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Exploring the Limits of International Human Rights Law

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EXPLORING THE *LIMITS* OF INTERNATIONAL HUMAN RIGHTS LAW

Margaret E. McGuinness*

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I. INTRODUCTION

*The Limits of International Law*¹ stands on the shoulders of international relations realists who have traditionally argued that international law does not affect interstate relations and is therefore unworthy of much scholarly attention.² International law scholars have in many ways set out to disprove the realist claim and explain the sources and effects of law as separate from politics: Why do states, which are driven primarily (according to realist theory) by a need to protect and expand security interests, insist on using international law at all? In *Limits*, Jack Goldsmith and Eric Posner engage both the international relations and international law scholarship to answer that question with a short, simple, and in many ways appealing, rational choice twist on realism: "International law emerges from states acting rationally to maximize their interests given their perceptions of the interests of other states and the distribution of state power."³ According to the *Limits* thesis, international law is what states create as a result of interstate relations, but it does not affect state behavior in the way most international law scholarship assumes.

Few international law scholars would argue with the notion that state actors in the international system operate in ways which, in large part, seek to further their interests. An understanding of instrumentalism in state behavior is valuable and has been a theme of international law scholarship for some time. Goldsmith and Posner, however, make the broader claim that international law can never be an exogenous constraint on state behavior and that therefore "some global problems may simply be unsolved."⁴ They reject the full range of other explanatory and predictive theories about how international law affects behavior while privileging their own simplifying theory above other competing, but not necessarily exclusive, claims about international law. This blanket rejection of alternative theories and explanations is the central shortcoming of the *Limits* thesis,⁵ a shortcoming that is most apparent where Goldsmith and Posner apply their approach to international human rights law.

¹ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

² HANS MORGENTHAU, *POLITICS AMONG NATIONS* (1940).

³ GOLDSMITH & POSNER, *supra* note 1, at 8.

⁴ *Id.* at 225-26.

⁵ See Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. (forthcoming 2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

The *Limits* theory of human rights is formulated primarily as a response to the theory that states comply with international law because of the “pull” of compliance or a sense of obligation to comply with treaties (*pacta sunt servanda*) that arises from fair and legitimate legal processes.⁶ This is a classic straw man. While it is true that some international law scholarship has relied on that normative assumption,⁷ the last decade has been marked by a shift toward examination of norm compliance from a range of alternative and interdisciplinary perspectives that seek to explain how international human rights norms alter behavior within a state. These additional explanations have been helpful for understanding the role of international human rights law in changing human rights practices.

Transnational legal process theory, for example, posits that through repeated participation in the international system individual government officials and government agencies come to internalize and eventually adopt the international rule as a behavioral habit.⁸ The theory of governmental networks, claims that compliance results when transnational networks of governmental agencies (including judicial networks) work together to harmonize regulation, enforce law, and share information.⁹ Additional accounts rely on constructivist notions that ideas transform behavior and look to the power of transnational communities of interest and expertise on a particular issue, which share information and coordinate responses across state borders.¹⁰ Liberal theory explains changes in human rights behavior as a result of domestic political structures and processes.¹¹ While none of these theories, on its own, supplies a complete answer to the compliance question, each has explanatory and

⁶ GOLDSMITH & POSNER, *supra* note 1, at 14-15. See THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (defining legitimacy as “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”).

⁷ See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988).

⁸ See Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

⁹ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2005); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002).

¹⁰ Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

¹¹ Hans Peter Schmitz & Kathryn Sikkink, *International Human Rights*, in HANDBOOK OF INTERNATIONAL RELATIONS 521 (2001).

predictive value. Taken together, they serve as helpful complements to rational choice theory.

Goldsmith and Posner lay out their claim as a descriptive or positive theory, which they suggest should be judged, "on the extent to which it sheds light on the problems of international law,"¹² and I intend to limit my critique to that metric. To what extent does the *Limits* theory shed light on current international human rights problems and their solutions? The short answer is, very little. As a starting point, the description of the human rights system in *Limits* is hardly recognizable to many who study and practice in the human rights field. That is largely because Goldsmith and Posner appear reluctant to acknowledge that the international human rights system has entered a new phase.¹³ Indeed, they spend a great deal of space in the chapter devoted to human rights exploring the ways in which human rights were a factor in international politics in the eighteenth and nineteenth centuries.¹⁴ The fact is, fifty years after the emergence of what is generally recognized as the modern human rights era, the system is marked by both a rapid increase in legalization of human rights norms and serious efforts to reform moribund and ineffective human rights institutions. For example, international and supranational adjudication of international human rights claims has grown significantly in the past fifteen years with the creation of the ad hoc criminal tribunals for former Yugoslavia and Rwanda and the International Criminal Court (ICC), the establishment of the European Court of Human Rights, and the expansion of state membership in the European Charter. Moreover, vast networks of private and public actors—of a kind virtually unheard of at the time the U.N.

¹² GOLDSMITH & POSNER, *supra* note 1, at 8.

¹³ *Id.* at 107. Part of the reason they may not acknowledge this new phase is the fact that their own theory is part of a broader discourse about the wisdom of applying international norms in domestic courts. See Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997); *infra* Part V (discussing normative claims of book).

¹⁴ GOLDSMITH & POSNER, *supra* note 1, at 112-15. Goldsmith and Posner assert that it is "misleading" to view the current international human rights regime as "novel post-World War II developments" because international law regulation has concerned itself with internal state regulation, such as protection of foreign investment, prohibitions against the slave trade, and protection of foreign nationals against denials of justice. *Id.* at 107. But these examples demonstrate the historical centrality of states in the international system; the protection of nationals and investments was at best derivative of the sending state's interest in asserting its sovereignty over the activities of its nationals, even when they were outside their home territory. The multilateralism of post WWII was new—albeit largely premised on the failed multilateralism of the League and the interwar bilateral agreements in Europe.

was founded—are providing conduits for the transfer of human rights norms into domestic legal systems. At the same time, the international community is working to review and reform the flawed and failed political human rights mechanisms within the United Nations, including working toward the creation of a Human Rights Council to overcome legitimate criticisms that the U.N. has failed in its task of human rights protection by allowing extreme human rights abuses, such as Libya and Sudan, to have chairs on the Human Rights Commission (UNHRC).

Against this backdrop, the rational choice theory in *Limits* is useful for understanding some of the current political trends in international human rights. It is of much more limited value for understanding human rights law. First, the book largely ignores the effect of international human rights *legal* institutions (e.g., ad hoc and permanent courts) on a range of state and individual behavior. Second, the exclusive focus on interstate behavior ignores the *domestic* dimension of human rights compliance, which is central to changes in human rights conditions. Third, by ignoring the role of individuals, NGOs, corporations, and other non-state actors, the book paints a distorted picture of the current processes through which human rights norms are elaborated and enforced. Fourth, the book draws overly broad conclusions from limited empirical data about the effect of legalization on human rights behavior. Finally, the discussion of human rights cannot be separated from the explicit normative claims of the book, i.e., that states should not act on the basis of moral values or the basis of perceived cosmopolitan duties, or the implicit normative claim that international law should not constrain state behavior.

For those who share the goal of improving the general human condition (and I realize that is not the goal of *Limits*), there is value in understanding rational choice and the constraints rationality may place on certain institutional designs. There may also be room and, arguably, a need in the discussion of international human rights for a “middle theory,”¹⁵ one that understands that most actors in the system act in instrumental ways, but that also acknowledges the importance of liberal democratic theory in explaining domestic political development and draws on constructivist understandings of how norms and transnational process alter interests and affect behavior. This Essay aims to

¹⁵ Daniel Bodansky suggested this term during the roundtable discussion. See Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT’L & COMP. L. 285 (2006) (noting the need for non-instrumentalist theories to explain international behavior).

illustrate that a hybrid approach can offer a more complete and useful account of human rights behavior and explain how law shapes that behavior.

II. THE LIMITS OF STATE INSTRUMENTALISM

For each state actor the international human rights regime presents two separate, but closely interrelated, questions. The first is whether and to what extent a state cares about the human rights practices in other states. The second is whether and to what extent a state is interested in committing *itself* to international human rights standards. The *Limits* theory answers both queries together: States sign on to human rights treaties to the extent that doing so is in the "state interest." State interest is defined by reference to the interest of the state's political leadership¹⁶—including dictators, absolute monarchs, corrupt kleptocrats, as well as democratically elected leaders accountable to and reflective of their constituencies. States thus "have an interest in the well-being of persons under their control," but a "weaker interest in the well-being of persons in other states."¹⁷

In the *Limits* formulation, a state's preference for how it treats its own inhabitants results from balancing individual rights against national security. A state will therefore abuse the human rights of its own inhabitants when it believes doing so will promote national security.¹⁸ The assumption that human rights violations result from rational calculations about national interests fits neatly into the broader rational choice model, but it is misleading. Recent interdisciplinary studies explain human rights conditions in states in relation to specific economic, sociological, religious, and psychological processes.¹⁹ A rational balancing of national security interests is one explanation for states' abuse of their own inhabitants or, in the context of interstate war, their abuse of inhabitants of other states.²⁰ But it ignores helpful alternative hypotheses about why, for example, individual agents of a state engage in atrocities,²¹

¹⁶ GOLDSMITH & POSNER, *supra* note 1, at 6.

¹⁷ *Id.* at 109.

¹⁸ *Id.*

¹⁹ Schmitz & Sikkink, *supra* note 11, at 518-20.

²⁰ *Id.* at 518-19.

²¹ *Id.* at 520 (citing PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STUDIES FROM RWANDA (1998); Ervin Staub, *Summary and Conclusions: The Societal and Psychological Origins of Genocide and Other Atrocities, in THE ROOTS OF EVIL* (Ervin Staub ed., 1989)).

discriminate against racial minorities,²² or keep women in subordinate societal roles.²³ Any theory that seeks to account for the effect of legal sanctions on human rights behavior should acknowledge these components. To the extent that the *Limits* theory fails to do so, it proves too little. To the extent it assumes that the full range of possible causal agents of human rights violations are merely elements of state preference, it proves too much. In either case, its assumption about the content of state preference is inaccurate.

Goldsmith and Posner suggest that a state's interest in the treatment of people in other states might derive from rational calculations about the impact of human rights compliance around the world on a state's ability to increase security and economic welfare, and might even include a preference for universal human rights in its interstate dealings.²⁴ But it is a weak interest, which tends not to be of central concern in signing treaties.

Adopting the same rational choice formula they apply to other treaties, the *Limits* authors posit that a state will join a human rights treaty when the treaty does not require a change in behavior ("coincidence of interest"), or because the state fears retaliation or some other reputational loss ("coercion").²⁵ Coincidence of interest occurs where states sign onto agreements that merely replicate domestic arrangements or where a state attaches reservations that limit its obligations to status quo domestic obligations. Coercion occurs where states refrain from exercising sovereignty over human rights conditions in their own territory in order to gain something from other states.²⁶ For example, states in transition may agree to human rights obligations as part of a peace settlement, in order to gain direct development assistance or other club goods, such as access to trade preferences.²⁷

²² Schmitz & Sikkink, *supra* note 11 (citing DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996)).

²³ Marilou McPhedran et al., *THE FIRST CEDAW IMPACT STUDY: FINAL REPORT 17-26* (2000).

²⁴ A preference for human rights might be based on, for example, a theory of democratic peace or the value of free societies on free trade. GOLDSMITH & POSNER, *supra* note 1, at 110. It might also include a preference for morality or cosmopolitanism, but Goldsmith and Posner see those as inappropriate elements of state preference. *Id.* at 205.

²⁵ "If each state would engage in the same action for self-interested reasons regardless of what the other state does, then there would be no reason to invest resources to enter an agreement codifying the behavior." GOLDSMITH & POSNER, *supra* note 1, at 88-90.

²⁶ Coordination, where "states receive higher payoffs if they engage in identical or symmetrical actions than if they do not," *id.*, does not apply in the human rights context.

²⁷ The example Goldsmith and Posner use is the Versailles Treaty. *Id.* at 90 (asserting that cooperation in making the treaty made the parties better off than if there had not been an

Goldsmith and Posner acknowledge that coincidence of interest and coercion occur in the international human rights context without legal agreements, but nonetheless assert that states choose treaties over nonlegal arrangements on the basis of the cooperation rationale.²⁸ The cooperation rationale comes into play where "states reciprocally refrain from activities . . . that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits."²⁹ States agree to be bound, rather than make nonbinding declarations, because treaties offer additional dimensions that assist the informational aspects of cooperation. Under the authors' broad theory, states will generally prefer treaties over nonbinding declarations because treaties (1) require domestic *legislative consent* and, therefore, convey important information about state preferences; (2) implicate *default rules* (e.g., the interpretive rules of the Vienna Convention on the Law of Treaties); and (3) convey a more *serious commitment* than non-binding agreements.³⁰ Each of these cooperation rationales assumes an interstate collective action problem where agreement can facilitate communication and create a focal point for overcoming the repeated bilateral prisoner's dilemma, a dilemma which is generally inapposite to the human rights regime.³¹

The international human rights system cannot be explained or aided by the bilateral prisoner's dilemma, because, despite being constructed from a web of multilateral treaties, the international human rights system does not centrally address itself to interstate behavior (bilateral or multilateral) but rather to domestic conditions. None of the core tenets of the six central human rights treaties addresses the substance of state obligations to one another.³² Rather,

agreement):

²⁸ *Id.* at 88-89.

²⁹ *Id.* at 12.

³⁰ *Id.* at 91.

³¹ The bilateral prisoner's dilemma is a two-party game in which the welfare of one party depends on the moves of the other party. Without knowledge of how the other party will act, the rational move of each party will reduce both parties pay off. Cooperation between the parties facilitates information and maximizes the pay off for both parties.

³² International Covenant on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456.

they are aimed at a state's conduct with regard to its own inhabitants.³³ Further, because the tenets are not reciprocal in nature,³⁴ they are not generally enforced by classic interstate actions, such as economic sanctions or military intervention,³⁵ and achieving compliance with human rights law does not generally require the level of interstate cooperation necessary to resolve collective action problems.³⁶

Indeed, apart from the limited historical examples they present of bilateral cooperation on the question of minority religious rights and the campaign to end the slave trade,³⁷ Goldsmith and Posner essentially concede that modern international human rights treaties do not reflect "robust cooperation."³⁸ Why then, if treaties add nothing that is not either already being done ("coincidence

³³ A small number of human rights treaties create specific obligations on states with respect to treatment of non-nationals outside territorial borders. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152. The requirement under the major human rights instruments that individuals exhaust domestic remedies prior to raising a claim internationally distinguishes human rights treaties from, for example, the WTO regime which explicitly disallows raising domestic claims under the GATT. *Compare, e.g.*, International Covenant on Civil and Political Rights, Opt. Prot. 1, art. 2, Mar. 23, 1976, 999 U.N.T.S. 302 [hereinafter ICCPR] (limiting individual complaints to the Committee on Human Rights to individuals "who have exhausted all available domestic remedies"), with Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (noting that WTO members are obligated to seek recourse only through the DSU rules).

³⁴ *See* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000) ("[I]nternational human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.").

³⁵ *Id.* The use of sanctions has generally been restricted to cases where human rights violations accompany ideologically opposed regimes (United States against Cuba) or threats to peace and security (U.N. sanctions against Iraq, Libya, Iran). *See* HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 662-72 (2000). I am setting aside here the question of intervening with military force solely on the basis of human rights violations. *See* NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000). But Goldsmith and Posner are correct in noting that, despite a number of situations in recent decades where such humanitarian intervention might have taken place, it infrequently has. GOLDSMITH & POSNER, *supra* note 1, at 213-14.

³⁶ There are a handful of notable exceptions, including the law governing the treatment of refugees, which requires some degree of cooperation and coordination between states to ensure the obligation of *non-refoulement* (non-return of individuals to a persecuting state) is met. *See* GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (1996).

³⁷ GOLDSMITH & POSNER, *supra* note 1, at 113.

³⁸ *Id.* at 119.

of interest") or which could more effectively be achieved through bilateral sanctions ("coercion"), do states go to the trouble of creating legal agreements over human rights?

Goldsmith and Posner are left with weak residual rationales. They first claim that some improvement in human rights conditions occurs through the drafting and ratification process, including the creation of reporting procedures.³⁹ Second, they argue that a treaty like the International Covenant on Civil and Political Rights (ICCPR) may simply be a way for liberal democracies to announce a "code of conduct" on which aid, trade concessions and other diplomatic benefits might be conditioned.⁴⁰ Under this rationale, treaties provide a blueprint for the "standards of civilization."⁴¹

They provide no evidence for the first proposition. Constructivist scholars in political science have noted that negotiations leading up to ratification and ratification itself are steps in the process of norm creation and norm compliance, but those stages are not deemed any more significant than the actual effect of the norm on ongoing state behavior.⁴² Even if it could be demonstrated that drafting and ratification have significant effects, Goldsmith and Posner do not explain how the effects of drafting and ratifying a legally binding instrument would be different from drafting and approving nonbinding statements.⁴³ As to the second rationale, it is of course the case that human rights may improve as a result of cooperation and coercion in a bilateral relationship.⁴⁴ The fact that a treaty may provide an easy textual reference to "the kinds of behavior that are deemed acceptable or not,"⁴⁵ is not illuminating. It is also inaccurate as an historical matter.

There are two important nonbinding, aspirational human rights documents—the preamble to the U.N. Charter and the Universal Declaration of Human Rights (UDHR).⁴⁶ Despite containing language that is nearly

³⁹ *Id.* at 128.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Schmitz & Sikkink, *supra* note 11, at 529.

⁴³ For an example of a nonbinding statement see the joint statement on the occasion of the World Conference on Human Rights, held at Vienna in 1993. *Vienna Declaration and Program of Action* (July 12, 1993), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

⁴⁴ GOLDSMITH & POSNER, *supra* note 1, at 128.

⁴⁵ *Id.*

⁴⁶ See Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1156 (1998) (the UDHR is an "agreement across cultures"). The UDHR has been invoked as "the fountainhead or constitution or grand statement of the human rights

identical to the UDHR,⁴⁷ the ICCPR was drafted precisely because the UDHR was deemed inadequate in that it was nonbinding and merely hortatory.⁴⁸ Certain states, including the United States, were reluctant to sign onto the ICCPR because they did not want to be bound to enforce it domestically, not because they disagreed with it as a “code of civilization.”⁴⁹ Indeed, the United States had long used coercive measures to pursue human rights issues in bilateral and multilateral relationships before it signed onto the ICCPR. It did not require a treaty to provide a code of conduct.⁵⁰

Goldsmith and Posner do not deny the existence of international law or, by extension, the existence of international human rights law. But after reviewing the rationales they offer for preferences for binding obligations, as opposed to mere pledges, we seem to be left with a theory not of law but of politics: International human rights *policy* emerges from states acting rationally to maximize their interests given their perceptions of the interests of other states and the distributions of state power.⁵¹ This reflects a classic realist assessment of diplomatic behavior and as such is a useful explanatory device. It is undoubtedly true that in the United States, for example, the preference for taking into account human rights practices of other states has emerged separately from the decision to undertake treaty obligations.⁵² The problem is that rational action as a matter of foreign policy does not explain why a state has a preference for obligating itself to fulfill the terms of an international

movement. . . .” ALSTON & STEINER, *supra* note 35, at 143.

⁴⁷ Compare the provisions of Articles 1-21 of UDHR, with Articles 6-27 of the ICCPR.

⁴⁸ ALSTON & STEINER, *supra* note 35, at 142-45.

⁴⁹ See, e.g., the Bricker debates in the United States. Many other countries shared this concern, see, e.g., ALSTON & STEINER, *supra* note 35, at 150 (citing H. LAUTERPRECHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950), on the general “rejection of the legal duty” to give effect to the rights in the UDHR); Moravcsik, *supra* note 34 (noting that the United Kingdom was one of three Council of Europe states initially opposed to language in the European Convention on Human Rights that would be bind member states’ domestic legal systems).

⁵⁰ The United States ratified the ICCPR in 1990; the adoption of human rights as an element in bilateral relations is placed at 1977, the first year of the Carter administration. See note 52 *infra*.

⁵¹ See Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT’L L. 143 (2001).

⁵² That preference was expressed through congressional statute in 1977, requiring the U.S. State Department to provide annual reports to Congress on global human rights conditions. 22 U.S.C. § 2304 (2005) (sections 116(d) and 502(b) of the Foreign Assistance Act of 1961 (as amended) and section 504 of the Trade Act of 1974 (as amended)). This came into effect before the United States became a party to the ICCPR and the Convention Against Torture.

treaty or how such a legal obligation, once undertaken, affects human rights practices or the decision of other actors in the international community to press for changes to a state's human rights practices.

The rational choice analysis becomes more useful as a predictive tool if we clearly distinguish between international human rights law and policy. A few of the central human rights institutions, such as the U.N. Economic and Social Council (ECOSOC) and the U.N. Human Rights Commission (UNHRC), are mechanisms not of assessment or adjudication of legal claims, but of interstate politics. They have been politicized in ways that can be counterproductive to the project of improving human rights conditions.⁵³ UNHRC for example, has allowed egregious human rights violators like Sudan and Libya to assume leadership positions, and conveyed to them the concomitant power to veto investigations and sanction recommendations. Rational choice models are important in understanding, as both a prescriptive and predictive matter, how these institutions can and should be reformed to take into account impediments to interstate cooperation. There is currently consensus that the UNHRC is broken and that a Human Rights Council that could more effectively engage the tools of cooperation and coercion may be needed.⁵⁴ Explicit acknowledgement and understanding of the kinds of rational choice limits to

⁵³ Schmitz & Sikkink, *supra* note 11, at 527 (“Charter-based human rights institutions at the U.N. have been much more politicized than the treaty-based institutions.”).

⁵⁴ The 2004 *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change* concluded that U.N. Human Rights Commission's ability to carry out its mission of protecting human rights globally “has been undermined by eroding credibility and professionalism,” and joined recommendations that the Commission be opened to universal membership. A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 89 (2004), <http://www.un.org/secureworld/report2.pdf>. Similarly, Secretary General Kofi Annan has stated that the “Commission on Human Rights suffers from declining credibility and professionalism, and is in need of major reform.” IN LARGER FREEDOM 5 (2005), <http://www.un.org/largerfreedom/executivesummary.pdf>. The U.N. member states agreed at the World Summit in September 2005 to work toward replacing the Commission with a Human Rights Council. See 2005 WORLD SUMMIT OUTCOME, 33, para. 160 (2005), <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/NO548760.pdf?OpenElement>. See also *Options Paper Human Rights Council* (2005) presented by Ambassadors Ricardo Alberto Arias and Dumisani Shadrack Kumalo, Co-Chairs of the HRC Negotiations to Ambassador Jan Eliasson, President of the General Assembly, available at http://www.eyeontheun.org/assets/attachments/documents/options_paper_on_hr_council.pdf. Prominent human rights NGOs support the idea of replacing UNHRC with a Council. See Joint NGO Statement, Nov. 22, 2005, www.unwatch.org/speeches/Joint_statement_on_HRC.html; *Amnesty International's Ten-point Program for the Creation of an Authoritative and Effective Human Rights Council*, Nov. 1, 2005, <http://web.amnesty.org/library/Index/ENGIOR410682005?open&of=ENG-393>.

interstate politics that Goldsmith and Posner describe are important to that project of institutional reform and design.

Yet a foreign policy of human rights—even a multilateral one—can exist without human rights treaties. The rather unsurprising conclusion that states are in part instrumental in pursuing human rights *policies* does not necessarily imply, as Goldsmith and Posner suggest, that international human rights law has *little or no exogenous effect* on state behavior. To understand why states enter treaties and/or comply with them requires a more complete description of international human rights laws and legal (as distinct from primarily political) institutions and also of the ways in which other theories (the ones about whose claims Goldsmith and Posner are skeptical) account for the effects of law and institutions.⁵⁵

III. HOW INTERNATIONAL HUMAN RIGHTS LAW AFFECTS STATE BEHAVIOR

Some international human rights treaties create direct enforcement mechanisms that are binding on states. These are distinct from institutions controlled through ongoing intergovernmental decision making bodies (e.g., the UNHRC and ECOSOC). They are created through interstate agreement and then left to operate relatively independently, with minimal oversight. Examples include the ECHR, the ad hoc tribunals for Yugoslavia and Rwanda, and U.N.-sponsored courts in Sierra Leone, East Timor, and Kosovo.⁵⁶ Institutions created under international human rights treaties themselves interpret treaty law, elaborate norms, and apply law in ways that frequently are contrary to the interests of a state that participated in creating them. And, contrary to the *Limits* theory, state behavior is altered by them.

A. *Institutional Effects on Behavior*

The International Criminal Tribunal for Former Yugoslavia (ICTY) is an example of an adjudicatory institution that fundamentally altered state behavior in ways not anticipated by the member states of the Security Council that created it. Goldsmith and Posner use the ICTY to illustrate their claim that coercion, not the rule of law, brings about compliance with human rights norms: “The tribunal has had modest success in trying war criminals, including

⁵⁵ GOLDSMITH & POSNER, *supra* note 1, at 83-91.

⁵⁶ INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Cesare P.R. Romano et al. eds., 2005).

Slobodan Milosevic. But it was not the gravitational pull of the ICTY charter that lured those defendants to the Hague. Rather, it was NATO's (and primarily American) military, diplomatic and financial might."⁵⁷ The effects of the tribunal on the very states that supported its creation, as well as on the parties to the conflicts in the Balkans, are quite different and more complex than Goldsmith and Posner portray them. Once the tribunal was created in 1992 (almost as an afterthought to one of the many failed peace processes in Bosnia), the international community could and did ignore its work rather than throw its diplomatic and military might behind it, as Goldsmith and Posner suggest. But only up to a point.⁵⁸ Even as it was subject to the vicissitudes of cooperation and funding from the Western powers, the work of the tribunal took on a dynamic of its own, affecting both the terms of the peace in Bosnia (and later Kosovo) and which actors were able to participate in the peace process.⁵⁹

One important incident illustrates how the tribunal served as an exogenous influence on the behavior of the United States, rather than the other way around. Shortly after the Srebrenica massacre of July 1995,⁶⁰ Bosnian Serb leader Radovan Karadzic and his military commander Ratko Mladic were indicted by the ICTY.⁶¹ The United States, which had taken over the lead role

⁵⁷ GOLDSMITH & POSNER, *supra* note 1, at 116. The first defendant tried by the ICTY, Dusko Tadic, was actually transferred to the Hague by the German government under the complementarity principles of the ICTY statute, well before the United States took the lead in the peace process and two years before the NATO bombings of Kosovo began. PAUL WILLIAMS & MICHAEL SCHARF, *PEACE WITH JUSTICE* 114-15 (2003).

⁵⁸ The ICTY had a small staff, minuscule budget, and few resources of its own. See David Rohde, *War Crime Probe in Ex-Yugoslavia Mired by Red Ink*, CHRISTIAN SCI. MONITOR, Oct. 6, 1995, at 1; Ray Bonner, *U.N. Fiscal Woes Are Said to Threaten War Crime Tribunals*, N.Y. TIMES, Oct. 4, 1995, at A8. It depended heavily on cooperation from western intelligence agencies to gather information to build cases. By dragging their heels on such cooperation, France, Great Britain and the United States could maintain the appearance of support for the tribunal, while not exposing themselves to criticism for failing to intervene militarily to end the fighting. Elaine Sciolino, *U.S. Says it is Withholding Data from UN War Crimes Panel*, N.Y. TIMES, Nov. 8, 1995, at A10.

⁵⁹ Cooperation with the tribunal was, in the end, a central term in the Dayton Accords.

⁶⁰ Srebrenica had been designated a "safe haven" by the U.N. Between July 4-6, 1995, the enclave was overrun by Ratko Mladic and Bosnian Serb military forces. The U.N. peacekeepers handed over the Bosnian Muslim residents of the protected area to Mladic, who then ordered and oversaw mass killings of approximately eight thousand Bosnian Muslim men and boys. That event proved to be a turning point for NATO bombings against Serb positions and set the stage for the Dayton process. Melanie C. Greenberg & Margaret E. McGuinness, *From Lisbon to Dayton*, in WORDS OVER WAR 60 (Melanie C. Greenberg et al. eds., 2000).

⁶¹ Karadzic was the elected prime minister of Republika Srpska, a self-proclaimed

in the diplomatic process of negotiating between the Bosniacs, Serbs and Croats from the EU and the U.N., had earlier considered Karadzic a credible representative of Republika Srpska, and he had traveled without threat of arrest to cities outside the region to attend peace talks.⁶² Following the indictment, Karadzic could not travel to any U.N. member state without fear of arrest because the terms of the tribunal's statute required any host state to arrest him and transfer him to the Hague to stand trial.⁶³ Despite noting, on the eve of the Dayton negotiations, that cooperation with the ICTY would "not be a show stopper,"⁶⁴ the United States was, in part, forced by the consequences of a legal prosecution it did not fully control⁶⁵ but under which it felt legally (if not morally) bound to comply, to alter its course.⁶⁶ Similarly, once Milosevic was deposed and ultimately transferred to the Hague to stand trial, the work of the ICTY—operating completely outside the territory of the former Yugoslavia—had an enormous effect on the opportunities for political reconciliation, future regional political developments, and the adoption of international human rights standards in domestic law.⁶⁷ The ICTY has also carried out, albeit imperfectly, its direct mandate to bring war criminals to justice.⁶⁸

autonomous republic within Bosnia. Despite the failures to achieve full intelligence cooperation, the ICTY gathered enough information (much of it in the public domain as a result of NGO activism and press reporting) to hand down indictments for those two Bosnian Serb leaders in February 1995. Following the Srebrenica massacre, the indictment was made public. It was amended in November 1995 to include charges arising from Srebrenica. Greenberg & McGuinness, *supra* note 60.

⁶² Karadzic negotiated the winter ceasefire of 1994-1995 with former President Jimmy Carter. *Id.* at 64-65.

⁶³ Statute for the International Criminal Tribunal for the Former Yugoslavia, art. 29, May 25, 1993, 32 I.L.M. 1192 (1993) [hereinafter ICTY].

⁶⁴ See Greenberg & McGuinness, *supra* note 60, at 70.

⁶⁵ The ICTY President is required under the statute to report annually to the Security Council. ICTY, *supra* note 63, art. 34.

⁶⁶ The United States had additional reasons to welcome the isolation of Karadzic by the time Dayton began. Greenberg & McGuinness, *supra* note 60, at 64-65. Of course, the fact that the United States withheld from the ICTY important information about Milosevic until after the Dayton agreement was signed, demonstrates that instrumentalism often creeps into decisions about cooperation with a tribunal, particularly where saving many lives may require delaying prosecution. The point is that justice was not the central concern of the United States; peace was. The ICTY altered the alternatives available to the United States.

⁶⁷ For example, the tribunal influenced how the post-war political transition took place in Serbia. See Tim Judah, *The Fog of Justice*, N.Y. REV. BOOKS, Jan. 15, 2004, at 23.

⁶⁸ That Karadzic and Mladic are still at large (though clearly isolated and unable to act publicly) might be seen as a failure of the Tribunal. But it can equally be viewed as the failure

I do not intend to make a normative judgment here, but rather an empirical observation about the way in which international legal processes affect state behavior.⁶⁹ Indeed, some might view this sort of exogenous effect on state behavior as a threat to peace processes more generally, where the ability to bargain away issues like prosecution of political leaders might be central to a negotiated solution.⁷⁰ Among the most valid objections to an independent ICC (a nonindependent ICC being objectionable for more obvious reasons) is the very ability of an ICC prosecution to alter the options available to a mediator or the parties themselves to achieve a negotiated solution.⁷¹ Nonetheless, to the extent that *Limits* fails to account for these independent effects on state behavior, it is incomplete.⁷²

B. Domestic “Lock-in” and Domestic Change

The *Limits* thesis is incomplete in that it fails to explain how international law interacts with domestic legal institutions. International human rights law addresses itself primarily to change on the domestic level. The doctrine of exhaustion of state remedies, for example, requires that redress of a failure to meet an international human rights obligation must first be sought at the state level. Every regional and international human rights treaty incorporates this

of the “coercive” methods that Goldsmith and Posner claim are responsible for the Tribunal’s success.

⁶⁹ With hindsight, the indictments of Karadzic and Mladic can be seen as either helpful or damaging to the peace process. The helpful interpretation posits that they removed potential “spoilers” from the process and forced the hand of Slobodan Milosevic to speak for and sign for the Bosnian Serbs at Dayton. Greenberg & McGuinness, *supra* note 60, at 65. The damaging interpretation is that, without the Republika Srpska there, the peace at Dayton was viewed as unjust to the Bosnian Serbs and helped set the stage for the failure of cooperation that has allowed Karadzic and Mladic to evade capture for over ten years.

⁷⁰ Examples where this was the case are the El Salvador and South Africa truth and reconciliation processes. Amnesties and exile have also been used in Haiti (in the cases of Baby Doc Duvalier and Raoul Cedras).

⁷¹ The indictment by the International Criminal Court of several Lords Resistance Army leaders in Uganda has been criticized on the grounds that it ended all hope of a negotiated solution to that country’s protracted civil war. *Uganda Aide Criticizes Court Over Warrants*, N.Y. TIMES, Oct. 9, 2005, at 20.

⁷² Goldsmith has conceded elsewhere that the ICC will have an effect on state behavior and choices, but that it “will not achieve its aims of eliminating, or even much reducing, impunity for human rights violations.” Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95 (2003). He goes so far as to argue that the ICC may actually increase human rights violations. *Id.* at 95-101.

requirement.⁷³ Similarly, the International Criminal Court, which permits direct supranational prosecution of certain criminal violations of international human rights law, provides for “complementarity” of domestic prosecutions.⁷⁴

Some states, as Goldsmith and Posner note, attach reservations to any treaty obligation which expands individual causes of action under their domestic legal system, and some states have simply refused to meet their obligation to provide a direct claim of right. As I discuss below, advocacy groups have recognized that importation of the language of international human rights into domestic legal systems—through direct litigation, domestic legislative change, and interactive processes with international and transnational tribunals—is required to shift domestic behavior in states that either expressly limit the extent of their obligation to improve human rights conditions or that brazenly violate obligations they have undertaken.

Setting those two situations aside for the moment, why do some states nonetheless agree to change their domestic legal systems to improve human rights conditions? One explanation that stems from liberal theory is that states choose treaties over nonbinding declarations in part to “lock-in” to the domestic polity the values of the human rights commitment. States that are most likely to need the domestic gains achieved by “locking in” their commitments are those in transition—from colonialism to independence, or from totalitarianism to democracy. International human rights treaties are adopted during these transition periods as conditions of peace agreements; the treaty text frequently is incorporated into new constitutions.⁷⁵ Periods of transition thus offer an opportunity for norm transformation,⁷⁶ not only within the states in transition, but within the communities of states with which they interact. The countries of Western Europe, particularly Germany and Italy

⁷³ See, e.g., American Convention on Human Rights, art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35, Nov. 4, 1950, 213 U.N.T.S. 221; ICCPR, *supra* note 33.

⁷⁴ Rome Statute of the International Criminal Court, art. 17, July 17, 1998, U.N. Doc. A/CONF. 18319, 2187 U.N.T.S. 90. The two ad hoc tribunals for former Yugoslavia and Rwanda treat complementarity differently. ICTY, *supra* note 63, art. 10 (noting that the tribunals have concurrent jurisdiction with and primacy over national courts and allowing the ICTY to request deference from a national court).

⁷⁵ The constitutions of several states either incorporate direct language from the ICCPR, or require that their own bills of rights be interpreted in compliance with the UDHR or ICCPR. In addition, many new constitutions directly incorporate international treaty obligations into domestic law. See, e.g., CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996).

⁷⁶ See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 38 GEO. WASH. INT'L L. REV. (forthcoming 2005).

during the period immediately following World War II, fit this model.⁷⁷ After the end of the Cold War, Eastern European states and the newly independent states created out of the former Soviet Union also sought to “lock-in” domestic change through treaty commitments.⁷⁸ Human rights NGOs and foreign governments became more involved on the ground level in new democracies, building domestic institutions based on international human rights law and respect for the rule of law generally. International institutions and regional organizations were active in assisting new states with domestic change that would enable them to obtain future membership.⁷⁹ To be sure, some of the agreements to adopt change at the domestic level can be accounted for as the result of coercion by powerful states of weaker states. But that does not diminish the outcome that the decision to join treaties has additionally “locked in” changes in state behavior which remain even after the coercive measures are no longer in place.

Moreover, the fact that states attach reservations to treaties does not undermine the value of the “lock-in” theory. Because more developed democracies have a longer tradition of observing human rights, they are the states least likely to need to accede to international commitments related to these domestic purposes and therefore most likely to attach reservations when they do accede.⁸⁰ Indeed, the initial intent of the United Nations human rights system can be seen as part of the effort by the United States to get the fragile

⁷⁷ Moravcsik, *supra* note 34. Goldsmith and Posner acknowledge that the European Charter of Human Rights (ECHR) is the best example of an international human rights system that does appear to exert an exogenous influence on states. But they explain the robustness of the system as analogous to the shift from confederation to federation. In so doing, they (mistakenly) conflate the ECHR and its place as part of the Council of Europe, which arose in the 1950s to promote the rule of law and human rights (supported by the United States as part of the project of promoting supranational restraints on the states of western Europe), with the emergence of the European Community in the 1970s and 1980s and the EU in the 1990s. The United Kingdom ratified the ECHR in 1951; it joined the common market of the European Economic Community in 1973. The decision to ratify the ECHR was therefore quite separate from the later decision to join the economic union. Further, given the failure of several member states to adopt the EU Constitution in 2005, characterizing the EU as a federation analogous to the United States in 1789 appears at best premature.

⁷⁸ See Bardo Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 EUR. J. INT'L L. 857 (2004); Herman Schwartz, *The Internationalization of Constitutional Law*, 10 HUM. RTS. BRIEF 10 (2003).

⁷⁹ See, e.g., NATO Partnership for Peace, available at <http://www.nato.int/issus/ptp/>.

⁸⁰ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002) (discussing why some democracies have better compliance records than others).

emerging democracies in Western Europe to lock-in long-term commitments for the purposes of strengthening the prospects of liberal democracy.⁸¹

C. Norm Transfer into Domestic Law and the Role of Non-state Actors

The *Limits* theory is incomplete for the additional reason that it relies on the out-of-date assumption that *states* lie at the center of the international order—including in the human rights area. While states act to “lock-in” norms by means of international agreement, concluded at times of transition, the norms and rules of the international human rights system are aimed not just at the behavior of the aggregated political power of the state in its interstate relations, but also at subsidiary political units and agencies, courts, individuals, corporations, and other non-state actors. In addition to being subjects of the law, these other actors play roles in elaborating, interpreting, and adopting international norms—even in states that are not parties to the treaty in which the particular human rights standard is elaborated.⁸² The focus of human rights engagement has thus shifted away from interstate diplomacy (and its rational limits) toward work at the grassroots.

Goldsmith and Posner recognize the role of NGOs, but conclude that NGOs do not depend much on international law because they, like states, will protest human rights violations even when the abuser is not a signatory to a treaty. The authors further dismiss many of the studies about the rise of NGOs and their role in norm transfer as “unremarkable,” noting that NGO activism has been around for centuries.⁸³ When they acknowledge the rise of NGOs in human rights, they attribute it to technology.⁸⁴ While it is undoubtedly true that NGOs can and do express concerns about human rights even absent a binding treaty obligation, this observation is not inconsistent with other observations about the important role NGOs play in situations where there is a treaty upon which to base a claim of legal obligations and corresponding rights.

NGOs are playing a larger and more aggressive role as transnational norm entrepreneurs and plaintiffs in the international human rights system. Why? One answer may be that the failure of international political bodies to effect

⁸¹ See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U.L. REV. 1971 (2004).

⁸² See Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195 (2004).

⁸³ GOLDSMITH & POSNER, *supra* note 1, at 124-25 (discussing the studies by Risse and Sikkink (1999)).

⁸⁴ *Id.*

change in human rights conditions has created a need to target efforts at the domestic level.⁸⁵ The failures of the UNHRC to grapple with the worst systemic human rights abusers and of U.N. member states to halt ongoing mass atrocities in Rwanda and the Darfur region of Sudan demonstrate that reliance on the traditional mechanism of interstate diplomacy to address shortcomings in human rights conditions is increasingly misplaced. As the problems of certain intergovernmental processes become pronounced, NGOs look to direct participation *within* states and *across* states to address problems.⁸⁶ Many of these NGOs, including Amnesty International and Human Rights Watch, are themselves transnational organizations beyond the reach of any one state.

Goldsmith and Posner conclude, in typically sweeping fashion, that the body of constructivist literature fails to demonstrate that "human rights law plays any *special* role."⁸⁷ But surely if international human rights law has any effect on state behavior through the processes of norm transfer, that would shed doubt on the sweeping claims of the *Limits* theory. Other actors are affected by international human rights laws and institutions, and in turn, these actors affect the way human rights conditions develop on the ground. Case studies illustrate this phenomena.

The recent convergence of international efforts to limit and abolish the death penalty and attempts to enforce individual rights under the Vienna Convention on Consular Relations protections for foreign nationals illustrates the way in which norm transfer takes place, even in a large, powerful country. The United States is not a signatory to Optional Protocol 2 of the ICCPR, which abolishes the death penalty, but it is a party to the Vienna Convention on Consular Relations (VCCR) which was, until recently, a relatively non-controversial multilateral treaty codifying the privileges, immunities, and status of consular officers.⁸⁸ Among the functions elaborated in the VCCR is the protection of nationals who have been arrested or incarcerated in a foreign

⁸⁵ See Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHL J. INT'L L. 1, 13-16 (2000).

⁸⁶ Some NGOs have played a large role in keeping the failures of the intergovernmental processes in the public eye. UN Watch is one example. See www.unwatch.org.

⁸⁷ GOLDSMITH & POSNER, *supra* note 1, at 125. They dismiss in particular, the work of Thomas Risse and Kathryn Sikkink, *The Socialization of Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL LAW AND DOMESTIC CHANGE* 1-38 (Thomas Risse et al., eds. 1999).

⁸⁸ Consular officers are not diplomats who serve as emissaries of the government on political questions (though they can frequently fill that role), but rather they serve to protect the commercial interests and the welfare of nationals of the sending state.

state by providing, *inter alia*, that consular officers be notified of the arrest of any of their nationals.

Until ten years ago, when anti-death penalty activists changed tactics, the VCCR had not been invoked as providing a direct claim for a right arising from an international human rights treaty. Around the mid-1990s, with Optional Protocol 2 as their standard, a transnational network of human rights activists, NGOs, and defense lawyers began a campaign to bring national criminal justice systems into conformity with the abolition of the death penalty in the ICCPR. In countries where capital punishment persisted—most notably the United States—the network of these “norm entrepreneurs” worked to limit the application of the death penalty through novel arguments rooted in emerging international and foreign practices. Using the VCCR as a portal to gain entry to United States courts was one of those entrepreneurial tactics.⁸⁹

Starting with the case of a Canadian national convicted of a capital crime in Texas, defense counsel and domestic and transnational NGOs initiated an interactive process between and among international tribunals (the Inter-American Court of Human Rights (IACHR) and International Court of Justice (ICJ)) and state and federal governments in a series of cases in which foreign nationals faced the death penalty.⁹⁰ Foreign governments used the VCCR as a means to get into court and take a stand against the application of the death penalty to their nationals.⁹¹ Defense attorneys, some receiving active and

⁸⁹ In 1992, Stan Faulder was the first defendant known to file a habeas petition based on a violation of the notification provisions of the VCCR. *Ex Parte Joseph Stanley Faulder*, No. 10740 (Tex. Crim. App. 1992). Earlier cases raised consular rights violations, but these were not based on claims of direct violation of the VCCR. See *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980); *United States v. Coplon*, 89 F. Supp. 664 (S.D.N.Y. 1950). See also William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257 (1998); William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535 (1998).

⁹⁰ The basis of the claim was that the foreign national defendants had not been informed of their right to consular notification and that the consulate's failure to be aware of their case caused prejudice. Remedies sought included excluding statements made prior to consular notification and review and reconsideration on state and federal habeas grounds based in the 4th, 5th, and 6th amendments. See *Ex Parte Faulder*, No. 10740; *Rangel-Gonzales*, 617 F.2d 529; *Coplon*, 89 F. Supp. 664.

⁹¹ Whether those foreign governments did so out of altruism toward co-nationals or as a means to exert power over the United States or out of a sense of strong moral obligation to oppose the death penalty is of no moment to this description of how the outside norms are integrated in the United States. Nonetheless, there is strong evidence that in the cases brought by Germany, Paraguay, and Mexico, strong anti-death penalty sentiment and support of the

monetary support from foreign governments, formed coalitions to seek review and reconsideration in scores of cases between 1997 and 2005. Key points in the process were the 1997 advisory opinion of the IACHR which stated that the obligation to provide consular notice was incorporated into the due process requirements of the ICCPR,⁹² and the 1998 decision of the ICJ that failure to notify required a separate remedy, regardless of domestic procedural rules.⁹³ In both cases, the rulings went against the United States. These efforts produced a “norm cascade” on the question of consular notification in death penalty cases: the United States government provided guidance and training to state and local governments; state and local governments trained police and courts; state and federal courts expanded procedural remedies for failure to notify (including claims based on suppression of confessions and ineffective assistance of counsel); and states began to consider and adopt legislation to create a cognizable right in cases where notification has not taken place.⁹⁴

To be sure, some of the behavior of the federal government in this case can be attributed to instrumentalist acts. The United States was subject to an interpretation of an obligation under an international treaty—the VCCR—with which it did not agree. It then took steps to withdraw from at least that part of the treaty that would subject it to future ICJ interpretation of disputes—an entirely rational act given the outcome. And some courts have started to limit the procedural remedy available to criminal defendants in the event that notification is not made. But the part of the federal government that acts as “the state” for the purpose of international relations was forced at many points along the way to do things it had resisted doing before: engage in active dialogue with local and state law enforcement authorities and conduct trainings; request a stay of execution from a governor; and request review and reconsideration of state habeas corpus petitions from a state governor.⁹⁵ The

“international rule of law” played a role. *See, e.g., Brief Amicus Curiae of the United Mexican States* filed in *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) at 14-16 (noting that Mexico involved consular officers in death penalty cases dating back to at least 1920, and that the United States recognizes Mexican assistance in death penalty cases as “extraordinary”); Plaintiff-Appellants Brief, at 7-8, *The Republic of Paraguay v. Allen*, 134 F.3d 622 (C.A.4 Jan. 22, 1998).

⁹² Advisory Opinion OC -16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. Ctr. H.R. (Oct. 1, 1999).

⁹³ *Case Concerning the Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 99 Discont. (Nov. 1998). *See also Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. No. 128 (March 31).

⁹⁴ *See* CAL. PENAL CODE §§ 834c and 5028 (2005); OR. REV. STAT. § 181.642 (2005); *but see* FLA. STAT. § 901.26 (2005).

⁹⁵ *See Consular Notification and Access: Instructions for Federal, State and Local Law*

United States now faces a legal result that was clearly not its preference: a change in the rule applied to foreign nationals in several state criminal justice systems.⁹⁶ This change in rule is, in turn, in combination with other efforts, chipping away at the death penalty in the United States.

The VCCR line of cases illustrates in an international human rights context what the political scientist Charles Epp has, in the context of the rights revolution in the United States of the Warren and Burger eras, labeled “support structures for legal mobilization”:

[S]ustained judicial attention and approval for individual rights *grew primarily out of pressure from below, not leadership from above*. This pressure consisted of deliberate, strategic organizing by rights advocates. And strategic rights advocacy became possible because of the development of . . . the support structure for legal mobilization, *consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing*.⁹⁷

The process that has come to bear on foreign nationals facing the death penalty is just one example of an “international human rights support structure” operating transnationally and domestically.⁹⁸ The interventions as *amici* by

Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them, available at http://travel.state.gov/consul_notify.html; Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. TIMES, Apr. 14, 1998, at A14 (discussing Letter from Secretary of State Madeleine Albright to Governor James S. Gilmore III requesting stay of execution of Angel Breard); Memorandum from President George W. Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (stating that “the United States will discharge its international obligations under the decision of the International Court of Justice”).

⁹⁶ See CAL. PENAL CODE §§ 834c and 5028 (2005); *People v. Ortiz*, 2002 WL 937642 (Cal. App. 2002); *People v. Pathan*, 2002 WL 31854948 (Cal. App. 2002); *People v. Valencia*, 2004 WL 887210 (Cal. App. 2004); *People v. Garcia*, 2005 WL 697970 (Cal. App. 2005); OR. REV. STAT. § 181.642 (2005). *But see State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005) (decided before the Oregon statute was law, holding that the VCCR does not confer individual rights to a detained foreign national to be asserted in a criminal proceeding).

⁹⁷ CHARLES R. EPP, *THE RIGHTS REVOLUTION* 2-3 (1998) (emphasis added). One difference in the VCCR context is that foreign governments provided some of the financing.

⁹⁸ Kathryn Sikkink has called general category “transnational advocacy networks.” Kathryn Sikkink, *A Typology of Relations Between Social Movements and International Institutions*, 97 AM. SOC’Y INT’L L. PROC. 301, 302-03 (2003).

transnational NGOs and the European Union in the *Roper v. Simmons*⁹⁹ case which abolished the juvenile death penalty in the United States, and the Supreme Court's explicit acknowledgments of the international standards in its opinions in those cases are further examples of how international human rights norms are creeping into the U.S. approach to a broad range of rights-based claims.¹⁰⁰

Again, this is not a normative claim. There are those who are pleased to see this process evolving and effecting change in the United States, either because they want the death penalty abolished or they want the United States to engage more actively with international human rights law, or both. There are others who are dismayed by this development, either because they do not want the death penalty abolished or they do not want the United States to feel bound to follow the standards in international human rights treaties (particularly those to which the United States has made reservations), or both.¹⁰¹ The point is that transnational state and non-state actors are at work in changing U.S. practice.

D. Alternative Claims as Complements

In each of the examples I have given, actors (individual government officials, NGO representatives, plaintiffs and defendants) behave for the most part in pursuit of interests. However, only through an understanding of alternative claims that challenge the primacy of the state actors and interstate political process does a more complete picture of the international human rights system emerge. But I do not intend to privilege these alternative theories over rational choice.

Just as rational choice theory sweeps too broadly and undervalues the role of non-state actors, transnational legal process theory tends to overestimate the power of participation, and underestimate the power of change in political

⁹⁹ 543 U.S. 551 (2005).

¹⁰⁰ See Brief for the Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA, 2004 WL 1628523 (July 15, 2004) and Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, 2004 WL 1619203 (July 12, 2004); *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁰¹ Indeed, in his early writings Jack Goldsmith has expressed concern that "illegitimate" international human rights litigation violates federalism and separation of powers doctrines. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORD. L. REV.* 319 (1997) (raising those critiques to the application of customary international law of torture at a time the United States was not a signatory to the Convention Against Torture).

leadership and preference. It is nonetheless helpful in describing ways in which treaties announce norms that can later become a reference point against which individual government officials measure their own behavior.¹⁰² Governmental networks theory focuses on transnational governance—particularly the judiciary—in ways that may miss important changes at the grassroots. Moreover, while these networks are strong in some areas (antitrust, monetary, and environmental regulation), they are weaker in the international human rights system, where coordination of state behavior is less central. In the case of emerging states, however, particularly those with a significant foreign and international institutional presence, governmental networks play a larger role in norm integration by providing technical assistance and aid aimed at building legal systems and institutions that support international human rights commitments.¹⁰³ These networks offer a less complete explanation for how change can and is taking place in democratic states on questions that deeply divide them, *e.g.*, the death penalty.

The theory of transnational communities of interest offers a useful description of groups that develop and share expertise on human rights problems that can fill the gaps in the governmental networks theory. At the same time, the theory alone does not tell us much about how these transnational communities go about effecting change at the domestic level. All these constructivist approaches deserve further exploration and elaboration in the international law literature through case studies.¹⁰⁴

¹⁰² The last four years of internal debate over the standards to be applied to detainees captured by the United States post-9/11 demonstrates the value of reference points. While the Geneva Conventions norm appeared well integrated in the U.S. military, the expanded battlefield role of the intelligence services and the desire to maintain detention facilities away from the battlefield but outside the United States, shifted the benchmark. Once public attention was brought to bear on abuses and deaths in detention that could be attributed to methods that do not comply with the Geneva Convention, a focal point emerged for public and political support to make the prior standard the law for all government agencies. See R. Jeffrey Smith & Josh White, *Cheney Plan Exempts CIA from Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A01; Sara Kehaulani Goo, *List of Foiled Plots Puzzling to Some; White House Document Mixes Half-Baked Plans with Serious Terrorist Threats*, WASH. POST, Oct. 23, 2005, at A06.

¹⁰³ See INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS, *supra* note 56.

¹⁰⁴ The death penalty and VCCR case study is further elaborated in Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights in US Courts* (forthcoming 2006).

IV. THE CHALLENGE OF MEASURING COMPLIANCE

In my claim that the *Limits* theory adds little value to answering the compliance question in international human rights law, I can be criticized for not providing a unitary counter-theory. I have not done so in large part because I think there is much that is helpful in the range of theoretical perspectives (including instrumentalism) and room for “middle theories” that do not seek to prove too much. But it is also because the empirical evidence relating to compliance is rather thin. To properly address the challenge of demonstrating compliance through empirical studies, two separate lines of inquiry need to be pursued. The first frames the appropriate empirical question: Is there a positive trend in the condition of human rights in the world compared to fifty or sixty years ago when the modern age of human rights was born? This basic empirical question turns out to be quite difficult to answer with any degree of certainty and raises complicated questions about hierarchies of rights.¹⁰⁵ Whatever the empirical data demonstrates in response to the first answer, the follow-up question is even more vexing: To what degree can we attribute the change in states’ human rights practices to the increase in state accession to human rights treaties as opposed to other factors, such as the fall of communism or improved economic conditions? Theories of behavior can be useful explanatory tools, but demonstrating causality is a notoriously difficult task. As Robert Keohane noted about the challenge to the empirical study of international institutions generally, outcomes are unreliable because there is no alternative world against which to measure the world which includes the United Nations and a multiplicity of regional organizations and institutions.¹⁰⁶

Goldsmith and Posner’s conclusion that a state will sign onto treaties because “a state incurs little cost from violating the treaties”¹⁰⁷ acknowledges that the available empirical evidence is, at best, limited. They note:

¹⁰⁵ Some recent studies are proving promising. See, e.g., Hathaway, *supra* note 80. But see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003) (arguing that Hathaway’s study contained “serious deficiencies in her empirical findings, theoretical model and policy prescriptions”). See Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT’L L. 185 (2003).

¹⁰⁶ Robert O. Keohane, *Multilateralism: An Agenda for Research*, 45 INT’L J. 731, 738 (1990).

¹⁰⁷ GOLDSMITH & POSNER, *supra* note 1, at 120.

[H]uman rights reports issued by the U.S. State Department, Amnesty International, and Human Rights Watch make clear that human rights abuses in violation of the ICCPR are widespread. . . . These reports suggest that the human rights treaties have not had a large impact, but they say nothing about the human rights treaties' possible marginal influence on human rights practices."¹⁰⁸

Indeed, the data from these different sources are not internally consistent.¹⁰⁹ Yet, they conclude that there is "no evidence that ratification affects human rights practices,"¹¹⁰ but that quantitative studies demonstrate "a statistical relationship between democracy, peace and economic development" and human rights.¹¹¹

There are two responses to this. First, the scant empirical evidence cuts both ways; there is no evidence that ratification of treaties affects human rights practices and there is equally no evidence that it does not.¹¹² Second, more needs to be understood about the effect of the international human rights treaty system on "democracy, peace and economic development,"¹¹³ particularly in newly independent or post-totalitarian states that are most likely to have acceded to binding norms at the time of transition. Indeed, in the domestic context, an examination of the economic, political, sociological and psychological causes for improvements in civil rights would not inexorably lead to the conclusion that, "civil rights law has no exogenous effect on behavior."¹¹⁴ The authors' further conclusions that, "states do occasionally coerce other states to improve their human rights practices, but this

¹⁰⁸ *Id.*

¹⁰⁹ See Steven C. Poe, Sabine C. Carey, & Tanya C. Vasquez, *How Are These Pictures Different? A Quantitative Comparison of the US State Department and Amnesty International Human Rights Reports, 1976-1995*, 23 HUM. RTS. Q. 650, 677 (2001) (noting differences between the Amnesty International Annual Report on Human Rights and the U.S. State Department's Annual Country Reports on Human Rights in the 1970s and 1980s).

¹¹⁰ GOLDSMITH & POSNER, *supra* note 1, at 121.

¹¹¹ *Id.* at 122.

¹¹² For an analysis of why measuring ratification might lead to inaccurate results, see Goodman & Jinks, *supra* note 105.

¹¹³ See Schmitz & Sikkink, *supra* note 11, at 518.

¹¹⁴ Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445 (2006) (noting that many of Goldsmith and Posner's critiques of failure of international law—by itself—to alter the behavior of states are equally valid in the domestic context and do not add additional insight into the operation of international law).

enforcement is episodic and correlates with the coercing state's strategic interest," also sheds little light on the power of binding norms and their ability to alter a state's "strategic interest." The "democratic peace" thesis suggests that human rights considerations will always be part of a democratic state's strategic interest. Disaggregating this interest from other strategic interests is difficult.

V. THE NORMATIVE AGENDA

My final critique focuses on whether the central claim of the book is a normative claim in positive clothing.¹¹⁵ From a socio-legal perspective, the thesis of the book concerns how the United States (and it does appear particularly aimed at a U.S. audience) should view international obligations. If international law reflects rational acts subject to change in preferences, as Goldsmith and Posner claim, then we need not wring our hands when the United States changes its mind about a long-standing treaty commitment. States need not be concerned about the notion of "legality" so long as the actions taken are rationalized, according to the *Limits* authors. The claim that international law is of limited utility can thus be used to support calls for withdrawal from multilateral regimes that are framed as "not in the interest of the United States," while shooting down the straw man that multilateral regimes should be followed because they represent "law."¹¹⁶ Goldsmith and Posner provide a theoretical basis for states not to participate in certain international law arrangements (e.g., The ICC, the Kyoto Protocol). But by doing so, the book avoids the substantive debate over whether multilateralism in certain cases may promote better results, including whether multilateral regimes can transform domestic human rights practices.

The book does not engage directly on the content of legal rules; that it fails to do so is a pity. Because it rejects the notion that international institutions can *ever* play a transformative role, the *Limits* theory (intentionally or not) provides an additional reason to reject international institutions categorically. Goldsmith and Posner acknowledge, for example, that instrumentalist, welfare-enhancing reasons for cooperating and participating in international

¹¹⁵ See *id.*; Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. (forthcoming 2006).

¹¹⁶ There are few international law scholars today who claim a treaty should be joined *solely* on the ground that it represents a binding legal obligation. The substance of the obligation matters.

institutions may exist, even for powerful states like the United States. But they give these arguments cursory, almost dismissive, treatment.¹¹⁷ It thus appears that while they support a theory of instrumentalism, it is limited to certain kinds of instrumentalism. Their ultimate conclusion—“that some global problems may simply be unsolvable”—belies their claim that the book is a positive, not normative, account of preferences. If law truly is an instrument of preference, it follows that it can be an instrument for a preference to solve international problems, even, for example, a preference for the universal observation and protection of human rights.¹¹⁸

As others have noted,¹¹⁹ the book cannot be viewed as separate from the authors' broader normative project—a project that seeks to minimize U.S. participation in international institutions and to limit the application of international law in the United States by expanding presidential power and limiting the role of the judiciary.¹²⁰ This important normative debate about international law in the United States is taking place within a larger discussion about the value of the rule of law internationally and the content of international rules. To the extent that the *Limits* revival of the realist debate prompts a new generation of scholars to engage in more rigorous analysis of state behavior within the broader discussion of the international rule of law, it is an important contribution. But the book has less value where it applies the simplifying assumptions of rational choice to the international human rights system. The complexity of issues, actors, and trends in human rights demands—and deserves—more useful approaches.

¹¹⁷ Just one paragraph in the chapter addressing “liberal democracy and cosmopolitan duty” restates the argument that “*the welfare of U.S. citizens would be enhanced in the fairer, safer, and more prosperous world that would result from increasing assistance to others.*” GOLDSMITH & POSNER, *supra* note 1, at 206. The authors “have no quibble with this argument,” but do not spend much time discussing how it logically results in a normative conclusion quite at odds with their own. *Id.*

¹¹⁸ Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305 (2006).

¹¹⁹ *Id.* (noting that even the descriptive elements of the book have normative implications); Spiro, *A Negative Proof of International Law*, *supra* note 114. See also Hathaway & Lavinbuk, *supra* note 115.

¹²⁰ Jack Goldsmith, *The Self-Defeating International Criminal Court*, *supra* note 72; Bradley & Goldsmith, *supra* note 101.