Israel, in Stanley Cohen's words, "the only country in the world to legislate torture."[83] Bureaucracies, too, may resist. No one believes that a court victory alone produces permanent rights changes. Rather, the point is that availability of litigation – and the crucial role of a *treaty commitment* rather than customary international law (which is harder to establish empirically) or a mere norm – is a crucial legitimating lever and can interact positively with political mobilization generally. Especially when treaties have direct effects in countries with independent judicial systems and broad respect for the rule of law, litigation is potentially an important mechanism for compliance.

Group Demands: Rights and Mobilization

A third mechanism by which international human rights treaties can influence rights outcomes is through their strategic use as a tool to support political mobilization. This section begins with a discussion of the mobilization process and then argues that ratified treaties can interact with such processes to enhance the likelihood that individuals will mobilize to claim the rights the treaties contain. I first consider the social mobilization process itself and ask, under what conditions can citizens be expected to mobilize to claim a set of human rights from their political leaders? Second, I argue that international treaties influence the probability of mobilization. They do this in two principal ways. International human rights treaties influence the value individuals place on the right in question (the value of succeeding), and they raise the likelihood of success. Given the proper political opening, international human rights treaties can have a significant impact on domestic politics at the mass level.

83 The quote can be found in an interview located at http://www.abbc2.com/historia/zionism/torture.html (accessed 12 August 2008).

Why Mobilize? Theories of Social Mobilization

Before discussing the role of international human rights law, it is useful to discuss why it is that individuals form or join groups to demand social or political change at all. The underlying issues are complex, but for individuals, we can think of mobilization as a function of two basic assessments: the *value* they place on the rights in question and the *probability that they will be successful* in their demands. The willingness to mobilize – to formulate a set of demands and to organize to press for them – can be thought of in terms of an individual's "expected utility," or the value of the outcome scaled by the likelihood that it can be realized. Individuals are much more likely to demand their rights when there is a perceived "rights gap" (there is much, potentially, to be gained), as well as a reasonable likelihood of success (a political and social environment that is relatively tolerant to such demands). The expected value of mobilization is highest when *the interaction* of these conditions is at its maximum.[84] People can hardly be expected to make a rights demand when there is practically no chance of succeeding, as in the case of immediate, harsh government repression. On the other hand, the motivation to demand is also low when the perceived value of the right demanded is marginal. Where rights are already well supplied and protected, the motive to demand more is fairly weak.

One reason people organize to demand political or social change is the sense that something is seriously wrong or unjust in their society. The concept of "grievance" has long been a central part of sociological theories of mobilization and plays a central role in many, if not most, accounts of social movements. Grievances can have many sources, depending on the nature of the society in question. Traditional explanations for grievances have emphasized sudden "structural strains" caused, in turn, by rapid social or economic change, by changes in power relations, or by structural conflicts of interest.[85] On the other hand, more "entrepreneurial" accounts suggest that given a basic latent discontent based on major interest cleavages, it is possible for energetic movement entrepreneurs to act without the rise of a significant new grievance. The point is not that grievances are manufactured de novo by such entrepreneurs but that they are able to tap into existing discontent, raising the chances of mobilization even in the absence of an abrupt structural upheaval.[86] To a large extent, we can

84 Cost–benefit calculations of this kind are a central theme in what some scholars have dubbed the "second wave" of social movement theory. See, for example, Zirakzadeh 2006:235–6. The logic advanced in this section is related to the logic discussed in the literature on political violence and repression. This literature emphasizes that mild political openings in a formerly repressive regime can lead some groups to make their political demands violently and for the government to counter with redoubled political repression. See, for example, Buena de Mesquita et al. 2005; Fein 1995; Gurr 1986; Muller 1985.

85 See, respectively, Gusfield 1968; Korpi 1974; plus McCarthy and Zald 1977 and Zald and McCarthy 1979.

86 McCarthy and Zald 1977.

think of discontent as structural, arising from the existing political, social, and economic relationships within a given society. In some cases, of course, grievances may be sharpened and focused by leaders who may have their own interest in stimulating the rights demands of aggrieved individuals or groups.

The most significant *variable* – or conditions subject to change and manipulation in the fairly short-term – in explaining mobilization is the probability that demanding a right will, in fact, turn out to be *successful*. The probability of success can turn on exogenous change in the existing political space; mobilization stands a much better chance as authoritarian regimes begin to come under greater challenge generally, for example. The probability of success is also influenced by shifts in the power and influence of the social movement itself. ''Resource mobilization theory'' emphasizes that movement success is influenced by tangible resources (money, facilities, and means of communication) as well as intangible resources (legitimacy, experience, various forms of human capital or skills, etc.).[87] One of the most important resources for a movement's success has been found to be support from actors who are not direct beneficiaries of the movement's goals. As Alan Hunt has written, ''. . . one of the most important features of any such strategic project is the concern to find ways of going beyond the limited expression of the immediate interests of social groups . . . such that they connect up with and find ways of articulating the aspirations of wider constituencies.''[88] Although there has been a good deal of debate over exactly which resources strengthen a group's political position, generally the greater a nascent movement's access to tangible and intangible resources, the better its chances of success.

The question of how such groups overcome collective action problems is still an issue. How do ''the aggrieved'' form an effective political force, considering that ''justice'' by definition is a collective good? The problem is compounded if the potential group of aggrieved individuals is geographically dispersed; it is mitigated somewhat if they are in relatively close geographical proximity.[89] One answer lies in cultivating group solidarity – strengthening group identity so that individuals incorporate outcomes for the groups into

87 Freeman 1979.

88 Hunt 1990:315–16. The campaign to ban child soldiers, for example, would never have gotten off the ground had it depended on the political voice of the world's children to express demands for protection. Resource mobilization includes the ability to garner resources and political support from individuals and groups that sometimes end up speaking for rather than working with the aggrieved groups.

89 Geography has been important for political mobilization of a broad range of latent political forces. In political economy, Busch and Reinhardt (2000) have found that protection is higher for geographically concentrated industries. In the rights area, studies have found that urbanization provided the geographical proximity helpful in organizing the southern black population in the United States (Wilson 1973). See also Handler (1978:16–18) who emphasizes the distribution (dispersed versus concentrated) of both costs and benefits in the likelihood of social mobilization.

their individual utility function.[90] Another answer lies in selective incentives. Divisible benefits are traditionally weak in the human rights area, although some have theorized the role that such incentives as career opportunities or individually bestowed moral approval may play for the entrepreneurial leaders themselves.[91] While notions of group solidarity, moral commitment, and intangible rewards can take us some way toward understanding human rights mobilization, it is generally the case that resources for human rights organizations are likely to be undersupplied.

In short, the formation and success of social and political movements are often linked to political, legal, organizational, or social changes that reduce the costs of mobilization and improve the likelihood of success.[92] International human rights treaties can prove to be an important resource in this regard. Such treaties are potentially important resources in domestic mobilization because, under some conditions, *they raise the expected value of mobilizing* to make a rights demand. As I discuss in the following two sections, they can change the value individuals place on succeeding as well as the probability of success.[93] In this way, treaties change the complexion of domestic politics in ways that make a net positive contribution to rights practices in many – though not all – countries around the world.

This is a "bottom-up" account of treaty effects that contrasts state-centered approaches prevalent in the international relations literature. When international relations scholars think of treaty effects, they are far more likely to have in mind the effects of an international agreement on states than on their citizens; on elites rather than on civil society. Martha Finnemore's work emphasizes international organizations as the normative teachers of *state elites*. Harold Koh's theory of transnational judicial process stems from transnational interactions among *judicial elites*, which generate rules for future interactions, which are eventually internalized. Jon Pevehouse's theory of democratization from the outside in and Iain Johnston's account of Chinese socialization focus on the role that face-to-face elite interactions in regional organizations can play in sensitizing *bureaucratic elites* to their interests in democratization and regional cooperation.[94] Possibly for very good reasons, citizens play no role in these accounts. They must play a central role, however, in the diffusion of values for the

90 Jenkins 1983.
91 Jenkins 1983:536.
92 Jenkins 1983.
93 This formulation draws on both of the major strands of legal mobilization literature: that of legal behaviorialism, which tends to "identify law primarily in instrumental, determinate, positivist terms" and interpretive approaches, which focus on "the intersubjective power of law in constructing meaning." See the review of these literatures in McCann 2006. (Quotes from page 21.)
94 See Finnemore 1993; Johnston 2002; Koh 1999; Pevehouse 2002. See also Checkel 2001, who argues that Ukraine's elites' attitudes toward nationality policy were subject to persuasion by European elites.

protection of individual rights. *Rights treaties affect the welfare of individuals.* If there is any international issue area in which socialization at the nonelite level is important, this should be it.[95]

In the politics of social mobilization, law can play an important role. "Legal mobilization" is the term sociologists and other scholars have given to the act of invoking legal norms to regulate behavior. The law can be mobilized quite outside of the litigation processes described in the previous section. The law is mobilized whenever "a desire or want is translated into a demand as an assertion of one's right."[96] The making of claims based on legal rights is an especially effective way of asserting a political or social demand, because it grounds one's claims in the legitimacy of law, on which most governments claim that their own legitimacy is based. Legal mobilization can be thought of as a form of political participation, not necessarily as a form of conflict containment or resolution. Indeed, scholars of legal mobilization have long recognized that law can be used as a political resource. Agents vie for control of this resource as they would for any other, sometimes leading to conflicts among groups (women and men; gays and straights; ethnic groups; dominant groups and dissidents) and between a group and a government.[97] Quite aside from the benefits (and risks) associated with litigation, legal mobilization in the broader sense of appealing to legal rights promotes movement organization and claim-making.[98]

International human rights treaties are useful in this mobilization process. I argue that they are useful in two ways. They can be useful in introducing rights claims to potential claimants, helping them to imagine themselves as bearers of such rights and encouraging them to value the substantive content of the treaty in question. Treaties can increase the value that potential rights demanders place on a set of rights. Ratified treaties can also increase the likelihood of a movement's eventual success in realizing its rights demands. The availability of international treaty law can thus increase agents' expected value of social/political mobilization, in turn increasing pressure on governments to live up to their legal obligations. These treaty effects are discussed in the following two sections.

Treaties, Rights Demands, and the Value of Succeeding

Legal frameworks are important resources in social mobilization because they have a powerful influence over how individuals and groups understand their identity and define their interests. One of the most powerful treaty effects is the introduction of a new set of rights and a new understanding of rights claimants into the local political setting. Treaties are externally negotiated agreements,

95 Jeffrey Checkel (1997) develops a framework in which the role civil society groups play is conditioned by the nature of domestic institutions, whether liberal, corporatist, or statist.
96 Zemans 1983:700.
97 Turk 1976:284.
98 McCann 1994.

which are *potentially* a source of great influence in local polities. They often introduce ideas and conceptions that are foreign, new, or at least not well articulated in a given local setting. This is the source of their potentially radical power but also, ironically, of their irrelevance. The transformative potential of externally negotiated law depends importantly on the success of "translating" external norms for local audiences, a condition I address in greater detail subsequently.

A growing body of research seems to indicate that legal frameworks have a significant impact on how individuals understand their interests and even their identities. Part of the "educative role of law," according to early work by Frances Zemans, is its ability to "change the citizenry's perceptions of their interests."[99] According to Patricia Ewick and Susan Silbey, legal frameworks are an important source of cultural schemas "that operate to define and pattern social life"[100] and, as such, exert a powerful influence over how people think of their rights and interests. New research on social movements focuses on such identity-formation processes and has found that people's actions are structured by deeply held beliefs,[101] which in turn respond, at least in part, to social conventions as reflected in legal arrangements.

Much of the evidence for these claims comes from studies of the influence of domestic legal frames on how people think about issues that concern them. Anna Maria Marshall's research shows that women use legal frames as a criterion for understanding their experiences of sexual harassment on the job.[102] Willima Eskridge, Jr.'s, research on equality in the United States found that "law contributed to group consciousness and motivation to seek greater equality by people of color, gay people, women, and people with disabilities. . . ."[103] He argues that law that discriminates or tries to end discrimination between or among groups is especially influential in hastening group identity formation. The process of using legal rights to enhance political mobilization and identity formation was crucial to identity formation of the U.S. civil rights movement. According to Elizabeth Schneider, civil rights activists "asserted rights not simply to advance [a] legal argument or to win a case, but to express the politics, vision, and demands of a social movement, and to assist in the political self-definition of that movement. We understood that winning legal rights would not be meaningful without political organizing to ensure enforcement of and education concerning those rights."[104] Drawing on these and other studies, Alan

99 Zemans 1983:697.
100 Ewick and Silbey 1998:43.
101 Zirakzadeh 2006:235.
102 Marshall 2003.
103 Eskridge 2001–2:451.
104 Schneider 1986:605. See also Francesca Polletta's (2000) recent study of the civil rights movement in the southern United States. She concludes that legal mobilization, including victories inside and outside of the courtroom, was a significant factor in overcoming the collective action problems of the movement.

Hunt advances a "Gramscian" perspective on rights that highlights their potential to change the discourse and thus to contribute to the political struggle.[105]

International human rights agreements have the potential to influence domestic politics because they suggest new ways for individuals to view their relationship with their government and with each other. The ICCPR suggests that individuals have a clear sphere of freedom for participating in political life; the CERD suggests to racial minorities their right to participate equally in the social and political life of their community and country; the CEDAW suggests to women that they are men's equals and entreats them to start viewing themselves in that light. In some societies, these suggestions will be superfluous (Scandinavian women may already view themselves as men's equals). In others they will be resisted; no doubt the very act of framing a practice as a right will resonate to differing degrees in different cultures.[106] But in many cases, human rights accords will contain highly attractive principles for a quite receptive mass audience segment.[107] Some citizens may not have thought of a particular practice in rights terms at all. Others may have questioned the appropriateness of thinking that way. When this is the case, international legal agreements are important because they can "condition actors' self-understandings, references, and behavior. . . ."[108] William Eskridge's perspective is apt: "A social group defined and penalized by [local] legal stigmas will not have an incentive to organize so long as most of its members view their stigma as justified, acceptable, or inevitable."[109] International legal standards that explicitly provide otherwise are useful alternative frameworks by which the oppressed gain a sense of political identity, legitimacy, and efficacy.

New research in social anthropology helps us to understand the processes by which international legal rights can influence the way local people form their identity as rights claimants and understand their interests. Sally Engle Merry's study on translating international human rights into local justice is especially helpful in this regard. Merry focuses on the critical role of local individuals who are deeply rooted in a particular local social and political context but with extensive connections to international and transnational communities in translating human rights from the "universal" to the "local vernacular." These actors – which in her case study of gender violence include national political elites, human rights lawyers, feminist activists and movement leaders, social workers and other social service providers, and academics – play a crucial role in bringing transnational cultural understandings to local settings.

105 Hunt 1990.
106 Cook 1993.
107 "A social group defined and penalized by legal stigmas will not have an incentive to organize so long as most of its members view their stigma as justified, acceptable, or inevitable" (Eskridge 2001–2:439).
108 Reus-Smit 2004:3. The influence of international law can be especially significant in this regard in transitioning countries. See, for example, Teitel 2000.
109 Eskridge 2001–2:439.

Transnational programs and ideas are translated into local cultural terms by these agents, but Merry notes that in doing so, they "retain their fundamental grounding in transnational human rights concepts of autonomy, individualism, and equality."[110] Merry's study suggests that individuals do not abandon their earlier values/perspectives; they layer new transnational human rights perspectives over them.[111] With the help of cultural translators, for example, indigenous women in Hong Kong developed a sustained critique of their problems in claiming property rights based on human rights as outlined in the CEDAW, and were much more successful in articulating and realizing their rights when they did compared to a frame that allowed the women's plight to be interpreted as a mere family squabble.[112]

The strategy of using treaties to raise rights consciousness is observable in the activities of many groups and organizations. NGOs have often specifically positioned themselves to educate people about the rights contained in documents their own governments have signed. Relatively new rights organizations, such as those of the disabled rights movement, view treaties as an important way to raise public consciousness about rights issues in this area.[113] The Coalition to Stop the Use of Child Soldiers "campaigns for all governments to adhere to international laws prohibiting the use of children under the age of 18 in armed conflict" in the context of its advocacy and public education functions.[114] The newly negotiated International Convention for the Protection of All Persons from Enforced Disappearance (2005) is viewed by transnational rights organizations as "an extremely important development in the fight against forced disappearances and for the protection of victims and their families,"[115] and these organizations advocate ratification as a tool for explicitly recognizing and educating people regarding a right not to "be disappeared" as a way to hold governments accountable. Francesca Polletta's research on the U.S. civil rights movement cautions that such innovative rights framing is most likely to occur and to be effective ". . . in settings where social institutions (legal, religious, familial, economic) enjoy relative autonomy, and when organizers are at some remove from state and movement centers of power."[116] But in many cases, organizations are positioned to advertise the existence and contents of a treaty commitment that, if taken seriously, turns out to be inconvenient for the government and other power brokers, providing identities and rights models that run counter to commonly held conceptions.

110 Merry 2006:177–8.
111 Merry 2006:180.
112 Merry 2006:202.
113 Disability 2002.
114 See the Web site of the coalition at http://www.child-soldiers.org/coalition/what-we-do (accessed 12 August 2008).
115 See Human Rights Watch: http://hrw.org/english/docs/2005/09/26/global11785.htm (accessed 12 August 2008).
116 Polletta 2000:369.

Human rights treaties, in short, may contain persuasive new information and ideas that can influence the values and beliefs of a public for whose benefit the agreement was ostensibly designed. They can put local cultural or political practices in a more universalistic perspective, suggesting a right to which some might not have previously considered themselves entitled. *Ratified* treaties reveal new information regarding a government's formal complicity in the rights enterprise, signaling for domestic audiences the legitimacy of pursuing rights in this specific cultural and political context. Treaties can inform interests and change values. Admittedly, the meaning of rights contained in international conventions is hardly determinative, and there is much room for contention and struggle over just what it means to be a legitimate rights claimant.[117] Nonetheless, treaties express collective intentionality,[118] the full meaning of which cannot easily be controlled by local power brokers. The fact that one's own government may have participated in and assented to this collective project legitimates it as an acceptable set of values in the local context. Officially acknowledging a set of rights – publicly and possibly for the first time – can affirm its value in the public consciousness.

This view of law as framing new interests and even identities (as legitimate claimants) stands in contrast to several other perspectives. In contrast to the view of Jack Goldsmith and Eric Posner,[119] I argue that moral/legal talk cannot be assumed to be costless, for it risks changing the values, identities, and interests of potential beneficiaries. Now, it could be that for the reasons alluded to in the previous chapter (short time horizons or poor information, which encourage strategic ratification), governments do not expect to bear the cost of new rights demands, but this does not prevent the potential for the educative or framing function of law described previously. This account is also distinct from the information role of international institutions, though information – about the existence of a public obligation, the nature of the rights at stake, and the rectitude of demanding compliance – is relevant. International institutions are not just a source of information in this account, as they are in Xinyuan Dai's analysis of monitoring regimes with weak enforcement; they are a source of new ideas as well.[120] "Information" in this conception is not exclusively about

117 A lot of new research on legal mobilization emphasizes that "The indeterminate meaning of rights . . . provides the [political or social] movement with space in which to shape its own identity" (Silverstein 1996:232). It also opens up the possibility, even the likelihood, of a conservative effort to delimit new understandings consistent with the interests of the dominant social and political power holders.

118 Collective intentionality is a key concept in much constructivist thought. See the discussion in Ruggie 1998.

119 See the discussion in Goldsmith and Posner 2002. The primary "rational" explanation for moral talk in international relations is that it is costless. Since to refrain from moral (or legal) talk might be interpreted as amoral (or a-legal), Goldsmith and Posner (2002) argue that there may be some benefit but little downside risk to making moral arguments.

120 Dai 2005.

objective realities that may be hidden from voting publics. It is also about conceptual frames that may serve to animate the demands of those whose ability, regularly and at low cost, to turn their leaders out of office is much less secure. Treaties matter because they potentially change the ideas that inspire political organization and activity. Ironically, this treaty effect may be stronger – because it is more radical – in repressive regimes than in those that are already quite free.

Mobilization Success

The preceding argument is about the recognition of *values* that people are convinced are worth organizing to demand. This section is about the *resources* a ratified treaty can bring to the fight. As social movement theorists have recently emphasized, legal rules and institutions are themselves a type of political opportunity structure that enables and constrains social movements.[121] Here I argue that a ratified treaty can do four things to improve the chances of successful mobilization. First, it precommits the government to be receptive to the demand; second, it may increase the size of the coalition; third, it enhances the intangible resources available to the coalition; and fourth, it expands the range of strategies the coalition may employ to secure the realization of their demands. Each of these effects will be discussed in turn.

Let us begin with one of the unique features of a ratified treaty compared to a broad international norm. A ratified treaty *precommits* the government to be receptive to rights demands. Ratification is not just a costly signal of intent; it is a process of domestic legitimation that some scholars have shown raises the domestic salience of an international rule.[122] In most countries, governments are required to submit international treaties to the legislature and to secure at least a majority vote. Some countries have even higher ratification barriers: The United States requires treaties to be ratified with the advice and two-thirds consent of the Senate. In a few countries, ratification requires a majority vote in both of two legislative chambers. Westminster parliamentary systems traditionally have not required a formal vote of the parliament, but have evolved norms that ensure that that body basically approves the treaty before the executive formally ratifies. Obviously, in some countries, ratification is a meaningless political gesture, just as all votes of the legislature are meaningless. But where the legislature has any independent stature at all, ratification engages its reputation for meaningful political activity. This does not mean, of course, that a ratified treaty will be promptly and unproblematically implemented into domestic law. It does mean, however, that individuals or groups with demands consistent with a ratified treaty are more likely to encounter a legislature "primed" – because they are precommitted – seriously to consider their demands. Ratification increases the probability that the legislative body itself may be – or at least contain – important political allies.

121 Pedriana 2004. See also Gamson and Meyer 1996:289; O'Brien 1996:32.
122 Cortell and Davis 1996:456.

Ratification precommitment has a subtle effect on the politics of rule implementation. Precommitment makes it harder for a government that has secured domestic ratification to plausibly deny the importance of rights protection in the local context. Even ratification that could be mere lip service has an important influence on domestic politics. Kathryn Sikkink has written that "The passage from denial to lip service may seem insignificant but suggests an important shift in the shared understandings of states that make certain justifications no longer acceptable."[123] The domestic act of ratification has even clearer implications for domestic understandings. As I have repeatedly argued, a citizenry has an even stronger motive than the international community to demand consistency in their government's behavior; after all, they live with the consequences of this behavior on a daily basis. Disingenuous governments will face inconsistency costs and thus risk loss of a degree of domestic legitimacy to the extent that their populations expect commitments to correspond at least in a very broad way to policies and practices. Ratification of important human rights treaties has the potential to raise governments' consistency costs at home and thereby to erode their domestic political support.

Rights demanders and their advocates work assiduously to expose the inconsistencies between precommitment and post-ratification behavior in countries around the world. Advocates for Tibetan rights include in their literature a list of the "relevant" human rights instruments that the People's Republic of China has signed (and presumably violated) in that country's treatment of ethnic Tibetans.[124] The Baha'i International Community refers to the ICCPR as one of "various international covenants on human rights that the government has freely signed" to legitimate its demands for religious freedom for the Baha'i living in Iran.[125] Groups that allege that the U.S. government has violated the privacy of U.S. citizens frame their complaints in terms of treaty violations for similar reasons.[126] Governments and even individual legislators who want to avoid apparent inconsistencies in their ratification position and post-ratification program are potential allies of a nascent rights movement.

The availability of legislators as allies leads directly to the next point: Ratified treaties offer opportunities to increase the size of the pro-rights coalitions in ways that would be less available without the ratified treaties. One of the most important insights of resource mobilization theories of social movements has been to point to the importance of out-of-group supporters in joining the initial cause – white students joining the civil rights movements of the 1960s, for

123 Sikkink 1993:415.

124 See, for example, Appendix 4 to the 2004 Annual Report of the Tibetan Centre for Human Rights and Democracy at http://www.tchrd.org/publications/annual_reports/2004/appendices/4_ratifi.html (accessed 12 August 2008).

125 See their Web site at http://denial.bahai.org/004_5.php (accessed 12 August 2008).

126 See, for example, a 21 December 2005 press release of the Meiklejohn Civil Liberties Institute, Berkeley, California; posted at http://www.uslaboragainstwar.org/article.php?id=9849 (accessed 12 August 2008).

example. The ratification of a treaty has the potential to bring in a broader range of allies to join the core beneficiaries in demanding rights implementation. One group might be individuals who oppose or want to constrain the government for reasons that do not relate explicitly to their own individual current rights struggles. Government opponents might decide to seize on the rights issue – playing up the inconsistency discussed previously – to embarrass or even bring down a government they oppose on other grounds. A ratified treaty could serve as a focal point for tactical support of a pro-rights coalition by a broad range of government opponents.

Second, as a form of law, ratified treaties are more likely than international norms or treaties the government has rejected to engage the interest of the legal profession. The mechanism here may be of two kinds. Legal interest groups may take a new interest in the issues covered by the treaty, debating, publicizing, and interpreting its meaning within the local legal system. Additionally, legally trained individuals – strongly motivated by selective incentives – may decide to lend their professional expertise to the nascent rights movement, providing the legal, technical, and advocacy skills that many students of social movements have noted are critical to their success.[127]

"Internationalists" – individuals or organizations that have strong material interests in maintaining good public relations with the outside world – may also have an incentive to support a local pro-rights movement. After all, treaty ratification is also an international commitment. I have argued that it is an international commitment that is unlikely to be enforced reliably, but even a small probability of enforcement is a serious worry for domestic groups that depend heavily on good political relationships with the outside world. In some countries, the pro-rights group will be supported in their quest by pro-internationalist groups that believe they have more to gain from their government's rights cooperation than from its intransigence. While they may be only mildly committed to rights per se, internationalists may support their demands *in the presence of a ratified treaty* as an insurance policy against the small probability that to renege could introduce political friction into their external relations – their foreign trade, travel, or investments. In this way, a treaty can change a *pro-rights* coalition into a *pro-compliance* coalition. The latter is almost by definition larger than the former. In short, a ratified (but unimplemented) treaty provides an opening for governmental opponents, actors with legal expertise, and actors with international interests to ally with a nascent rights movements for tactical reasons that may be orthogonal to those of rights claimants themselves.

Third, a ratified treaty provides *intangible resources* to a nascent rights coalition. The most important of these is legitimacy, which in turn can be

127 Note, however, that there is a debate in the legal mobilization literature that legal tactics divert movement resources to lawyers and away from grassroots mobilization, to the detriment of the movement. See, for example, Brown-Nagin 2005; McCann 1986; Rosenberg 1992; Scheingold 1974.

parlayed into further political support. Treaties are especially useful in establishing the legitimacy of a claim because they represent global agreement on "best practices" and as such offer a fairly clear statement of the nature (and limits) of the demands the group is making. In the Russian context of the early 1990s, for example, Gennady Danilenko writes that "The legitimacy attributed to international human rights standards was . . . based on the general perception that they expressed 'universal human values' shared by the majority of the international community."[128] This is particularly important when local rights standards are new, in question, or in flux.[129] In these cases, treaties play crucial roles in providing benchmarks, focal points, and models. As a benchmark, they provide standards against which both the demands of the populace and the actions of the government can be assessed. The treaty provides reassurance to citizens that their rights demands are not unreasonable, making them more willing to mobilize. As a focal point, a ratified treaty can also help to coordinate and prioritize the efforts of the coalition. In India, for example, the National Commission for Women (NCW) was set up in 1990 to safeguard women's interests by reviewing legislation, intervening in individual complaints, and undertaking remedial actions, but they seized on India's 1993 ratification of the CEDAW to pressure the Indian government to implement specific programs.[130] Finally, ratified treaties provide a resource as models for domestic legislation. Sally Engle Merry's study of India and China reveals the extent to which the CEDAW has effectively been imported into a number of important legislative protections for women.[131]

Finally, treaty ratification increases the range of strategies a social movement can use to secure policy change. To circle back to the point developed previously with respect to litigation, a ratified treaty has in many countries the status of law and thus offers a unique point of entry into an important indigenous branch of local governance – the courts. And to reiterate the point stressed earlier, such cases are politically important for rights movements even if they do not result in a decisive legal win.

Treaty ratification also provides a political opening for rights demanders in polities where the courts are unlikely to be accessible or reliable. The voluntary assent of a government to a legal standard of behavior creates room for strategies of "rightful resistance," or the ability of individuals and nascent social movements to use officially sanctioned levers in pressing their rights claims. In Kevin O'Brien's useful formulation, "Rightful resistance is a partly institutionalized

128 Danilenko 1994:459.
129 These are the conditions under which Jeffrey Checkel (2001) argues that international norms become most "persuasive."
130 Merry 2006:170–1.
131 Merry cites the Indian 2001 draft domestic violence law, which mentions CEDAW; she also notes that the Law of the People's Republic of China on the Protection of Women's Rights and Interests is based on CEDAW (2006:167).

form of popular action that employs laws, policies, and other established values to defy power holders who have failed to live up to some ideal or who have not implemented a popular measure." The fact that some government official or officials participated in the act of ratification opens the possibility of exploiting divisions among the powerful. As O'Brien notes, "When receptive officials, for instance, champion popular demands to execute laws and policies that have been ignored, unexpected alliances often emerge and simple dominant–subordinate distinctions break down. On these occasions, popular resistance operates partly within (yet in tension with) official norms."[132] Rightful resistance employs the rhetoric and commitments of the powerful to curb political or economic power. Treaty ratification contributes to this strategy by providing a lever to critique the government with its own commitment. Whether a government is sensitive to this critique or not depends on its ability to insulate itself from rights-based popular demands.

To summarize: The ratification of international treaties influences the chances of successful social mobilization. I have provided reasons to expect this influence to work in a positive direction – toward more effective mobilization as expectations of success increase. But these claims are about broad tendencies based on expected influences in domestic politics. In common with other mobilization theorists, I recognize that these kinds of claims can stimulate countermobilization and conservative opposition. There is nothing inevitable about the triumph of treaty commitments over domestic practices, any more than it is inevitable that all rights appeals will prove irresistible.[133] On balance, however, ratified treaties provide a political opening for rights demanders that is more favorable than is the case in their absence. In combination with their educative function, ratified treaties tend to enhance the motive as well as the means for group mobilization. They tend to increase the expected value of such mobilization.

EXPECTATIONS

The three mechanisms through which treaties might have effects in domestic politics – altering the national agenda, leveraging litigation, and empowering political mobilization – suggest some fairly precise expectations for empirical research. First of all, they suggest that treaty ratification should *generally* have positive effects on various measures of government behavior associated with the obligations contained in ratified treaties. However, none of these mechanisms suggest that international law has a homogeneous effect across all polities. Each mechanism suggests that treaties can be more or less influential *under particular institutional or political conditions.* The purpose of this section is to make this

132 O'Brien 1996:iii and 32.
133 Hunt 1990.

point explicitly for each of the channels through which treaties potentially influence domestic politics (recognizing, of course, that these channels are not at all mutually exclusive).

Altering the National Agenda

I have argued that treaties can have an important influence on national politics simply because they alter the substantive priorities of the legislative agenda compared to what it would have been in the absence of an exogenously presented treaty obligation. This is a modest but not a trivial mechanism. It does not posit a change in the information, preferences, or resources of any domestic political actor. It simply notes that treaty effects – especially legislative changes – can result from a relatively uncontroversial international commitment. Nevertheless, these changes would not have occurred in the absence of the intrusion of international politics into the domestic legislative space.

Agenda effects of the kind described here should be most noticeable in indicators of legislatives output and harder to detect in indicators of changes in actual practice. Moreover, agenda effects should be most noticeable in countries that are most likely to have been among the sincere ratifiers discussed in the previous chapter. The prime candidates for the agenda-setting effects of international legal agreements are expected to be the Western democracies. Finally, agenda-setting effects are likely to be most pronounced in polities in which legislatures tend to have relatively greater control over the national legislative agenda. On the one hand, we might expect greater impact to a treaty negotiated and introduced by the executive if this gives him or her unique agenda-setting power vis-à-vis the legislature. This would lead us to expect a greater treaty agenda-setting impact in presidential systems. If this pattern prevails, we might infer a greater tendency for treaties to empower a president relative to the legislature.

On the other hand, once a treaty has been introduced for ratification (once again, emphasizing that this is a prerogative of the executive), the ability to get legislation passed in compliance with treaty obligations is higher where the government faces no important resistance to placing related legislative reform on the legislature's agenda. If simply altering the national agenda is an important mechanism by which legislative compliance is observed, we might expect ratification to lead to legislative changes more often in systems where legislatures exert fewer effective constraints on the executive. The result in the aggregate is likely to be ambiguous, since agenda changes are likely to be larger but fewer in presidential systems and smaller but more frequent in parliamentary ones, where the government already has a stronger legislative agenda-setting role (making change from the status quo less significant but also more frequent). Overall, *the ideal typical case where we might expect strong agenda-setting effects from treaty ratification is in a highly democratic parliamentary or*

presidential system. These are hardly, of course, difficult cases for human rights treaty compliance, but they may nevertheless constitute evidence of an important mechanism by which international norms are imported into domestic law.

Leveraging Litigation

In many if not most cases, the political consensus for compliance and implementation may not be as strong as in the agenda-altering scenario previously described. Ratified treaties may encounter resistance flowing from incompetence to inattention to downright opposition from the government of the day to the permanent bureaucracy to various societal powerbrokers. But in contrast to norms and even international custom, treaties are explicit statements of a legal obligation to comply with their terms. Treaties are laws in most countries. Under a circumscribed set of conditions, they can be used to litigate in national courts, which, I have argued, can influence the further development of rights jurisprudence, alter the political costs of noncompliance, and, equally important, stimulate the politics of rights mobilization going forward.

Litigation can be expected to enhance treaty compliance only under a limited set of circumstances. Specifically, for litigation to be an important compliance mechanism, treaties have to be enforceable in domestic courts and litigation itself must be meaningful. If litigation – or the potential for meaningful litigation – accounts for changes in rights protection, then we should expect treaties to have their most significant impact where respect for judicial decisions is likely to be highest. *Evidence that treaties have stronger effects in countries with more independent judicial systems would be consistent with the litigation mechanism.* Where courts are relatively free from political interference, treaties as legal instruments should have their greatest potential to influence policy.

Empowering Political Mobilization

Treaties can change values and beliefs and can change the probability of successful political action to achieve the rights they promulgate. I have argued that a ratified treaty can effectively raise the expected value to potential rights holders of mobilizing to demand their government's compliance. For these reasons, we should expect treaty effects to show up in countries' compliance behavior. Consider first the *value* a nascent group is likely to place on the contents of a human rights treaty. A treaty dealing with civil or political rights would likely duplicate a number of existing guarantees in a stable democracy. The treaty itself would likely add very little to the rights already enjoyed in such a polity. The marginal value of an additional right in a rights-rich environment is likely to be small. On the other hand, an individual's welfare gain associated with the realization of even basic civil and political rights in a highly repressive regime or even basic recognition of equality in a highly discriminatory one is potentially

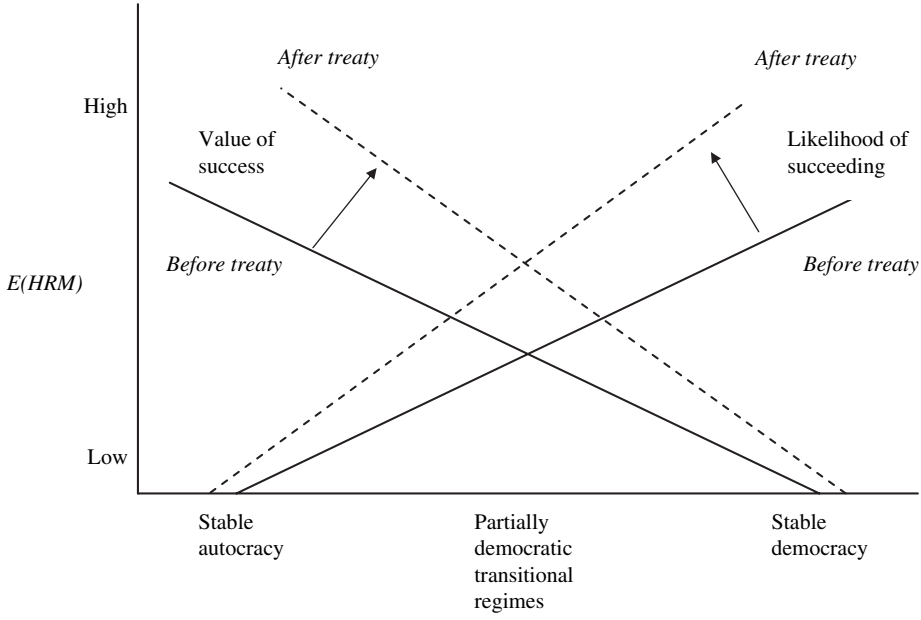

Figure 4.1. Influences on Human Rights Mobilization in Stable Autocracies, Stable Democracies, and Partially Democratic or Transitional Regimes.

very high indeed. The value of securing treaty compliance is much higher in a repressive or discriminatory setting than in a liberal democracy, which has a wide variety of domestic guarantees already in place. This is depicted as a downward-sloping relationship in Figure 4.1.

At the same time, the probability of *successfully* demanding a civil or political right is likely to be low in a highly repressive environment. Such demands are likely to be met with repression in stable autocracies or regimes rooted in discrimination. Democracies tend to be highly responsive to citizens' demands. The presumption is not only that individuals have basic civil and political rights and equality before the law; if they request it, they are also likely to get a ballot in their native language, be able to register to vote when they renew their drivers' licenses, and get a ride to the polls. All the accoutrements of freedom – a free press, free assembly, free speech and expression – increase the likelihood that a demand will be given a fair hearing.[134] Thus, the probability is relatively high that potential demanders will succeed in their rights claims. The probability of succeeding is depicted as upward-sloping in Figure 4.1.

134 Eskridge notes in his study of the civil rights movement in the United States that the broad range of civil and political freedoms contributed to the "massness" of the movement and its ultimate success (2001–2:452).

The treaty effects via social mobilization are illustrated with the dashed lines. A ratified human rights treaty can increase the value an individual places on succeeding in securing a policy change, often by framing the issue itself in rights terms. We should expect treaty effects to be minimal in a stable democracy, where international agreements contribute little to prevailing beliefs and understandings. Citizens in stable democracies are already apprised of their rights and do not need a treaty to shore up these beliefs and values. The situation in autocracies is fundamentally different. Individual civil and political rights are existentially denied, brutally repressed, and delegitimated constantly. Citizens identify much more readily as subjects of the state than as individuals with an autonomous right to participate in the political and social life of the country. The potential for value reorientation is much greater in an autocracy, and a ratified treaty suggests that *even my government agrees – formally and publicly – that I can legitimately claim some individual rights vis-à-vis the state.* When this happens, treaty effects show up as a steepening of the line representing the value an individual places on succeeding in a rights demand.

I have argued that treaties can also influence the expected value of mobilization by increasing the chances of success. But it is very possible that this influence varies across regime types as well, at least for civil and political rights. The mechanisms I have outlined by which treaties increase the likelihood of a successful mobilization are more likely to prevail in a democracy than in an autocracy.[135] Take the strategy of litigation as one example. The political control typically exerted over the judiciary in autocratic polities forecloses litigation as a realistic alternative. Treaties have played a much more important role in litigation in the highly democratic and newly democratic countries – from Canada to Australia, from Argentina to Israel – than they have in autocracies. As legal instruments, they are a much greater resource in countries where law can be used in the courts to constrain political actors. Treaties have institutional traction in democratic polities (relative to autocracies); the effect is to steepen the line representing the likelihood of success.

When we combine these arguments, some interesting expectations emerge. Figure 4.2 graphs the expected value of mobilizing to demand a right (value of succeeding times probability of success) with and without a ratified treaty obligation. Rights mobilization is low in autocracies because people are afraid of the consequences. Treaties may instill a new identity as a rights holder, but individuals run up against "brute facts" and are deterred from making much of a demand. Rights mobilization is relatively low in democracies as well: Even though democratic governments tend to be responsive (increasing the

135 Much of the law and society literature has come to recognize the conditional nature of the power of legal mobilization. According to Michael McCann, "Legal mobilization does not inherently disempower or empower citizens. How law matters depends on the complex, often changing dynamics of the context in which struggles occur" (2004:519).

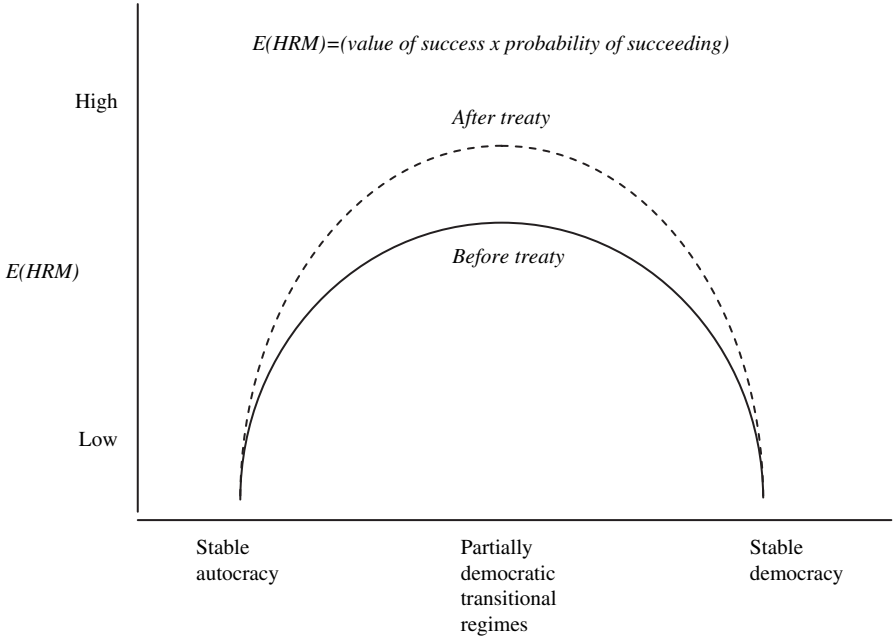

Figure 4.2. The Expected Value of Human Rights Mobilization in Autocracies, Democracies, and Partially Democratic/Transitional Regimes.

probability of success), it is hard to get excited about mobilizing where the *n*th right is of decreasing marginal utility. International human rights treaties are largely redundant.

Where we are likely to see the most significant treaty effects – at least with respect to civil and political rights – is in the less stable, transitioning "middle ground." In these countries, individuals have both the motive and the means realistically to press their governments to take international human rights treaties seriously. Treaties can still play a legitimating function, reassuring a nascent coalition that their demands are legitimate and solidifying their identity as individuals with a moral and legal case to make vis-à-vis their government. Mobilizing is meaningful, even exciting, but not nearly as dangerous as in stable autocracies that tolerate no opposition. Treaties create additional political resources for pro-rights coalitions under these circumstances; they resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the *specific* rights at stake, but also believe they must take a stand on rule-governed political behavioral in general. The courts may be somewhat corrupt, inexperienced, or even incompetent, but they are not nearly as likely to execute the government's will as loyally as in a stable autocracy. International human rights treaties may be in their most fertile soil

under such circumstances. As we shall see, the consequences for rights compliance can be profound.

CONCLUSIONS

To the question "why – or under what conditions – do governments comply with their international human rights treaty commitment?" this chapter has proposed that we look closely at domestic mechanisms. None of the international explanations for international human rights compliance are particularly plausible. Globally centralized enforcement is a chimera; despite the rise in state-to-state accountability chronicled in Chapter 2, states simply do not have a strong and consistent interest in enforcing human rights agreements in other countries. The assumptions underlying theories of self-enforcing agreements are suited for issues involving mutual gains and reciprocity – two assumptions that are a stretch, if not completely inappropriate, in the human rights area. Theorists also underestimate the collective action problems associated with reputational sanctions; governments have typically been reluctant to impose costs of any description on all but the most egregious rights abusers. In the absence of such costs, it is difficult to view international human rights treaties as costly commitments to the international community of states. Nor are international signaling models very helpful. They see treaties as screens but not *constraints* on state action. High ex ante costs lead to an interpretation that only the highly committed are likely to sign the treaty in the first place. This is interesting when a costly signal is necessary in order for two or more states to realize a joint gain, but it is less relevant if we are looking for treaty effects on an individual government's behavior.

I have advocated a theoretical reorientation of the compliance problems premised on the highly plausible stipulation that nobody cares more about human rights than the citizens potentially empowered by these treaties. No external – or even transnational – actor has as much incentive to hold a government to its commitments as do important groups of its own citizens. Citizens mobilize strategically. But these strategic calculations are influenced by what they value (or come to value) as well as the probability of succeeding in realizing these values. An international treaty regime has the potential to influence both the ideational and strategic components of mobilization's expected value. Treaty ratification will be shown in the next four chapters to improve rights practices and outcomes around the world. As we will see, certain civil rights, women's equality, the protection of children from exploitation, and the right of individuals to be free from officially sanctioned torture have improved once governments have explicitly made relevant treaty commitments. This chapter has made a case for the power of domestic mechanisms – new agendas, litigation, and especially social mobilization – in harnessing the potential of treaties to influence rights practices. These effects should not always be thought of as

unconditional. At least in the case of civil and political rights, a treaty's greatest impact is likely to be found not in the stable extremes of democracy and autocracy, but in the mass of nations with institutions in flux, where citizens potentially have both the motive and the means to succeed in demanding their rights. The following four chapters examine the data and cases and find a good deal of hard evidence for the positive impact of international law across several indicators of human rights.