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- (3) Where should such research be carried out? In the academy? In IOs? In NGOs?
- (4) How do we balance the advantages of qualitative work and of quantitative work?
- (5) How should those appraising human rights conduct address the question of causation?
- (6) How can the community of human rights specialists in diverse arenas work together to get maximal value from research?
- (7) Is there any evidence that policymakers are now listening? How can states and IOs overcome obstacles and integrate empirical findings into their policymaking?

This sort of discussion is not only the provenance of international lawyers alone. Important empirical studies have been undertaken by a small number of colleagues in political science who have overcome their ingrained aversion of political science to international law, including Beth Simmons' quantitative work and much qualitative work by scholars in the constructivist arms of international relations theory.

**THE DIFFERENCE LAW MAKES:  
RESEARCH DESIGN, INSTITUTIONAL DESIGN, AND HUMAN RIGHTS**

*by Ryan Goodman\**

The inclusion of this panel at the ASIL Annual Meeting indicates how far our field has come from soft empiricism and unexamined empirical assumptions, and how far we still have to go. The fact that the panel title ("Empirical Work and Human Rights") is framed in very general terms suggests how new empirical scholarship is to the field. It is difficult to imagine a conference panel in another academic field with a general title like "empirical work and corporate law," "empirical work and contracts," or "empirical work and employment law."

That said, there is considerable ground to cover in this session, some of which I imagine will be deferred to the Q&A. I want to circumscribe the scope of my initial remarks by concentrating on a dimension of the issue suggested implicitly by this year's conference theme: the relationship between international law and its wider normative and institutional environment. My goal is to encourage and strengthen empirical work. Accordingly I want to address three topics: (1) research design; (2) institutional design; and (3) future research agendas. All three areas can benefit from more careful attention to distinctions between law and normative behavior in general.

**RESEARCH DESIGN**

In discussing research design, I want to discuss issues involved in the study of legal behavior versus other normative behavior.

First, consider studies of the effectiveness of human rights treaties. The impact of human rights treaties cannot be fully understood without evaluating both the vertical and the horizontal effects of ratification. However, a number of studies analyze exclusively vertical dimensions, that is, the domestic changes in a state after it ratifies a treaty. While worthwhile, these studies can provide only a partial account. If high levels of treaty ratification generate and shape global norms across the world—horizontally—we must try to determine whether increased ratification is associated with better human rights practices in ratifying and nonratifying states alike. For

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example, a leading study shows that legislatures frequently rely on human rights treaties in drafting statutes and constitutions, even when their government has yet to ratify the relevant treaty.<sup>1</sup> Would these actors so readily rely on treaties that were not widely ratified or thought to reflect universal standards? Are higher levels of human rights treaty ratification associated with cross-national progressive legal reform? Similar questions apply specifically to ratifying states. For example, a treaty may have a strong normative effect within a ratifying state only after the number of world-wide ratifications has crossed a particular threshold. The important point here is that research is needed to integrate both vertical and horizontal dimensions; commentators should be careful not to make prescriptive claims about human rights treaty regimes writ large on the basis of studies that attend to only one axis along which a regime might exert influence.<sup>2</sup>

Another concern for research design is the selection of indicators of human rights violations.<sup>3</sup> A particular problem concerns indicators that are overinclusive. Consider the study of the effectiveness of the Genocide Convention.<sup>4</sup> The best available source for quantifying acts of genocide is a database at the University of Maryland. However, the Maryland database is not precisely tailored to the legal definition of genocide—for example, it combines acts of genocide and what has been called “politicide,” whereas the drafters of the Genocide Convention purposely excluded the latter.

Of course it is important to know if overall instances of geno/politicide increase after states ratify the Genocide Convention, but in analyzing those findings, we should be cautious about making descriptive inferences concerning the relationship between law and normative behavior. While one explanation may be that a state’s acceptance of the treaty obligation increases violations and thus law is counterproductive, another equally and perhaps more plausible explanation is that the legal regulation of one practice draws attention away from regulating other practices. That is, the legal regulation of genocide—through treaty accession, national criminalization, salient international prosecutions, and related educational campaigns—has achieved some success in the area it covers but has shifted institutional resources away from other issues, such as the eradication of members of political groups.

Such an interpretation would mean law is working, perhaps too well. At a prescriptive level, that conclusion might support simply expanding, not fundamentally altering, the current form of legal regulation. Alternatively, these findings might support deeper critiques, such as David Kennedy’s work on the legitimating effects and blind spots created by law. The important point here is that scholars must ensure that theoretical questions can be answered by the research design, and they must determine whether the data allow inferences to be drawn about legal compliance or normative behavior more generally.

Another issue of overinclusiveness that leads researchers to mistake normatively undesirable practices for unlawful practices relates to the prerogative of governments to suspend or restrict rights. As a matter of legal doctrine, human rights are generally not unqualified guarantees. At least three devices permit states to qualify or suspend the protection of rights: 1) limitation clauses in treaties and analogous accommodations in customary international law; (2) derogation regimes, in treaties and custom; and (3) treaty reservations.

Failure to take these elements into account can create serious design flaws. First, researchers and data collectors often erroneously consider particular governmental acts unlawful even

<sup>1</sup> Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483 (2001).

<sup>2</sup> For a more extensive discussion of this argument, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 13 EUR. J. INT’L L. 171 (2003).

<sup>3</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (discussing these types of errors in empirical legal scholarship).

<sup>4</sup> See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002), at 1968.

though one or more of these devices permit the action. A recent study of the International Covenant on Civil and Political Rights demonstrates the import of such considerations. Linda Camp Keith found that reclassifying periods of official derogation as periods of nonratification rendered her results statistically significant.<sup>5</sup> That methodological choice was potentially sound. One might wonder, however, whether particular rights restrictions during such periods should be considered violations at all. Why not consider the government a ratifying state and classify the conduct that is excused by the derogation as consistent with compliance?

Second, these devices may allow states to *reduce* their international legal obligations by codifying and ratifying new treaties. For example, the limitation clauses in a treaty may be more flexible than existing customary rules. Or a state might ratify a treaty with reservations that reduce obligations under existing custom and treaties.

Third, these considerations raise further questions about the definition of noncompliance. For example, how should we consider "violations" that are followed by adequate (individual or structural) governmental remedies? Depending on the research question at issue, such state conduct might be treated either as consistent with compliance or as "efficient breaches."

In short, these legally permissible qualifications must be taken into account in evaluating the effectiveness of international law. Empirical analysis that fails to do so may be incapable of providing meaningful information about state compliance with legal obligations. Studies that do incorporate these factors are not only better equipped to measure compliance with law; they may also provide deeper insights into how international law affects legally prohibited and normatively undesirable behavior as two distinct effects.

#### INSTITUTIONAL DESIGN

I want to address not just institutional design but more precisely how empirical understandings of state practice in the area of human rights can be used to create or reform international legal regimes. The empirical literature reveals more about the influence of human rights *norms* in general than the influence of human rights *law* in particular. International relations scholars, locked in a debate between constructivist and realist/rationalist approaches, have been satisfied to prove or disprove the importance of norms in shaping state practice. Law has not figured prominently in their studies. Nevertheless, two important insights can be drawn from empirical understandings of the social forces that drive state behavior. Both concern the ability to make prescriptive claims about institutional design.

First, questions about institutional design necessarily turn on empirical claims about how states behave and under what conditions their behavior changes. As Derek Jinks and I have discussed elsewhere,<sup>6</sup> substantial empirical evidence suggests three distinct mechanisms whereby states and institutions might influence the behavior of other states. The three mechanisms are coercion, persuasion, and acculturation.

These mechanisms operate according to different, often conflicting, social logics. Consequently, they may call for different, and conflicting, institutional reforms. For example, according to social movements and social psychology scholarship, strategies based on the principles of persuasion should highlight the prevalence of human rights violations across all states; discount the importance of multilateral over bilateral interactions; and define and tailor legal obligations as precisely as possible. However, according to other empirical studies, strategies based on the principles of acculturation should perhaps highlight states with exemplary human rights policies; strongly promote participation in multilateral organizations; and frame universal

<sup>5</sup> Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95, 105 (1999).

<sup>6</sup> Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (forthcoming 2004).

legal obligations at general levels of abstraction. Furthermore, empirical studies in areas like women's rights suggest emphasizing forms of persuasion or coercion in a limited number of states in the early stages of a norm's adoption and emphasizing forms of acculturation across a larger number of states at later stages.

In short, while there is little empirical evidence on the effect of *law* on state practice, there is considerable empirical evidence on the ways various *social forces* influence state practice. Perhaps empirical research has reached the point where we can, and should, create and reform institutions in light of those understandings. Part of the larger challenge is to design institutional arrangements to harness different forms of social influence at different stages in the diffusion of a norm, under different material conditions, and at different points in the life of an organization.

The second insight to be drawn from these empirical understandings of social process involves the obverse: recognizing limitations on the types of prescriptive claims that can be generated by empirical analysis. Indeed, empirical studies by legal academics often end with prescriptive claims about institutional design that are not based on the findings of the studies. Focusing on mechanisms of social influence can help temper those types of assertions. For example, a few commentators have concluded that the record of state compliance with human rights treaties is poor, measured for example by reporting requirements or levels of violations. On that basis, they have recommended sweeping reforms of international legal regimes, without adequately considering the causal mechanisms required for these reforms to succeed.<sup>7</sup>

Some proposals assume poor performance is primarily an issue of political will, when it might be an issue of capacity, lack of a focal point, or lack of trend-setters. Other proposals presuppose duplicity or weakness of the will on the part of states or assume, without empirically evaluating, how states will respond to more coercive measures. Proposed changes also frequently assume one size fits all: the proposed rule would apply to all states even though, when disaggregated, the data suggest particular states may be oriented in different ways to the international system. Attention to the complex nature of social processes should help hone intuitions against engaging in such prescriptions without adequate empirical foundation.

#### FUTURE RESEARCH AGENDAS

With regard to future research agendas, I want to discuss specifically avenues for research that can be illuminated by emphasizing the relationship between human rights *law* and human rights *norms*.

First, scholars should reconsider the fundamental objectives of human rights law, that is, whether the central question for human rights institutions is how best to socialize "bad actors" to accept globally legitimated models of state-behavior. A common finding in empirical research to date is that different types of governments respond to different forms of social influence under particular conditions. The three mechanisms suggest that some decisions about allocating institutional resources may turn on the extent to which human rights institutions prioritize solving the world's worst problems in the worst states or improving the performance of generally liberal states. Thus, researchers of state treaty practice should perhaps parse their data by separating ratifying states that take at least one significant step toward incorporation from ratifying states that do not. Otherwise, we risk producing aggregated findings and descriptive inferences that are driven by what might be called the "bottom 10 percent."

Second, and lastly, empirical research should pay greater attention to the impact of international law on transnational advocacy networks and epistemic communities. Some skeptics

<sup>7</sup> See, e.g., Hathaway, *supra* note 1, at 2023–25; and ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS (2001).

of international law, such as Jack Goldsmith and Eric Posner, admit that transnational human rights NGOs, social movements, and epistemic communities might change state behavior, but they contend that the law itself is epiphenomenal. On this view, international law places little, if any, external constraint on states, which are motivated instead by material power and self-interest.

However, a deeper understanding of the significance of international law might be gained by studying whether international law influences the behavior—including the expectations, claims, and dispositions—of transnational advocates and professional groups. For example, the positions adopted by NGOs in treaty negotiations and the efforts of NGOs in evaluating and criticizing governments' human rights practices seem to be shaped by international legal concepts of human rights, state responsibility, territorial jurisdiction, and the like. Legal concepts of human rights have also begun to influence actors in epistemic communities, such as public health professionals.

International law may not influence states or governmental actors directly; it may instead influence particular transnational actors, who in turn shape the state. Whether the result is one of enlivening, deradicalizing, or moderating transnational actors has not been adequately studied, at least not empirically.

#### REMARKS BY KARIN LUCKE\*

##### INTRODUCTION

Oona Hathaway's empirical investigation into whether human rights treaties make a difference<sup>1</sup> and her later debate with Ryan Goodman in the *European Journal of International Law*<sup>2</sup> are the background for this panel. Hathaway's article poses a series of questions on the effectiveness of human rights treaties and offers a number of conclusions and policy recommendations, some for the United Nations.

Working with the treaty bodies on a daily basis, however, gives a different perspective. In that context, it is important to look at one of the most significant recent developments in the UN human rights program, the shift of emphasis from standard-setting and the creation of monitoring structures towards implementation at the national level. The Office of the High Commissioner for Human Rights (OHCHR) has made a central part of its activities the strengthening of implementation of the core treaties on the ground and followup to the recommendations of the UN human rights mechanisms.

Currently, the OHCHR is implementing a number of the proposals in the Secretary-General's 2002 report, "Strengthening of the United Nations: an Agenda for Further Change," which emphasizes that the purpose of the UN human rights framework is to support implementation of human rights norms at the national level. The Secretary-General makes it clear that establishing or enhancing a national protection system in each country, one that reflects international human rights norms, is a principal objective of the United Nations, particularly in countries emerging from conflict,<sup>3</sup> and emphasizes that the human rights treaty bodies are key actors in the pursuit of this objective.

This paper deals with current proposals to reform the treaty-monitoring system and the efforts of the UN to make treaties more effective and enhance their impact at the national level. This

\* Office of the UN High Commissioner for Human Rights. These remarks are made in the author's personal capacity and do not necessarily reflect the position of the Office of the High Commissioner for Human Rights.

<sup>1</sup> Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

<sup>2</sup> Ryan Goodman and Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003); Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185 (2003).

<sup>3</sup> UN Doc. A/57/387 (2002).

is relevant for several reasons. First, empirical research can play a significant role in identifying trends, weaknesses, and strengths of the system, which should inform policy design. Second, the treaty-monitoring system is a useful framework for empirical studies. Standardized data collection reflecting treaty provisions is a prerequisite for precise comparative analysis.

The treaty system is a rich resource of data and tools for empirical research. Because the process of reporting enhances the impact of treaty adherence, it is an invaluable element of the system as a whole. This naturally has measurement implications. Here, the defining question must be how we can enhance the impact of the UN human rights mechanisms at the local level, and what role empirical research should play in that process.

#### THE UN HUMAN RIGHTS CONVENTIONAL MECHANISMS

The human rights treaty system is grounded in the seven core human rights treaties, which set legal standards for the promotion and protection of human rights.<sup>4</sup> Compliance is monitored by treaty bodies through several procedures, including reporting, consideration of individual complaints, and, for two treaties, inquiries into systematic violations.

The principal objective of the treaty body system is to ensure human rights protection for individuals at the national level through implementation of the rights in each treaty to which a state is party.<sup>5</sup> The process of treaty implementation—in particular the preparation of reports, followup measures to recommendations, and responses to individual complaints—is a critical mechanism for legislative, policy, and programmatic change at the national level. The preparation and examination of the reports of states parties allow for a comprehensive and periodic review of national legislation and administrative rules, procedures, and practices that can be assessed against the benchmarks established in the treaties.

Ideally, the process provides a platform for national dialogue on human rights among the stakeholders in a state party and an opportunity for public scrutiny of government policies, encouraging the involvement of various sectors of society in formulating, evaluating, and reviewing policies. Through their recommendations, treaty bodies evaluate the extent to which states parties meet treaty obligations and identify specific human rights problems, which may help set national priorities. Together with the state party report, the recommendations in the concluding observations of treaty bodies may be a framework for joint action by governments, UN agencies, nongovernmental organizations (NGOs), and other partners.

#### SECRETARY-GENERAL REFORM: ACTIONS 2 AND 3

In response to the Secretary-General's report, OHCHR has initiated a series of activities. They are directed at on the one hand strengthening monitoring and followup, and thus indirectly the enforcement system, and on the other, at the national level, improving implementation of international human rights treaties by encouraging the participation in the process of a wide range of national stakeholders, including UN partners.

Reviews of the human rights treaty system have reaffirmed that the reporting system is positive and successful, contributing to the creation of constituencies at the national level to

<sup>4</sup> Seven core human rights treaties set legal standards for states parties for the promotion and protection of human rights: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment; the Convention on the Rights of the Child; and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families.

<sup>5</sup> The Committee on Economic, Social and Cultural Rights specified seven objectives of the reporting process in its first General Comment, adopted during its third session in 1989. See *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 8-10 (2003).

promote implementation of human rights. Increasingly, the work of the treaty bodies is seen as contributing directly to the development of new national laws, policies, and programs. National and regional courts refer more often to the jurisprudence developed by treaty bodies in considering individual complaints and reports. A project of the Committee of the International Law Association on International Human Rights Law and Practice is currently exploring the impact of the work of the UN treaty bodies on national courts and tribunals".<sup>6</sup>

Partners, such as national human rights institutions, civil society, regional bodies and UN agencies, have stepped up their involvement in treaty implementation. For instance, UNICEF systematically facilitates participation by states and NGOs in the reporting process relating to the Convention on the Rights of the Child, provides concise data to the Committee and uses its outputs as a programming tool. This transforms the reporting exercise into a dynamic tool for assessment and dialogue with states, UN agencies, and NGOs, which can provide an essential framework to hold states parties accountable for their treaty obligations.

### *Action 2*

One of the Secretary-General proposals emphasizes strengthening human rights-related UN action at the country level. Pursuant to these proposals, commonly referred to as Action 2, OHCHR, in cooperation with the UN Development Group and the Executive Committee on Humanitarian Affairs, has developed a three-year interagency Plan of Action to improve the integration of human rights into the activities of UN agencies at the country level. The main goal of the plan is defined as

... developing the capacity of the United Nations humanitarian and development operations so that they can support the efforts of interested Member States in establishing and strengthening national human rights promotion and protection systems consistent with international human rights norms and principles, including their integration in development and humanitarian processes.<sup>7</sup>

Key elements in the plan, which was presented to the Secretary-General in September 2003, are creating a means to enhance cooperation between UN agencies and the UN human rights mechanisms and having the recommendations of these mechanisms increasingly taken into account in UN action at the country level. OHCHR is preparing a variety of tools and strategies to link the UN human rights machinery with UN country work.

Country Human Rights Status Notes currently being prepared by OHCHR for UN country teams seek to provide a user-friendly summary of the main recommendations from the treaty bodies and of special procedures mechanisms concerning each country. The Office provides training to country teams on how to use human rights norms and principles and the outputs of human rights mechanisms during the preparation of the country assessment and development assistance frameworks.

OHCHR is also developing strategies to create opportunities for dialogue between treaty bodies and agency policymakers, UN country teams, and national partners. We are hopeful that treaty bodies can be provided with specific up-to-date information on the realities on the ground, which in turn will allow them to formulate more concrete and practical recommendations. UN country teams should also be able to provide feed-back on good practices and reasons why recommendations have not been implemented. Closer involvement of the country teams in the monitoring process should enhance implementation at the national level.

<sup>6</sup> See International Law Association, New Delhi Conference (2002), Committee on International Human Rights Law and Practice, "Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals."

<sup>7</sup> Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, UN Doc. E/CN.4/2004/12/Add.1, para. 2.

### Action 3

The Secretary-General second reform proposal directly geared towards enhancing the treaty system, commonly known as Action 3, calls on the international human rights treaty bodies to craft a more coordinated approach to their activities and standardize their varied reporting requirements. It suggests that each state should be allowed to produce a single report summarizing its adherence to the full range of international human rights treaties to which it is a party.<sup>8</sup>

Those ideas were prompted by the challenges facing the system, including the growth in the number of treaty bodies, increased ratification and accession of human rights treaties since the Vienna Conference in 1993, and difficulties of states parties in implementing the treaties, particularly with respect to their reporting obligations. These ideas aim to simplify the reporting system, facilitate a consistent approach by the different treaty bodies, emphasize quality rather than quantity of information, and enhance efficiency by streamlining the procedures. Emphasis has also been placed on the adoption of concrete and operational recommendations by treaty bodies to encourage and facilitate implementation.

These proposals have resulted in an extensive process of consultation, particularly with regard to the idea of the single report. Stakeholders have favored an expansion of the core document, which forms the initial part of reports of states parties and is submitted to all treaty bodies, to include information on substantive rights congruent to all or several treaties, as well as other information of general relevance to all committees.<sup>9</sup> This expanded core document would be submitted along with a targeted, treaty-specific report for each treaty. The Secretariat is currently preparing draft harmonized guidelines on reporting and guidelines for an expanded core document. The possibility of making greater use of information technology is also being explored.

### STRENGTHENING FOLLOWUP

There has been increased emphasis by both treaty bodies and the Secretariat on the need for followup measures and mechanisms in order to strengthen implementation.

Insofar as the treaty bodies are concerned, the Human Rights Committee several years ago established a procedure for followup to its Views under the Optional Protocol to the International Covenant on Civil and Political Rights, and recently created a followup procedure for concluding observations. While it is probably too early to evaluate the effectiveness of the procedure, the response has been encouraging. Other treaty bodies have followed suit or are considering similar procedures.

The Office has also emphasized followup in its technical cooperation efforts and since 2002 OHCHR has organized two regional and sub-regional workshops on followup to concluding observations of the Human Rights Committee and the Committee on the Rights of the Child, held in Ecuador in 2002 and Syria in 2003. These workshops are innovative in that they bring together governments, UN agencies, and NGOs to discuss good practices in and obstacles to following up on recommendations and to formulate strategies to enhance implementation. Similar workshops are planned for the other treaties and regions. OHCHR has also launched a project to enhance implementation of conclusions and recommendations of human rights treaty bodies at the national level by strengthening the capacity of national human rights institutions, NGOs, and the media. The objectives of this activity are to provide direct access to the treaty bodies through on-site training of participants during treaty body sessions and to secure the active participation of these stakeholders in followup to treaty body outputs at the national level.

<sup>8</sup> See *supra* note 3, para. 54.

<sup>9</sup> Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, UN Doc. A/58/350 (2003).

## CONCLUSION

Monitoring and assessing the implementation of the treaties and evaluating their effectiveness is a complex process. The effectiveness of treaties and the monitoring bodies depends on a genuine willingness of states parties themselves to respect and ensure the rights stipulated in the treaties, as well as the involvement of active NGOs, UN agencies, and individuals.

Cynical observers may argue that states parties may simply ignore recommendations they dislike due to the absence of a strong enforcement mechanism, and even the most passionate supporters of the treaty system are aware of its shortcomings. However, experience demonstrates that the work of the treaty bodies has become an important framework for change, with much depending on those involved in the process to work for real changes in practice on the ground.

Moreover, the system is exploring measures to encourage and enable compliance and provide an effective mechanism for public pressure to hold violators accountable. Greater efforts are needed to ensure that the reporting system can reach its fullest potential, particularly in terms of adequate data collection and analysis and formulation of sound implementation strategies. Little will be settled without carefully designed empirical studies that assess the impact of the treaties and their monitoring procedures and give real guidance on the causal factors that facilitate or obstruct compliance.

In the meantime, current reform initiatives must be supported and the value of the core treaties reaffirmed. Those treaties set the benchmarks against which the behavior of states parties must be measured. Efforts should be concentrated on ensuring that the rights enshrined in those treaties are afforded to all those who need them most, in every corner of the globe.

#### THE NEW EMPIRICISM IN HUMAN RIGHTS: INSIGHTS AND IMPLICATIONS

*by Oona A. Hathaway\**

More than fifty years ago, the nations of the world came together to make a revolutionary pledge: Together, they would work to promote "universal respect for and observance of human rights and fundamental freedoms."<sup>1</sup>

Although significant progress has been made toward this goal in the half-century since, the world remains rife with human rights abuses. In Haiti, the turmoil unleashed in the wake of Aristide's removal from power has opened the door to growing violence. In Nigeria, the weeks leading up to local elections saw politically motivated killings and the use of violence to secure votes. Ethnic violence continues to seethe in the former Yugoslavia, with recent news of attacks on Serbs by ethnic Albanians.

The continuing—and in some parts of the world worsening—reality of human rights violations raises a difficult question for advocates and students of international law: Can international human rights law be used to help bring an end to such atrocities?

To answer this question, we must first know something about the effect of current international laws on states' human rights practices. How do the existing human rights treaties shape state behavior? Are some more effective than others? If so, why?

#### THE STUDY OF HUMAN RIGHTS LAW

Until recently, there were few systematic efforts to explore these issues. Advocates of international law tended to operate on the assumption that the laws were effective "most of the time." Skeptics derided the role that international law could play in shaping state behavior,

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<sup>1</sup> Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 (1948).

arguing that because it carried few explicit sanctions, international law could not be effective. Neither side spent much time considering what worked and what did not, much less why.

In recent years, this has begun to change. A burgeoning new literature on compliance with international human rights law has contributed greatly to our understanding of the impact of human rights law on the human rights practices of states.

Two types of research have predominated. The first—the staple of empirical research in the human rights field—has been qualitative case studies that examine particular treaties or countries in great depth and give detailed evidence of how one or several countries have reacted to international law. For example, Laurence Helfer offers a revealing study of what he terms the overlegalization of international human rights law in three Commonwealth Caribbean countries.<sup>2</sup> Ellen Lutz and Kathryn Sikkink examine the impact of human rights prohibitions on torture, disappearances, and democratic governance in several Latin American countries.<sup>3</sup> These works and others of a similar character provide deep insights into how law can influence state action.

The obvious drawback of this work, however, is that it is not well suited to the task of isolating the role that law plays in changing state behavior. When a state begins to torture less frequently, for instance, it is difficult to determine with a historical case study whether the change is due to ratification of an international legal convention, the cessation of a civil war, improved economic conditions, some combination of these changes, or something else entirely.

In response to this problem, a second set of empirical scholarship uses large-N quantitative methods to explore the effect of international law on human rights practices. This work assesses the human rights practices of large numbers of countries in an effort to analyze the impact of law on state practice.<sup>4</sup> My own work, for example, has sought to examine the effect of several universal and regional human rights agreements on state use of torture, fair trial practices, civil liberties, genocide, and women's political representation.<sup>5</sup>

This work, of course, has its own limitations. Most notably, the results of quantitative empirical work are only as good as the data on which they rest, and the data are sparse and sometimes—though, I would argue, far from universally—of questionable value. Hence, conclusions from this work must be drawn with caution.<sup>6</sup>

#### KEY FINDINGS OF EXISTING STUDIES

Together, these two types of empirical work have greatly enriched our understanding of the relationship between international human rights law and the human rights practices of states. Quantitative studies have identified trends and relationships across large numbers of countries and significant periods of time. Qualitative case studies have examined trends on the ground, tested the plausibility of causal claims, and provided the context necessary for a deep understanding of causal relationships.

<sup>2</sup> Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

<sup>3</sup> Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000).

<sup>4</sup> Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1935–2042 (2002); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Oona A. Hathaway, *Why Do Nations Join Human Rights Treaties?* (unpublished manuscript, on file with author); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999); and Beth Simmons, *Why Commit?* (unpublished manuscript, on file with author).

<sup>5</sup> Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 4.

<sup>6</sup> For a debate over the pros and cons of quantitative empirical research, see Oona A. Hathaway, *Testing Conventional Wisdom*, 13 EUR. J. INT'L L. 185 (2003); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 13 EUR. J. INT'L L. 171 (2003).

Several valuable insights have emerged from this growing body of empirical human rights research, three of which deserve special attention.<sup>7</sup>

*Domestic Enforcement of International Law Is Essential to Compliance*

Strong domestic institutions are essential to the international as well as the domestic rule of law. Where international bodies are less active in enforcement of treaty commitments—as in the area of human rights—it falls to domestic institutions to fill the gap. In some states, this reliance on domestic institutions is effective, in others, less so. In democratic nations, where domestic enforcement tends to be relatively strong (in part because the judiciary, media, and political parties are free to operate independent of the executive), states are more likely to abide by international law whether or not it is externally enforced. In less democratic nations, where domestic enforcement tends to be less effective, states are less likely to abide by international law that is not enforced by transnational bodies.

Indeed, the most robust finding in the empirical literature to date is that democratic nations behave differently with regard to international law than do nondemocratic nations. Andrew Moravcsik in examining the European Convention on Human Rights argues that international treaties offer states a means of consolidating democratic achievements, “thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats.”<sup>8</sup> My examination of several multilateral and regional human rights treaties explores the role of democracy beyond the European context. In doing so, it reinforces Moravcsik’s claim that democracy matters, while challenging the specific spin he puts on the argument.

I find that democracies are on the whole more likely to join international human rights treaties than nondemocracies, but they are less likely to join human rights treaties if they have worse human rights practices than if they have better practices. By contrast, nondemocracies are more likely to join if they have worse practices than if they have better practices. Moreover, only the most democratic states appear to *improve* their practices after ratifying human rights treaties.<sup>9</sup>

*There Appears to be a Tradeoff Between Participation in and the Effectiveness of Human Rights Treaties*

Although enforcement of international law by international actors is not essential to effective international law, it is far from irrelevant. Where international legal rules are accompanied by sanctions for their violation, there are several predictable results. Perhaps most obvious, where penalties for noncompliance with an international legal rule are significant, states not already in compliance are less likely to commit to a treaty. Hence, unless the sanctions are offset by incentives favoring commitment (such as strong reciprocal benefits to membership), treaties that contain such sanctions will gain fewer adherents. Thus, there is a tradeoff between enforcement and commitment: Where enforcement is stronger, all else being equal fewer countries should be expected to commit. However, those fewer adherents will be more likely to comply with the treaty than they would be if the treaty were less strongly enforced.

The Convention Against Torture is a compelling example of this dynamic. My research found that countries with the worst torture ratings and countries with the best both ratify the Convention at roughly the same rate. I find similar results for a wide array of human rights treaties.

<sup>7</sup> The following is adapted from a lengthier discussion in Oona A. Hathaway, *Between Power and Principle: A Political Theory of International Law*, 71 U. CHI. L. REV. (forthcoming May 2005).

<sup>8</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000).

<sup>9</sup> These findings are discussed in more depth in Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 4; Hathaway, *The Cost of Commitment*, *supra* note 4; and Hathaway, *Why Do Nations Join Human Rights Treaties?*, *supra* note 4.

While the states that join human rights treaties usually have better practices than those that do not, the difference between the two groups of nations is much smaller than many would expect. Moreover, states with poor human rights practices regularly join human rights treaties, sometimes at a rate similar to that of countries with the very best human rights practices. For example, roughly half the countries with the very worst genocide ratings have ratified the Genocide Convention—about the same portion of those with the very best ratings.

In fact, holding political and economic factors constant, states with good human rights records are no more likely to commit to human rights treaties than those with poorer records. Among nondemocratic nations, the pattern is even more striking: Nondemocratic nations with worse reported human rights practices appear *more likely* to have ratified human rights treaties than those with better reported practices.<sup>10</sup>

#### *Nonlegal Incentives Have Power*

Nonlegal incentives play an important role in state decisions to participate in and comply with international law. Several implications arise from this finding, one of which I will discuss here: Membership in certain treaties can boost a state's reputation, often regardless of whether the member state actually abides by the treaty. This is possible because the international community does little to police many treaties, which means that member states that do not police themselves may have little risk of exposure if they fail to abide by treaty requirements. As a consequence, states that violate treaties and have weak domestic rule-of-law institutions have every reason to join treaties that confer reputational benefits, such as human rights treaties. It can be expected that states that join treaties primarily to obtain such benefits will not always comply with them, and sometimes have even worse practices subsequent to commitment.

Several of the empirical studies of human rights treaties support these claims. States regularly join treaties with which they are not in compliance. Indeed, the states with the best human rights practices (and hence the best reputations) are often more reluctant to join human rights treaties than those with worse practices (and hence worse reputations). This suggests that states with better practices have little to gain and something to lose by joining the treaties, whereas the opposite is true of states with poor practices. This supposition finds support in the additional finding that states that join human rights treaties regularly fail to improve their practices after doing so, regardless of whether their practices are consistent with the treaties or not.<sup>11</sup>

#### LESSONS FOR ACTIVISTS, ACADEMICS, AND POLICYMAKERS

Though empirical work in human rights is still in its infancy, studies to date have helped us to think about human rights law in new ways, and they have offered important clues about how law can shape state behavior. Their findings not only form a foundation for future empirical research; they also offer guidance to policymakers and activists interested in using international law to protect human rights.

Here, I take the opportunity to outline four important goals that draw from the early forays into empirical human rights research.

#### *The Vital (and Improvable) Role of NGOs*

If there is one conclusion that stands out in the research to date, it is that better information about countries' human rights practices is an important first step toward improving those

<sup>10</sup> These findings are drawn from Hathaway, *The Cost of Commitment*, *supra* note 4; Hathaway, *Why Do Nations Commit to Human Rights Treaties?*, *supra* note 4; Hathaway, *Why Do Nations Join Human Rights Treaties?*, *supra* note 4.

<sup>11</sup> See Keith, *supra* note 4 (finding that becoming a party to the International Covenant on Civil and Political Rights does not appear to make a difference in human rights behavior); Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 4; and Hathaway, *Why Do Nations Join Human Rights Treaties?*, *supra* note 4.

practices. To date, the bulk of the information on human rights practices has been produced by nongovernmental organizations (NGOs). Yet as essential as this information has proven, it has not always been gathered as carefully and systematically as is necessary to make it reliable for tracing causal connections between international law on human rights and the human rights practices of various countries.<sup>12</sup> A redoubling of these information-gathering efforts and attention to the critiques of existing studies could provide a more solid foundation for efforts to evaluate the successes and failings of existing laws.

#### *Better Connection of Theory and Practice*

The empirical research in human rights has provided a useful starting point for understanding the relationship between international human rights law and countries' human rights practices, but much more research and theorizing remains to be done, and it must be linked to concrete policy recommendations. Academics should continue to contribute to the debate over the effectiveness of human rights treaties by conducting further large-scale quantitative studies as well as additional qualitative case studies.

We can also play an important role in assembling and analyzing the data generated by state actors and NGOs, formulating theories to help organize and explain the information that is generated daily, and helping to guide the information-gathering efforts of other actors. In doing so, we can strive to provide guidance to national and international policymakers on how best to use this information to create a more effective international human rights regime.

#### *Improving the Domestic Rule of Law*

A central conclusion of existing empirical studies of human rights practices is that domestic enforcement of international human rights commitments is crucial to their success. Improving enforcement of and compliance with international human rights agreements is not something that happens only at the international level. As important, if not more important, is enforcement at the domestic level.

Domestic enforcement of international law in turn requires robust domestic rule-of-law institutions and individuals willing to use them to press governments to honor their international legal commitments. National policymakers and practitioners can play a central role in this process. In nations with weak or nascent rule of law institutions, national policymakers can ensure better international legal compliance by working to strengthen *local* rule of law. Where rule of law institutions are strong, policymakers and practitioners can ensure better compliance with international human rights law by working to maintain those institutions and using them where necessary to press governments to live up to their international commitments.

#### *Understanding Treaty Tradeoffs*

If, as the research indicates, there is a tradeoff between participation in and effectiveness of human rights treaties, international policymakers must look for ways to mediate this tradeoff. Treaties might be structured to offer states assistance to offset some of the costs of compliance. In addition, the fact that there are nonlegal incentives for treaty commitment and compliance

<sup>12</sup> For example, Amnesty International and Human Rights Watch both produce excellent reports on countries' human rights practices. Yet these reports are relatively short and do not cover every country every year, making them a poor source for social scientific inquiry. The Freedom House produces one of the very few quantitative human rights indexes, but it has been criticized for lack of replicability and reliability. See FREEDOM HOUSE, *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 1999-2000* (Adrian Karatnycky ed., 2000); Christopher Mitchell et al., *State Terrorism: Issues of Concept and Measurement, in GOVERNMENT VIOLENCE & REPRESSION* 1, 20 (Michael Stohl & George A. Lopez, eds., 1986) (critiquing the Freedom House reports). The U.S. Government also does a set of human rights reports but they have been charged with political bias. E.g., David Carleton & Michael Stohl, *The Role of Human Rights in U.S. Foreign Assistance Policy: A Critique and Reappraisal*, 31 AM. J. POL. SCI. 1002, 1007 (1987) (citing and briefly discussing reports of Americas Watch, Helsinki Watch, and the Lawyers Committee for International Human Rights and critiquing the State Department reports for political bias).

suggests that international policymakers could also use these incentives to encourage compliance with international law—by, for instance, placing greater emphasis on monitoring states' compliance with their international human rights treaty commitments. Doing so would make it more costly for states to commit to treaties and then fail to comply with them, and it would more effectively reward states that join treaties and do comply with them, thus lessening the participation-effectiveness tradeoff.

#### THE ROAD AHEAD

We have learned a great deal in recent years about how states respond to international human rights law. In the process, we have come to appreciate anew both the power and the weaknesses of the international legal system. International law sets a standard against which state actions are judged—by those both inside and outside the state. It mobilizes the attention of the world to abuse of the world's most vulnerable.

Yet violations of international legal protections remain rife, and current treaties often do little to change what states do. By working to better understand empirically when and why states abide by their international human rights commitments, we can make it possible for international law to more fully realize its great promise.