Part I

I

Introduction

Human rights underwent a widespread revolution internationally over the course of the twentieth century. The most striking change is the fact that it is no longer acceptable for a government to make sovereignty claims in defense of egregious rights abuses. The legitimacy of a broad range of rights of individuals vis-à-vis their own government stands in contrast to a long-standing presumption of internal sovereignty: the right of each state to determine its own domestic social, legal, and political arrangements free from outside interference. And yet, the construction of a new approach has taken place largely at governments' own hands. It has taken place partially through the development of international legal institutions to which governments themselves have, often in quite explicit terms, consented.

How and why the turn toward the international legalization of human rights has taken place, and what this means for crucial aspects of the human condition, is at the core of this study. From the 1950s to the new millennium, governments have committed themselves to a set of explicit legal obligations that run counter to the old claim of state sovereignty when it comes to protecting the basic rights of individual human beings. There was nothing inevitable about this turn of normative and legal events. Indeed, the idea that sovereign governments are not accountable to outsiders for their domestic policies had been presumed for centuries. But from its apogee in the nineteenth century, the idea of exclusive internal sovereignty has been challenged by domestic democratic movements, by international and transnational private actors, and even by sovereigns themselves. The result today is an increasingly dense and potentially more potent set of international rules, institutions, and expectations regarding the protection of individual rights than at any point in human history.[1]

1 See, for example, Power and Allison 2000.

So much is well known. What is less well understood is, why would individual governments – only a short time ago considered internally supreme – choose to further this project of international accountability? What disturbed the conspiracy of mutual state silence that prevailed until the second half of the twentieth century? And why would an individual government choose to commit itself internationally to limit its freedom of action domestically? The former question is related to broader processes of democratization, transnational social movements, and the creation of intergovernmental organizations that have pushed governments to take these rights more seriously. The latter question requires us to explore the choice a government faces to tie its hands – however loosely – with international human rights treaties. The choice to commit to, or to remain aloof from, international normative structures governing individual human rights is itself a decision that needs to be explained.

Whether treaty law has done much to improve rights practices around the world is an open question. Has the growing set of legal agreements that governments have negotiated and acceded to over the past half century improved the "rights chances" of those whom such rules were designed to protect? Attempts to answer this question have – in the absence of much systematic evidence – been based on naive faith or cynical skepticism. Basic divisions exist over who has the burden of proof – those who believe that international law compliance is pervasive and therefore conclude that it falls to the skeptics to prove otherwise[2] versus those who view international law as inherently weak and epiphenomenal and require firm causal evidence of its impact.[3] Supporters of each approach can adduce a set of anecdotes to lend credence to their claims. Yet, broader patterns and causally persuasive evidence remain illusive.

This book addresses this gap in our knowledge of the linkages between the international human rights treaty regime and domestic practices. I argue that once made, formal commitments to treaties can have noticeably positive consequences. Depending on the domestic context into which they are inserted, treaties can affect domestic politics in ways that tend to exert important influences over how governments behave toward their own citizens. Treaties are the clearest statements available about the content of globally sanctioned decent rights practices. Certainly, it is possible for governments to differ over what a particular treaty requires – this is so with domestic laws as well – but it is less plausible to argue that the right to be free from torture, for example, is not something people have a right to demand and into which the international community has no right to inquire; less plausible to contend that children should be drafted to carry AK-47s; and less plausible to justify educating boys over girls on the basis of limited resources when governments have explicitly and voluntarily agreed to the contrary. Treaties serve notice that governments

2 Chayes and Chayes 1993; Henkin 1979, 1995.
3 Downs et al. 1996; Goldsmith and Posner 2005.

are *accountable* – domestically and externally – for refraining from the abuses proscribed by their own mutual agreements. Treaties signal a seriousness of intent that is difficult to replicate in other ways. They reflect politics but they also shape political behavior, setting the stage for new political alliances, empowering new political actors, and heightening public scrutiny.

When treaties alter politics in these ways, they have the potential to change government behaviors and public policies. It is precisely because of their potential power to constrain that treaty commitments are contentious in domestic and international politics. Were they but scraps of paper, one might expect every universal treaty to be ratified swiftly by every government on earth, which has simply not happened. Rather, human rights treaties are pushed by passionate advocates – domestically and transnationally – and are opposed just as strenuously by those who feel the most threatened by their acceptance. This study deals with both the politics of treaty commitment and the politics of compliance. It is the latter, of course, that has the potential to change the prospects for human dignity around the world.

If it can be shown that government practices with respect to human dignity can be improved through the international legal structure, then this will have important consequences both for our theories of politics and, more importantly, for public policy and local and transnational advocacy. Respect for international legal obligations is one of the few policy tools that public and private members of the international community have to bring to bear on governments that abuse or neglect their people's rights. It is certainly not the case that such obligations can always influence behavior; certain governments will be very difficult to persuade in any fashion, and some will never significantly alter their practices. These are the unfortunate facts of life. But the evidence presented in this study suggests that under some conditions, international legal commitments have generally promoted the kinds of outcomes for which they were designed. This argues for a continued commitment to the international rule of law as a possible lever, in conjunction with monitoring, advocacy, and resource assistance, in persuading governments that they have little to gain by systematically violating their explicit rights promises.

WHY INTERNATIONAL LAW?

Human rights practices are never the result of a single force or factor. The first years of the twenty-first century may not provide the most convincing portrait of the importance of international law for ordering international relations or shaping governmental practices. Doubts abound regarding the ability of international law to constrain hegemonic powers from acting unilaterally at their pleasure or to alter the calculations of ruthless governments that would entrench and enrich themselves at the price of their people's dignity. Advances in human rights are due to multiple social, cultural, political, and transnational influences. Why are legal rules worth attention in this context?

The reason is simple. The development of international legal rules has been the central *collective* project to address human rights for the past 60 years. Whenever the community of nations as a whole has attempted to address these issues, it has groped toward the development of a legal framework by which certain rights might become understood as "fundamental." As I will discuss in Chapter 2, the progress of this collective project – its growing scope, sophistication, and enforceability – has been impressive, especially over the past 30 years. The international legal structure, and especially those parts to which governments have explicitly and voluntarily committed via treaty ratification, provides the central "hook" by which the oppressed and their allies can legitimately call for behavioral change.

This is not, of course, a view that is universally held. International law is viewed as little more than a shill for power relations by its critics. Maxwell Chibundu cautions that ". . . human rights claims are not less susceptible to capture by self-interested groups and institutions, and . . . when transposed from their lofty ideal to practical implementation they serve multifaceted goals that are rarely, if ever, altruistic. . . ."[4] David Kennedy is scathing in his critique of "law's own tendency to over-promise."[5] Susan Engle draws attention to the appeal to international law to justify particular policy interventions favored by the politically powerful while drawing attention away from the more critical problems facing oppressed groups.[6] To many taking a non-Western perspective, the dominant discourse that informs the global human rights movement – no less than the legal structure that supports it – is little more than a front for Western imperialist values.[7] Critical feminist legal scholars point to the essentially patriarchal and obsessively "public" nature of the international legal system.[8]

Even mainstream scholars increasingly warn of the dangers of too much legalization at the international level. A common theme is that international adjudication is a step too far for most governments and a problematic development for the human rights regime generally. Lawrence Helfer, for example, argues that supranational adjudication to challenge rights violations encourages some countries to opt out of treaty agreements.[9] Jack Snyder and Leslie Vinjamuri make the compelling case that zealous rights prosecutions – in the context of unstable political institutions – worsen rather than improve the chances for peace, stability, and ultimately justice.[10] In the context of the International Criminal Court, Jack Goldsmith and Steven Krasner have argued that this legal

4 Chibundu 1999:1073.
5 Kennedy 2004:22.
6 Engle 2005.
7 Anghie 2005; Mutua 2001.
8 Olsen 1992.
9 Helfer 2002.
10 Snyder and Vinjamuri 2003–4.

tribunal might actually increase rights violations by discouraging the use of force where necessary to halt and punish egregious violations.[11] These accounts reflect a growing skepticism that the world's idealists have thrown *too much* law at the problems of human rights, to the neglect of underlying political conditions essential for rights to flourish.

These views are not without merit, but they hardly deny the need to ask what effects human rights treaties have had on outcomes that many can agree are important aspects of individual well-being. Mutua's critique is helpful in this respect: We should harbor no naive expectations that a dose of treaty law will cure all ills. Political context matters. Once we understand the law's possibilities and its limits, we will be in a much better position to appreciate the *conditions* under which treaty commitments can be expected to have important effects on rights practices and the channels through which this is likely to happen. The theory I advance in fact does much to undermine what Mutua refers to as the "dominant discourse," which views oppressed groups as helpless "victims" and Western institutions and nongovernmental organizations (NGOs) as "saviors."[12] *Treaty commitments are directly available to groups and individuals whom I view as active agents as part of a political strategy of mobilizing to formulate and demand their own liberation.* Rather than viewing international law as reinforcing patriarchal and other power structures, the evidence suggests that it works against these structures in sometimes surprising ways.

But why focus on law, some may ask, rather than on the power of norms themselves to affect change in rights practices? Norms are too broad a concept for the mechanisms I have in mind in this study. The key here is commitment: the making of an explicit, public, and lawlike promise by public authorities to act within particular boundaries in their relationships with individual persons. Governments can make such commitments without treaties, but for reasons discussed in the following pages, treaties are understood by domestic and international audiences as especially clear statements of intended behavior. I am not referring here primarily to broad and continuous processes of socialization, acculturation, or persuasion that have pervaded the literature on the spread of international norms. The mechanisms discussed in these pages depend on the explicit public nature of making what might be referred to as a lawlike commitment. When such commitments are broadly accepted as obligatory, we call them "legal." My central contention is that commitments with this quality raise expectations of political actors in new ways. True, some agreements that are not strictly legally binding may also raise expectations in an analogous way (the much vaunted "Helsinki effect"). But legal commitments have a further unique advantage: In some polities they are in fact legally enforceable.

11 Goldsmith and Krasner 2003.
12 Mutua 2001.

In some respects, my focus on international law is fully consistent with the broader norms literature. International human rights law does, after all, reflect such norms to a significant extent. Norms scholars in fact often appeal to international law to discover the exact content of many of the norms they study.[13] But here I am interested in the effect of explicit commitment-making. For this reason, not every legally binding norm is relevant to this study. Customary international law governs the practice of torture but cannot, I argue, as effectively create behavioral expectations as a precise, voluntary, sovereign commitment.[14] Treaty ratification is an observable commitment with potentially important consequences for both law and politics. That ratification improves behavior is verifiable by dogged political agents and falsifiable in social science tests. That norms play a role is undeniable, but the point developed here is that under some circumstances the commitment itself sets processes in train that constrain and shape governments' future behavior, often for the better.

As will become clear, making a case for the power of legal commitment in improving rights chances is not the same as making a case for an apolitical model of supranational *prosecution*. Those who see international law as part of the problem are worried about the consequences of *overjudicialization*, not the consequences of the kinds of treaty commitments examined here. In this study, legal commitments potentially stimulate political changes that rearrange the national legislative agenda, bolster civil litigation, and fuel social and other forms of mobilization. Any model in which law *replaces* politics is not likely to bear much of a relationship to reality and is likely to give rise to misguided policy advice, as several of the preceding critiques claim.

I offer one final justification for the focus on international law. In my view, alternative levers to influence official rights practices have proved in many cases to be unacceptable, sometimes spectacularly so. Sanctions and force often cruelly mock the plight of the most oppressed.[15] Yet, social and political pressures alone sometimes lack a legitimizing anchor away from which governments find it difficult to drift. The publicness and the explicitness of international law can potentially provide that anchor. In a world of inappropriate or ineffectual alternatives, the role of international law in improving human rights conditions deserves scholarly attention.

13 See, for example, Legro 1997.

14 On the weakness of customary international law's effect on helping states make binding commitments, see Estreicher 2003.

15 Michael Ignatieff has written persuasively that "We are intervening in the name of human rights as never before, but our interventions are sometimes making matters worse. Our interventions, instead of reinforcing human rights, may be consuming their legitimacy as a universalistic basis for foreign policy" (Ignatieff 2001:47). Our own inconsistency with respect to humanitarian intervention "has led to an intellectual and cultural challenge to the universality of the norms themselves" (ibid.:48).

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF KNOWLEDGE

At no time in history has there been more information available to governments and the public about the state of human rights conditions around the world. The dedicated work of governmental organizations and NGOs, of journalists and scholars has produced a clearer picture than ever in the past of the abuses and violations of human rights in countries around the world. The possibility now exists to make an important theoretical as well as empirical contribution to understanding the role that international law has played in influencing human rights practices around the world. Only within the past decade or two has it been possible to address this relationship in a wide-ranging and systematic fashion.

Theoretical obstacles to such inquiry are also on the decline. State-centered realist theories of international relations dominated the Cold War years and discouraged the study of norms, nonstate actors, and the interaction between international and domestic politics. Certainly, realism in international politics reinforced the idea that international law is not an especially gripping subject of inquiry. With some important exceptions,[16] realists have ignored international law, typically assuming that legal commitments are hardly relevant to the ways in which governments actually behave. One lesson some scholars drew from the interwar years and the humanitarian abominations of the Second World War was that the international arena was governed largely by power politics and that the role of law in such a system was at best a reflection of basic power relations.[17] International law's weakness, its decentralized character, and the remote possibility of its enforcement (outside of the normal course of power relations) demoted it as an area of scholarly concern. In policy circles, some viewed international law as a dangerous diversion from crucial matters of state.[18] The turn to the study of system "structure" reinforced by Kenneth Waltz's theory of international politics further denied the relevance of legal constraints as an important influence on governmental actions.[19] In this theoretical tradition, international law was viewed as epiphenomenal: a reflection of, rather than a constraint on, state power. And in the absence of a willingness to use state power to enforce the rules, adherence could be expected to be minimal.[20]

16 Krasner 1999.
17 Bull 1977; Carr 1964; Hoffmann 1956; Morgenthau 1985. These realists tend to agree with Raymond Aron that while "the domain of legalized interstate relations is increasingly large . . . one does not judge international law by peaceful periods and secondary problems" (Aron 1981:733). This perspective is tantamount to the claim that if international law cannot solve all problems, then it cannot address any, which Philip Jessup referred to as the fallacy of the "great issues test" (Jessup 1959: 26–27).
18 Kennan 1951.
19 Waltz 1979.
20 Krasner 1993.

The past decade has seen some interesting new ways to think about international law's effects on government actions and policies. Rational theorists have emphasized the role that law can play in creating institutions that provide information to domestic audiences in ways that help them hold their governments accountable.[21] Liberal theorists have argued that international legal commitments supplement domestic legal structures, and they view international human rights agreements as attempts to solidify democratic gains at home.[22] Constructivist theorists have come to view "... international law and international organizations [as] ... the primary vehicle for stating community norms and for collective legitimation,"[23] and some prominent legal scholars have explicitly incorporated such concepts as discourse, socialization, and persuasion into an account of transnational legal processes through which international law eventually puts down roots in domestic institutions and practice.[24]

The availability of new theoretical perspectives and new sources of information on rights practices has stimulated a range of research that was not possible only a decade or so ago. New empirical work has begun to illuminate and test theories generated by looking intensively at specific cases. Oona Hathaway's "expressive" theory of treaty ratification, Emily Hafner-Burton and Kiyoteru Tsutsui's theory of ratification as an empty promise created by institutional isomorphism, and Eric Neumayer's theory of civil society participation are all important efforts to put systematic evidence of treaty effects on the table.[25] These and other works illustrate that it is possible to test with quantitative evidence the proposition that the international legal regime for human rights has influenced outcomes we should care about.

Nonetheless, the study of international law and human rights is a minefield of controversy in several important respects. Here we are dealing with sensitive political, social, and even personal issues, in which the essentially human nature of our subject is central. People suffer, directly and often tragically, because of the practices examined in this book. Many readers will find it an effrontery to apply the strictures of social science to such suffering.[26] Others may have concluded that cultural relativism and the hegemony implied by the international legal order itself render uselessly tendentious any inquiry into international "law and order."[27] As alluded to previously, human rights issues are often

21 Dai 2005.
22 Moravcsik 2000.
23 Risse and Sikkink 1999:8.
24 Harold Koh (1999) argues that transnational interactions generate a legal rule that can be used to guide future transnational interactions. In his view, transnational interactions create norms that are internalized in domestic structures through judicial decisions, executive or legislative action, etc. The norms become enmeshed in domestic structures; repeated participation in this process leads nations to obey international law.
25 Hafner-Burton and Tsutsui 2005; Hathaway 2002; Neumayer 2005.
26 Some believe that the social sciences cannot be usefully integrated with legal studies generally. See, for example, Barkun 1968:2–3; Koskenniemi 2000; Stone 1966.
27 See, for example, Evans 1998.

highly "perspectived" in ways that are more obvious, diverse, and deeply felt than many other areas of social research.

There is no getting around the sensitive and subjective nature of the issues dealt with in this book. Yet, the question of international law's impact on state behavior and outcomes calls for a well-documented and consistent evidentiary approach. The research strategy that has dominated the literature in both international law and human rights studies has been the use of intensive case studies on individual countries.[28] These have been invaluable in generating insights into specific crucial episodes, but they leave open the question about the influence of international legal commitments on practices more broadly. I take a different tack, one that complements the rich collection of case studies in this area: I look for broad evidence of general relationships across time and space. To do this, it is necessary to categorize and quantify rights practices governed by the major treaties. To quantify is hardly to trivialize; rather, it is an effort to document the pervasiveness and seriousness of practices under examination.[29] It is fairly straightforward to quantify aspects of formal legal commitment. Data on which countries have signed and ratified the core human rights conventions, and when, are easily assembled. By further documenting the making of optional commitments (individual rights of complaint, the recognition of various forms of international oversight), reservations and declarations (which may be evidence of resistance to these treaties), and the willingness to report, we can get a good idea of the conditions under which governments sign on to a treaty regime.

Quantification of meaningful institutional and behavioral change is far more difficult.[30] It requires a systematic comparison across time and space and a willingness to compress many details into a few indicators. This is obviously not the only way to investigate human rights practices. It is just one way to view a complex and multifaceted set of problems. Clearly, there are limits to what this kind of approach can reveal. At the same time, the data do show some patterns that, to date, more detailed case studies have not brought squarely to our attention. The quantitative evidence is supplemented in Chapters 6 and 7 with detailed discussions of how treaties have influenced politics and practices in particular countries. My hope is that by being as transparent as possible about how the quantitative data are gathered and deployed and by providing qualitative examples of the potential mechanisms, I will persuade at least some readers

28 Among the best are Audie Klotz's study of apartheid in South Africa (Klotz 1995); Daniel Thomas's study of the effect of the Helsinki Accord on the rights movement in Eastern Europe (Thomas 2001); and Kathryn Sikkink's research on human rights coalitions in Latin America (Sikkink 1993).

29 On the difficulty of quantification in the human rights area, see Claude and Jabine 1986.

30 Scholars who point out how difficult it is to measure human rights practices/violations include Donnelly and Howard 1988, Goldstein 1986, Gupta et al. 1994, McCormick and Mitchell 1997, Robertson 1994, and Spirer 1990. In some quantitative studies of human rights, little attention has been given to whether or not "rights" are adequately conceptualized and measured (Haas 1994).