

FROM 'CONTRACT' TO 'PLEDGE':  
THE STRUCTURE OF INTERNATIONAL  
HUMAN RIGHTS AGREEMENTS

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International agreements—treaties—are basic building blocks of international law.<sup>2</sup> Article 38 of the Statute of the International Court of

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<sup>2</sup> According to the Vienna Convention on the Law of Treaties, Art 2(a), 1155 UNTS 331 (entered into force 27 January 1980) (hereinafter Vienna Convention), "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Many different terms are used to refer to international agreements; for present purposes, the differences are of no importance and this Article will use the words 'agreement', 'treaty', and 'convention' interchangeably. See JAS Grenville and Bernard Wasserstein, (eds), 1 *The Major International Treaties of the Twentieth Century* (2001) 10: 'Whether the treaty is called an "Alliance Treaty" or a "Declaration" makes no difference. Treaties have been called by many other names and each type of treaty is usually cast in its own conventional form. Some of the more common types of treaties are headed Convention, *Acte Finale*, Pact, Agreement, Protocol, Exchange of Notes, *Modus*

Justice places them first on the list of international law sources,<sup>3</sup> and during the six decades since the Statute was adopted, treaty law has become ever more predominant.<sup>4</sup> Considering the complexity of contemporary legal problems, it is difficult to imagine the creation of international law and international legal institutions without carefully negotiated, written, agreements.<sup>5</sup> Changes in customary international law (the practice of states) come slowly, and contemporary international law needs the most efficient possible vehicles for modernization.

International human rights and humanitarian law—the main area of interest in this Article—is no exception; the rapid development of the subject could only have taken place through written agreements. What is not sufficiently appreciated, however, is the degree to which international human rights agreements depart from the traditional treaty form. International rights agreements are so different from traditional treaties that they might better be analyzed as a distinct jurisprudential phenomenon. The same is true of many of the other international instruments that the rights revolution has helped to inspire: international environmental agreements, animal welfare agreements, and protection for the rights of indigenous peoples, for example.<sup>6</sup>

International treaties, traditionally, took a form analogous to private law contracts: an exchange of commitments to the reciprocal advantage of the signing parties. Traditional treaty doctrine reflected the reliance on the private contract analogy in important ways. Enforcement, traditionally, was the responsibility of the parties to the treaty; the only state with standing to retaliate against a breach was the one whose treaty rights

*Vivendi*, or Understanding, as well as Treaty, with some prefix such as alliance, boundary, etc.; and this list is not comprehensive.' See also Restatement (Third) of the Foreign Relations Law of the US §301, Comment (a) ('*Various designations of agreements*. The terminology used for international agreements is varied. Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, *concordat*, exchange of notes, agreed minute, memorandum of agreement, memorandum of understanding, and *modus vivendi*. Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise'); Malcolm Shaw, *International Law* 634 (4th edn, 1997) (the words 'refer to the same basic activity and the use of one term rather than another often signifies little more than a desire for variety of expression').

<sup>3</sup> Statute of the International Court of Justice, 26 June 1945, 59 Stat 1055, TS No 993, 3 Bevans 1179: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.

<sup>4</sup> Compare JAS Grenville and Bernard Wasserstein, 1 *The Major International Treaties of the Twentieth Century* (2001) 1 ('during the five decades after the end of the Second World War more treaties were signed than during the whole of the previous four centuries').

<sup>5</sup> See, eg United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 21 *ILM* 1261; Antarctic Treaty (1959 Antarctic Treaty), 1 December 1969, 402 UNTS 71; Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, at <<http://unfccc.int/resource/docs/convkp/kpeng.html>>; General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 61 Stat A3, 55 UNTS 187.

<sup>6</sup> See text at nn 65–86 below.

were violated.<sup>7</sup> Responses to violations included self-help through suspension of performance or abrogation of the agreement; to put the matter in contract terminology, obligations were conditional upon one another.<sup>8</sup> These resemblances stem from the fact that treaties, like contracts, were intended as reciprocal exchanges, of mutual benefit to the signing parties but of little or no legal concern to the rest of the world. Most modern treaties still take this form.

This exchange model of treaty relationships, however, is not well suited to human rights agreements. Human rights treaties protect not the reciprocal interests of other signatory states, but (more importantly) the rights of non-parties (the individual rights holders). International legal doctrine reflects this fact by making broad exceptions to the usual treaty rules. Rather than leaving enforcement to a single aggrieved state, the entire international community is charged with enforcement of an obligation *erga omnes*.<sup>9</sup> Moreover, retaliation in kind is not a permitted response to a breach; it would only compound the injury to the treaties' real beneficiaries.<sup>10</sup> Put bluntly, the guiding principle is not 'tit for tat' but 'two wrongs don't make a right'.<sup>11</sup> Human rights and humanitarian law agreements are not reciprocal exchanges of conditional promises—contracts—but parallel and independent commitments to respect pre-existing moral norms—what this Article will call 'pledges'. 'Pledging' now extends beyond its initial area of application to other normative domains such as species preservation and environmental protection—indeed, to every subject matter where activists seek to use international law to further normative objectives.

The distinction between traditional treaties and pledges is not merely theoretical; it has important consequences for compliance. The central motivation for both private contract and traditional treaty compliance is that both parties have a stake in the continued vitality of a mutually beneficial legal relationship. The most potent force for treaty compliance, in other words, is reciprocity; breach by one party means that the aggrieved state will deny it the benefits of the treaty regime in response.<sup>12</sup> The motivations are very different when human rights agreements are at issue. When human rights treaties are violated, retaliation in kind by other states is both self-defeating and impermissible under international law.<sup>13</sup> A state that violates human rights knows that other states are unlikely to respond by violating the rights of their own nationals, and probably has little concern whether other states might do so, in any event.<sup>14</sup> Enforcement of human rights agreements is therefore quite unlike enforcement of other international agreements, and empirical studies have suggested that compliance has not been high.<sup>15</sup> This is not to say that human rights agreements should not be thought entitled to

<sup>7</sup> See text at n 89 below.

<sup>9</sup> See text at nn 92–6 below.

<sup>11</sup> See text at n 104 below.

<sup>13</sup> See text at nn 115–18 below.

<sup>15</sup> See text at nn 105–08 below.

<sup>8</sup> See text at nn 97–100 below.

<sup>10</sup> See text at nn 101–04 below.

<sup>12</sup> See text at nn 111–14 below.

<sup>14</sup> See text at nn 119–21 below.

enforcement—they are—but rather that the usual mechanisms for enforcement are, in practice, less effective than the enforcement mechanisms for traditional contractual treaties.

It is entirely unclear whether human rights conventions achieve any greater level of respect and compliance than the underlying norms on which the conventions are grounded. It is unclear, in other words, whether anything is gained by taking a moral norm and embedding it in a legal instrument. This Article concludes with speculation about why rights activists struggle to obtain legal recognition for moral norms—whether pledges, in other words, give added value. Answering this question will require considerable additional empirical research and analysis.

## I. FROM 'CONTRACT' TO 'PLEDGE'

Treaties are the way that states have traditionally expressed their voluntary assumption of international legal commitments. When the international humanitarian and human rights law movements first gained strength, therefore, it was natural for rights advocates to embody these newly recognized rights and obligations in treaties. Yet the analogy does not quite fit; traditionally, treaties were founded on reciprocity—a 'contract' model—while rights agreements are parallel, unilateral pledges to respect pre-existing moral principles. As the Inter-American Court of Human Rights put it, a human rights agreement is not 'a reciprocal exchange...for the mutual benefit of the contracting States' but 'a framework enabling States to make binding unilateral commitments'.<sup>16</sup>

### A. *The Traditional Model: Treaty As Contract*

The analogy between treaties and contracts has always seemed self-evident.<sup>17</sup> Lord McNair observes, '[i]t is obvious that the treaty as a concept of international law has been mainly indebted in the course of its development to the agreement or contract of private law'.<sup>18</sup>

<sup>16</sup> See text at nn 58–64 below.

<sup>17</sup> Asserts one introductory international law textbook, '[T]reaties [are] really not much different from citizens of states in their contractual relationships'.

Christopher L Blakesley, Edwin B Firmage, Richard F Scott, and Sharon A Williams, *The International Legal System: Cases and Materials* (5th edn, 2001) 855. The authors continue: 'What makes treaties binding? By the same token, why are contracts in a domestic system binding?... In antiquity, religious solemnity provided the obligatory force for both contracts and treaties.'

Christopher L Blakesley, Edwin B Firmage, Richard F Scott, and Sharon A Williams, *The International Legal System: Cases and Materials* (5th edn, 2001) 856. Compare Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (2003) 109: 'A treaty is recognized as being legally binding on all its parties and *only* on its parties. Treaties are therefore analogous to contracts in domestic law. That is, treaties are unlike legislative acts. At the same time, treaties are not the same as contracts because contracts are written with the understanding that they will be enforced by a third party: the state.'

<sup>18</sup> McNair, *The Law of Treaties* (1961) 6.

[T]he legal identity of treaties and contracts is almost universally assumed by writers upon International Law... [I]n matter of form, it is undeniably true; the nearest approach in private law to the treaty in point of form is the contract.<sup>19</sup>

Oppenheim defines treaties as ‘conventions or contracts between two or more States concerning various matters of interest’.<sup>20</sup> Observes Niemeyer:

The axiom that *contracts* are binding obligations has become of paramount importance for the whole of international law, since it has been made the very foundation of its obligatory force. Under the influence of a school of thought which essentially reduces international law to the tenet that agreements must be kept, public opinion in the whole world has become accustomed to consider as international law that which has been stipulated between states.<sup>21</sup>

The analogy between treaties and contracts is in many respects a natural one. The experience of drafting a treaty, for one thing, is like the experience of drafting a contract. Those who negotiated the Louisiana Purchase or Russia’s sale of Alaska to the United States would have had no difficulty seeing the analogy, but these examples are hardly unique.<sup>22</sup> Moreover, there are many contract law doctrines that have analogous provisions in treaty law.<sup>23</sup> Both treaties and contracts can be invalidated for error or fraud;<sup>24</sup> for coercion in obtaining assent;<sup>25</sup> or for inconsistency with strongly held public values (‘*jus cogens*’, or peremptory norm, in the treaty context; ‘public policy’ in the contract context).<sup>26</sup> Neither treaties nor contracts are binding on third parties without their consent,<sup>27</sup> although (in both contexts) non-signatories can be made ‘third party beneficiaries’.<sup>28</sup> Treaty signatories, revealingly, are referred to as ‘contracting states’.<sup>29</sup> The most important similarity, of course, is that both

<sup>19</sup> McNair, *The Law of Treaties* (1961) 744.

<sup>20</sup> Oppenheim, *1 International Law* (3rd edn, 2005) 652.

<sup>21</sup> Gerhart Niemeyer, *Law without Force: The Function of Politics in International Law* (2nd edn, 2001) 12.

<sup>22</sup> Louisiana Purchase Treaty, 30 April 1803, US-Fr., at <[http://www.archives.gov/exhibit\\_hall/american\\_originals/louistxt.html](http://www.archives.gov/exhibit_hall/american_originals/louistxt.html)>; Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, 20 June 1867, US-Rus., at <<http://www.yale.edu/lawweb/avalon/diplomacy/russia/treatywi.htm>>.

<sup>23</sup> McNair, *The Law of Treaties* (1961) 6; but see *ibid.* at 744 (noting various doctrinal differences).

<sup>24</sup> Vienna Convention, Arts 48–9; see also Restatement (Second) of Contracts (1981), §§152 (mutual mistake), 153 (unilateral mistake), 163 (preventing formation of), and 164 (rendering voidable).

<sup>25</sup> Vienna Convention, Art 51–2; see also Restatement (Second) of Contracts (1981), §§174 (mutual mistake) and 175 (unilateral mistake).

<sup>26</sup> Vienna Convention, Art 53; see also Restatement (Second) of Contracts (1981), §178.

<sup>27</sup> Vienna Convention, Art 34–5; see also Restatement (Second) of Contracts (1981), §17.

<sup>28</sup> Vienna Convention, Art 36; see also Restatement (Second) of Contracts (1981), §304.

<sup>29</sup> Vienna Convention, Art 2(f): “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.’ The Vienna Convention is not declaratory of general pre-existing law in all respects, but the provisions cited in this paragraph and generally throughout this Article are among the least controversial.

treaties and contracts are consensual, bilateral or multi-party, sources of legal obligation.<sup>30</sup>

The contractual treaty model has proven enormously useful for dealing with a wide variety of subject matters. There are peace treaties, land and maritime boundary treaties, treaties of alliance, arms limitation agreements, intellectual property conventions, agreements to refer disputes to arbitration or to the International Court of Justice, and treaties creating regional organizations or free trade groupings. For as long as there have been international relations, there have been international agreements.<sup>31</sup> So long as states have interests in common, one should expect them to continue institutionalizing their common interests in treaties.

### B. Rights Agreements

International humanitarian and human rights agreements (the central focus of this Article) are a relatively recent development. The historical antecedents were anti-slavery agreements.<sup>32</sup> Rules of armed combat (such as the Hague Regulations)<sup>33</sup> and international humanitarian law ('IHL')<sup>34</sup> followed thereafter, with the four Geneva Conventions being adopted just after the end of the Second World War.<sup>35</sup> Included among

<sup>30</sup> See, eg Vienna Convention, Art 2(b): "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.

<sup>31</sup> One of the earliest recorded peace treaties was between the Hittite and Egyptian empires after the Battle of Kadesh (c 1280 BC). After an extremely costly four-day battle in which neither side gained any significant advantage, both sides claimed victory. A few hours later, resumption of the battle (which neither side could afford) seemed imminent. A peace treaty was signed in two versions, one in Egyptian hieroglyphs and the other in Akkadian using cuneiform; both versions survive to this day. Its provisions are far-reaching; they include a mutual assistance pact in the case of attack from a third party; articles pertaining to repatriation of refugees; and threats of retribution if the treaty is broken. The treaty is considered of such importance in the field of international relations that a reproduction of it hangs in the United Nations headquarters. See Encyclopedia: Peace treaty, at <<http://www.nationmaster.com/encyclopedia/Peace-treaty>>.

<sup>32</sup> See, eg Berlin Act, 26 February 1885 (dealing with termination of the slave trade in Africa); General Act of the Brussels Conference of 1889–1890; Convention of Saint-Germain-en-Laye, 1919; Slavery Convention, 25 September 1926, 60 LNTS 253, 46 Stat. 2183 (entered into force 9 March 1927).

<sup>33</sup> The laws of warfare are dated, customarily, to the drafting of the Lieber Code during the American Civil War. See generally Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 *Colum J Transnat'l L* (1997) 269. More than 15 conventions regulating the conduct of warfare were adopted by the Hague Peace Conferences of 1899 and 1907. See Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984).

<sup>34</sup> The phrase 'international humanitarian law' is generally understood to include the four Geneva Conventions adopted in 1949, together with the two Additional Protocols drafted in Geneva in 1977. See generally Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984). This, obviously, was prior to the adoption of most international human rights agreements. For a history of the development of international humanitarian law ('IHL'), see P Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima* (1985).

<sup>35</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, 12 August 1949, 6 UST 3114, 75 UNTS 31 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August

these so-called '*jus in bello*' restrictions on conduct in armed conflict were regulations protecting prisoners of war<sup>36</sup>; prohibitions on use of biological, bacteriological or chemical weapons, poison, and certain types of bullets or projectiles<sup>37</sup>; safeguards for enemy aliens resident in occupied territory (or otherwise falling into the hands of the hostile power)<sup>38</sup>; and prohibitions on pillage or destruction of cultural property.<sup>39</sup>

The development of international human rights law ('IHR') started even more recently, gathering momentum around the middle of the last century.<sup>40</sup> The process is still underway. There are conventions protecting civil and political liberties; safeguarding the rights of racial minorities, women and children; and prohibiting torture and genocide, as well as numerous regional human rights agreements.<sup>41</sup> Although the two bodies of law cannot be equated (there are important differences between them),<sup>42</sup> this Article will refer to both IHL and IHR conventions, collectively, as 'rights agreements'.

Although the fact passed largely unremarked in the literature of the time, it was probably apparent to the drafters of these agreements that there was something jurisprudentially radical about the enterprise in which they were engaged. Rights agreements constituted a sharp departure

1949, 75 UNTS 85 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS. 287 [hereinafter Geneva IV].

<sup>36</sup> Geneva III.

<sup>37</sup> See, eg Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 UST 571, 94 LNTS 65 [hereinafter Geneva Protocol]; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980.

<sup>38</sup> Geneva IV.

<sup>39</sup> Protocol Additional (No I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art 53, 1125 UNTS 3 [hereinafter Protocol I].

<sup>40</sup> See also Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 347: 'To the extent that international humanitarian law . . . engender[s] human rights, it is interesting to note the dates when the central instruments were formulated. Whereas the development of the international human rights of peacetime began in earnest only after World War II, some fundamental freedoms of wartime had a seminal existence even before World War I.'

<sup>41</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; International Convention on the Elimination of all Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195; Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 18 December 1979, 29 ILM 33; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; African Charter on Human Peoples' Rights, 26 June 1981, 21 ILM 59 [hereinafter Banjul Charter]; American Declaration of the Rights and Duties of Man, 30 March–12 May 1948, OAS Off Rec OEA/Ser. L/V/I.4 Rev. (1965); American Convention on Human Rights, 22 November 1969, 1144 UNTS 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

<sup>42</sup> It would be an oversimplification to say that one deals with treatment of civilians in times of peace and the other with treatment of both civilians and soldiers in times of war; human rights exist in times of war as much as times of peace. However, the main thrust of international humanitarian law is the legality of conduct in times of war, and human rights law is mainly concerned with rights that individuals have generally—both in times of peace, as well as in times of war.



from the traditional contractual model.<sup>43</sup> Rights agreements are not traditional contracts of accommodation—marriages of convenience between states whose economic or security interests happen to overlap. The distinctive characteristic of rights agreements is that they are designed to affirm the existence of, and pledge commitment to, a set of pre-existing moral norms.<sup>44</sup> Reciprocity is not the glue that holds a rights regime together; the glue that holds a rights regime together is shared commitment to moral principle.

This characteristic is more pronounced with human rights agreements than with IHL agreements, where elements of reciprocal advantage can still be found.<sup>45</sup> In signing an agreement to respect the rights of prisoners of war, for example, a state may hope to receive better (reciprocal) treatment of its own soldiers, if they are captured.<sup>46</sup> The same is true with protections for enemy aliens; each state benefits reciprocally from the other's better treatment of its nationals.<sup>47</sup>

Even this remnant of reciprocal self-interest vanishes with human rights agreements, which focus on a state's treatment of its own nationals. Formalistically and superficially, states signing a human rights agreement are making reciprocal promises to one another not to engage in certain acts. But the reason for complying with one's own obligations is not that one receives an advantage from the other state complying, as well. The other's compliance in most cases confers no concrete advantage at all.

<sup>43</sup> A somewhat similar distinction is sometimes made between 'contractual' and 'legislative' treaties. See, eg McNair, *The Law of Treaties* (1961) 743: We come now to an even more fundamental distinction, namely, that between treaties whose essential juridical character is that of the Contract, and treaties whose essential juridical character is that of Law-making of Legislation. . . . Oppenheim is mainly responsible for familiarizing British and American writers with the conception. One the one hand we have the *Vertrag* or contract where the will of one party is different from that of the other, the contract (*Vertrag*) being here a means for achieving different and opposite ends. Thus while the purchaser promises to pay the money, the seller undertakes to deliver the goods. . . . On the other hand, (we have) the agreement (*Vereinbarung*) which serves the purpose of realizing identical aims.' What McNair and Oppenheim conceive as 'legislative' treaties resembles the notion of a pledge, because both parties share a common aim and agree to do the same thing. The difference is that a legislative treaty need not embed a moral norm, which is an essential element of a pledge. It is because of the embedded moral norm that retaliation in kind is forbidden, which influences greatly the methods of enforcement that are available. See text at nn 116–22 below.

<sup>44</sup> The foundations of human rights is a highly controversial issue. The various explanations might include that human rights are universal moral rights; that they arise out of customary international law; or that they are predominantly religious in derivation. Here, however, there is no need to resolve the ultimate grounding of the rights in question. Although for convenience they will be referred to as embodying 'moral' rights, this is not meant to exclude other strongly held principles extrinsic to treaty law.

<sup>45</sup> This Article characterizes IHL as predominantly a pledge rather than a contract, nonetheless. First, many IHL provisions apply to civil wars, so that reciprocity cannot be the explanation. See, eg Geneva Conventions I–IV, Common Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 [hereinafter Protocol II]. Moreover, IHL resembles human rights law in important doctrinal respects, such as the prohibition of retaliation in kind and the obligations *erga omnes*. See text at n 101 (countermeasures for both human rights and humanitarian law); n 9 (obligation *erga omnes* for human rights); n 96 (obligation *erga omnes*) for Geneva Conventions.

<sup>46</sup> For protection of prisoners of war, see Geneva III.

<sup>47</sup> For protection of enemy aliens, see Geneva IV.



One complies with one's obligations because of their moral grounding—in signing the pledge, a state thereby acknowledges its moral basis—and not because other states are doing so.

Human rights and humanitarian law agreements might be characterized as 'morally declaratory'. A provision in an international agreement is said to be 'declaratory' if it restates (declares) what customary law already holds.<sup>48</sup> A provision in a human rights agreement, by analogy, can be characterized as '*morally* declaratory' if it restates (declares) what *morality* already requires.<sup>49</sup> Although the norms enunciated in rights agreements may not already have been acknowledged as *legally* binding (and they are thus not declaratory in the usual sense), they are treated by the agreement as already *morally* binding. Rights agreements codify and affirm what the signatories already accept as morally compelling, and by signing them, states commit themselves to respect those norms as a matter of law. Thus our label: 'pledge'.

The language of rights agreements often makes plain that they are designed to codify pre-existing moral values. Consider, for example, the Preamble and opening Articles of the International Covenant on Civil and Political Rights:

The State Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .

Agree upon the following articles:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>50</sup>

The rhetoric has distinct moral overtones.<sup>51</sup> The text refers to norms that predate the agreement itself (peoples' right to freely determine their political status, for example, and the values of inherent dignity, equality,

<sup>48</sup> See, eg *Merriam-Webster Legal Dictionary*: '*Declaratory*: adj. Serving to declare, set forth, or explain, as (1) Declaring what is the existing law'.

<sup>49</sup> It should be noted here that rights agreements often contain material that is not of itself an embodiment of a moral right, but instead makes provision for ancillary arrangements (eg obligations to extradite or prosecute, creation of reporting requirements). Although these are not themselves moral rights, the skepticism expressed here concerning state willingness to enforce them still applies; given that their ultimate goal is respect for moral norms rather than reciprocity.

<sup>50</sup> International Covenant on Civil and Political Rights, (preamble), 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [hereinafter ICCPR].

<sup>51</sup> Comparable text can be found in the The Declaration of Independence (US 1776): 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.'

and inalienable rights). In becoming parties to the ICCPR, the signatories commit themselves to the principle that all people already have these rights, and the remainder of the text expresses ways in which the signatories pledge to further these pre-existing moral values. Many other human rights agreements display a similar rhetorical style, essentially affirming and codifying moral norms that exist independently of the agreement itself.<sup>52</sup>

*C. 'A Framework Enabling States to Make Binding  
Unilateral Commitments'*

Academic writers have noted, on occasion, the difference between traditional contractual agreements and human rights conventions:

Although reciprocity is a fundamental principle of international law that governs treaty relations between states, it does not form the foundation for human rights treaties. *These conventions do not represent agreements among states, but often amount instead to unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens...* As a result the mechanism of reciprocity is not a direct factor in the implementation of such treaties.<sup>53</sup>

<sup>52</sup> See, eg International Convention on the Elimination of all Forms of Racial Discrimination, (preamble), 7 March 1966, 660 UNTS 195: 'Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

...  
Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination, in theory or in practice, anywhere,

...  
Convinced that the existence of racial barriers is repugnant to the ideals of any human society'; 'Convention on the Rights of the Child, November 20 1989, (preamble), 1577 UNTS. 3: Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can assume its responsibilities within the community,

Recognizing that the child, for full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

<sup>53</sup> Francesco Parisi and Catherine Sevcenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 *Berkeley J Int'l L* 1 (2003) 20 (emphasis added); see also Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005) 97 (human rights agreements are different because not based on reciprocity); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 357–8 (international humanitarian law is different because reprisals not allowed); Oona Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 *Yale Lj* (2002) 1935, 1938 (human rights agreements have different incentives for compliance because of lack of reciprocity); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 238–9 ('Conceptually, countermeasures are based on the principle of interstate reciprocity, which, generally speaking, is foreign to human rights'); Louis Henkin, *International Law: Politics, Values and Functions*, 216 *Recueil des Cours D'Academie de Droit International* (1989) 27 at 253 ('the principal element of horizontal deterrence is missing...[T]he threat that "if you violate the human rights of

More frequent acknowledgements can be found, however, in the case law of the bodies charged with enforcing the rights in question.

The ICCPR's Human Rights Committee has stated that human rights treaties 'are not a web of inter-State exchanges of mutual obligations' and that the 'principle of inter-State reciprocity has no place' in human rights.<sup>54</sup> Addressing the question of reservations to human rights treaties, the International Court of Justice wrote, 'one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties'.<sup>55</sup>

The Inter-American Court of Human Rights has observed, in greater detail, how little human rights instruments resemble traditional-type treaties 'concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States':<sup>56</sup>

*Modern human rights treaties in general . . . are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contract States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.*<sup>57</sup>

The Court continued, 'the [American] Convention must be seen for what in reality it is: a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction'.<sup>58</sup> In *Ivcher v Peru*, the Court confirmed this holding and cited opinions of the International Court of Justice and the European Commission and Court of Human Rights in support.<sup>59</sup>

your inhabitants, we will violate the human rights of our inhabitants" hardly serves as a deterrent').

<sup>54</sup> ICCPR Human Rights Comm., General Comment 24(52), 52d Sess., 1382d mtg. at 10, UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

<sup>55</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 15, 23.

<sup>56</sup> The Effect of Reservations on the Entry into Force of the ACHR (Arts 74 and 75), 2 Inter-Am. Ct. H.R., ser. A (1982), 3 *HRLJ* 153, para 29.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid* para 35. The Human Rights Committee has described the object and purpose of the ICCPR similarly: 'The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify.' See ICCPR Human Rights Comm., General Comment 24(52), 52d Sess., 1382d mtg. at 10, UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

<sup>59</sup> *Ivcher v Peru*, Inter-Am. Ct. H.R., 8 BHRC 522 (1999), p 7-9, para 42-45: 'The convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. . . . That finding [of the Inter-American Court on Human Rights, at nn 56-8] is consistent with the case law of other international jurisdictional bodies. For example,

#### D. *The Growth of Pledging*

Over the last five decades, this strategy—using international agreements as pledges of support for moral values—has spread to other substantive domains. Once the trend was underway, advocacy groups clamored for analogous agreements promoting their own normative agendas. As with rights agreements, the purpose of these conventions is to ensconce moral values in treaties that, while superficially reciprocal, are unilateral in underlying structure.

One issue area where the strategy has been frequently employed is that of human and natural heritage. The preamble of the World Heritage Convention, a treaty which seeks to protect sites of scientific, aesthetic, or conservational value, makes the Convention's normative agenda clear:

Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'.

Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole'.<sup>60</sup>

Other 'heritage' conventions include agreements on underwater cultural heritage, intangible cultural heritage, and minority group heritage, as well as the more prosaic natural, archaeological, historical, and artistic heritage.<sup>61</sup>

in its advisory opinion on Reservations to the Convention on Genocide (1951) 18 ILR 364 at 370, the International Court of Justice held that with treaties of this nature: 'the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes of the *raison d'être* of the convention'. For their part, the European Commission and Court of Human Rights have arrived at similar findings. In *Austria v Italy* (1961) YB of the ECHR 140, the European Commission declared that the obligations undertaken by the states parties to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): 'are essentially objective in nature, and intended to protect the fundamental rights of human beings against violations on the part of the High Contracting Parties, rather than to create subjective and reciprocal rights between the High Contracting Parties'. Similarly, in *Ireland v UK* (1978) 2 EHRR 25 (para 239) the European Court held the following: 'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".' In *Soering v UK* (1989) 11 EHRR 439 (para 87), the European Court declared that in interpreting the European Convention: 'regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. . . . Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.

<sup>60</sup> UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 16 [hereinafter World Heritage Convention]. The Convention states that 'existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong'.

<sup>61</sup> International Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, at <<http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>>; Buenos Aires Convention on the Protection of the Underwater Cultural Heritage, adopted 2 November 2001,

Wildlife and the environment have also been frequent beneficiaries of this trend.<sup>62</sup> Thus, for example, in the preamble to the 1971 Convention on Wetlands of International Importance, Especially Waterfowl Habitat (the 'Ramsar Convention'), the contracting parties 'recognize[d] the interdependence of Man and his environment' and affirmed their conviction 'that wetlands constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable'.<sup>63</sup> Similarly, the preamble to the Convention on the Conservation of Migratory Species of Wild Animals explains that the contracting parties:

[R]ecognizing that wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind [and] aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely.<sup>64</sup>

Some of these agreements encompass norms on a variety of topics. For example, Agenda 21 laid down moral obligations relating to (among other things) the protection of human health, sustainable human settlement development, the fight against poverty, forest conservation, conservation of biological diversity, and respect for indigenous knowledge and cultures.<sup>65</sup>

at <[http://www.unesco.org/culture/laws/underwater/html\\_eng/convention.shtml](http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml)>; European Convention on the Protection of the Archaeological Heritage (Revised), *opened for signature* 16 January 1992, CETS 143; European Charter for Regional or Minority Languages, *opened for signature* 5 November 1992, CETS 148; Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, 16 June 1976, 15 ILM 1350; World Heritage Convention; European Cultural Convention, *opened for signature* 5 May 1955, CETS 18.

<sup>62</sup> Johannesburg Declaration on Sustainable Development, 10 September 2002, at <<http://www.unhabitat.org/wssd/joburgdec.asp>> (visited 12 June 2005); Convention on Biological Diversity, 3–14 June 1992, at <<http://www.biodiv.org/convention/articles.asp>> (visited 12 June 2005); Rio Declaration on Environment and Development, 13 June 1992, 31 ILM 874 [hereinafter Rio Convention]; Agenda 21, UN Doc A/CONF. 151/26 (1992); Nonlegally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, UN Doc A/CONF. 151/26, v.3 (1992); Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1980 MISC 11, at 118 [hereinafter Bonn Convention]; Convention for the Conservation of Antarctic Seals, 11 ILM 251, 11 March 1978; Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, 2 February 1971, 1976 UNTS 246, at 115–18 [hereinafter Ramsar Convention]; Agreement on the Conservation of Polar Bears, 15 November 1973, 13 ILM 13; African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3; International Convention for the Protection of Birds, 17 January 1963, 638 UNTS 186; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72; Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1 May 1942, O.A.S. 31.

<sup>63</sup> Ramsar Convention.

<sup>64</sup> Bonn Convention.

<sup>65</sup> Agenda 21, UN Doc A/CONF. 151/26 (1992). The United Nations Conference on Environment and Development (UNCED) in June 1992, also referred to as the Earth Summit, held in Rio de Janeiro, Brazil, and attended by over 180 countries and 100 heads of state, resulted in the creation of several guiding environmental documents, including Agenda 21.

Among the more ambitious draft agreements are those concerning the transplantation of tissues and organs,<sup>66</sup> the right to adequate housing,<sup>67</sup> the minimum allowable age for employment,<sup>68</sup> use of biological resources and genetic information,<sup>69</sup> regulation of adoption,<sup>70</sup> the health and well-being of animals used for science,<sup>71</sup> use and ownership of firearms,<sup>72</sup> industrial accident prevention,<sup>73</sup> and delivery of express mail.<sup>74</sup> There are conventions about preventing violence at football matches<sup>75</sup> and conventions promoting the social well-being of farmers.<sup>76</sup> The European Convention for the Protection of Pet Animals recognizes 'that man has a moral obligation to respect all living creatures and... that pet animals have a special relationship with man'.<sup>77</sup> It imposes a variety of duties, including prohibiting the unsupervised acquisition of animals by children under 16, preventing unplanned pet reproduction, and disallowing the dispensing of animals as gifts or prizes.<sup>78</sup> Another convention dealing specifically with animal transport requires that, with the exception of reptiles, all domestic animals 'likely to give birth during carriage or having given birth during the preceding 48 hours shall not be considered fit for transportation'.<sup>79</sup>

Drafting of such legal instruments is no longer the exclusive province of official governmental, international, or transnational bodies such as the Council of Europe, the International Committee of the Red Cross, or the United Nations. Private groups or even individuals with normative agendas can draft their own and offer them for international signature.<sup>80</sup>

<sup>66</sup> Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin, 24 January 2002, CETS 186.

<sup>67</sup> Draft International Convention on Housing Rights, at <<http://action.web.ca/home/housing/resources.5html?x=67094>>.

<sup>68</sup> Convention Concerning Minimum Age for Admission to Employment, 19 June 1976, ILO 138.

<sup>69</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *opened for signature* 4 April 1997, CETS 164; Ad Hoc Committee on an International Convention Against the Reproductive Cloning of Human Beings, at <<http://www.un.org/law/cloning/>>.

<sup>70</sup> European Convention on the Adoption of Children, *opened for signature* 24 April 1967, CETS 58.

<sup>71</sup> European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, *opened for signature* 18 March 1986, CETS 123.

<sup>72</sup> European Convention on the Control of the Acquisition and Possession of Firearms by Individuals, *opened for signature* 28 June 1978, CETS 101.

<sup>73</sup> Prevention of Major Industrial Accidents Convention, 3 January 1997, ILO C174.

<sup>74</sup> Express Mail Agreement, 9–23 July 1990, US-Mozam., Hein's No. KAV 2757, Temp. State Dep't No. 90–208, at 2.

<sup>75</sup> European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches, 19 August 1985, CETS 120.

<sup>76</sup> European Convention on the Social Protection of Farmers, 6 May 1974, CETS 83.

<sup>77</sup> European Convention for the Protection of Pet Animals, 13 November 1987, CETS 125.

<sup>78</sup> *ibid.*

<sup>79</sup> European Convention for the Protection of Animals during International Transport, 13 December 1968, CETS 65.

<sup>80</sup> See, eg Universal Declaration of Animal Rights, at <<http://www.uncaged.co.uk/declarat.htm>> (visited 9 June 2005); Freedom 21 Alternative to Agenda 21, at <<http://www.freedom21.org/alternative>> (visited June 9, 2005); Citizens' Alternative Treaty to the Multilateral Agreement on Investments, at <<http://www.greens.org/s-r/17/17-08.html>> (visited 12 June 2005); Earth Charter,



Undeniably, treaty-drafting is a growth industry; most of the conventions mentioned above have garnered enough state support to have gone into force.<sup>81</sup> The ‘rights paradigm’, one might say, has revolutionized international jurisprudence. Another way to characterize the revolution, however, is to say that ‘pledging’ has taken its place as a recognizable new form of international agreement.

## II. RIGHTS AGREEMENTS: EVOLUTION OR REVOLUTION?

How wide a gap really exists between agreements of mutual advantage and pledges to respect pre-existing moral norms? Has general treaty law simply expanded at the margin, to provide for treaties on newly important topics? Or has the last half-century witnessed the creation of an innovative jurisprudential form? The latter is closer than the former to the truth.

What is distinctive about pledges is that the expectation of performance by other signatories is no longer the only—or indeed the most important—reason for compliance. The strongest reason for a state to comply (or to urge compliance by other states) is that it agrees with the values that the treaty embodies. Compliance is grounded on recognition of the underlying pre-existing norm as morally binding, and not on reciprocal self-interest. Taking a pledge is an act of commitment to do the right thing, and this commitment’s force does not depend on what other states do.

This distinction has had at least two important doctrinal consequences for rights agreements. The first is the rejection of the traditional doctrine that the proper party to complain of a violation is the treaty signatory that was directly affected (or whose nationals were directly affected). This traditional reciprocity-based notion is clearly unworkable for rights agreements, where there is likely not to be any directly aggrieved treaty

at <http://www.earthcharter.org/files/charter/charter.pdf> (visited 12 June 2005); International Convention for the Protection of Animals, at <http://www.animallaw.info/treaties/itconfprotanimal.htm> (visited 12 June 2005). In addition to these treaties which are drafted with the intention of acquiring signatures by international governments, non-governmental organizations have also created similar treaties intended for signature by other non-governmental organizations. See, eg, NGO Alternative Treaties, at <http://habitat.igc.org/treaties/> (last modified 8 November 2002). The Human Bioethics Treaty Organization, a non-profit organization incorporated in Delaware and composed of an array of international representatives, describes its purpose as drafting treaties to oppose abortion, human cloning, and the death penalty. This organization employs the familiar moral rhetoric in its constitutional charter, declaring its representatives ‘determined to safeguard the legitimate freedom, common heritage, ethical values and treasured traditions of their peoples, founded on the principles of the rule of law’ and ‘seeking to promote the moral stability as well as the social, economic and spiritual development of their nations’. Human Bioethics Treaty Organization: HBTO Overview, at <http://www.hbto.org/hbto/overview.asp> (visited 12 June 2005).

<sup>81</sup> Of the treaties listed above, the only ones that are not in force are: Universal Declaration of Animal Rights; Freedom 21 Alternative to Agenda 21; Citizens’ Alternative Treaty to the Multilateral Agreement on Investments; Earth Charter; International Convention for the Protection of Animals; and International Convention on Housing Rights.



signatory and, in any event, the objective is not protection of mutual advantage. The second important doctrinal innovation is that each signatory is expected to continue to observe its pledge despite non-compliance by others. Compliance is predicated on states' parallel and unconditional moral commitments, which are not affected by another signatory's breach. Both of these doctrinal innovations are substantially out of step with the traditional 'contractual' assumption of reciprocal advantage.

#### A. From 'Reciprocal Advantage' to Obligations Erga Omnes

The intended beneficiaries of rights agreements, quite clearly, are individuals and not the signatory states themselves.<sup>82</sup> In particular, in the case of human rights agreements, it is the interests of the state's own nationals that are at stake. States therefore have no direct practical stake in one another's compliance:

[I]t is somewhat questionable whether there are substantial *mutual* benefits from greater respect for human rights across countries . . . As Moravcsik . . . has put it: 'Unlike international institutions governing trade, monetary, environmental or security policy, international 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'.<sup>83</sup>

While in some cases there may be international spillover effects from rights violations, this typically is not the case, and rights agreements are not for that reason any less binding. The existence of a violation does not turn on whether externalities, in fact, occur.

The question of negative externalities is important because, as a matter of general treaty law, a state has diplomatic standing to protest a violation only if it has a direct interest. Either it, or one of its nationals, must have been injured.<sup>84</sup> This traditional doctrine that the state whose nationals have suffered from a violation is the one with standing to protest is unworkable for rights agreements; it defeats the whole purpose of

<sup>82</sup> The reference, here, is to human rights and international humanitarian law treaties. However, the pledge model (as noted above) has also been adopted by other sorts of agreements, such as environmental or species protection. A pledge not to destroy habitat or hunt endangered species would be for the benefit of the species, not individual human beings.

<sup>83</sup> Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', 50 *J Conflict Resolution* 1 (forthcoming 2006), most recent version available at <<http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Humanrightsarticle.pdf>>, at 4–5, citing Stephen Krasner, 'Sovereignty, Regimes, and Human Rights, in *Regime Theory and International Relations* (Volker Rittberger (ed), (1993)) 139–67, and Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 *International Organizations* (2000) 217–52.

<sup>84</sup> See generally Ian Brownlie, *Principles of Public International Law* (6th edn, 2003) 389, 391 (citing *Nottebohm* [1955] ICJ Rep 4): '[D]iplomatic protection . . . rests primarily on the existence of the nationality of the claimant state attaching to the individual or corporation concerned both at the time of the alleged breach of duty and at the time when the claim is presented . . . It is trite learning that, with some exceptions, states may only exercise diplomatic protection in respect of their nationals.'

the agreement, namely, to protect individuals from abuses by their own states. Rights agreements would be empty shells if the so-called ‘domestic jurisdiction’ defense—that human rights violations are exclusively the concern of the violating state—were still accepted. For purposes of international human rights and international humanitarian law, this ‘domestic jurisdiction’ argument has accordingly been rejected.<sup>85</sup>

Academic commentators have recognized the connection between this question of diplomatic standing to protest and the contractual approach to treaty obligations:

The nature of human rights obligations is different from that of most other rights and duties in international law. *Treaty and customary obligations generally are reciprocal or contractual in nature.* Treaty partners confer equal benefits on each other and accept equal duties in return. In consequence, *most acts in breach of a treaty cause direct and usually immediate injury to the interests of another state.* The state committing the wrongful act incurs state responsibility and the duty to make reparations for the harm caused. In contrast, human rights obligations have ‘the purpose of guaranteeing the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States’.<sup>86</sup>

The doctrine that has replaced the restrictive traditional view of diplomatic standing is that of ‘obligations *erga omnes*’—obligations extending to all states.<sup>87</sup>

<sup>85</sup> See generally Henkin, ‘Human Rights and “Domestic Jurisdiction”, in (Thomas Buergenthal (ed.) *Human Rights, International Law and the Helsinki Accord* (1977); Thomas Buergenthal, ‘Domestic Jurisdiction, Intervention and Human Rights’, in P Brown and D MacLean (eds), *Human Rights and U.S. Foreign Policy* (1979) 111. In regard to the ‘domestic jurisdiction’ argument, human rights and the laws of war are somewhat different. International humanitarian law is largely concerned with the conduct of interstate war; offences against another state’s soldiers are not susceptible to the defence that they are within the state’s ‘domestic jurisdiction’. It should be kept in mind, however, that IHL also makes important provision for protection of civilians in civil wars and rebellions. Yoram Dinstein, ‘Human Rights in Armed Conflict: International Humanitarian Law’, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 347–8, 350 (recognizing that general focus is on interstate wars, but citing provisions of the Geneva Conventions and Additional Protocols applying to internal armed conflict).

<sup>86</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn 2005) 47 (emphasis added), quoting Other Treaties Subject to the Advisory Jurisdiction of the Court (Art 64 ACHR), (1982) 1 Inter-Am.Ct Hum.Rts, (ser. A), (1982) 3 *HRLJ* 140. See also Francesco Parisi and Catherine Sevchenko, ‘Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention’, 21 *Berkeley J Int’l L* 1, 20 (2003): ‘These conventions do not represent agreements among states, but often amount instead to unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens. A human rights treaty often nets the signing state little in concrete benefits. It is instead an assumption of obligations for purposes of prestige. As a result, the mechanism of reciprocity is not a direct factor in the implementation of such treaties.’

<sup>87</sup> The doctrine of obligations *erga omnes* is commonly attributed to *Barcelona Traction*, although its historical roots are said to go much deeper. See, eg, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 187: ‘The concept of customary obligations *erga omnes*, which dates back at least to the Hugo Grotius’ discussion (1625) of humanitarian intervention, became prominent in the nineteenth century in the context of protection of minorities.’

In *Barcelona Traction* the International Court of Justice declared, ‘all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’ [1970] ICJ Rep 32.

The doctrine of obligations *erga omnes* is a corollary of the abandonment of the contractual reciprocity model of treaties, which sees reciprocal advantage to other state parties as the core rationale underlying international agreements. For rights agreements (in contrast to traditional contractual treaties) there is likely to be no state with a direct interest. To the extent that compliance provides benefits to other states (or non-compliance causes injuries), these tend to be intangible and diffused across the international community as a whole. The entire international community is therefore equally responsible for ensuring compliance, regardless of injury or benefit.

The doctrine of obligations *erga omnes*—that all states have standing to protest violations of rights agreements—has been endorsed by the Restatement (Third) of Foreign Relations Law. Section 703(2) of the Restatement provides, 'Any state may pursue international remedies against any other state for a violation of the customary international law of human rights'.<sup>88</sup> The International Law Commission concurs.<sup>89</sup> Certain human rights/international humanitarian law agreements explicitly recognize that it is the responsibility of all states parties to protest violations, regardless of whether they have experienced any tangible injury.<sup>90</sup>

### B. *The Right of Retaliation in Kind*

A second distinctive characteristic of rights agreements concerns the type of permissible remedies following a violation. For traditional agreements of a contractual sort, materially aggrieved states are generally entitled to retaliate by suspending their own compliance or by rescinding the agreement in its totality.<sup>91</sup> In the case of human rights agreements,

<sup>88</sup> The Reporters' Note elaborates: 'The customary law of human rights... protects individuals subject to each state's jurisdiction, and *the international obligation runs equally to all other states, with no state a victim of the violation more than any other*. Any state, therefore, may make a claim against the violating state.' Reporters' Note 3 to Sec. 703(2) (emphasis added). See also Reporters' Note 4: 'Remedies available to states parties under international human rights agreements... and remedies available to all states for violation by any state of the customary law of human rights... do not depend on the nationality of the individual victim.'

<sup>89</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001, published by UN 2005), at Art 48, Commentary, paras 2, 7. Art 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of Art 42.

<sup>90</sup> The Common Art 1 to the Geneva Conventions, for example, recognizes the obligations of all states to ensure the enforcement of its provisions: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 227: 'Common Article 1 of the Geneva Conventions is an important conceptual precursor of the principle of obligations *erga omnes*... Article 1 clearly provides every state party with the authority to make representations before a wrongdoing state to bring it back into a position of compliance with the Convention.' The doctrine of obligations *erga omnes*, however—with its rejection of reciprocal advantage as the basis for human rights enforcement—applies even in the absence of such explicit provision.

<sup>91</sup> There are occasional instances where other sorts of norms are considered so important that 'tit for tat' behaviour is excluded (eg diplomatic protection). See, eg, International Law Commission,

this is not the case. The pledges that states make to protect human and humanitarian rights are independent and parallel, not conditional and reciprocal, so that non-performance by one party does not excuse non-performance by another.

The traditional doctrine of right of retaliation in kind for breach of treaty flows directly from the analogy to contract law and from the principle of reciprocity of obligation.<sup>92</sup> In private contract law, obligations are usually conditional, such that failure of performance on one side excuses a failure of performance on the other.<sup>93</sup> One introductory international law casebook reasons as follows:

***Similarities to the private law of contracts.*** Neither parties to private contracts nor states parties to treaties are disposed to carry out their obligations if the other side has not lived up to its undertaking or has made it clear that it does not intend to perform. There are public international public [*sic*] law parallels to failure of consideration in the common law world, or failure of cause in the civilian world. There are parallels to prior breach of condition precedent, material breach, anticipatory breach, frustration of expectations, and the like.<sup>94</sup>

Article 60(1) of the Vienna Convention on the Law of Treaties codifies this general principle of treaty law:

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.<sup>95</sup>

Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001, published by UN 2005), at Article 50: 'Obligations not affected by countermeasures

.... 2. A State taking countermeasures is not relieved from fulfilling its obligations:

.... (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents'.

The restriction on retaliation in kind is based on the strong normative commitment of the international community, even though the underlying norm is strictly speaking not a moral norm.

<sup>92</sup> The International Law Commission states that the traditional rule for treaties in general as follows: 'The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty'.

International Law Commission, '*Draft Articles on the Law of Treaties with commentaries*', in *Yearbook of the International Law Commission*, 1966, vol II, at Art 57, Commentary (1). The claim that 'the great majority of jurists' hold this view is widely supported. See, eg, Ian Brownlie, *Principles of Public International Law* (6th edn, 2003) 593 (emphasis added): '*It is widely recognized that material breach by one party entitles the other party or parties to a treaty to invoke the breach as the ground of termination or suspension. This option by the wronged party is accepted as a sanction for securing the observance of treaties.*'

<sup>93</sup> Restatement (Second) of Contracts (1981), §§237–238 (effect of failure to offer or give performance); §253 (anticipatory repudiation).

<sup>94</sup> Christopher L Blakesley, Edwin B Firmage, Richard F Scott, and Sharon A Williams, *The International Legal System: Cases and Materials* (5th edn, 2001) 893.

<sup>95</sup> Vienna Convention, Art 60(1). Art 60(2) concerns 'a material breach of a multilateral treaty by one of the parties'. According to subparagraph (a), the other parties may by unanimous agreement suspend the operation of the treaty in whole or in part. Subparagraph (b) provides: '[A] party specially affected by the breach [may] invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.' Vienna Convention, Art 60(2)(b).

For rights agreements, the rule is directly contrary. Some humanitarian conventions say so in as many words.<sup>96</sup> More generally, Article 60(5) of the Vienna Convention exempts rights agreements from Article 60(1)'s general rule, providing that retaliation in kind is not permissible as to protections of the rights of individuals:

Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.<sup>97</sup>

Theodor Meron states the reason succinctly: '[I]nterstate reciprocity . . . is foreign to human rights'.<sup>98</sup> Obviously, given the objective of maximum protection of human rights, it would be self-defeating for one breach of an agreement to open the door for another.<sup>99</sup>

The traditional contract model is 'tit for tat'; for pledges, the applicable principle is 'two wrongs don't make a right'. The difference in approaches reveals two important distinctions between contracts and pledges. First, it makes sense to speak about 'wrongs' only where there is a normative principle in the background, such that a retaliatory violation of the agreement can be characterized as independently wrongful. 'Two wrongs don't make a right' presumes, obviously, that the issue is one about which

<sup>96</sup> Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 357–8: 'Article 13 of the Third Geneva Conventions expressly proclaims: "Measures of reprisal against prisoners of war are prohibited." Similar prohibitions of reprisals against protected persons appear in the other Geneva Conventions and in Protocol I.'

<sup>97</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 241: 'Although the Swiss delegation introduced the amendment leading to Article 60(5) at the Vienna Conference on the Law of Treaties primarily with the Geneva Conventions in mind, the delegation's broader intent was "to put a curb on the harmful effects which the provisions of Article 57 [now Article 60] could have on individuals [and to create] a saving clause to protect human beings".' See also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* with commentaries (2001, published by UN 2005), at Art 50: 'Obligations not affected by countermeasures

1. Countermeasures shall not affect:

... (b) Obligations for the protection of fundamental human rights.'

<sup>98</sup> 'Conceptually, countermeasures are based on the principle of interstate reciprocity, which, generally speaking, is foreign to human rights.' Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 238–9, citing Theodor Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process* (1986) 146–7. See also Simma, 'Self-Contained Regimes', 16 *NethYB Int'l L* 131 (1985). See also Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 237. ('Draft Article 12(b) [of the ILC Draft Articles on State Responsibility], which prohibits suspending obligations constituting peremptory norms of international law by taking countermeasures, is of particular significance to human rights and humanitarian norms.')

<sup>99</sup> The argument has been made that an exception to general reciprocity requirements ought to be made for reservations to human rights agreements. As a general matter, when one state signs a convention subject to a reservation, then a reciprocal advantage is extended also to any other state in their mutual dealings. Francesco Parisi and Catherine Sevchenko, 'Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention', 21 *Berkeley J Int'l L* 1, 12 (2003): '[H]uman rights conventions obligate states to benefit third parties, thereby rendering the automatic reciprocity effect of reservations less effective than usual.'

moral judgment is appropriate; it applies to violations of treaties prohibiting genocide but not violation of treaties of friendship and commerce. Second, with pledges, the retaliating ‘wrong’ cannot be excused by the fact that the other party has already committed it. For pledges, there is no ‘eye for an eye and a tooth for a tooth’. Thus the two essential characteristics of a pledge are the shared understanding of a moral foundation for the agreement, together with the understanding that the commitment to the underlying moral principle is not conditioned upon compliance by others. Pledges, that is to say, are both normative and unconditional.

### III. CONSEQUENCES FOR COMPLIANCE

Both of these doctrinal differences—obligations *erga omnes* and the prohibition on retaliation in kind—relate to the consequences of violations of rights agreements, amending the traditional enforcement regime in important ways. More states are authorized to respond to a violation (the doctrine of obligations *erga omnes*), but their choice of responses is more limited (the impermissibility of retaliatory suspension). The latter (while logical and desirable on its own terms) clearly restricts enforcement power (and thus has consequences for compliance), but the former has consequences for compliance, as well, by creating serious collective action problems. In situations where the treaty itself has not established an effective coercive regime for enforcement of the right (as is typically the case) the rights instruments are at greater risk of non-enforcement than traditional contractual treaties.

The issue of whether nations obey international law as a general matter has been a perennial topic of debate for international lawyers and international relations scholars.<sup>100</sup> In recent years increasing attention has been paid to the more specific question of whether states observe human rights treaties.<sup>101</sup> The results of recent surveys have not been encouraging. The author of one important empirical study finds no clear connection, or possibly a slight negative correlation, between ratification

<sup>100</sup> The literature is vast and this Article will not attempt to list even the most important representative works, but only the ones most directly relevant here. In addition to Oona Hathaway, ‘Do Human Rights Treaties Make A Difference?’, 111 *Yale Lj* 1935 (2002), see, eg, Louis Henkin, *How Nations Behave* (2nd edn, 1979) 47 (emphasis omitted) (‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’); Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 3 (‘foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations’); Harold Hongju Koh, ‘Why Do Nations Obey International Law?’, 106 *Yale Lj* 2599 (1997).

<sup>101</sup> Oona Hathaway, ‘Do Human Rights Treaties Make A Difference?’, 111 *Yale Lj* 1935 (2002); Eric Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’, 50 *J Conflict Resolution* 1 (forthcoming 2006), most recent version available at <<http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Humanrightsarticle.pdf>>; Jack L Goldsmith and Eric A Posner, ‘A Theory of Customary International Law’, 66 *U Chi L Rev* 1113 (1999).



of human rights conventions and human rights conditions.<sup>102</sup> Another study (undertaken from a game theoretic point of view) explains away apparent patterns of compliance with customary international law of human rights by saying that most states simply have no incentives to commit certain sorts of violations.<sup>103</sup> In light of the current debate surrounding compliance with human rights and humanitarian agreements, the argument that rights agreements have different objectives and incentive structures from traditional contractual treaties takes on particular significance.

Much of the more optimistic literature about state compliance with treaty obligations relies on the contractual aspects of interstate agreements. One author who explicitly analogizes treaties to contracts<sup>104</sup> recognizes three general categories of incentives for states to fulfill their treaty obligations: 'balance of advantages,' 'the deterrent element . . . of the possible countermeasures,' and 'international credibility'.<sup>105</sup> Enforcement strategies relying on the contractual aspects of treaties are unlikely to work well, however, when applied to rights agreements. Rights agreements are at a pronounced disadvantage when it comes to strategies for enforcement because they are grounded on moral commitment rather than reciprocal state interest. This is not to say that rights agreements should be denied legal enforcement on the grounds that they are not traditional treaties, but rather that from a practical point of view, establishment of an effective enforcement mechanism is likely to be difficult. The three strategies of 'balance of advantages,' countermeasures, and

<sup>102</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 1940 (2002): 'Yet given that I find not a single treaty for which ratification seems to be reliably associated with better human rights practices and several for which it appears to be associated with worse practices, it would be premature to dismiss the possibility that human rights treaties may sometimes lead to poorer human rights practices within the countries that ratify them'.

<sup>103</sup> Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law', 66 *U Chi L Rev* 1113, 1173 (1999): 'Some nations in history have committed genocide, but most nations most of the time do not. International legal scholars use this behavioral regularity of not committing genocide, in combination with many pronouncements (including the Genocide treaty), as evidence that nations respect the prohibition on genocide as a legal obligation. As usual, this account is consistent with the appearance of a compliance pattern but cannot explain either violations of the norm or the reason why nations appear to comply with it. A better explanation is that the absence of genocide reflects a coincidence of interest'.

<sup>104</sup> JAS Grenville and Bernard Wasserstein (eds), 1 *The Major International Treaties of the Twentieth Century* (2001) at 5 ('[a]n international treaty can be viewed as a bargain or contract').

<sup>105</sup> JAS Grenville and Bernard Wasserstein (eds), 1 *The Major International Treaties of the Twentieth Century* (2001) at 5–6 (emphasis added): 'There are three inducements for keeping treaty provisions which are generally more important than any other: *first*, the positive one that a treaty contains a balance of advantages and the country which violates a treaty must expect to lose its advantages. . . . [A] serious violation of a treaty may end it. . . . The *second* inducement for keeping a treaty is the deterrent element it may contain. Before acting, political leaders have to decide whether the violation of a treaty is worth the risk of the possible countermeasures taken by the aggrieved state or states. A *third* inducement is that a government has to consider its international credibility; failure to fulfill a treaty may well weaken the defaulting country's international position as other states calculate whether treaties still in force with it will be honoured, and whether new agreements can any longer usefully be concluded.'



international credibility are insufficient to ensure the enforcement of international rights agreements.

*A. 'The Balance of Advantages', or Reciprocity*

Probably the most important inducement for a state to comply with treaty obligations is the benefit it derives from the treaty regime, which it would be denied if other states retaliated by not complying, or if the regime collapsed altogether from general withdrawal of support. Much contemporary scholarship therefore gravitates towards a game-theoretic analysis of treaty compliance, explaining compliance as a rational strategy of 'cooperation' in an 'iterated prisoners' dilemma'.<sup>106</sup> This analysis has little or no force in the context of rights agreements, which are not motivated by reciprocity.

Under the game-theoretic approach, the primary motivation for compliance with one's own treaty obligations is to keep other treaty partners from defecting, as well. The general rule about reprisals—incorporated in Article 60 of the Vienna Convention—is interpreted as a 'tit for tat' strategy.<sup>107</sup> John Setear, a proponent of this approach, reasons as follows:

Article 60 thus gives legal blessing to an essential part of the tit-for-tat strategy: If one party defects (i.e., breaches materially in a bilateral agreement) in a given iteration, then the other party may legally defect (i.e., is released from its own obligations) in the next iteration.<sup>108</sup>

From a game-theoretic point of view, he continues, reciprocal non-performance is a rational and practical method of ensuring compliance by other signatories:

This alignment of international law and the teachings of rationalist IR theory seems laudable. If a breach by one party never released other parties from their

<sup>106</sup> In recent years, international relations theory has had an increasingly significant impact on legal scholarship. See, eg Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL* 205, 207, 214 (1993); Kenneth W Abbott, 'Modern International Relations Theory: A *Prospectus for International Lawyers*', 14 *Yale J Int'l L* 335, 342–54 (1989). A particularly influential work in political science has been Robert Axelrod, *The Evolution of Cooperation* (1984), which pioneered the application of 'tit for tat' strategy to prisoner's dilemma games. See also Robert Keohane, 'Reciprocity in International Relations', 40 *International Organizations* 1 (1984).

For applications of game theory to treaty compliance, see, eg, Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (2003); John K Setear, 'Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility', 83 *Va L Rev* (1997).

<sup>107</sup> John K Setear, 'Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility', 83 *Va L Rev* 1, 30 (1997): 'If we extend the view of international cooperation as an IPD to the question of treaty law, then the general idea behind Article 60—the release of parties from their treaty obligations after certain kinds of important breaches—is perfectly sensible in light of the utility of the tit-for-tat strategy in promoting cooperation.'

<sup>108</sup> John K Setear, 'Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility', 83 *Va L Rev* 1, 31 (1997).

obligations, then the victims of a breach would need to choose between obeying international law and protecting themselves against repeated exploitation by the breacher. Removing parties from the horns of such a dilemma creates a system, i.e., treaty law, that is more likely to encourage cooperation to evolve between parties faced with an IPD.<sup>109</sup>

This argument assumes (as is reasonable in the case of most traditional contractual treaties) that it is costly for a state to comply with its treaty obligations, but that a state should ordinarily be willing to do so as long as it is confident that it will receive the benefits of performance by its treaty partners. According to this analysis, each side is deterred from defecting because it has a stake in the continued vitality of the treaty regime, from which it receives advantages.<sup>110</sup> To be deterred by the possibility of retaliation in kind, however, a state contemplating a violation must not only believe that such retaliation is likely to occur; it must also care. Neither of these conditions is likely to be satisfied in the case of pledges in general, or rights agreements in particular; retaliation in kind is not an effective threat because (first) it is unlikely to occur and (second) the violating state would be indifferent to it, in any event.

Retaliation in kind is unlikely because it is a classic example of cutting off one's nose to spite one's face.<sup>111</sup> A state that cares enough about individual rights to be willing to police human rights conditions in other countries is unlikely to respond to a violation in one state by abusing its own nationals. Violating states can be confident that their behavior is unlikely to trigger comparable abuses in law-abiding states. Even if another state were so inclined, moreover, retaliation against individuals is specifically prohibited by Article 60(5) of the Vienna Convention—the very article that supposedly incorporates the 'tit for tat' strategy.<sup>112</sup> Yoram Dinstein observes correctly that 'practical considerations of reciprocity and fear of reprisals' cannot be relied on in the enforcement of international humanitarian law:

Ordinarily, the implementation of the law of armed conflict hinges, to a very large degree, on practical considerations of reciprocity and the fear of reprisals... The prospect of reprisals serves as a sobering and inhibiting factor on a state which contemplates a departure from accepted norms of behavior. However, when state

<sup>109</sup> John K Setear, 'Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility', 83 *Va L Rev* 1, 31 (1997).

<sup>110</sup> There are various technical qualifications that must be kept in mind. For example, the extent to which potential for reciprocal defection acts as a deterrent depends on factors such as the possibility of accurate detection of a defection by the other side and discount over time. The game theoretic literature addresses these problems as they affect treaty compliance regimes; they are not important for present purposes.

<sup>111</sup> The same argument applies to treaty reservations, which are normally reciprocal. 'In the face of a unilateral reservation of one state, it would hardly benefit the other non-reserving states by guaranteeing the same "right" to deny human right protection under similar circumstances.' Francesco Parisi and Catherine Sevchenko, 'Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention', 21 *Berkeley J Int'l L* 1, 12 (2003).

<sup>112</sup> See text at n 108 above.

A commits an illegal act against state B warranting reprisals, state B is not allowed to retaliate by performing an act which constitutes a violation of the independent human rights of persons who had nothing to do with the original illegality. Thus, if state A kills prisoners of war of state B, state B (while entitled to retaliate in other ways) may not kill prisoners of war of state A.<sup>113</sup>

Finally, even if retaliation in kind were both likely and permissible, it would have little or no impact on the typical state contemplating violation. A state that is unwilling or unable to meet its own obligations under a rights agreement has little or no reason to care whether other states reciprocate.<sup>114</sup> In the first place, in the context of human rights agreements, the victims of retaliatory measures would most likely be the citizens of other states; the violating state has no reason whatsoever to care about them.<sup>115</sup> Moreover, even if it were possible for other states to retaliate against the violating state's own nationals (for instance because they were residing abroad), a state that does not care about human rights generally might be completely indifferent.<sup>116</sup>

Reciprocity is a very unsuitable basis for enforcement of rights agreements. This is precisely because they take the form of pledges which, unlike contracts, are not motivated by the desire for other states' performance. A state that violates human rights has little or no interest in whether

<sup>113</sup> Yoram Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law' in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 357–8. See also Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale LJ* 1935, 2007 (2002) (citing Louis Henkin, 'International Law: Politics, Values and Functions', 216 *Recueil des Cours D'Academie de Droit International* 27 (1989), at 253): 'Moreover, as Louis Henkin puts it, "the principal element of horizontal deterrence is missing" in the area of human rights: "the threat that 'if you violate the human rights of your inhabitants, we will violate the human rights of our inhabitants' hardly serves as a deterrent".'

<sup>114</sup> Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law', 66 *U CHI L Rev* 1113, 1174 (1999): 'Consider a world of two nations, A which abuses its citizens and B which does not. A gains nothing if both nations agree to stop abusing citizens. The same is true if both A and B abuse their citizens. They lose something and gain nothing from a mutual agreement to provide greater protection to their citizens.'

<sup>115</sup> There has been some speculation that states might receive reciprocal benefit in the form of better treatment of their own nationals while they are residing abroad. See, eg Jack L Goldsmith and Eric A Posner, 'Understanding the Resemblance Between Modern and Traditional Customary International Law', 40 *Va J Int'l L* 639, 669 (2000): 'Cooperation. It is possible for two states to cooperate in not abusing their citizens. For example, State A contains a minority of people who have ethnic affinities with the majority of B, and B contains a minority of people who have ethnic affinities with the majority of A. If the majorities in each state feel altruism toward their co-ethnics in the other state, one can imagine the development of a norm of reciprocal tolerance towards the minority populations in both states. Indeed, such bilateral guarantees for minority religious rights occurred in treaties throughout the seventeenth and eighteenth centuries... [A]bsent special circumstances like the minority rights situation, a nation otherwise inclined to abuse its citizens gains nothing from declining to do so in return for a reciprocal commitment from another nation to do the same.'

<sup>116</sup> Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', 50 *J Conflict Resolution* 1 (forthcoming 2006), most recent version available at <[http://eprints.lse.ac.uk/612/01/JournalofConflictResolution\\_49\(6\).pdf](http://eprints.lse.ac.uk/612/01/JournalofConflictResolution_49(6).pdf)>, at 4–5: 'Given that a country's citizens often reside in many foreign countries, a country with high human rights standards might be concerned about the fate of its own citizens abroad and therefore benefit from an effective international human rights regime... However, countries with low standards are not likely to share such benefits. Given they do not respect the human rights of their citizens living in their own country, why would they benefit from knowing that the human rights of their citizens are respected abroad?'

other states do so, as well. 'Tit for tat' is irrelevant—no, *pernicious*—in the context of rights agreements. The second sort of enforcement strategy to examine is countermeasures other than retaliation in kind.

### B. Countermeasures

If retaliation in kind is ruled out, then states can resort to other forms of countermeasures (eg trade sanctions, cutoffs in foreign aid, and exclusion from cultural or athletic events).<sup>117</sup> There are two problems with countermeasures of this sort. First, as is well appreciated, sanctions are costly to coordinate and impose. Second, even those states that do have human rights enforcement policies focus not on the treaty language but on the underlying moral norms; it is therefore not clear what added value rights agreements contribute to the enforcement effort.

Consider, first, the difficulty in motivating states to maintain countermeasures. The problem with decentralized enforcement of rights agreements is that, just as no particular state benefits from compliance, so also no particular state suffers from non-compliance. When a traditional contractual treaty is violated there is an aggrieved state with an interest in taking action. In a regime of obligations *erga omnes*, however, even where there are states with sufficient clout to take action, they typically lack incentive to take the initiative. Collective action problems undercut any move towards sanctions.

Sanctions require actions that the enforcing state would not otherwise take and which might be costly to local interests, such as arms embargoes. As threats, they are credible only if the violator believes that they will actually be imposed; this is unlikely unless for some reason they make the enforcing state better off (or, at the very least, not worse off):

Economists have argued that enforcement mechanisms such as sanctions to deter non-compliance have to be self-enforcing in the sense that recourse to an external enforcement agency is not feasible and have to be renegotiation-proof. A sanction will only be credible if the threatening group of countries is better off actually executing the sanction than refraining from execution and renegotiating a new agreement with the free-riding country.<sup>118</sup>

Such sanctions are difficult to devise. Retaliation in kind—reciprocity—is the ideal sanction because it consists of allowing the state to do what it prefers to do, but would have been forbidden to do with the treaty in place. As we have already noted, however, retaliation in kind is not a suitable sanction for rights agreements.

Sanctions are particularly difficult to impose when the target state has a power base of its own, such as substantial oil reserves, an ally on the

<sup>117</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 234 ('Because states are reluctant to bring actions for human rights breaches, countermeasures are an extremely important mechanism for enforcing human rights').

<sup>118</sup> See n 116 above at 5.

Security Council, or a key position in the 'war on terror'. It is therefore not surprising that sanctions are an infrequent occurrence, imposed mainly when a state's own nationals have been injured<sup>119</sup>:

Powerful countries rarely employ sanctions—political, economic, military or otherwise—to coerce other countries into improving their human rights record. Indeed, for the most part, countries take relatively little interest in the extent of human rights violations in other countries, unless one of their own citizens is affected.<sup>120</sup>

Even those formal complaint mechanisms that do exist are infrequently employed.<sup>121</sup> In noting the underutilization of existing institutional complaint mechanisms,<sup>122</sup> Theodor Meron observes that 'most state complaints [that actually were filed] were motivated by the special ethnic or religious relationship of the complaining states with the victims of the alleged violations rather than by the common interest in vindication of human rights'.<sup>123</sup> Countermeasures, as a general matter, are not an effective deterrent because states lack the altruistic willingness to bear the costs of imposing them.

A second reason to doubt the utility of countermeasures is that, even when states have been willing to employ them, the countermeasures frequently are unrelated to the signing of an agreement. Countermeasures are not undertaken as enforcement of rights agreements, per se, but as response to violations of moral norms that matter to the enforcing state. While the effect of such countermeasures may perhaps be beneficial overall, the countermeasures cannot be characterized as a strategy of enforcing treaty compliance.

In response to lobbying by human rights advocacy groups, for example, the US Government started monitoring human rights conditions abroad,

<sup>119</sup> Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law', 66 *U Chi L Rev* 1113, 1175 (1999): '[I]t is very costly for the United States to enforce international human rights, and it tends to do so in two situations that present special enforcement incentives. The first occurs when one nation's human rights violations pose a significant adverse threat to the United States. This explains the United States intervention in the former Yugoslavia (to avoid a broader European conflict) and Haiti (to avoid a domestic crisis in Florida). A second context where we find human rights enforcement is when the federal government receives domestic political benefits from enforcement, and the costs of such enforcement—in economic or military terms—are low. Examples of this phenomenon are U.S. economic sanctions against weak and unpopular countries like Cuba and Myanmar. In general, the United States will not enforce human rights if enforcement is costly and the strategic benefits of enforcement are low or uncertain.'

<sup>120</sup> See n 116 above at 3 (emphasis added).

<sup>121</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 152–3: 'Significantly, despite the existing interstate institutional machinery in the OAS system, no contentious case has yet been submitted by one state against another. Only about a score of interstate complaints have been submitted to the European Commission of Human Rights under Article 24 of the European Convention. In no case has a provision granting the ICJ compulsory jurisdiction to determine the interpretation or application of a human rights treaty been invoked before the ICJ.'

<sup>122</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 152–3 (states unwilling to antagonize one another by bringing actions).

<sup>123</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 153 n 53.

issuing annual State Department country reports.<sup>124</sup> Strikingly, these State Department reports freely criticize countries for conduct they never legally committed themselves not to engage in. A standard set of criteria are applied to all countries examined, regardless of what treaties the countries in question have signed.<sup>125</sup> No effort is made to establish that the 'human rights violation' complained of is a violation of international law; all that matters is whether the activity in question contravenes US human rights policy.

For example, one category included in the reports is a country's treatment of persons with disabilities; no effort is made to tie the country critiques to any relevant treaty obligations, and it does not seem that most of the states reported on have actually signed any international agreement addressing the matter.<sup>126</sup> The annual country reports' treatment of discrimination against women is particularly interesting. Not only have some of the states criticized in the annual reports never signed the Convention on Elimination of Discrimination Against Women,<sup>127</sup> but the United States itself still refuses to ratify the convention. It is difficult to cast the annual reports as designed to enforce compliance with a treaty to which neither the enforcing state nor the target state has agreed.<sup>128</sup>

<sup>124</sup> These reports are available at <<http://www.state.gov/g/drl/rls/hrrpt/>>.

<sup>125</sup> The standard topics covered in these reports include: (1) respect for the integrity of the person, including freedom from arbitrary and unlawful deprivation of life, disappearance, torture, and other cruel, inhuman, or degrading treatment or punishment, arbitrary arrest, detention or exile, denial of fair public trial, arbitrary interference with privacy, family, home, or correspondence, and use of excessive force and violations of humanitarian law in internal conflicts; (2) respect for civil liberties, which includes freedom of speech and press, freedom of peaceful assembly and association, freedom of religion, and freedom of movement within the country, foreign travel, emigration, and repatriation; (3) respect for political rights and the right of citizens to change their government; (4) governmental attitude regarding international and nongovernmental investigation of alleged violations of human rights; (5) discrimination based on race, sex, religion, disability, language, or social status; and (6) workers' rights, including the right of association, the right to bargain collectively, prohibition of forced or compulsory labour, status of child labour practices and minimum age for employment, acceptable conditions of work, and trafficking in persons.

<sup>126</sup> There are no generally applicable international agreements that explicitly address the rights of the disabled. There are several pertinent regional agreements: the European Council's Convention for the Protection of Human Rights and Fundamental Freedoms; the African Charter on Human and Peoples' Rights; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art 18. However, most countries that are criticized for failing to respect the rights of the disabled are not parties to any of these agreements.

<sup>127</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, 29 ILM 33. Iran, for example, has not signed the relevant conventions prohibiting discrimination against women, but Iran is cited in the Annual Reports for gender discrimination, nonetheless. US Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices—2004: Iran (28 February 2005), at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm>>.

<sup>128</sup> The current administration's arguments against ratifying CEDAW include that it will undermine 'traditional' moral and social values, including motherhood, marriage, and family structure, and that it will provide women with a right to abortion on demand. See, eg, United Nations Association of the United States of America and the Business Council for the United Nations, UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), March 2004, at <<http://www.womenstreaty.org/CEDAW%20Book%20Appendix%201.pdf>>.



The annual reports are so indifferent to whether a particular country has signed the relevant rights agreements that Oona Hathaway was able to use them as a database for comparing the human rights practices of states that have ratified particular human rights treaties with the human rights practices of states that have not.<sup>129</sup> The reports can be taken as a useful database for comparative purposes precisely because they include equally comprehensive assessments of the practices of non-ratifying, as well as ratifying, states. Nor (needless to say) do the reports concern themselves with violations of human rights agreements with which the United States happens not to agree.<sup>130</sup> The Reports simply cannot be characterized as a system of sanctions for treaty non-compliance.

Enscorning a moral principle in an international rights agreement, it seems, does not necessarily give the principle any more force than it would already have. The limited extent to which human rights concerns are influential in US policy seems to have little to do with whether the norm in question is or is not the subject of an international agreement. Countermeasures—when they are used at all—are not employed to enforce rights agreements, but to impose the enforcing state's view of human rights on states that violate it.

### C. Reputation and 'Shaming'

Oona Hathaway's recent influential empirical study of compliance with human rights treaties agrees that state sanctions for violations of human rights agreements are minimal.<sup>131</sup> She notes that direct sanctions are rare and threats of retaliation in kind are untenable.<sup>132</sup> Few observers of the

<sup>129</sup> For the same reason, she relied on reports by Human Rights Watch, Amnesty International, and Freedom House. Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 1964 n 114 (2002): 'The four most prominent sources of comprehensive cross-national time series information on a broad spectrum of human rights practices are the United States Department of State *Country Reports on Human Rights*, Human Rights Watch's reports, Amnesty International's *Country Reports*, and Freedom House's *Freedom in the World* reports.'

Hathaway herself notes that 'neither NGOs nor Western states tend to limit their focus to treaty ratifiers'. Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 2003 (2002).

<sup>130</sup> For example, the US does not believe that capital punishment is a violation of international human rights, but many other states have signed instruments prohibiting it. See n 140 *below*. The annual reports do not inquire into whether the targeted countries practice capital punishment, even if the countries in question have signed conventions outlawing it.

<sup>131</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 1938 (2002), citing Louis Henkin, *How Nations Behave* (2nd edn, 1979), at 235 (emphasis added): '[The] major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights' . . . [U]nlike in the case of trade agreements, the costs of retaliatory non-compliance are low to nonexistent, because a nation's actions against its own citizens do not directly threaten or harm other states. Human rights law thus stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms. As Henkin remarked, 'The forces that induce compliance with other law . . . do not pertain equally to the law of human rights'.

<sup>132</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 1951 (2002): 'Direct sanctions in the form of economic or military reprisal for human rights treaty violations are so rare . . . that states are unlikely to conform their actions to a treaty solely on that basis.'



international human rights scene would be surprised at her conclusion that 'reputation' becomes, by default, the most attractive enforcement alternative:

The institutional model is left, then, with reputation as the primary anchor of compliance for all but those countries for which compliance is costless: States comply with human rights treaties to obtain or maintain a reputation for compliance and hence good international citizenship. In the institutional model, therefore, if countries change their behavior in response to human rights treaties, it is largely because of concern for their reputation.<sup>133</sup>

Shaming—exposing violations publicly and organizing public criticism—is the tactic most frequently employed by advocacy groups and therefore probably the one with which the general public is most familiar. Reputation is the third inducement to compliance that must be considered.

An obvious advantage to reputational strategies is that they can be employed by non-State actors, who may be more motivated than states to pressure violators.<sup>134</sup> Given the proliferation of watchdog groups, and the profusion of their published reports, it is difficult to avoid the impression that these strategies are gaining ground. While exposure may be less effective as a sanction than cutting off aid or imposing trade sanctions, if these more forceful countermeasures are unavailable, then shaming may be the most effective vehicle for action.

But as was true of state-imposed countermeasures, shaming by advocacy groups is rarely directed to treaty enforcement per se. As with the State Department reports, advocacy groups' investigations apply the same critical standards to all states equally, with little attention to the question of which conventions the criticized state has actually signed. For example, the United States is criticized for its death penalty policies (especially the juvenile death penalty) even though the United States has been careful either not to sign, or to make reservations to, treaties or conventions inconsistent with its policies on capital punishment.<sup>135</sup> Similarly, although few states have signed treaties to protect migrant workers, the

And the threat of retaliatory noncompliance with the treaty does not have the power that it does in other contexts, such as trade or arms agreements, as a threat that a treaty party will violate the treaty in retaliation for violations by another party is untenable.'

<sup>133</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 1952 (2002).

<sup>134</sup> A state's relationships with other states—including human rights violators—necessarily have many different facets, all of which must be taken into account in arriving at a decision about countermeasures. Advocacy groups, in contrast, can focus single-mindedly on their specific missions.

<sup>135</sup> See, eg, Amnesty International, Amnesty International Annual Reports 2005: *United States of America*, at <<http://web.amnesty.org/report2005/usa-summary-eng>> (visited 10 June 2005); Human Rights Watch, 'United States of America', in *Human Rights Watch World Report (2005)* 508–9. Although the United States has signed treaties that could be construed as banning the death penalty, particularly with regard to juveniles, it is US policy to attach a reservation to any policy in a convention with which it is unwilling to conform. For example, whereas the International Covenant on Civil and Political Rights prohibits execution of juveniles, the United States entered the following reservation: 'The United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or

practices of those states that discriminate against them are criticized, nonetheless.<sup>136</sup> Indeed, sometimes the criticism leveled in human rights reports is that a state ought to sign a particular convention.<sup>137</sup> While an intelligent strategy for human rights advocacy, such criticism has nothing to do with treaty compliance.

The focus of these published reports is on exposing what actually happened, not whether a particular state has honored its treaty obligations. The gravamen of the advocacy groups' complaints is not treaty violation per se, but violation of the moral norms that underlie the treaty. Such complaints are not about shaming states into fulfilling legal, treaty based, obligations; they are about shaming states into fulfilling their *moral* obligations. This is not to say that human rights groups should limit their criticisms to states that have signed treaties; moral criticism is well within their mandate. The point, rather, is that the most effectively enforced human rights policies seem to be those that are based directly on underlying moral norms and not on treaties. Given that both Amnesty International and the US Department of State seem to attach little importance in the 'shaming' context to whether target states are actually parties to the treaties in question, it is unclear what purpose is served by putting the norms in question into treaty form.

#### *D. Individual Beneficiaries, International Guarantors, and Compliance with Pledges*

Although the above discussion concerns human rights and humanitarian law agreements, these observations about the difficulties of enforcement pertain equally to pledges, generally. Embodying the moral rights of third parties in an international agreement results in a distinctly non-reciprocal structure. It is the increasing attention to the rights of non-State actors (whether human beings, animals, fragile habitats, or cultural objects) that has led to forms of international agreement that are particularly difficult to enforce.

There was a time when it was generally assumed that international law, and international treaties, were the exclusive province of states. In such

future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.'

US Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 102d Congress, 2d Sess., in 138 Cong. Rec. S. 4781 (2 April 1992).

<sup>136</sup> See, eg, Human Rights Watch, 'Angola' in *Human Rights Watch World Report (2005)* 99–100; Amnesty International, *Amnesty International Annual Reports 2005: South Korea*, at <<http://web.amnesty.org/report2005/kor-summary-eng>> (visited 10 June 2005).

<sup>137</sup> For example, the US has refused to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This has led to immense pressure from human rights groups. See, eg Human Rights Watch, *CEDAW: The Women's Treaty* (31 January 2005), at <<http://hrw.org/campaigns/cedaw>>; Minnesota Advocates for Human Rights, *Take Action: Help Ratify the Women's Rights Convention!* (24 September 2002), at <[http://www.mnadvocates.org/Take\\_Action\\_Help\\_Ratify\\_The\\_Women\\_s\\_Rights\\_Convention!.html](http://www.mnadvocates.org/Take_Action_Help_Ratify_The_Women_s_Rights_Convention!.html)>; Amnesty International USA, *Ratify the Women's Rights Treaty* (2005), at <<http://www.amnestyusa.org/cedaw/index.html>>.

a world, one would not have expected treaties to accomplish much more than reciprocal exchanges of promises of the traditional contractual sort, with the interests of the states themselves the exclusive focus. There is now considerable agreement, however, that international law need not concern itself exclusively with states, and neither should international agreements. The rights of non-State actors matter, too. These are protected by traditional reciprocal 'contractual' agreements only if sufficient state advantage exists.<sup>138</sup>

Human rights, environmental, animal rights, and other advocacy groups go beyond state interest when they lobby for the adoption of treaties reflecting humanitarian, environmental, cultural, or other values. Rights agreements, species protection treaties, habitat preservation conventions, and other pledges are promoted and adopted regardless of the existence of sufficient reciprocal benefit, simply because they represent the right thing to do. A state wishing to protect third party interests might make a domestic law commitment to observe these moral values, for instance by adopting the norm in question into legislative or constitutional provision. But a state can always change (or ignore) its domestic law. A pledge to the international community carries the commitment one step further; states promise one another that they will respect third party rights. The other states are not the beneficiaries of the promise, but rather the guarantors.

It is the absence of a secure grounding in reciprocal state interests that creates the special enforcement problems facing rights agreements in particular and pledges generally. States lack sufficient stake in the continued vitality of such regimes to be willing to devote resources to their enforcement. Grounded on moral commitment rather than self-interest, pledges to respect third party interests are intrinsically insecure. Pledges take the form of contractual treaties, on the surface, but they are not founded first and foremost on reciprocity.

<sup>138</sup> A good example of a situation in which contractual agreements have the effect of protecting nonstate actors is that of international investment agreements. Developing states need investment in manufacturing and infrastructure; multinational corporations are willing to supply the necessary capital only if given adequate assurances that their investments will be protected from expropriation or related dangers. A web of contractual and treaty agreements provides the necessary guarantees. States sign investment agreements committing themselves to international arbitration in the case of dispute, and states by treaty bind themselves to respect the results of these international arbitrations. Where states find it in their interests to protect non-State actors, they look for ways to do so (and often succeed). See, eg, Nigel Blackaby, 'Public Interest and Investment Treaty Arbitration', in (Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (2003), 356 (outlining 'overriding public interest in effective foreign investment protection'): 'States recognize that effective investor protection promotes foreign investment—they proudly display their record in this regard on their foreign investment propaganda, promising a secure environment for such investments underpinned by effective international law standards. As the tribunal in *Amco v Indonesia* noted: "To protect investment is to protect the general interests of development and of developing countries".' The enforceability of arbitral awards in domestic courts is addressed by the United Nations Convention on Recognition and Enforcement of Arbitral Awards (New York Convention), 1958.

## IV. THE VALUE OF PLEDGES: A RESEARCH AGENDA

These observations on the compliance problems with pledges raise doubts about the value of embodying moral values in legal instruments. It is not clear what good it does to take a moral norm and formalize it as a legal convention. A cynic would say that adoption of 'morally declaratory' conventions—pledges—is pointless; states may choose to respect the underlying moral norm or not, as they wish, but embedding the norm in a legal instrument does not increase the odds.<sup>139</sup> Rights advocates, obviously, are likely to be more optimistic that embedding moral norms in legal conventions gives them added force. They are a driving force behind the drafting of many such agreements and consider their entrance into force a genuine accomplishment.

Settling this difference of opinion requires formulation of a research agenda that recognizes the peculiar character of pledges. Rather than asking, '[d]o states obey the treaties they sign?'—a perfectly appropriate question in regard to treaties in general—the question should be, 'Do states honor the pledges that they make to any greater degree than they would honor the underlying moral norm the pledge embodies?' The discussion below outlines first the cynical answer to this question and then the more optimistic response. In describing the cynical and the optimistic accounts of the value of pledges, this concluding section identifies some of the empirical and analytical questions that should be central to any future research agenda for pledging.

*A. Two Competing Accounts*

The cynic sees the drafting of morally declaratory conventions as a pointless exercise. He or she would dismiss as naïve those rights activists who sincerely believe that they have accomplished something by reducing a moral norm to formal written agreement. The cynic may even suspect that legal conventions can be genuinely pernicious, misleading the public into believing that the state of human rights around the world is better than it is. Conventions soothe the consciences of western elites while achieving nothing in the world at large: this is the cynical view.

The cynic would dismiss much convention-drafting as reflecting mainly the institutional self interests of the participating rights activists. A small circle of elite repeat players—representatives of private NGOs, UN agencies, and academic think tanks, together with a smattering of carefully selected indigenous third world political activists—all potentially benefit from participation in the process of drafting and adoption. The expensive conferences held in exotic venues provide self-serving participants a sense of accomplishment wholly out of proportion to what they actually achieve. Each new convention adds lustre and legitimacy to

<sup>139</sup> My use of the phrase 'morally declaratory' is explained in the text at n 48 above.

the participating groups' political profiles, and the ability to claim credit for helping to secure adoption of a rights convention gives a helpful boost to fundraising.

The cynic might acknowledge that in certain circumstances an underlying moral norm could have international consequences, but would deny that a state feels any more bound by a moral norm simply because it has been formalized as a convention. What force conventions do have comes from the norms underlying them; the legal instrument is irrelevant. Those lobbying for stronger human rights policies do not take their values from treaties, and their ability to influence foreign policy depends on whether they have domestic political clout, not whether their views reflect international treaty law.

At the opposite end of the spectrum are the optimists; Dean Harold Koh is one of these. He posits a process by which moral norms are transformed over time into a binding principle of conduct, accepted as authoritative by the international community. In many cases, he says, it is 'transnational norm entrepreneurs' who supply the initial impetus for formulation of norms and then shepherd the norms through the process to eventual acceptance.<sup>140</sup> He includes in this category individuals as diverse as Eleanor Roosevelt, Jesse Jackson, the Dalai Lama, Aung Sang Suu Kyi, and Princess Diana, as well as 'governmental norm sponsors' such as UN Human Rights Commissioner Mary Robinson, Presidents Oscar Arias of Costa Rica and Jimmy Carter of the United States, and the Pope.<sup>141</sup>

The sponsors' first step towards full legal efficacy, Koh asserts, is to obtain authoritative recognition of the norm in question before some 'law-declaring forum':

Such law-declaring fora thus include treaty regimes; domestic, regional, and international courts; *ad hoc* tribunals; domestic and regional legislatures; executive entities; international publicists; and nongovernmental organizations: law-declaring fora that create an 'interpretive community' that is capable of defining, elaborating and testing the definition of particular norms and their violation.<sup>142</sup>

<sup>140</sup> Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1409 (1999): '[T]he key agents in this transnational legal process are transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, interpretive communities and law declaring fora, bureaucratic compliance procedures, and issue linkages among issue areas.

Many efforts at human rights norm-internalization are begun not by nation states, but by "transnational norm entrepreneurs," private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm.'

<sup>141</sup> Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1410 (1999). See also *ibid.* at 1413: 'Today, modern transnational norm entrepreneurs include most of our recent Nobel Peace Prize winners: Burma's Aung San Suu Kyi, East Timor's Bishop Belo and Jose Ramos-Horta, Tibet's Dalai Lama, Britain's Amnesty International, and America's Martin Luther King, Jr. and Jody Williams of the Landmines Coalition'.

<sup>142</sup> Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1410 (1999).

This account of formal recognition in some 'law-declaring forum' is an apt description of how activists go about formulating and promoting state adoption of pledges.

The next step is for domestic actors to internalize these norms and their interpretation:

Within national governments and intergovernmental organizations, for example, in-house lawyers and legal advisers acquire institutional mandates to ensure that the government's policies conform to international legal standards that have become embedded in domestic law.<sup>143</sup>

As domestic actors become progressively acculturated to these norms, Koh asserts, they come to accept them as binding and to apply them automatically in their own decision-making:

[O]ver time, domestic decision-making structures become 'enmeshed' with international legal norms, so that institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes. Gradually, legal ideologies come to prevail among domestic decision-makers so that they seek to avoid perceptions that their actions will be perceived as domestically unlawful.<sup>144</sup>

Thus Koh sees adoption of a moral norm into legally cognizable form as the first step in a process by which human rights norms come to be recognized and obeyed as authoritative. The norm then percolates through and permeates a state's domestic legal system, ultimately winning the hearts and minds of foreign policy decision-makers.

### B. *The Need for Empirical Data*

Neither of these accounts provides sufficient specificity and supporting data to settle the question. Koh's account is anecdotal, giving no reason to believe that the process he describes will lead generally to the result he favors. The cynical account lacks empirical support, as well, being based mainly on lack of positive reason to have confidence in the optimists' predictions. To this date, little or no study has been done comparing the efficacy of international legal norms with the efficacy of international moral norms.

Koh postulates a mechanism by which international norms *can* penetrate and influence the domestic sphere, ultimately shaping the choices made by foreign relations decision-makers. But this is far short of an argument that all or most of them *will*. Koh gives no basis for optimism that success is likely. The existence of occasional success stories no more proves that normative conventions will eventually receive their due

<sup>143</sup> *ibid* at 1411 'The next vertical step is for national governments to internalize norm interpretations issued by the global interpretive community into their domestic bureaucratic and political structures'.

<sup>144</sup> *ibid*.



international recognition than the occasional Horatio Alger story proves that American capitalism invariably rewards merit.

Koh's description of the campaign to ban landmines is illuminating. The process he describes is highly serendipitous. The campaign was initiated in late 1991, he says, by a group of NGOs in Washington.<sup>145</sup> The group was able to attract the support of Senator Patrick Leahy, who introduced legislation on the issue which was adopted into law. Other transnational figures who supported the cause included Pope John Paul II and Princess Diana;<sup>146</sup> Canadian Foreign Minister Lloyd Axworthy was later enlisted and played an influential role in the story's happy ending:

In the end, the Ottawa process reached agreement on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which has now been signed by more than 120 countries.<sup>147</sup>

For norm entrepreneurs who are not confident of the support of British royals, world religious leaders, US senators, and foreign ministers of important Western countries, this account is not particularly heartening.

This particular description is of the initial drafting and adoption of the Landmine Convention, but the same point applies to Koh's descriptions of support for conventions already in force.<sup>148</sup> 'Transnational legal process' explains how international law norms *can* come to influence decision-makers, but Koh's account is too anecdotal to show that the process works consistently, or within a reasonable period of time. The process he describes seems most likely to work in cases with sufficient visibility and sex appeal to attract media attention and popular support, and in regard to norms that are relatively easy to understand, do not require too much sacrifice from reluctant domestic publics, and do not touch on fundamentally divisive matters.<sup>149</sup> The process Koh describes is too haphazard to

<sup>145</sup> Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, at 1412–13.

<sup>146</sup> Koh cites a *Washington Post* article entitled 'A Blitz with Glitz: Princess Diana Dazzles a Red Cross Benefit for Land Mine Victims'. Roxanne Roberts, 'From London, a Blitz with Glitz: Princess Diana Dazzles a Red Cross Benefit for Land Mine Victims', *Washington Post*, 18 June 1997, at D1 (cited in Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1413 n 36 (1999)).

<sup>147</sup> Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1412–13 (1999).

<sup>148</sup> Thus, for example, Koh explains the efforts of various groups to reverse U.S. policy toward the Haitian boat people after an adverse Supreme Court decision left the US in violation of its international legal obligations: 'Various legislative efforts were made to overturn the Supreme Court's ruling, and the issue later became the subject of domestic political pressure from the African-American community, the Congressional Black Caucus, and Trans-Africa, all of whom began to promote the notion of a safe haven for Haitian refugees. Finally, in the fall of 1994, the U.S. government changed its Haitian policy, and intervened to return the refugees. When the issue arose again the following year, with regard to fleeing Cuban refugees, the Administration first resisted, then ultimately admitted into the United States those Cuban refugees being detained at offshore refugee camps.' Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind Lj* 1397, 1416.

<sup>149</sup> Third World debt relief seems these days to fall into this category. Internationally famous musical acts have put on concerts to raise money and awareness—although apparently they have

serve as a general theory of compliance with international norms in general, or pledges, in particular.<sup>150</sup>

The cynical position appears, at first, to be supported by Hathaway's empirical demonstration that non-signatories and signatories have roughly comparable rights records.<sup>151</sup> But Hathaway's study, while certainly suggestive, does not purport to examine the question of interest here, which concerns whether compliance is caused by the signing of a treaty or by commitment to the underlying norm. We need to know whether there are states that would defy the norm if it was not embedded in a convention but respect the norm once it was legally formalized. The cynic challenges the optimist to provide reasons to believe that embedding a moral norm in a legal instrument makes a difference, and as to this there is precious little empirical information.

### *C. Pledges: a Research Agenda*

While there is little empirical information about whether it makes a difference that a moral norm is embedded in a formal legal instrument, there are plausible reasons for speculating that it might. These hypotheses about the value of pledges remain to be tested both analytically and empirically. They regard (1) objective establishment of consensus; (2) rhetorical support for political battles; and (3) increased likelihood that a judicial forum will be found to enforce the norm in question.

First, and probably most importantly, widespread adoption of a pledge agreement amounts to objective international recognition of the moral values that the pledge embodies. One objective of formalization of the moral norm in question is that it changes or solidifies the way we think about human rights when we grant them legal recognition. Indeed, pledging may be the closest institutional analogy that international legal processes have to a petition or referendum. The process of obtaining signatures is democratic in the same sense as the adoption of General

not been particularly accepting of musical talent from the communities whose interests they purport to represent. See, eg Paul Hoskins, 'Live 8 Concert will be held in Africa—Geldof', Reuters, 16 June 2005; Lars Brandle and Nigel Williamson, 'Ignored by Live 8, African acts plan own U.K. show', Reuters, 16 June 2005; 'Live 8 Concerts Extended to Tokyo, Toronto, Joburg', Reuters, 16 June 2005; 'Destiny's Child, Linkin Park added to Live 8 Lineup', *USA Today*, 16 June 2005; Steve McGinty, 'Bands told "Thanks, but no thanks" by Live 8', *The Scotsman*, 16 June 2005.

<sup>150</sup> Koh, importantly, was writing about enforcement of human rights norms and associated humanitarian norms such as bans on landmines—what we have been referring to as 'rights agreements'. His account of promulgating and internalizing legal norms works best in the area he set out to discuss. Traditional human rights and humanitarian causes are the most glamorous, the simplest to understand, the easiest to explain and to convince people of, the ones least likely to require personal sacrifice from the American public—in short, the easiest to market. Rock stars are more likely to lend their names to the cause of canceling Third World debt than to that of shaming the US into paying its UN dues.

<sup>151</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935 (2002).

Assembly declarations, which fills a somewhat similar function of objectively establishing widespread international support for a particular position.<sup>152</sup> Widespread adoption effectively lays to rest the criticism that moral norms are purely subjective, that they are just the idiosyncratic opinions of particular states, or that they are peculiar to particular geographical regions or cultures. The effects of such general recognition extend even to states that are not signatories.<sup>153</sup>

Second, and partly as a corollary, pledges give those who are willing to agitate for recognition and implementation of the embedded norms a degree of social and legal traction they would not otherwise have.<sup>154</sup> In large part because of such activism, perspectives and arguably even behavior are beginning to change. Private parties—increasingly important as rights activists—gain legitimacy for their critiques and activism. Pledges not only secure these parties' right to claim the moral high ground; they also vindicate their claim to represent the public interest by providing any objective definition of what the public interest is. 'Pledge' treaties also provide cover for official agents, both domestic and international, who face countervailing political pressures.

Finally, although adopting a moral norm into law does not guarantee that a forum will be found to enforce it, it definitely improves the odds. Even a rights agreement that contains no mandatory adjudicative provision will still be judicially enforceable at the International Court of Justice if there is some other basis for jurisdiction (for example, general consent to jurisdiction in advance by the state in question).<sup>155</sup> Rights agreements (or other pledges) may be binding in domestic courts.<sup>156</sup> *Ad hoc* criminal courts may be created to enforce them (for instance, the criminal courts for the former Yugoslavia and Rwanda, which applied conventional law).<sup>157</sup> Arbitral tribunals or claims commissions are another

<sup>152</sup> Note that even General Assembly declarations, which have no binding legal force, are taken as authoritative indications of general opinion; pledges, which are explicitly intended to have binding legal force, are at least as authoritative.

<sup>153</sup> Oona Hathaway, 'Do Human Rights Treaties Make A Difference?', 111 *Yale Lj* 1935, 2021 (2002): 'Indeed, when a treaty gains a sufficient following, it is generally viewed as expressing what conduct is and is not acceptable to the community of nations. The treaty can thus influence individual countries' perceptions of what constitutes acceptable behavior. What is important to note... is that this influence can be felt by countries regardless of whether they ratify the treaty or not.'

<sup>154</sup> The author thanks Professor Michael Reisman for his helpful comments on this point.

<sup>155</sup> Art 36(2) of the Statute of the International Court of Justice provides: 'The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty'. For a case to be brought at the ICJ, it should be kept in mind, the complaining party would have to be the state of which the aggrieved party is a national.

<sup>156</sup> See, eg *Filartiga v Pena-Irala*, 630 F2d 876 (2d Cir. 1980) (allowing foreign human rights victims to sue foreign official in US court under Alien Tort Statute, 28 USC § 1350 (1994)).

<sup>157</sup> The ICTY and the ICTR were established by the Security Council in 1993 and 1994, respectively, to deal with the violence in the former Yugoslavia and in Rwanda. They were empowered to apply international human rights and humanitarian law, generally. The existence of the new

vehicle for enforcement.<sup>158</sup> Although existence of a forum cannot be taken for granted, these possibilities can arise once a moral norm is adopted into law.

None of these three possibilities can be evaluated in the abstract. In assessing them, the questions that need to be studied include:

- How frequent and how important is judicial application in the enforcement of pledges?
- Do courts require that a moral norm be embedded in conventional form before recognizing it, or do courts have ways to appeal to moral norms directly?
- To what degree does it matter to foreign policy decision-makers that their refusal to recognize a legal right is idiosyncratic?
- To what degree are foreign relations policy makers more strongly influenced by a norm embedded in legal instrument than by a moral argument?
- In mobilizing popular support for a cause (for instance, for fund raising purposes), does the ability to cite conventional law make any difference to the population at large?

Undoubtedly there are large numbers of other questions that must be addressed, but these supply some starting points for an investigation. It is already clear that pledges raise questions quite different from traditional contractual treaties, and need to be assessed with an eye to their particular idiosyncracies.

## V. CONCLUSION

Pledges seem more solid than they really are. They look like treaties, so we assume instinctively that signatory states will treat them like treaties. But the reciprocity-based incentives that support enforcement of traditional contractual treaties are not present with pledges, and it cannot be taken for granted that states will comply altruistically (or that other states, altruistically, will pressure them to comply).

This is not to say that drafting and adopting pledges is a pointless activity. Pledges occupy a great deal of the attention and resources of some of the most important private actors in contemporary international

International Criminal Court is less relevant here, because it has its own substantive definitions of international crimes. It is therefore unlikely that it will find itself enforcing these pledges as a general matter.

<sup>158</sup> One example is the Eritrea-Ethiopia Claims Commission (EECC), organized under the auspices of the Permanent Court of Arbitration in the Hague, which litigates issues relating to the laws of war and international human rights arising out of the Eritrea-Ethiopia boundary war of 1998–2000. See Permanent Court of Arbitration, *Recent and Pending Cases*, at <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)>. The author of this article is counsel for the State of Eritrea before the EECC.

law: non-governmental organizations. It would be a significant mistake to conclude too quickly that these organizations do not know their own business, namely, the progressive recognition and enforcement of rights agreements. We do not yet fully understand how the process works, or how well the process works. Maybe we will never fully understand the significance of pledges, but hopefully some day we will understand them at least as well as traditional contractual treaties.