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ESSAYS ON THE LAW AND ECONOMICS
OF INTERNATIONAL HUMAN RIGHTS LAW

BY

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Abbreviations

CAT	Committee Against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention to Eliminate All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UN	United Nations
UNCAT	Convention Against Torture
UNHCR	UN High Commissioner for Refugees

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Preface

I. Motivation

‘Despite its importance within the legal academy, virtually nothing has been written from a theoretical perspective by economically oriented scholars on international human rights law.’¹

When it came to determining a research project for this dissertation, it soon emerged that, with some notable exceptions,² few scholars had attempted to link law and economic with international human rights law, and that the research that linked the disciplines in some way mainly did so through the conduit of trade law.³ Whether this was an oversight or a conscious decision on behalf of the academic community was not clear. It seemed difficult to fathom that international human rights law had been overlooked, despite the prominence it played in twentieth century world politics.⁴

That importance was the end point along a continuum running back to the Industrial Revolution, when crowded factories led to workers calling for better working conditions and more equitable treatment.⁵ Over the following two

¹ Alan O Sykes, ‘International Law’ in AM Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (1st edn, North Holland 2007), 815.

² Jeffrey L Dunoff and Joel P Trachtman, ‘Economic Analysis of International Law’ [1999] 24 *Yale Journal of International Law* 1; Joel P Trachtman, *The Economic Structure of International Law* (1st edn, Harvard University Press 2008).

³ Alan O Sykes, ‘International Trade and Human Rights: An Economic Perspective’ (2003) John M. Olin Law & Economics Working Paper No. 188; Joel P Trachtman, ‘Unilateralism and Multilateralism in U.S. Human Rights Law Affecting International Trade’ in Frederick Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (1st edn, Michigan University Press 2005).

⁴ This prominence is analysed very well in Stefan-Ludwig Hoffman, *Human Rights in the Twentieth Century* (1st edn, Cambridge University Press 2010).

⁵ For a good overview, see Friedrich Engels, *The Condition of the Working Class in England* (Reissue edn, Oxford Paperbacks 2009).

centuries, progress in improving social conditions remained slow,⁶ although what we now term human rights began to spread in Western states and democracy started to take hold: slavery was abolished,⁷ labour rights were improved,⁸ and the franchise was extended to women.⁹ The nineteenth century saw Western Europe and the United States – then emerging as a global power – consolidate dominance across the globe through carefully planned colonial expansion and efficient administrative bureaucracies.¹⁰ European citizens were experiencing ever-more freedom at home while colonial subjugation continued. It was under these circumstances that Europe remained at the forefront of global politics and economics.

Then, between 1914 and 1945, two World Wars irrevocably changed the tentative balance that had previously existed, twice putting Germany in conflict with other states and twice resulting in Germany ending each war on the losing side and in ruins. And while the inter-war period saw increased international efforts to curb such barbarity, in the form of conferences and inter-state collaboration,¹¹ the origins of the First World War in domestic politics, jingoism, ethnic tension, and

⁶ So as to make comparisons between two important states at this time, see Henri See and EH Zeydel (trs), *Economics and Social Conditions in France During the Eighteenth Century* (1st edn, Bathoche Books 2004); Thomas Beer, *The Mauve Decade: American Life at the end of the Nineteenth Century* (1st Carroll & Graf edn, Carroll & Graf Publishers 1997).

⁷ Although the formal abolitionist process in the United Kingdom began with Abolition of Slave Trade Act 1807, it was not until the Slavery Abolition Act 1833 that abolition could be said to be relatively complete (with some exceptions), while slavery was not outlawed in the United States until 1865, through the Thirteenth Amendment to the United States Constitution.

⁸ See, for example, the gradual legislative changes that were introduced in the UK in relation to working hours and the employment of children and which began with the Cotton Mills and Factories Act 1819 and continued for decades thereafter.

⁹ This movement began in New Zealand with The Electoral Act 1893 and spread elsewhere, such as to Australia, which introduced the Commonwealth Franchise Act I 1902.

¹⁰ See, for a region-specific overview of how such governance operated, Lillian M Penson, *The Colonial Agents of the British West Indies: A Study in Colonial Administration, Mainly in the Eighteenth Century* (Volume 16, Frank Cass 1971).

¹¹ Woodrow Wilson was at the heart of this approach and central to the formation of the League of Nations. See John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League* (1st edn, Cambridge University Press 2001).

nationalism¹² meant that attention was primarily on coordinating efforts to curb such violence rather than on advocating for bills of rights, or on a global push to prioritise the rights of the individual. And while security and stability were emphasised, this failed to prevent the Second World War.

The gravity of the hatred that emanated from the Nazi regime in the direction of Europe's minorities shocked both the European and international consciousness and indicated that changes to global cooperation would be required.¹³ Human rights as values that ought to be outlined in international documents emerged with the Universal Declaration of Human Rights,¹⁴ then only an aspirational – but subsequently very influential – document.¹⁵

Since World War Two, myriad human rights documents have been formulated both internationally and regionally and covering subject matters as broad as rights for individuals with disabilities¹⁶ to rights for migrant workers.¹⁷ While greater protection for all citizens – both those that have been subject to persecution and those that have not – is a positive movement and one that largely stemmed from World War Two's unprecedented violence, the international human rights system has been criticized for failing to fully deter states from

¹² These influences, and others, are discussed at length in AJP Taylor, *The Origins of the Second World War* (1st Penguin edn, Penguin Books 1964); James Joll and Gordon Martel, *The Origins of the First World War* (3rd edn, Pearsons Education 2001).

¹³ For a seminal paper on the post-war developments in international affairs, see Leland M Goodrich, 'From League of Nations to United Nations' [1947] 1 International Organization 1.

¹⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), UN Doc A/810 (UDHR); for an overview of the creation of this declaration, see Mary A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (1st edn, Random House 2001).

¹⁵ Even today, most people are aware of the UDHR, even if it is not a treaty or binding, and are less aware of treaties that confer rights on them and bring greater obligations on states than the UDHR.

¹⁶ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CPRD) (adopted 13 December 2006, entered into force 3 May 2008), UNGA Res 61/106 (2007).

¹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3.

violating the human rights of their citizens and for not achieving state compliance.¹⁸

The decision to undertake a law and economics analysis of this area of international law stemmed from a commitment to human rights principles, a deeply held interest in international law, and a background in law and economics. The probing question ‘why is there such a gap between what the law requires and the actual behavior of nations?’¹⁹ suggested that the absence of a coherent answer might leave room for a new theoretical approach. The greatest challenge in developing and applying a law and economics approach to international human rights treaties was in trying to explain the emergence of those treaties using that very law and economic approach, while also attempting to justify the discipline’s application to this area of law.²⁰ Ultimately, the endeavour was an arduous academic undertaking, requiring the application of assumptions from the highly rational discipline of law and economics to the highly moralistic area of human rights law.

This dissertation attempts to make a contribution to original knowledge by applying economic theory to both the drafting of international human rights treaties and the manner in which monitoring of compliance is structured. In addition, it challenges accepted wisdom in relation to the formation of international treaties by tackling these complex issues using an entirely new methodology.

¹⁸ As outlined in, among others, Ryan Goodman and Derek Jinks, ‘Incomplete Internalization and Compliance with Human Rights Law’, [2008] 19(4) *The European Journal of International Law*, 725.

¹⁹ Jack L Goldsmith and Eric A Posner, ‘A Theory of Customary International Law’ [1999] 66(4) *University of Chicago Law Review* 1113, 1173.

²⁰ We should recall that ‘law and economics has both a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption of those that maximize wealth. Game theory and public choice theory are often considered part of law and economics’, Steven R Ratner and Anne-Marie Slaughter, ‘Appraising the Methods of International Law’ [1999] 93(2) *American Journal of International Law* 291, 294.

I. Research Questions

In developing the research questions for this dissertation, the starting point is the assumption that the normative goal of the drafting of international human rights treaties is to achieve universal ratification.²¹ However, as has been outlined in the literature, universal ratification has not yet been achieved for almost all human rights treaties.²² Some states ratify that are not expected to ratify and others that are expected to ratify do not ratify.²³ Ratification of international treaties is therefore somewhat anomalous. In this respect, the first issue that must be addressed is:

1. *Where does the established political science and International Relations literature leave us in understanding state ratification of human rights treaties? And can we develop a framework that links these theories with the normative assumptions of law and economics?*

As will be shown, a number of International Relations (IR) theories exist that attempt to explain the emergence of international human rights law. These include theories based on realism, liberalism, and constructivism, among others.²⁴ These questions are addressed in Part I, where are interested in placing rational choice assumptions into these contexts.

²¹ 'Harold Koh, 'The Spirit of the Laws', [2002] 43 Harvard International Law Journal 23, 26.

²² While universal ratification is a long way off in most cases, the sole exception is the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; for a discussion of the ratification process of this treaty among states, see David Weissbrodt, 'Prospects for Ratification of the Convention on the Rights of the Child' [2006] 20 Emory International Law Review 209.

²³ Hathaway, in her assessment of compliance, found 'that not only does noncompliance seem to be rampant [...] but countries with poor human rights ratings are sometimes *more* likely to have ratified the relevant treaties than are countries with better ratings', Oona A Hathaway, 'Do Human Rights Treaties Make a Difference? [2002] 111(8) Yale Law Journal 1935, 1978.

²⁴ For a good overview of the political science literature detailing ratification of human rights treaties, see: Jack Snyder 'One World, Rival Theories' *Foreign Policy* (Nov/Dec 2004), 52.

2. *What does the assumption of rational states tell us about how international treaties are – and should be – designed? How can we analyse international law using economic theory? In addition, how are human rights protected, and how might they be differently protected according to a law and economics approach? When we design institutions to monitor compliance with treaties, what approaches can we take?*

In Part II, the dissertation's fundamental originality is developed, as we take on the role of treaty drafters and institutional designers. We challenge traditional assumptions about drafting treaties and address their normative goals.

3. *How do the institutions that monitor state adherence to human rights treaties look? What regulatory functions are they afforded and are these effective at achieving compliance? Finally, if states breach their treaty obligations, what recourse do victims of breach have to attain a remedy?*

Part III addresses human rights regulation from the perspectives of periodic review and dispute settlement mechanisms. Centrally, we draw on previous proposals to improve these mechanisms and analyse how those altered structure would aid or hinder international human rights law.

II. Dissertation Outline

From these research questions, it is clear that this dissertation proceeds in a very linear fashion. We follow human rights issues from a world without treaties to a world consisting of several international and regional treaties and monitoring mechanisms. In this way, it is hoped that the reader will be able to picture human rights regulation along a continuum, and will be able to see how law and economics can assist our understanding of this complex area of international law. The dissertation is divided into four principle parts.

Part I is comprised of two chapters. Chapter 1 introduces the methodological considerations that underline the overall project and which are a necessary aspect of understanding the approach taken throughout. Chapter 2 introduces

arguments largely from the field of IR and attempts to link these both together, and to the existing law and economics understanding about the emergence of international law. This section therefore looks at human rights treaties from the perspective of states.

In Part II, we assume the role of treaty drafters and address the formation and drafting of human rights treaties and regimes in a number of ways. Chapter 3 applies approaches from law and economics to some of the central issues of international human rights law (e.g. universal ratification and progressive realisation); chapter 4 analyses how human rights are protected in international law and asks whether the status quo should be preserved; and chapter 5 investigates how human rights treaty bodies might function were they to be designed differently.

Part III tackles the monitoring of human rights treaty obligations. Chapter 6 does this by assessing the periodic review system and examines alternative models to the current system; chapter 7 tackles the difficult issue of dispute settlement mechanisms and proposes reasons for their underuse; and chapter 8 briefly looks at remedial regimes in place for breaches of treaty obligations.

Part IV attempt to bring together the analysis and finding of the entire dissertation in conclusions.

Section I Theoretical Background

Chapter 1: Methodological Considerations

Before applying law and economics approaches to international human rights law, consideration was given to the merits of such an undertaking. The following sections outline some of the central methodological considerations that scholars ought to address when analysing international law in this way. These include having to address the nature of international law as a subject of economic analysis and the translation of economic concepts, such as rational actor approaches, to states. Giving consideration to the methodological issues surrounding the present dissertation assists us in understanding the dissertation's limits and in appreciating what was not attempted during the course of this research.

A. Analysing International Law

Public international law has become more important in recent times, with much of this increase in importance stemming from an increase in demand for social protection since the advent of globalization.²⁵ This development can be seen in, among other things, greater market integration on the global level²⁶ and increased levels of foreign direct investment.²⁷ In both these cases, globalization can be seen to be a positive development: increased and easier interaction between states reduces the costs of international engagement and facilitates the coordination of policies in relation to issues of global concern. However, globalization can equally result in negative consequences, such as greater environmental damage on account of increased transnational corporate

²⁵ Robert McCorquodale and Richard Fairbrother, 'Globalization and Human Rights' [1999] 21 Human Rights Quarterly 735; Alison Brysk (ed), *Globalization and Human Rights* (1st edn, University of California Press 2002); Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (1st edn, University of California Press 2008).

²⁶ See, generally, Michael D Bordo, Alan M Taylor and Jeffrey G Williamson (eds), *Globalization in Historical Perspectives* (1st edn, University of Chicago Press 2003); Dani Rodrik, 'How Far Will International Economic Integration Go?' [2000] 14(1) Journal of Economic Perspectives 177.

²⁷ David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformation: Politics, Economics and Culture* (1st edn, Stanford University Press 1999), 216.

engagement,²⁸ or graver security concerns due to the transformation of terrorism from a localized problem to a global phenomenon.²⁹ In response to such changes on the global level, international law has changed from a state-centric response³⁰ to an outcome of multi-lateral cooperation.³¹

But has consideration been given to the merits of this change? Is increasingly internationalized lawmaking really a positive outcome of globalization? Methodologically, by assuming that states are black boxes³² we are able to examine this question in detail, such that it is possible to analyse state-to-state interaction on that level alone and apart from other possible influential factors. Despite this simplifying the analysis, it also opens it up to more criticism as it could be said to be an oversimplification. One could argue that state decisions are rarely made alone, but are rather the result of a complex interplay between each respective state and other states, and between each respective state and its own citizens.³³ Such an approach might reflect the manner in which states elect to act on the international setting more realistically, but modelling the interplay is likely to be more difficult as it assumes that two levels of interaction exist: between the state and its citizens and between states themselves. The traditional

²⁸ By this, we mean that corporations can more easily operate in different jurisdictions and might not take account of the consequences of their actions in host countries to the same extent they otherwise might were they operating in their home state. See, among innumerable examples, the degradation of the environment in southern Nigeria as a result of the activities of foreign corporations, Ike Okonta and Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (1st edn, Verso 2003).

²⁹ Albert J Bergesen and Omar Lizardo, 'International Terrorism and the World-System', [2004] 22(1) *Sociological Theory* 38; Audrey K Cronin, 'Behind the Curve: Globalization and International Terrorism' [2002] 27(3) *International Security* 30.

³⁰ For an overview of the criticisms and challenges of this approach, see Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influences' [2006] 19(2) *Leiden Journal of International Law* 339.

³¹ This perspective might be context and region-specific, such as the European context being one that is less state-centric in nature, see Gary Marks, Liesbet Hooghe, and Kermit Blank, 'European Integration from the 1980s: State-Centric vs. Multi-level Governance' [1996] 34(3) *Journal of Common Market Studies* 341.

³² Jayantanuja Bandyopadhyaya, *A General Theory of International Relations*, (1st edn, Allied Publishers 1993), 59.

³³ This public choice analysis can be traced back to Robert D Putnam 'Diplomacy and Domestic Politics: The Logic of the Two-level Game' [1988] 42(3) *International Organization* 427.

view of international law puts states as the central actors,³⁴ and whereby all actions are the result of that interplay.

However, recent developments have altered this state-centric perspective: communication costs have fallen,³⁵ international corporations have become more influential,³⁶ there has been an increase in the role of non-state actors,³⁷ and the rights of the individual have become evermore central to international negotiations.³⁸ These various factors could be said to have led to international law having lost its character of being the outcome of relations between states alone and having rather taken on the dynamic character of being the result of elaborate interactions between highly differentiated entities. When we speak of international law now, we can no longer simply speak of the law of nations: instead we should recognise that international law can have several forms, and that there has been a shift towards transnational networks.³⁹

In addition, if we consider that the EU, a supranational entity, can become party to the European Convention on Human Rights (ECHR),⁴⁰ an international treaty for a specific region, we see a clear example of how actors exist in many forms and how international law governs entities and not just nations. This increase in the role of private entities such as NGOs or corporations has been taken account of by international law and international organisations, with private actors now

³⁴ A good example of this approach can be found in Fred Halliday, 'State and Society in International Relations: A Second Agenda' [1987] 16(2) *Millennium – Journal of International Studies* 215.

³⁵ The importance of this point cannot be overstated; communication costs are assumed to be a pivotal factors determining international engagement; see Hamid Mowlana, *Global Information and World Communication: New Frontiers in International Relations* (2nd edn, SAGE Publications 1997).

³⁶ If corporations are becoming more powerful, a pressing question might be where this development leaves the state. This is discussed in Michael Mann, 'Has Globalization Ended the Rise and Rise of the Nation-state?' [1997] 4(3) *review of International Political Economy* 472.

³⁷ Anna Holzscheiter, 'Discourse as Capability: Non-State Actors' Capital in Global Governance' [2005] 33(3) *Millennium – Journal of International Studies* 723.

³⁸ This tendency in international law is '[...] due to a fundamental paradigm shift from state sovereignty as the cornerstone of the legal order, to the rights of the individual', Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' [2011] Amsterdam Centre for International Law Research Paper No 2011-07 (SHARES Series), 24.

³⁹ Margaret E Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' [1999] 51 *International Social Science Journal* 89

⁴⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 59, para 2

widely under obligations to consider human rights treaties when they act.⁴¹ Accordingly, as the heterogeneity of the parties to international law and to international organisations has increased, it could be reasonably assumed that enforcement problems may increase from their present level. A lack of clarity as to an entity's legal character or as to its actual legal obligations are assumed to become more pertinent issues as heterogeneity between entities increases, with this resulting in assumed lower enforcement in cases of breaches of obligations of international law.

Such enforcement difficulties likely stem from the absence a central enforcement entity, such as an executive, in international law. This challenges the characterisation of international law as law from an Austinian viewpoint, as it fails the requirement that law involves sovereign commands met by sanctions.⁴² International law's lack of both a clear sovereign and – in many cases – sanctions,⁴³ results in an interesting methodological challenge: how do we analyse state commitment to international law if little of consequence materialises if states do not abide by their obligations. In addition, unless there is 'internal acceptance' of an international norm, international law can be challenged as law in itself,⁴⁴ while one might predict that the system will not run effectively if there

⁴¹ Jordan J Paust, 'The Other Side of Rights: Private Duties Under Human Rights Law' [1992] 5 Harvard Human Rights Journal 51; Jordan J Paust, 'Human Rights Responsibilities of Private Corporations' [2002] 35 Vanderbilt Journal of Transnational Law 801; Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights', [1999] 21(1) Human Rights Quarterly 56; Tanja A Börsel, 'Private Actors on the Rise? The Role of Non-State Actors in Compliance with International Institutions' MPI Collective Goods Preprint, No. 2000/14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267733> accessed 17 June 2011.

⁴² For an good overview and critique of this perspective, see Colin Tapper, 'Austin on Sanctions' [1965] 23(2) The Cambridge Law Journal 271; see, also, Frederick Schauer, 'Was Austin Right After All?: On the Role of Sanctions in a Theory of Law' (2009) University of Virginia Law School: Public Law and Legal Theory Working Paper Series 128 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1198&context=uvalwps>> accessed 2 May 2011.

⁴³ This is discussed, generally, in Harold Koh, 'How is International Human Rights Law Enforced?' [1998] 74 Indiana Law Journal 1397.

⁴⁴ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Law Series 1994), 214; a detailed analysis of this issue is given in Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' [2006] Fordham Law Review 1171.

is no 'internal acceptance' by states.⁴⁵ Effectiveness is assumed to be an outcome of enforcement and compliance, which sit as complex issues with few clear answers, especially in the area of human rights law, where compliance varies enormously.⁴⁶

In this light, it might be possible to use economic theory to attempt to understand the anomaly that states commit to treaties but fail to comply with the requirements of those treaties. This turns on the effectiveness of public international law. Equally, we could also examine why public international law materialises in the first place, as the outcome of the interplay between numerous parties that need to communicate preferences. For both questions, if traditional legal scholarship has failed to provide satisfactory answers, then law and economics, through the application of rational choice theory, might remain as a strong social scientific approach that can be used to explain the dynamics of international legal developments and state choices.

That stated, assuming that states pursue their own interest may be challenged as being too simplistic and unrealistic. To that end, there has been an increase in the influence of other social scientific approaches to law, especially approaches from psychology, which question rationalism as a central methodological tool,⁴⁷ and which apply some of other concepts borrowed from behavioural analysis, such as risk aversion and prospect theory, to international relations.⁴⁸ While rational choice is therefore not necessarily a new approach – it has existed as a scholarly tool in IR for decades⁴⁹ – its application by law and economics scholars to the analysis of specific international treaties is a new development.

⁴⁵ Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979), 58 – 63.

⁴⁶ Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' [2005] 110(5) *American Journal of Sociology* 1373.

⁴⁷ This can be traced back to, among other influential articles, Herbert A Simon, 'A Behavioral Model of Rational Choice' [1955] 69(1) *The Quarterly Journal of Economics* 99; for a more recent analysis, see Christine Jolls, Cass R Sunstein, and Richard Thaler 'A Behavioral Approach to Law and Economics' [1998] *Stanford Law Review* 1471.

⁴⁸ Barry O'Neill, 'Risk Aversion in International Relations Theory' [2001] 45(4) *International Studies Quarterly* 617; Jack S Levy, 'Prospect Theory, Rational Choice, and International Relations' [1997] 41(1) *International Studies Quarterly* 87.

⁴⁹ For an overview of its eminence since World War II, see Duncan Snidal, 'Rational Choice and International Relations', in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (1st edn, Sage Publications 2002).

Rational choice theory is the framework mostly applied in the present dissertation, despite its methodological problems. It is entirely conceivable that states ratify international human rights treaties for reasons other than self-interest, but to ignore self-interest as a potential motivating factor would be equally naïve. By using rational choice theory, we attempt to improve our understanding of international human rights law in terms of its evolution, in relation to how the treaties are structured, and in the way in which states view it. Tools from law and economics that may be useful to the analysis of international law might be those that investigate the role of transaction costs and strategic action in the formation of treaties and the creation of institutions or the analogising of treaties as akin to domestic contracts, in which states parties are promisors and the state's citizens and the international community are promisees. This latter assumption is central to the present dissertation and facilitates analysis significantly. In this way, the discipline is able to elucidate as to how to resolve problems relating to human rights treaties so that positive outcomes can materialise. On top of this level of descriptive analysis, the discipline is also useful in its ability to compare institutional structures for the extent to which they aid cooperation and joint gains. In this way, law and economics tools can be used to explain the operation of international institutions and to compare inter-institutional effectiveness.

Where economic methodology falls down, however, is in relation to its ability to provide a positive interpretation of international law. Economics cannot dictate to lawyers how international law is in reality, as this remains the preserve of traditional legal analysis, and nor can it make determinations as to a law's validity. While the application of economic methods therefore provides scholars with some interesting social science-based approaches to the analysis of international law, it is limited in some important respects. By recognising these failings we are pointing out that the theories developed in this dissertation and the policy recommendations that flow therefrom come with caveats.

In better understanding the context of the methodology applied here, we can take a number of approaches. Firstly, it is possible to take on an ethical approach, according to which we assess our particular discipline (i.e. law, in our case) through a normative lens. Rather than being cautious in their analysis, normative approaches deal with how something should be interpreted, how something should be striven for, or how something should be differently structured. In this

sense, normative approaches are very open to criticism. Unlike their positive analytic cousins – where the question turns on how something *is* – these normative perspectives sometimes provide contentious answers. For example, the law and economics assumption that law should be efficient is a normative statement; in addition, that assumption might counter a traditional belief in law as being something that ought to be moral or inviolable.⁵⁰

In the present dissertation, the assumption is made that international human rights treaties should take account of the economic concept of efficiency in a number of ways, and that human rights need not be viewed as peremptory norms.⁵¹ Such normative approaches are often used to explain phenomena that become noticed following positive analyses of particular issues. Those analyses, which come in different forms, include the second role a lawyer can assume: to examine public international law through sociological perspectives. It may be possible to step away from ethical analyses and to instead examine the functioning of law for its causal effects. It allows us to examine how to structure institutions on the basis of those assumptions, while it is also sometimes possible to test our hypotheses empirically. Empirical testing, alluded to throughout this dissertation, has already been carried out in relation to international human rights law, with it having acted as a means by which hypotheses could be both tested and developed. Sociological and economic perspectives offer scholars the chance to carry out strong scientific work, in that the tools they provide enable cause and effect analysis.

However, apart from these ethical and sociological perspectives, lawyers can also take on a doctrinal approach. This classical approach assesses law for what it is, through interpretation, and involves interpretation in one way or another to predict whether certain effects will accordingly materialise. Doctrinal work is not devoid of sociological considerations either, as the effects of laws or court

⁵⁰ The role of morality in law has been analysed and challenged as long as law has existed; for relatively recent but very influential work in this area, see Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969); Shirley R Letwin, 'Morality and Law' 2(1) [1989] *Ratio Juris* 55.

⁵¹ A long line of literature emphasises – and analyses – the relationship between human rights and principles of *jus cogens*; see Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' [2008] 19(3) *European Journal of International Law* 491; Karen Parker and Lyn Beth Neylon, '*Jus Cogens*: Compelling the Law of Human Rights' [1988] 12 *Hastings International and Comparative Law Review* 411; Diana T Meyers, *Inalienable Rights: A Defense* (1st edn, Columbia University Press 1985).

judgements will undoubtedly affect society in some capacity, but its role is distinct from economic or sociological perspectives in that its views are not as externally driven. Those latter approaches, which assess law objectively, are more appropriate tools for academic work than doctrinal and internally focused analysis. What follows in this dissertation, whereby rational choice theory and the concept of efficiency are applied to international human rights treaties, is far more extrinsic in its analysis. In this way, we are able to assess our subject matter from afar while simultaneously being aware of – and critical of – our methodological problems.

A final matter that requires attention is the position of the present dissertation in the context of the legal heritage of law and economics, which chiefly has its origins in American legal thought.⁵² Whereas most academic institutions in the US have been home to law and economics research centres for decades,⁵³ the discipline's development in Europe has been much more muted.⁵⁴ This has led to a divergence between US and European approaches to the emergence of international law and how it might be structured.⁵⁵ Perspectives that emphasise the inviolability of international law feel more at home in European contexts, whereas perspectives that contend that international law need not necessarily be so sacrosanct might feel more at home if they were to emanate from the mouths of US scholars. This dissertation might therefore sit aloof from the traditional legal research carried out by European scholars. Its ideological

⁵² Kristoffel R Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism', [2008] American Law & Economics Association Annual Meetings Paper 88, 32.

⁵³ Much of that development can be traced to the John M. Olin Foundation, which was fundamental in financing law and economics research centres across the United States over a number of decades.

⁵⁴ This is discussed and critiqued in Richard A Posner, 'The Future of Law and Economics Movement in Europe', [1997] 17(1) *International Review of Law and Economics* 3; Nuno Garoupa and Thomas Ulen, 'The Market for Legal Innovation: Law and Economics in Europe and the United States', [2007] 59 *Alabama Law Review* 1555; Roger van den Bergh, 'The Growth of Law and Economics in Europe', [1996] 40(3-5) *European Economic Review* 969.

⁵⁵ For an assessment of the influence of the Cold War on this, see Brenda Cossman, 'Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era', [1991] 32(2) *Harvard International Law Journal* 339; for a critical analysis of US policies in relation to international treaties, see Kenneth Roth, 'The Charade of US Ratification of International Human Rights Treaties', [2000] 1 *Chicago Journal of International Law* 347.

differentiation from the traditional European legal scholarship is important as it might indicate a potential shift in the European perspective. Throughout, though, references are made to the international order, at the centre of which Europe has been a crucial member since the emergence of human rights treaties after World War II.⁵⁶ In this way, the development of international human rights law is framed around European fracturing and integration. We take this approach in order to be able to relate the reality of the situation in Europe to a theoretical approach that has not always sat well among European legal scholars. This has been done out of a desire to challenge traditional European legal scholarship and to ensure that the theories put forward in this dissertation can be related to by European scholars. Were the theories to remain more abstract, the connection between traditional legal scholarship and law and economics scholarship would remain strained. Making reference to European states, the European system, and Europe's role in the international order may enable the bridging of the gap between contrasting theoretical foundations.

B. The Externalities of Human Rights

This dissertation assumes that the human rights standards that exist in each state result in externalities for the international community and, by definition, the states that comprise that community. Externalities form a central focus of traditional law and economics research, in which they are defined as the consequences that pertain for other actors from a first actor's actions and whereby those consequences can be both positive and negative.⁵⁷

The relevance of this theory to international law is the assumption that international treaties attempt to encourage states to take account of the externalities they impose on other states. The most pressing example is the

⁵⁶ Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', [2000] 54(2) *International Organization* 217; Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' [1995] 1(2) *European Journal of International Relations* 157; Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' [1998] 8 *Transnational Law & Contemporary Problems* 313.

⁵⁷ Robert Cooter and Thomas Ulen, *Law and Economics* (3rd edn, Addison Wesley Longman 2000), 151.

problem of environmental damage, whereby international attempts at curbing climate change are viewed as measures aimed at deterring states from imposing the externality of pollution on one another.⁵⁸ In effect, they are contractual agreement governing pollution. In relation to human rights matter, we assume that bad human rights standards result in such externalities as refugee flows,⁵⁹ moral outrage,⁶⁰ and higher humanitarian or intervention costs for the international community.⁶¹ In practice, the UN Charter alludes to issues of social concern having an international character in Article 55, where it states that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁶²

⁵⁸ The literature detailing pollution as an externality and how best to resolve public goods problems is vast; some useful overviews are PK Rao, *International Environmental Law and Economics* (1st edn, Wiley Blackwell 2001); Grant K Hauer, 'International Pollution Externalities: Public Bads with Multiple Jurisdictions' (PhD thesis, University of Minnesota 1997); Mathew J Kotchen, 'Voluntary Provision of Public Goods for Bads: A Theory of Environmental Offsets' [2009] 119 *The Economic Journal* 537.

⁵⁹ Pae JoonBeom, 'Sovereignty, Power, and Human Rights Treaties: An Economic Analysis', [2006] 5(1) *Northwestern Journal of International Human Rights Law* (2006) 71, 72.

⁶⁰ I assume that being morally offended by the actions of a state can be read as a cost because the international community has to direct its attention to that particular issue, and is thereby distracted from focusing on other issues, assuming a limited ability to deal with all the problems facing the world.

⁶¹ Eric Neumayer, 'A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court' [2009] 46(5) *Journal of Peace Research* 659.

⁶² United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 55.

In addition, Article 56 then goes on to further establish these principles by effectively codifying *erga omnes*, when it states that ‘All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55’.⁶³ In this way, the Charter implicitly makes references to matters that might be termed externalities and obliges states to take account of these issues when making domestic decisions and when engaging on the international level.

We assume that the establishment of international human rights treaties can be viewed from two perspectives. Firstly, treaty formation could be analogised as a way of codifying this principle and that a successfully functioning international human rights system can result in fewer externalities for other states and the international community. This takes a regulatory perspective. Secondly, we could analogise treaties as agreements relating to human rights protection and with a goal of fewer externalities. This takes a contractual perspective. Given that states parties to such treaties commit to providing their citizens with a treaty-mandated level of human rights protection, and, assuming those commitments are genuine, we would anticipate fewer externalities among states parties. Thus, for example, fewer refugees will leave states that fail to adhere to their treaty obligations and move to states that don’t violate those obligations or to refugee camps or internally displaced persons camps.⁶⁴ Fleeing a state with poor human standards is assumed to be a rational response on the part of individuals, with refugees having left states in which repression was rife for centuries.⁶⁵ It is difficult, however, to separate refugee flows in peacetime from refugee flows in wartime. Generally speaking, refugees are more likely to be found leaving states with bad human rights standards and engaged in conflict, rather than from states with bad standards but which are otherwise peaceful. Nonetheless, while individuals will

⁶³ *ibid*, art 56.

⁶⁴ As at the end of 2012, UNHCR claimed to be dealing with 35.8 million ‘persons of concern’, with 17.7 million of these internally-displaced person and 10.5 million of these refugees; see UNHCR ‘Displacement: The 21st Century: UNHCR Global Trends 2012’ (19 June 2013).

⁶⁵ When Spain controlled The Spanish Netherlands, ‘there was large scale migration from Flanders and Brabant to the new republic. [...] The refugees included a large proportion of the merchant class and bankers of the Southern Netherlands (though some of the latter went to Germany). They brought capital, skills and international contacts. Virtually all of the Jewish population moved to the North.’ Angus Maddison, *The World Economy: A Millennial Perspective* (Development Studies Centre OECD 2001), 79.

naturally flee conflicts, which are governed by humanitarian law,⁶⁶ this should not preclude the assumption that pure human rights violations can result in individuals fleeing peaceful states. Contrariwise, if states adhere to their legal obligations, such that human rights standards are upheld and citizens can claim these rights on the domestic setting, then there should be no need for individuals to flee their home state as refugees.⁶⁷ In this way, the establishment of international treaties, all things held equal, should result in reduced refugee flows. Equally, though, we should also recognise that refugee flows can also bring positive externalities: refugees can often contribute more to their host state than the costs they impose.⁶⁸

In addition, the externalities of moral outrage among the states and an assumed movement toward an interventionist policy on the basis of a state's poor human rights standards has been subject to significant academic debate.⁶⁹ Intervention can take many forms: military intervention, peacekeeping missions, the establishment of refugee camps, or it might take more indirect policies, such as campaigns urging the respective states to improve their institutional weaknesses and respect for human rights principles. As a larger proportion of states recognises the value of good human rights standards, and as more states commit to their obligations, there will be an assumed lower likelihood that the

⁶⁶ An excellent overview of the issues pertaining to refugees and humanitarian law can be found in Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (1st edn, Cambridge University Press 2012).

⁶⁷ Individuals may continue to leave their home states for reasons other than poor human rights standards. Economics factors are widely regarded as exerting a significant contributing influence on refugee flows. For an overview of general migratory trends in recent times, see Stephen Castles and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (1st edn, Guildford Press 2009).

⁶⁸ Many examples exist in this respect, but the most pertinent is the emigration of established Jewish artists, scientists, and academics from Europe before World War II, when human rights for Jews became very restricted. This led to significant benefits to (chiefly) American society in a range of different areas of its social make-up. See, on a more general level, Karen Jacobsen, 'Can Refugees Benefit the State? Refugee Resources and African Statebuilding' [2002] 40(4) *Journal of Modern Africa Studies* 577.

⁶⁹ Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (1st edn, Rowman & Littlefield 1998); JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (1st edn, Cambridge University Press 2003); Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (1st edn, Cambridge University Press 2003).

international community will have to intervene, often at significant cost,⁷⁰ in the internal affairs of states with poor domestic human rights standards.

In both the case of negative and positive externalities, we cannot determine their level and effect. Despite that, this dissertation utilises their assumed existence as a cornerstone of its analysis. This transfer of an analogy from the domestic context to the international context proceeds despite externalities on the domestic context, such as pollution, being more tangible than externalities stemming from the absence or existence of international human rights law. Nonetheless, framing poor human rights standards and rights violations around the concept of externalities enables us to more easily understand the justification for international law as a regulatory response to rights violations.

C. Efficiency as a Methodology

Economics provides social science scholars with some exciting tools with which to analyse international law, although the two approaches that form the focus of the present analysis – rational choice and efficiency – differ in the degree to which they can be challenged as appropriate. Whereas rational choice theory is applied as an analytical tool to assess state motivations and the development and stability of international law, efficiency is used as a replacement for the traditional normative criterion of justice.⁷¹

The application of an analytical tool with origins outside of doctrinal analysis cannot be brought into question from the perspective of scientific research, but replacing a dogmatic discipline's (law's) central normative principle (justice) with a more open discipline's (social science) basic foundation (efficiency) may be subject to greater discussion.⁷² Applying the efficiency criterion to international

⁷⁰ In 2012, UNHCR's annual budget was \$4.3 billion. UNCHR 'Financial Figures' <<http://www.unhcr.org/pages/49c3646c1a.html>> accessed 2 May 2013.

⁷¹ By contrast, rational choice theory does not leave moral questions at the door entirely, and is therefore not as removed from moralistic argument as is the concept of efficiency; Jack Landman III and Eric A Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' University of Chicago Law & Economics, Olin Working Paper No. 108 <<http://ssrn.com/abstract=250042>> accessed 3 May 2012.

⁷² Such a discussion can be found in Richard Zerbo Jr, *Economic Efficiency in Law and Economics* (1st edn, Edward Elgar 2001).

law may seem, at first instance, a peculiar application of an approach that is typically reserved for economic science. In that discipline, in which one of the central foci is that costs are kept to a minimum and that resources are put in the hands of those that value them the most, efficiency forms a central tenet and has a number of rather distinct meanings. Firstly, 'productive efficiency' relates to the aforementioned problem of putting resources to their best use, such that altering any of the combinations of inputs cannot increase productivity.⁷³ Secondly, allocative efficiency measures whether society or an economy is producing only what is desired most by its constituents or customers. Thirdly, efficiency can also be understood to mean *Pareto* efficiency, whereby the premise is that the current allocation of goods is an allocation that cannot be improved upon.⁷⁴ In the case of this latter definition, individual preferences are assumed to determine *Pareto* efficiency. A situation is only *Pareto* efficient if the individuals to be affected by a change in the distribution of the resources enjoyed by those individuals are indifferent between the status quo and the proposed changed situation. Finally, an altered version of that model is Kaldor-Hicks efficiency, which asked whether, upon a change in distribution that was not *Pareto* efficient, those who gained from the change could compensate those who lost for their loss.⁷⁵

When applying efficiency to legal matters, therefore, there are various avenues open to scholars. On the one hand, we might wish to structure laws so that we achieve efficiency in terms of resource allocation. For example, companies might be legally required to operate using renewable energy, on the basis that this is a social policy goal (allocative efficiency in terms of society wanting a cleaner environment). But if this limits company output then it is not productively

⁷³ This is a difficult issue to measure and is often theoretical in many ways. For an overview of its unmeasurability, see MJ Farrell, 'The Measurement of Productive Efficiency' [1957] 120(3) *Journal of the Royal Statistical Society: Series A (General)* 253; Harold O Fried, CA Knox Lovell and Shelton S Schmidt (eds), *The Measurement of Productive Efficiency: Techniques and Applications* (1st edn, Oxford University Press 1993).

⁷⁴ Bert N Adams, 'Vilfredo Pareto' in George Ritzer (ed), *Encyclopaedia of Social Theory* (1st edn, SAGE Publications 2005), 545-548.

⁷⁵ In this way, the Kaldor-Hicks criterion is more accommodating of changes in distribution, as the conditions that must be met are lower. Consequently, the criterion has been subject to careful discussion in relation to its fairness and the moral aspects of its application; see Walter J Schultz, *The Moral Conditions of Economic Efficiency* (1st edn, Cambridge University Press 2008); Daniel M Hausman and Michael S McPherson, *Economic Analysis, Moral Philosophy and Public Policy* (2nd edn, Cambridge University Press 2006).

efficient. On the other hand, from a *Pareto* perspective, we could argue that a legal change should not be introduced if it is not *Pareto* improving.⁷⁶ Ergo, the legislation would not have been introduced, as the companies would have been made worse off. Equally, if the company values producing using non-renewable energy more highly than the value placed by society on this social policy, then the legislation would reject Kaldor-Hicks efficiency as well. Applying *Pareto* efficiency to law has not been without its critics.⁷⁷

In this dissertation, the question of efficiency is extremely contentious, as we are neither applying efficiency to domestic law, nor to international law generally, but to international human rights law in particular, which emphasises, as its core foundation, the normative concepts of fairness and equality.⁷⁸ These concepts directly confront the approach of reallocating resources to the individuals that values them the most: the former highlight need whereas the latter highlights want. In addition, whereas the application of efficiency to domestic law might suggest, as the classic example does, that the factory owner might be allocated the right to pollute when balanced against the laundrette owner's right to clean air,⁷⁹ the application of efficiency to international law has consequences for international relations, domestic politics, and for the individual citizens that comprise the states of the world. If an international law were to be established that would allocate to larger states the exclusive right to fish on the basis that they would be able to take advantage of economies of scale, then this might affect the economies of smaller states, it might affect the economies of coastal states, it might institutionalise comparative advantage, and it might affect the distribution and sustainability of fish stocks. By focusing exclusively on efficiency as the criterion to be used when determining how to structure a particular law, we risk failing to take account of consequences similar to those

⁷⁶ If *Pareto* efficiency relates to the question as to whether an allocation cannot be improved upon, the presence of a *Pareto* improvement is the measurement determining *Pareto* efficiency.

⁷⁷ See, among others, EJ Mishan, 'The Futility of *Pareto*-Efficient Distributions' [1972] 62(5) *The American Economic Review* 971.

⁷⁸ For an analysis of the normativity of these concepts in law and economics, see Klaus Mathias and Deborah Shannon (trs), *Efficiency Instead of Justice? Searching for the Philosophical Foundation of the Economic Analysis of Law* (1st edn, Springer 2009); for a more general assessment of this normativity, see Oscar Schachter, 'Editorial Concept: Human Dignity as a Normative Concept', [1983] 77(4) *American Journal of International Law* 848.

⁷⁹ Ronald Coase, 'The Problem of Social Cost', [1960] 3 *Journal of Law and Economics* 1.

that might pertain in the fisheries example. Despite that, there is nothing that should preclude the application of efficiency to international law from a purely academic viewpoint. Doing so, though, requires recognition of the limits and dangers of such an application.

In addition, the efficiency criterion conflicts with traditional utilitarian justice, which assumes that the utility received by all individuals is equal irrespective of their identity or their preferences.⁸⁰ For a law to be structured in a way that assumes that one person's enjoyment of something might be objectively valued as being more important than another's undermines Bentham's view that pleasure is of an equal weight across all individuals.⁸¹ Despite that, though, it is difficult to argue with the contention that individuals value enjoyment of an activity (or something similar) differently. Wealthier individuals might be less likely to enjoy an additional dollar of income than poorer individuals, while wealthier states might be less likely to benefit from trade liberalisation than poorer states, for each unit of increased income that that liberalisation brings. If we accept the premise that utility exists on a scale,⁸² then the next step is to accept that efficiency might be a criterion for ordering laws.

In this dissertation, we discuss efficiency in terms striving for universal ratification, in relation to how treaty bodies are structured, and regarding the remedies and sanctions that can be applied to states if they are found to have breached their obligations. In this way, our analysis treads new ground in its attempt to analyse treaty formation and institutional structures. Pivotaly, though, the conceptual and ethical issues of this approach are acknowledged.

⁸⁰ We can trace this discussion back a significant period, but its best elaboration can be found in Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' [1939] 49(195) *The Economic Journal* 549.

⁸¹ An overview of the influence of both Jeremy Bentham and JS Mill on economic science and the role of utility is provided in Jacob Viner, 'Bentham and J.S. Mill: The Utilitarian Background' [1949] 39(2) *The American Economic Review* 360.

⁸² The question as to whether we can measure utility on a scale relates to the distinction between cardinal and ordinal utility. This is discussed well in Bernard MS van Praag, 'Ordinal and Cardinal Utility: An Integration of the Two Dimensions of the Welfare Concept', [1991] 50(1) *Journal of Econometrics* 69.

D. Absence of Quantitative Work

As has been alluded to so far, this dissertation is chiefly theoretical in its approach. Where possible, reference is made to real world examples and applicable treaty provisions or institutional structures. No attempt is made to test the expressed theories through a quantitative approach. There are a number of reasons for this.

Firstly, a quantitative analysis – while a logical corollary to a theoretical analysis – was never an aim of this dissertation. The author recognised his limits in empirical testing and felt that to attempt a quantitative analysis would be fruitless. In addition, establishing a testable theory and measuring this using data techniques would have been difficult because of the nature of the theories developed, which focus on inter-treaty structural comparisons. Previous econometric work in the area of international human rights law has differed from this dissertation as most of that research has aimed to question the extent to which states that ratify human rights treaties show commitment to those treaties,⁸³ and has examined the difference between a state's human rights standards before ratification and after ratification.⁸⁴ These approaches require the respective application of panel data and time series analyses. Instead of applying such approaches, we are examining the formalization of treaties and institutionalization of treaty bodies through an economic lens, while also asking how states might respond to a variety of treaty structures in terms of both their ratification decision and their decision to subsequently comply. Because this involves looking at treaties in a more nuanced way than viewing them as whole units, an econometric analysis would involve the examination and comparison of differentiated treaty structures and would require a very large database with

⁸³ Beth A Simmons, *Mobilizing for Human Rights* (1st edn, Cambridge University Press 2009); Oona A Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' [2007] 51(4) *Journal of Conflict Resolution* 588; Wade M Cole, 'Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999' [2005] 70(3) *American Sociological Review* 472.

⁸⁴ Daniel W Hill Jr, 'Estimating the Effects of Human Rights Treaties on State Behavior' [2010] 72(4) *The Journal of Politics* 1161; Wade M Cole, 'Reevaluating the Effectiveness of Human Rights Treaties, 1981-2007' [2012] 117(4) *American Journal of Sociology* 1131; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' [2005] 49(6) *Journal of Conflict Resolution* 925; Hathaway, 'Do Human Rights Treaties Make A Difference?' (n 23).

many variables. This inability, both as a result the author's limitations and the project's nature, to empirically test the theories developed here might reduce this dissertation's academic value.

Apart from the hindrance that empirical testing is difficult in this case, the author would have encountered a more serious problem had it been possible: acquiring data. In order to measure the effects of treaties on the level of human rights protection a state affords its citizens, econometric research relies heavily on 'human rights indicators'.⁸⁵ Such indicators are used to assist in the analysis of changes over time, but are problematic because they often 'have a striking resemblance to the standard indicators of socio-economic progress',⁸⁶ which makes it difficult to determine whether it is a change in socioeconomic or human rights conditions that is being analysed.

Aside from this uncertainty as to the identity of the dependent variable, the indicators used in such approaches are expected to be 'SMART': specific, measurable, attainable, relevant, and time-framed.⁸⁷ In attempting to fulfil all of these criteria, and in attempting to achieve progress toward more empirical work on the impact of international law, the crucial difficulty is that such analysis is burdened 'by a shortage of good reliable data'.⁸⁸ Acquiring data in relation to human rights issues is difficult for countless reasons: governments may be cautious about handing over data to international bodies, NGOs, or academic institutions for fear of being 'outed', while a further limitation will be the fact that many abuses take place behind closed doors.⁸⁹ In addition, the difficulty in

⁸⁵ 'Technically speaking, an indicator refers to a set of statistics that can serve as a proxy or a metaphor for phenomena that are not directly measurable. However, the term is often used less precisely to mean any data pertaining to the social condition', in Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement', [2001] 23 Human Rights Quarterly 1062, 1076.

⁸⁶ UN Office of the High Commissioner for Human Rights, 'Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies', (10 September 2002)

<<http://www.refworld.org/docid/3f8298544.html>> accessed 9 September 2013.

⁸⁷ This is discussed in Erik Andre Andersen and Hans-Otto Sano, 'Human Rights Indicators At Programme and Project Level: Guidelines for Defining Indicators Monitoring and Evaluation', (Danish Institute for Human Rights, 2006), 11-13.

⁸⁸ Oona A Hathaway and Ariel N Lavinbuk, 'Book Review: Rationalism and Revisionism in International Law' [2006] 119 Harvard Law Review 1404, 1441.

⁸⁹ These various influences are broadly discussed in Herbert F Spirer, 'Violations of Human Rights. How Many? The Statistical Problems of Measuring Such Infractions Are Tough, but

acquiring data means that quantitatively assessing human rights violations and standards is likely to be troubled by ethical issues in its methodology.⁹⁰

These very practical output-oriented hindrances should also be read in light of the input-oriented SMART criteria. Firstly, achieving specificity as to the level of human rights violations is problematic for numerous reasons: victims of violations may not report incidents of rights violation to specific state institutions out of fear of reprisals or a lack of faith in the national system; those incidents that are reported to one state institution and which relate to another state institution may not be recorded in national statistics; in some cases, victims of violations may die, making self-reporting impossible; victims may be ignorant of a violation having taken place, making it evidently implausible that it will be reported; victims of violations may be geographically removed from the state institutions to which reports of violations ought to be submitted, making reporting difficult.

Equally, measuring violations and acquiring the requisite data from states is also difficult, as those institutions or non-governmental organisations that might be interested in measuring rights violations might suffer from a lack of expertise in collecting data or might be subject to resource – or bureaucratic⁹¹ – constraints, while the rights subject to measurement might simply be immeasurable.

In addition, and stemming from the aforementioned factors, the requirement that human rights indicators be time-framed also runs into difficulties. Often, it might be the case that data is acquired long after a violation has taken place, meaning that analysing rights violations or changes in a state's adherence to its legal obligations will require time-lagging the variables. Further, if the relevant data

Statistical Science Is Equal to It' [1990] 49(2) American Journal of Economics and Sociology 199; James M McCormick and Neil J Mitchell, 'Human Rights Violations, Umbrella Concepts, and Empirical Analysis' [1997] 49(4) World Politics, 510.

⁹⁰ For a good overview of the ethical issues involved in such work, see Craig K Enders and Amanda C Gottschall, 'The Impact of Missing Data on the Ethical Quality of a Research Study' in AT Panter and Sonya K Sterba (eds), *Handbook of Ethics in Quantitative Methodology* (1st edn, Routledge 2011); Michael Stohl, David Carleton, George Lopez, and Stephen Samuels, 'States Violations of Human Rights: Issues and Problems of Measurement' [1986] 8 Human Rights Quarterly 592.

⁹¹ For example, hierarchies within these institutions may have determined that the collection of data on rights violations is not a priority.

can only be acquired a significant period after the violation has taken place, then any analysis that is carried out in the period between the violations themselves and the acquisition of the data relating to the violations may undervalue the level of violations present.

Resolving these issues requires a systematic shift in the collection of data relating to human rights issues. As mentioned, distinguishing between strictly human rights indicators and measurements of socio-economic change can be difficult. Both allude to changes in the examined society but whereas the former might be indicative of a breach of a legally mandated obligation, the latter might not. Furthermore, an additional challenge will be processing the raw data into quantitative 'scores' for inter-state comparison and for measurement against legal obligations. Human rights law has not been structured in a way that easily facilitates the quantification of violations, an argument best exemplified by the ambiguity of the United Nations Convention against Torture's (UNCAT) definition of torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁹²

The intricacies of this description would require tediously analysing each and every alleged and actual incident falling under the Article's remit, and meticulously ascribing a score to each incident. On top of this, accounting for the psychological effects of torture on victims 'makes this concept largely subjective',⁹³ and accordingly results in greater difficulties when quantifying. The

⁹² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1984) 1465 UNTS 85 (UNCAT) art 1.1.

⁹³ Robert J Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses' [1986] 8 Human Rights Quarterly 607, 610.

unmeasurable nature of psychological harm stemming from torture⁹⁴ is likely to mean that scores based on these qualitative sources, and which measure physical harm in a numerical sense,⁹⁵ will be uncertain.

The quantitative findings of other authors were used in the early stage of this research project to better understand the context in which the research would be conducted. Quite a lot of the data used in the statistical and econometric work cited in this dissertation is based on a database of human rights scores held by Cingranelli and Richards.⁹⁶ This, in turn, is a composite rating of annual human rights standards compiled by Amnesty International and the US State Department. While this database is an invaluable resource for scholars employing econometric approaches, the origins of the data in US State Department country scores may weaken the database's reliability, as those scores are likely to reflect the United States' particular global outlook. During the Cold War, for example, the data is likely to have been biased against communist states, irrespective of the actual human rights standards that may have existed in those states; accordingly, using these scores as a means of constructing a composite score is likely to have affected the reported statistical findings.⁹⁷ Readers are therefore discouraged from assuming that the econometric work cited in this dissertation is absolutely reliable in either its input or output.

⁹⁴ Derrick Silove, 'The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework' [1999] 187(4) *Journal of Nervous & Mental Disease* 200.

⁹⁵ See, for example, David L Cingranelli and David L Richards, 'Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights' [1999] 43(2) *International Studies Quarterly* 407.

⁹⁶ David L Cingranelli and David L Richards, 'The Cingranelli and Richards (CIRI) Human Rights Data Project' [2010] 32(2) *Human Rights Quarterly* 401; the project and the data can be found at: The CIRI Human Rights Data Project; available at <<http://ciri.binghamton.edu/>> accessed 23 May 2011

⁹⁷ Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' [2003] 14(1) *European Journal of International Law* 171, 179.

E. Overview

This analysis has attempted to provide an insight into some of the issues that arose both before and during this research project. As has been shown, undertaking a law and economics analysis of international human rights law is fraught with conceptual issues and ethical problems. But as will be equally shown throughout this dissertation, such scholarly work should be completed cautiously and with conscious recognition of the approach's limit. While what follows offers some interesting new insights into the emergence of, ratification of, and compliance with, human rights treaties, we should appreciate the confines of our methodology and our assumptions. The complex nature of international law and the intricate character of state-to-state engagement require such assumptions. We therefore proceed with our analysis in light of the methodological considerations developed here. International treaties, we assume, are contractual agreements between states and their citizens and between states and the international community in relation to human rights matters, and institutions created to monitor state compliance engage in regulatory functions. The drivers of the formation of such treaties are assumed to be the externalities that stem from grave human rights abuses. Equally, states are assumed to be rational and are assumed to assess treaties and treaty bodies according to a cost-benefit analysis. While a relatively simplified canvas on which to paint our analysis, the detailed nature of the subject matter presents an exciting challenge that requires careful scholarly brushstrokes. We proceed in that vein.

Chapter 2: Understanding States

By combining the disciplines of law and economics and human rights law, we are bringing together two areas of research that share both similar and vastly distinct heritages. The roots of law and economics in focusing on efficiency and maximising preferences⁹⁸ might be viewed as being in inherent conflict with human rights law's goal of advancing the liberty of the individual and providing redress in cases in which that liberty and freedom has been compromised.⁹⁹ While the two might appear uncomfortable bedfellows at first, potentially contradicting one another about the relevance of costs, or the importance – or unimportance – of contractual obligations, they nonetheless share the distinct similarity of having somewhat obscure theoretical foundations. There is no single theoretical lineage that will explain to us whence human rights law emerged: realism,¹⁰⁰ idealism,¹⁰¹ and liberalism¹⁰² have all been used, as tools of IR, to explain the discipline's development in recent decades. Equally, although many of the approaches used in economic analysis have microeconomic models as their foundation,¹⁰³ although game theoretic principles are often used to examine the interaction between

⁹⁸ Trachtman, *The Economic Structure of International Law* (n 2), 15.

⁹⁹ See, generally, Amartya Sen, 'Elements of a Theory of Human Rights' [2004] 32(4) *Philosophy & Public Affairs* 315.

¹⁰⁰ See, for an introduction, Fred Halliday, *Rethinking International Relations* (1st edn, Palgrave Macmillan 1994).

¹⁰¹ Peter Wilson, *The International Theory of Leonard Woolf: A Study in Twentieth Century Idealism* (1st edn, Palgrave Macmillan 2003); Christian Tomuschat, *Human Rights: Between Idealism and Realism* (1st edn, Oxford University Press 2008).

¹⁰² Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', [1997] 51(4) *International Organization* 513; Anne-Marie Slaughter, 'International Law in a World of Liberal States' [1995] 6 *European Journal of International Law* 503; for a good review of the existing literature: Michael Doyle and Stefano Recchia, 'Liberalism in International Relations' in Bertrand Badie, Dirk Berg-Schlosser, and Leonardo Morlino (eds), *International Encyclopaedia of Political Science* (5th edn, Sage 2011).

¹⁰³ The role of such models is discussed in detail in Vernon L Smith, 'Microeconomic Systems as an Experimental Science', [1982] 72(5) *American Economic Review* 923; Richard S Markovits, 'A Basic Structure for Microeconomic Policy Analysis in our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics', [1975] 32(4) *Wisconsin Law Review* 950.

different entities,¹⁰⁴ and although the development of legal institutions has been subject to theorising by new institutional economics scholars,¹⁰⁵ no single intellectual heritage can be applied to the discipline of law and economics either. Of course, this is not necessarily a bad thing: such a rich range of tools only adds to the discipline's explanatory power. Were we merely able to rely on neoclassical economic models, the law and economics approaches applied in this dissertation, and more generally, would be far more limited – and more open to criticism¹⁰⁶ – in their ability to make positive findings.

This dissertation tackles the conundrum of the emergence of human rights treaties by contending that the purpose of these treaties is to provide for the internalisation of externalities by states. It suggests that one state's poor human rights standards results in other states and the international community having to deal with the consequences of those poor standards. But this alone fails to explain why states elect to ratify such treaties: on the face of it, sovereignty is ceded but there is no discernible gain attained from giving up that sovereignty. Instead, a state is likely to face greater pressure from the international community to align its standards with those of the treaty,¹⁰⁷ and there will be a closer two-way relationship between the international plane and the domestic plane.¹⁰⁸ Ratification can therefore be a costly endeavour if a state's human rights

¹⁰⁴ See, generally, Jeffrey S Rosenschein and Michael R Genesereth, *Deals among Rational Agents* (1st edn, Stanford University 1985).

¹⁰⁵ Ronald H Coase, 'The New Institutional Economics' [1984] *Journal of Institutional and Theoretical Economics* 229; Oliver E Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' [2000] 38(3) *Journal of Economic Literature* 595.

¹⁰⁶ A more adaptable approach would be for such analysis to utilise a number of methodologies and to reflect different theoretical approaches; see the criticism of purely neoclassical approaches in Lawrence A Boland, 'On the Futility of Criticizing the Neoclassical Maximization Hypothesis', [1981] 71(5) *American Economic Review* 1031; Frederic S Lee and Steve Keen, 'The Incoherent Emperor: A Heterodox Critique of Neoclassical Microeconomic Theory' [2004] 62(2) *Review of Social Economy* 169.

¹⁰⁷ For an influential work explaining the expectancy of the international community and the role of state sovereignty, see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1st edn, Harvard University Press 1998); for a context-specific elaboration of this problem, see Beth A Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs', [2000] 94(4) *American Political Science Review* 819.

¹⁰⁸ This issue is widely discussed in IR literature; for some of the works that assisted this author's understanding of this matter, see Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the*

record is not exemplary. In that light, ratification can seem somewhat anomalous. The approach pursued in this dissertation assumes that states are rational actors that elect to ratify international human rights treaties and to comply with treaty body pronouncements according to how ratification and compliance affect their welfare: what follows is an assessment of the how the principle theories from IR fit within this rationalist assumption and where law and economics analysis fits within those IR theories.

I. Rationalism in Context

At the centre of traditional economic methodology, including in its application to domestic law, the approach taken is that individuals make decisions in order to maximise their utility.¹⁰⁹ This assumption, termed *homoeconomicus*,¹¹⁰ can be applied to any area of social interaction, and fits as much for the simple purchasing of an apple over an orange as it does for moving from one football club to another. As prices or wages increase, we assume individual preferences change. The interaction between legal and economic theory is well explained through the conduit that if we follow legal positivism's assumption that law is an obligation backed by a sanction, we learn that

economics provide[s] a scientific theory to predict the effects of legal sanctions on behaviour. To economists, sanctions look like prices, and

Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs (1st edn, Cambridge University Press 1991); Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', [2006] 47 *Harvard International Law Journal* 327; Tomas Risse-Kappen, Stephen C Ropp, Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1st edn, Cambridge University Press 1999).

¹⁰⁹ See generally William Coleman, *Rationalism and Anti-Rationalism in the Origins of Economics: The Philosophical Roots of 18th Century Economic Thought* (1st edn, Edward Elgar 1995).

¹¹⁰ This assumption has been subject to considerable attention in recent times, with scholars suggesting that it can be reassessed to take account of behavioural issues, see Tanina Rostain, 'Educating *Homo Economicus*: Cautionary Notes on the New Behavioral Law and Economics Movement', [2000] 34(4) *Law & Society Review* 973; Elizabeth Anderson, 'Beyond *Homo Economicus*: New Developments in Theories of Social Norms', [2000] 29(2) *Philosophy & Public Affairs* 170; Russell Korbkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' [2000] 88(4) *California Law Review* 1051.

presumably, people respond to these sanctions much as they respond to prices.¹¹¹

In translating this onto the international setting, we use rationalism to attempt to predict how states will respond to various legal approaches to the protection of human rights. Such an application to the investigation of legal problems has, however, never been without its critics.¹¹² Traditional arguments might be that laws are followed out of a feeling of moral duty, rather than because of an increase in the costs of breaking that law.¹¹³ Furthermore, whereas rationalism is traditionally applied to individuals, its application to international law is open to greater criticism.¹¹⁴ Despite that, it is by no means a new approach, as other authors have previously contended that international law ‘emerges from states acting rationally to maximise their interest, given their perceptions of the interest of other states and the distribution of state power’.¹¹⁵ In combining rationalism and international law, it has been suggested that

even if we were to assume that self-interest is the central motivating force for states, we can test whether international law has an independent causal effect on behaviour by, for example, examining cases where self-interest predicts one behaviour and law-abiding behaviour predicts another.¹¹⁶

Other scholars have attempted such analysis by utilising, among other approaches, quantitative analyses to examine whether ratification of treaties results in improved human rights standards in ratifying states. We would expect rational states to ratify treaties to which they can adhere and not to ratify treaties that require genuine change on the domestic level. States are assumed to rationally calculate the costs and benefits that stem from ratification and make a

¹¹¹ Cooter and Ulen, *Law and Economics* (n 57), 3.

¹¹² See, for an overview of the perspective of critical legal studies, Duncan Kennedy, ‘Law and Economics from the Perspective of Critical Legal Studies’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law: Volume 2*, (1st edn, Palgrave Macmillan 1998).

¹¹³ David Bear, ‘Establishing a Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics’ [2007] 34 Florida State University Law Review 491.

¹¹⁴ A good discussion is provided in Jack L Goldsmith and Eric A Posner, ‘The New International Law Scholarship’, 2006 University of Chicago, Public Law Working Paper No. 126 (May 2006).

¹¹⁵ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (1st edn, Oxford University Press 2005), 3.

¹¹⁶ Oona A Hathaway, ‘Book Review: Rationalism and Revisionism in International Law’ [2006] 119 Harvard Law Review 1404, 1442.

ratification decision accordingly, with this approach resting upon the concept of international law as a way in which states are regulated so that externalities are internalized.¹¹⁷ Such a perspective may be reasonably criticised for being simplistic, for failing to take account of other motivations for ratifying treaties, and for putting too much emphasis on a concept (rationalism) that is difficult to measure and somewhat intangible in relation to states. Establishing the presence of rationalism when examining the decisions of individuals is problematic because of the difficulties individuals face in assessing the likely future payoffs of a particular course of actions, as distinct from more immediate payoffs; this hindrance has been termed 'bounded rationality'.¹¹⁸ These cognitive restrictions inhibit individuals from accounting for all likely contingencies and restrict the usefulness – and pragmatism¹¹⁹ – of rationalism in its application to individuals. The decision to purchase an apple over an orange is only truly rational if an individual's preference for apples remains constant in future periods. The individual's inability to calculate how his/her future preferences will appear frustrates the genuine rationality of his/her decision to purchase the apple. Individuals, as emotionally charged beings, are unlikely to be capable of delineating between their possible future preferences and their definite immediate needs. To do so would require an unreachable level of cognitive processing. Applying rationalism to individuals may therefore seem unrealistic. But while these issues are evidently significant hurdles in the latter case, they form an even greater burden when one attempts to apply rationalism to states. In this case, the application involves assuming that an entity comprising innumerable separate individuals can have clear preferences and is capable of calculating the likely outcomes of acting out those preferences. In addition, even if it is possible for states to be rational in this way, by making this assumption we also allude to potential state short-termism. The threat of electoral defeat,¹²⁰ or the

¹¹⁷ Trachtman, *The Economic Structure of International Law* (n 2), 11.

¹¹⁸ Herbert A Simon, 'Theories of Bounded Rationality' in CB McGuire and Roy Radner (eds), *Decision and Organization: A Volume in Honor of Jacob Marschak* (1st edn, North-Holland 1972); Herbert A Simon, *Models of Bounded Rationality, Vol. 3: Empirically Grounded Economic Reason* (MIT Press 1997).

¹¹⁹ Reinhard Selten, 'What is Bounded Rationality?' in Gerd Gigerenzer and Reinhard Selten (eds), *Bounded Rationality: The Adaptive Toolbox* (MIT Press 2002), 16.

¹²⁰ See, generally, Alessandro Bonfiglioli and Gino Gancia, 'Uncertainty, Electoral Incentives and Political Myopia' [2013] 123(568) *The Economic Journal* 373.

need to appease external donors¹²¹ are just two examples of immediate issues that may affect a state's preference in the short term, such that it chooses to ratify a particular treaty. If the state were to take long-term issues into account, perhaps an alternative policy may have been chosen. The state's inability to account for its future preferences is set aside when one applies rationalist assumptions. Its bounded rationality, possibly influenced by the realities of politics and international relations, entail that it might pursue policies that are harmful in the long term.

By applying rationalism to state decisions, this dissertation brings with it the intellectual baggage associated with all applications of rationalism in social scientific analysis. To that end, we simplify our analysis significantly, and assume that states are capable of consciously assessing the consequences of their actions and pursuing the policies that best result in overall gains. In doing so, immediate issues may influence them to a greater extent than less tangible issues.

In applying these assumptions to states it is necessary to frame them within the context of the established IR theories. Accordingly, we are concerned with investigating how power, domestic contexts, non-state actors, and institutions all influence the decision of states to ratify treaties and to comply with treaty bodies. This is done so as to make links between the various IR theories and to assist the contextualising of rational choice arguments within those established theories.

A. The Role of Power

The emergence of human rights treaties stems from, according to realism, the preferences of powerful states,¹²² while the backing it receives is, in turn, reliant upon the dynamics existing between – and among – powerful states and less powerful states.¹²³ This argument is rather pessimistic about the value of

¹²¹ This has been shown to be particularly the case in relation to states ratifying the Convention Against Torture. See Christoff H Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' [2001] 23(3) Human Rights Quarterly 483, 494.

¹²² See, for an extensive analysis of realism's eminence in IR scholarship, Jack Donnelly, *Realism and International Relations* (2nd edn, Cambridge University Press 2002).

¹²³ Kenneth W Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' [1999] 93(2) American Journal of International Law 361, 376.

human rights treaties as it implies that the international community is subservient to the interests of powerful states. Indeed, the extent to which powerful states constitute 'the international community' itself, rather than being constituents of that community would also be instrumental, from a realist perspective, to the emergence of human rights treaties. Realism's focus on coerciveness would suggest that greater and less concentration of power in a number of states would result in less and greater leeway for each state to pursue its own decision to ratify a human rights treaty or comply with its obligations. In this way, we can see that its explanatory power is limited by its rather simplistic assertion that power can be influential and according to which 'treaty ratification is simply cheap talk'.¹²⁴ If states alter their human rights practices following ratification of a treaty, such that they elect to comply, and if that conflicts with the interests of powerful states, then we could reasonably conclude that power has been usurped.

On a practical level, if human rights treaties exist because they satisfy the interests of powerful states, then it should be possible to explain the emergence of treaties since World War Two as having occurred alongside the granting of independence to former colonial states in Africa during the middle part of the twentieth century.¹²⁵ The theory would argue that treaties emerged because they fitted the interests of the key international powers in light of the growing number of states existing on the world stage and in light of the on-going Cold War. From this reading, their emergence would be explained by a desire by the dominant powers – in this case the US and its European allies – to outline to new and emerging states the human rights standards that the international community expected these state to strive for. In a world in which the preferences of the dominant powers differed so drastically, however, such an analysis ignores the interests of the USSR; realism's contention that treaties emerge because they add to a powerful state's stock fails to explain how a treaty might emerge despite hegemonic states having competing heterogeneous preferences. However, if the

¹²⁴ Hathaway, 'Do Human Rights Treaties Make a Difference?' (n 23), 1987

¹²⁵ By this, we mean that powerful states would have had to take account of the changing global dynamics that were emerging on account of decolonization. For interesting accounts of this process, see Berch Berberoglu, *The National Question: Nationalism, Ethnic Conflict, and Self-Determination in the Twentieth Century* (1st edn, Temple University Press 1995); Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1st edn, University of Oklahoma Press 1993).

competing hegemonies are both able to benefit from a treaty's emergence – one benefitting because emergence suits its desire to be a party to the treaty and another benefitting because emergence suits its preference of not being a party to the treaty – then realism is a rather intuitive approach. A treaty will emerge irrespective of whether one powerful state does not want to be party to that treaty; in fact, the treaty may very well emerge because of a powerful state's apathy for the treaty. The apathetic hegemony may be able – just as with the treaty-advocating state – to coerce other states to join it in its apathy. In this way, there is nothing to preclude us viewing treaties as the outcome of what might appear contrasting preferences and power struggles.

Such emphasis on the power of the state has led to the development of theories that share certain characteristics with realism but that are more cautious in the level of focus they give to powerful states: chief among these is neorealism, which suggests that compliance with human rights treaties is merely coincidental and that it occurs because states are assumed to 'act primarily in pursuit of their self-interest'.¹²⁶ Little or no emphasis is given to the power of international law to change behaviour, with any changes to behaviour the result of the rational calculations of states existing in an anarchic world;¹²⁷ if states are committed to human rights, and if their human rights standards fit those outlined in the relevant treaty, this is either the result of the interaction between less powerful and more powerful states or of coincidences of interest.¹²⁸

In situations in which state-to-state interaction plays a role in state decisions, regional integration or disassociation is assumed to be influential: decisions made on the international setting invariably have power-implications for a state's regional and international stock. States might be accordingly viewed, in line with classical realism, as being motivated by geopolitical interests.¹²⁹ As states exist in a setting in which they must often closely interact – and cooperate – with neighbouring states, the influence of geopolitics is entirely conceivable. An

¹²⁶ Hathaway, 'Do Human Rights Treaties Make a Difference?' (n 23), 1938.

¹²⁷ This relationship between power and anarchy is analysed in Alexander Wendt, 'Anarchy Is What States Make of It: The Social Construction of Power Politics' [1992] 46(2) *International Organization* 391.

¹²⁸ Goldsmith and Posner, *A Theory of Customary International Law* (n 19), 1115.

¹²⁹ For critical assessments of such arguments, see Peter Toft, 'John J Mearsheimer: An Offensive Realist between Geopolitics and Power' [2005] 8 *Journal of International Relations and Development* 381; Phil Kelly, 'A Critique of Critical Geopolitics' [2006] 11(1) *Geopolitics* 24.

apparent trend in ratification in a particular region could be rooted in a ratification consensus among the states of that region. Equally, a paucity of ratifications in a particular region might indicate a regional consensus not to ratify. In these contexts, geopolitics can either act as a constraint on the state's ratification decision or it may hasten the state's ratification decision. Equally, the converse might be true, such that states might ratify in order to influence the ratification decisions of other states. In each of these scenarios, the state is acting rationally given the circumstances, and reflects the state's responses to the 'shifting distribution of power among states'.¹³⁰ This neorealist perspective emphasises a hierarchical structure and suggests that it is powerful states that essentially determine the rules of the ratification game, as well as whether treaties or institutions exist.¹³¹ This is not to say that the less powerful states cannot achieve their self-interested goals, but rather that achieving those goals may be dependent on the interests of powerful states. If such states desire that a human rights treaty emerges, we would expect this to occur. Power, therefore, in its purest form, can both facilitate and stifle self-interest. What matters is on which side of the power divide a particular state falls.

B. The Role of Domestic Factors

The IR literature is strong in its linkage of treaty commitment and domestic politics and democracy,¹³² with the central concept being that the inherent structure of liberal democratic societies acts as a control on executive action: judicial decisions, constitutional provisions, domestic NGOs, and the level of lawyer education can all help or hinder the consolidation of human rights norms.¹³³ In essence, 'liberal international relations theory has come to stand for the straightforward proposition that domestic politics matter'.¹³⁴ This suggests

¹³⁰ Snyder, 'One World, Rival Theories' (n 24), 53.

¹³¹ A critique of neorealist assumptions is provided in Stefano Guzzini, 'Structural Power: The Limits of Neorealist Power Analysis' [1993] 47(3) *International Organization* 443.

¹³² Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' [1997] 107(2) *The Yale Law Journal* 273.

¹³³ These, and many other influences, as discussed at length in Heyns and Viljoen, 'The Impact of Human Rights Treaties the Domestic Level' (n 121).

¹³⁴ Hathaway *Do Human Rights Treaties Make a Difference?* (n 23), 1952.

that we shouldn't simply view states as unitary entities acting alone, but should instead look beyond this. A link may exist between the decisions made at government level and those sought on the level of the general population. From the perspective of ideational liberalism, which '...views the configuration of domestic social identities and values as a basic determinant of state preferences and, therefore, of interstate conflict and cooperation',¹³⁵ there is a bottom-up movement of preferences among various states and whereby this will influence state behaviour. When preferences at the lowest level coincide in different states, we would expect those states to cooperate on the macro, international level. It may be that those preferences evolve organically in separate states, or it may be that states themselves want a stability of preferences between the domestic level and the governmental level. This can be found most distinctly in states emerging from instability or an absence of democracy, such that governments 'lock-in' preferences on the domestic setting.¹³⁶

Accordingly, liberalism presents a rather linear understanding of the relationship between vertical layers of preferences, moving from individuals to domestic institutions and the state and on to how those states interact with international institutions. There is a vertical channelling of preferences, with horizontal interaction taking place between those states sharing homogenous predilections. As a result, stability would materialise on the international level as uniformity across state preferences would be expected. According to this reading,

liberalism thus generates a testable hypothesis: liberal nations are more likely to comply than others, and treaties are more likely to lead to favourable changes in the practices of liberal nations than in the practices of others.¹³⁷

In reality, though, it is sometimes the case that states not expected to comply with international law nonetheless do.¹³⁸ If such states – which do not have to answer to internal preferences – adhere to liberal principles, this presents scholars of liberalism with an anomaly that cannot be easily explained. But rather than expecting norms to flow from established democracies to new democracies, liberal scholar might be better served by following Moravcsik's (2000) assertion

¹³⁵ Moravcsik, 'Taking Preferences Seriously' (n 102), 525.

¹³⁶ Moravcsik, 'Origins of Human Rights Regimes' (n 56), 220.

¹³⁷ Hathaway 'Do Human Rights Treaties Make a Difference?' (n 23), 1954.

¹³⁸ Such states have been termed 'false positives'. See Simmons, *Mobilizing for Human Rights* (n 94).

that the emergence of human rights treaties stems from the need for emerging democracies to internalise international norms.¹³⁹ Coming out of a period in which rights may have been oppressed, the governments of these states seek to establish international mechanisms around which future governments will be forced to frame their standards while simultaneously being subject to monitoring by an international treaty body. In this way, present governments are able to – or at least attempt to – preserve human rights provisions in the following periods.

Apart from this very logical explanation about why emerging states favour human rights treaties for their internalising qualities, it may also be the case that established democracies and their citizens take good human rights standards almost as a given and accordingly there is a lower incentive to push for the establishment of institutional regimes that demand high levels of human rights protection: the stability of a state's democracy might ensure that domestic constraints will guarantee that those good standards are upheld. By contrast, emerging democracies face a far greater likelihood that domestic institutions – either intentionally or not¹⁴⁰ – will fail to uphold those international standards. This republican liberalist perspective might accordingly contend that '*the strongest support for binding human rights regimes should come not from established democracies but from recently established and potentially unstable democracies*'.¹⁴¹

Despite this, the literature remains unclear as to the influence democracy plays in a state's tendency to commit to treaties: the backing of citizens¹⁴² and a state's commitment to the rule of law¹⁴³ have both been identified as influential factors. But how does this square with the argument that emerging democracies are the key drivers behind such treaties? After all, the rule of law in such states is

¹³⁹ Moravcsik, *Origins of Human Rights Regimes* (n 56), 228.

¹⁴⁰ States can intentionally breach their treaty obligations by concerted action aimed at violating a particular treaty provision, or they might unintentionally breach owing to institutional problems that result in a violation. Equally, states might fail to give effect to the treaty provisions, such as by aligning its domestic legislation with its international requirements, and whereby this can also be intentional or unintentional.

¹⁴¹ Moravcsik *Origins of Human Rights Regimes* (n 56), 228-229.

¹⁴² Marc Busch and Eric Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in Daniel LM Kennedy and James D Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E Hudec* (1st edn, Cambridge University Press 2002), 457.

¹⁴³ This is discussed in detail in Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 132),

unlikely to have already become stable and reliable. It may be that the process of emerging from a non-democratic context may have run contemporaneous with a stabilisation and improvement of the rule of law. Alternatively, the spread of democratic values may have been the result of rational action: states might calculate the impact of treaty commitment on the domestic setting and consider the effect of ratification on democratic principles in other states. Domestic politics and the preferences of the populace are therefore expected to drive activity on the international level. In this way, two levels of engagement exist: the state's engagement with its citizens and its engagement with the international community.¹⁴⁴ But as we have indicated, the direction of the causality can go both ways. On the one hand, the Putnam model focuses on the state translating the preferences of its constituents to the international level, whereas on the other hand, the Moravcsik model emphasises the translation of international norms onto the domestic setting. In both cases, domestic preferences and domestic politics can drive and be subject to human rights norms, with the nature of this interaction explainable from both liberal and rationalist perspectives.

A further factor influencing both state ratification and compliance will be the need to transpose the treaty's provisions into domestic legislation.¹⁴⁵ We assume that the identity of a state as a monist state or a dualist state could influence ratification and compliance tendencies,¹⁴⁶ as monism dictates that treaties are automatically internalized.¹⁴⁷ For such states, in which the ratification of a human rights treaty automatically enables citizens of that state to claim the rights provided for in the treaty in domestic courts and through quasi-judicial bodies, the cost of ratification is assumed to incorporate the additional cost of

¹⁴⁴ Putnam, *Diplomacy and Domestic Politics* (n 33).

¹⁴⁵ The relationship between domestic law and international treaties has been subject to extensive analysis, some of which are Robert B Lillich, 'Invoking International Human Rights Law in Domestic Courts' [1985] 54 *University of Cincinnati Law Review* 367; Christopher Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents' [2000] 22(1) *Human Rights Quarterly* 187.

¹⁴⁶ Heyns and Viljoen, *The Impact of Human Rights Treaties the Domestic Level* (n 121), 490.

¹⁴⁷ This author found the following helpful in his research into the intricacies of these two approaches: JG Starke, 'Monism and Dualism in the Theory of International Law' [1936] 17 *British Yearbook of International Law* 66.

compliance that comes with potential claims.¹⁴⁸ As the content of the treaty immediately becomes part of domestic law, this brings with it the added issue that the state can be henceforth held to account for breaches of its treaty obligations. The added nature of monist transposition as entailing that the transposed treaty takes precedence over domestic law, as provided for in many monist states,¹⁴⁹ is also likely to increase ratification costs in situations in which the transposed treaty conflicts with domestic legal provisions. Assuming that domestic practices by state institutions would have been in line with domestic legislation, then ratification is likely to make those practices actionable and illegal. Unless the state institutions can quickly alter their practices and improve their human rights standards in a short time frame, we would expect claims to be made in the periods after ratification. This additional cost of ratification, such that the state has limited time to alter domestic practices before claims are taken, might deter ratification among monist states. In one sense, monism mitigates the ability of states to ratify solely for reputational and political purposes, as the costs of potential complaints will be more accentuated in the cost of ratification. If state standards are aligned with treaty standards pre-ratification, reputational benefits can actually drive ratification among monist states, as the benefits accruable will be more pronounced.

This must be contrasted with the situation relating to dualist states, wherein it is more difficult to determine the nature of state motivations: as dualist states require transposition of treaties into domestic law, states are able to ratify international treaties and attain the reputational benefits thereof without having to deal with the real costs of the treaty on the domestic level. Delays in

¹⁴⁸ Importantly, though, that cost will also depend on how the court's interpret the relevant treaties and their provisions. See David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (1st edn, Cambridge University Press 2009); Melissa A Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' [2007] 107(3) Columbia Law Review 628.

¹⁴⁹ Some states are said to operate a mixed system of transposition, with some areas of international law directly enforceable and other requiring legislative action, and so they cannot be said to be either monist or dualist. The US is one such state. For a more detailed overview of the US context regarding human rights treaties, see Richard B Bilder, 'Integrating International Human Rights Law into Domestic Law – U.S. Experience' [1981] 4 Houston Journal of International Law 1; David Sloss, 'The Domestication of international Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' [1999] 24 Yale Journal of International Law 129.

transposition assist the state in enjoying those benefits without incurring the costs of being subject to claims. The dualist approach, however, can have advantages if states are motivated toward improving their human rights standards. In those circumstances, the delay between ratification and implementation provides the state with a period during which they cannot be subject to complaints relating to the treaty's provisions. This is assumed to give the state leeway toward facilitating state improvements in their human rights standards so that they are brought up to the level required by the treaty. In those periods, breaches of treaty obligations may continue, but if the state intends to improve its standards then claims that might be otherwise taken in relation to treaty breaches would likely to be inefficient, as the outcome would likely be a determination that the state ought to improve its standards, which it is assumed to be attempting to do anyway. Dualism can therefore remove the possibility of inefficient claims being taken by alleged victims of treaty breaches in cases in which the dualist state is a genuine ratifier. Equally, for those dualist states with no intention of altering their standards but which wish to attain the reputational benefit of ratification, implementation of the treaty can be postponed for significant periods. In that way, dualist ratification has two sides to it.

Whether states are monist or dualist only addresses the superficial cost of ratification, in that it deals with a treaty's relationship with domestic law and the extent to which it takes precedence over that law. Separate to this, however, will be the degree of judicial independence,¹⁵⁰ the level of education of judges and lawyers,¹⁵¹ and the state's legal heritage. These issues are expected to influence the extent to which the treaty's contents will be actually taken account of on the domestic setting and the resulting cost of compliance. Whereas monism and dualism only relate the international order with the domestic order, these variables are more pertinent in determining how that interaction operates. So although a treaty might be directly enforceable in a monist states, fiercely independent judges might not take heed of the directly enforceable treaty. Equally, well-educated lawyers may be capable of circumventing a state's dualist

¹⁵⁰ This is assumed to be a crucial issue, and something that distinguishes democratic states from non-democratic states. The importance of independence is well discussed in Linda Camp Keith, 'Judicial Independence and Human Rights Protection around the World' [2002] 85(4) *Judicature* 195.

¹⁵¹ Heyns and Viljoen, 'The Impact of Human Rights Treaties' (n 121), 528.

character and may be able to take advantage of the standards outlined in the treaty when making claims against the state for its poor human rights standards. We can therefore see that while a state's legal character is an importance factor in a treaty's incorporation into domestic law, other features of a state's domestic legal character can also be pivotal in the influence a treaty has domestically. To ignore the domestic context, both in relation to democratic principles and the nature of the state's legal system would exclude from our analysis a variable that is assumed to affect state decisions regarding international engagement significantly. But by recognising – and possibly including – this factor in the analysis, we are moving away from the state as a 'black box'. A state that has unitary preferences is a state that is not subject to the influences of other entities. In this light, taking a rational choice approach and acknowledging domestic influences requires the kind of careful probing applied above. Domestic factors can play a role, we argue, but that role will be subsumed into a state's cost-benefit analysis. This preserves the character of the state as a unitary act while also recognising the undeniable contribution of domestic issues in international affairs.

C. The Role of NGOs

Rational choice theory based approaches fail to consider that human rights treaties might emerge because of a spreading belief in their general worthiness,¹⁵² and pay no attention to idealism and constructivism, which make a correlative link between the emergence of international human rights law and the activities of NGOs.¹⁵³ The influence of NGOs exists – and has existed for decades – to a large extent parallel to the realm of state power, although not outside the realm of state control.¹⁵⁴ State power exists apart from the emergence of norms and the influence

¹⁵² Michael W Doyle, 'Liberalism and World Politics' [1986] 80(4) *The American Political Science Review* 1151.

¹⁵³ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] 52(4) *International Organization* 887; Jeffrey Huffines, 'The Role of N.G.O.S in U.S. Ratification of Human Rights Treaties' [1997] 3 *ILSA Journal of International & Comparative Law*, 641.

¹⁵⁴ States may influence the emergence of norms through strategic and targeted campaigns either for or against these norms, while states are equally capable of aiding, through funding, and

of NGOs because it is intrinsic to each state, rather than existing, as those other influences do, on a transnational level. A state's power is inherent to its character and manifests itself on a horizontal level such that states interact with other states in a to-and-fro manner and express their power in this way.¹⁵⁵ This is evidently distinct from the way in which 'norm entrepreneurs',¹⁵⁶ stakeholders that attempt to mobilise collective action relating to a norm, attempt to spread norms throughout the world: rather than spreading horizontally through state-state interaction, or vertically through engagement with the state, transnational NGOs exist laterally to these dynamics by being able to utilise poor human rights standards in one state to petition governments in other states to both recognise those poor standards and to improve their own provision of human rights.¹⁵⁷ As non-state actors have a status that is not formal or institutional like that of states, they must influence state decisions without exercising significant power, and must instead take a softer approach, affording states the leeway to make their own judgements while simultaneously putting pressure on states to consider the inter-state effects of those decisions.

While the ideational reading of the spreading of norms is far less cynical of the possible success of an international movement calling for greater respect for human rights, it has certainly not been without its critics.¹⁵⁸ The accusation that idealism 'overemphasizes the role of social structures and norms at the expense of the agents who help create and change them in the first place'¹⁵⁹ puts it in direct

hindering, through repression, NGOs. See, for example: Mark Neocleous, *Administering Civil Society: Toward a Theory of State Power* (1st edn, Palgrave Macmillan 1996).

¹⁵⁵ States can also exercise power vertically, through the suppression of interest groups that are a threat to a state's hegemony.

¹⁵⁶ There are a number of nuanced interpretations of this meaning. See: Cass R Sunstein, 'Social Norms and Social Roles' [1996] 96 Columbia Law Review 903; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' [2004] 54 Duke Law Journal 621; Ethan A Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' [1990] 44 International Organization 479.

¹⁵⁷ Thomas Risse, 'The Power of Norms versus the Norms of Power: Transnational Civil Society and Human Rights' in Ann M Florini (ed), *The Third Force: The Rise of Transnational Civil Society* (1st edn, Carnegie Endowment 2000); Anne Peters, *Non-State Actors as Standard Setters* (1st edn, Cambridge University Press 2009).

¹⁵⁸ Jack Goldsmith and Steven D Krasner, 'The Limits of Idealism' [2003] 132(1) Daedalus 47.

¹⁵⁹ Jeffrey T Checkel, 'Review: The Constructivist Turn in International Relations Theory' [1998] 50(2) World Politics 324, 325.

conflict with state-centric models, including rational choice, and suggests that it fails to sufficiently account for the importance of state power. Nevertheless, recent changes in the nature of international engagement and the speed with which norm can be spread – such as through online campaigns¹⁶⁰ – can be used to justify the approach's merit. The greater ability of transnational actors to engage with one another, to disseminate literature, and to update one another about human rights standards in other regions assists the argument that social movements must be recognised as being influential in the emergence of a global human rights discourse.

That notwithstanding, we must be careful not to apply a counter-factual analysis to the development of treaties by assuming that the falling cost of communication may have aided global recognition of human rights norms. Indeed, the historical existence of such barriers to communication remained in place – since time immemorial – until relatively recently.¹⁶¹ Any contention that idealism may have been a pivotal force in the development of human rights norms must take account of these issues. The ease with which norms can spread – both organically and as part of a structured campaign by transnational actors – is a direct function of the cost of spreading those norms.¹⁶² Lower costs of spreading information are assumed to be found in economically developed states, owing to greater access to information technology.¹⁶³ Equally, it may be that

¹⁶⁰ An interesting study of the relationship between NGOs, norms, and information technology can be found in Hyunjin Seo, Ji Young Kim, Sung-Un Yang, 'Global Activism and New Media: A Study of Transnational NGOs' Online Public Relations' [2009] 35(2) Public Relations Review 123; but information and its costs can also be analysed from a power-centric perspective, as applied in Robert O Keohane and Joseph S Nye Jr, 'Power and Interdependence in the Information Age' [1998] 77(5) Foreign Affairs 81.

¹⁶¹ In a long-term sense, the pace of change of falling communication was remarkably slow over the centuries. See, for an overview of economic history and the role of communication and information costs, Gregory Clark, *A Farewell to Alms* (1st edn, Princeton University Press 2007), 305-309.

¹⁶² For an overview of the costs of reporting human rights related problems, see Jamie Frederic Metzel, 'Information Technology and Human Rights' [1996] 18(4) Human Rights Quarterly 705.

¹⁶³ This can be broadly termed the 'global digital divide' and relates to the inequality existing between states in terms of access to information technology. See Mauro F Guillen and Sandra L Suarez, 'Explaining the Global Digital Divide: Economic, Political, and Sociological Drivers of Cross-National Internet Use' [2005] 84(2) Social Forces 681.

economically developed states are also likely to be more democratic.¹⁶⁴ In addition, the commitment these countries show to democracy – such that domestic NGOs are not repressed¹⁶⁵ – might be assumed to indicate that norms will spread from wealthier and more democratic states to poorer and less democratic states. The relationship between democracy and a strong NGO sector has been shown to be correlated with better human rights standards,¹⁶⁶ with this finding acting as evidence ‘in favor of liberal theories and the theory of transnational human rights advocacy networks’.¹⁶⁷ But these findings do not establish the nature of the causality. While ideational arguments emphasising the importance of non-state actors implicitly make reference – owing to the means by which non-state actors interact – to the value democratic states place on human rights principles, it may be this valuation of the importance of those principles that aids the spreading of norms, rather the existence of non-state actors themselves. Without the facilitation of democratic states committed to these principles, and without the greater ease of communication that comes with democratic – and perhaps wealthier – states, norms cannot spread.

This slights the role of non-state actors, as it apports the credit for the emergence of human rights norms to states. This is not to say that constructivist arguments fail to explain the evolution of treaties in any way; rather, the approach’s failings lie in the difficulty in distinguishing the influence of non-state actors from the role played by state power and state institutions in facilitating that influence. If we cannot remove NGO-influence from the shadow of democratic states, we cannot measure their impact alone.

¹⁶⁴ It has been argued that ‘[...] democracy is related to the state of economic development. The more well-to-do a nation, the greater the chances that it will sustain democracy’, Seymour Martin Lipset, ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’ [1959] 53(1) *American Political Science Review* 53, 75.

¹⁶⁵ For an overview of the relationship between these entities, see Claire Mercer, ‘NGOs, Civil Society, and Democratization: A Critical Review of the Literature’ [2002] 2(1) *Progress in Development Studies* 5.

¹⁶⁶ Hafner-Burton and Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (n 46), 1390.

¹⁶⁷ Neumayer ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ (n 84), 950.

D. The Role of Institutions

Quite apart from the influence of input-oriented factors that might affect how a state reaches its ratification decision, such as the power of the state or the role of non-states actors, output-oriented factors, such as the benefit to be attained from establishing a treaty and an institution to regulate and monitor human rights standards, also play a role.¹⁶⁸ From this viewpoint, 'international law exists and has force [...] because it provides a means of achieving outcomes possible only through coordinated behaviour.'¹⁶⁹ This doesn't address the identity of the states involved in the establishment of the treaty but instead assumes that, irrespective of a state's internal characteristics, self-interest will be a motivating factor. So long as the existence of the treaty and the institution serve the state's interests, the state will ratify the relevant treaty and recognise the institution's authority to regulate its domestic provision of human rights. During treaty negotiations, though, states are somewhat constrained in their ability to genuinely assess the likely advantages and disadvantages of electing to pursue one course of action or another, related to the aforementioned problem of bounded rationality.¹⁷⁰ Accordingly, establishing the true cost of future engagement with other states parties and the relevant institution is constrained.¹⁷¹ A state's inability to fully determine how other states will interact with it in future periods might result in that state electing to pursue solely its own interest or result in it electing to cooperate with other states. Bounded rationality can therefore push states in the direction of self-interest alone, cooperation alone, and cooperation as a self-serving approach.

¹⁶⁸ Some of the best articles dealing with this approach include Robert O Keohane and Lisa L Martin, 'The Promise of Institutional Theory' [1995] 20(1) *International Security* 39; William J Aceves, 'Institutionalist Theory and International Legal Scholarship' [1997] 12 *American University Journal of International Law & Policy* 227; Kenneth W Abbott, 'Towards a Richer Institutionalism for International Law and Policy' [2005] 1 *Journal of International Law & International Relations* 9.

¹⁶⁹ Hathaway *Do Human Rights Treaties Make a Difference?* (n 23), 1950.

¹⁷⁰ Simon, 'Theories of Bounded Rationality' (n118), Simon, *Models of Bounded Rationality* (n118).

¹⁷¹ This translation of bounded rationality to international relations is well discussed in James M Goldgeier and Philip E Tetlock, 'Psychology and International Relations Theory' [2001] 4 *American Review of Political Science* 67.

Institutionalism enables us to better understand the development of international human rights law by emphasising that states, rather than acting alone and solely in their own interest, engage with other states in order to foster cooperation, which may benefit the state's stock on the international setting, may consolidate standards on the domestic setting, or may result in standards improving in other states. Cooperation is the conduit through which a state's base motivations are achieved. Once that cooperation takes place, such that states start to discuss the formation of a treaty outlining human rights standards, it is unclear to what extent states will cooperate in each subsequent period. Cooperation might be viewed as simply the point at which states come together to negotiate and might not be viewed as a continuous approach. Once states have agreed to cooperate over an area of international law, they may nonetheless fail to fully cooperate in the periods during which the treaty is negotiated and in the periods following its – or the monitoring body's – establishment. If states are pursuing self-interested goals, however, then cooperation may stem from a state's concern for its international reputation.¹⁷² This evidently suggests that self-interest and cooperation do not have to contradict one another; it may rather be that institutions can either coexist with state self-interest or can actually be the result of that self-interest. Institutionalism, in this vein, argues that

‘regimes exist in order to facilitate agreements and are complied with largely because of the rational utility-maximizing activity of states pursuing their self-interest. Regimes thus allow countries to engage in cooperative activity that might not otherwise be possible by restraining short-term power maximization in pursuit of long-term goals’¹⁷³

Whether the benefits that can be gained from forming institutions genuinely affect state motivations is not clear. With the quantitative research showing anomalous ratification patterns among states,¹⁷⁴ it is entirely conceivable that these anomalies can be explained through the institutionalist approach. States unconcerned about human rights values might become party to treaties if cooperation – or at least artificial cooperation – aids their overall welfare.

¹⁷² The most well-developed approach to this issue can be found in Andrew T Guzman, ‘Reputation and International Law’ (2008) UC Berkeley Public Law Research Paper No. 1112064 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112064> accessed 10 January 2011.

¹⁷³ Hathaway *Do Human Rights Treaties Make a Difference?* (n 23), 1948.

¹⁷⁴ *ibid* 1978.

Institutionalism assists us in understanding how agreements are reached and explains various treaty structures. Its explanatory value lies in its attractively simple assertions.

E. The Role of Reputation

Concern for one's reputation may be a motivating factor influencing all (rational) state activities, and can be used to explain state motivations and the emergence of international treaties.¹⁷⁵ While it can be used as a standalone explanatory theory, it can also be used in conjunction with the dominant IR theories. Thus, for example, realism's focus on powerful states as the core drivers of international law does not preclude the contention that states that follow those powerful states do so because they want to advance their international reputation. This may be as a state committed to international human rights law, or as a state committed to the political philosophy of the powerful state it has followed, or indeed both. Equally, idealism's emphasis on non-state actors and the spreading of norms can also be fitted around the reputational model, as being seen to be receptive to changing norms might improve a state's reputation among non-state actors.¹⁷⁶ That improved reputation could lead to increases in non-state actor aid to a state's citizens or a larger non-state actor presence with that state.¹⁷⁷ From the perspective of institutionalism, engaging in negotiations may add to a state's reputation as being cooperative, with the adherence of states to treaties

¹⁷⁵ See, generally, Guzman, 'Reputation and International Law' (n 172).

¹⁷⁶ Congratulatory statements by NGOs in relation to state ratification decisions regarding international treaties are not uncommon; for such a statement relating to ratification of the Rome Statute, see Parliamentarians for Global Action Press Release, 'Parliamentarians for Global Action (PGA) applauds the decision of the President of the Philippines to refer the Rome Statute of the ICC for the approval of the Senate of the Philippines', 7 March 2011, available at <http://www.pgaction.org/uploadedfiles/ICC_Philippines_PGA_Statement_7_March_2010%20_2_.pdf> (accessed 18 December 2011).

¹⁷⁷ In states with poor human rights records, we might expect that a state's assumed commitment to its obligations would result in non-state actors increasing their role or presence in the state, owing to a higher likelihood that this will be effective and a lower likelihood that operations will be curtailed or assets expropriated; in a state with a good human rights record, an improved commitment to human rights might result in a greater concentration of NGOs based in that state.

explained on the basis of ‘concern for their reputation.’¹⁷⁸ But this has been rejected by some scholars, who argue that compliance cannot be explained by reputation if states will need to align their standards with those of the treaty.¹⁷⁹ Only those states that can costlessly ratify, such as if their pre-treaty standards fit the standards outlined in the treaty, will ratify. States that do not intend to comply will not ratify because ratification entails an increase in expectations on the domestic level and in the international setting, and whereby meeting these expectations will require concerted action by the state. For such states, it will be cheaper not to ratify the treaty and to suffer the associated reputational costs than to ratify the treaty and to suffer the associated reputational costs of being unable to comply with its standards.

This evidently suggests that while power, non-state actors, domestic politics, and institutions can influence a state’s decision to ratify a human rights treaty, reputation-based motivations affect both the decision to ratify and the decision to comply. In addition, the influence of reputation is distinct in another way: it can be used to punish non-ratification and compliance. While reputational sanctions – such as international condemnation – that can be applied to non-ratifying states ‘are limited in their magnitude’,¹⁸⁰ they might nonetheless push states in the direction of ratification and compliance.

A further limitation of the usefulness of reputational sanctions is that they only matter when they are observable and when the observer is concerned about the treaty that has not been ratified or complied with. Observability is a function of the level of integration of the respective states, while the level of concern shown by the international community depends on the community’s commitment to the respective treaty. In this way, greater damage will be done to a state’s reputation the less contentious the treaty’s subject matter and the more closely integrated the state parties.¹⁸¹ By contrast, when states fail to ratify treaties

¹⁷⁸ Hathaway ‘Do Human Rights Treaties Make a Difference?’ (n 23), 1952

¹⁷⁹ Rachel Brewster, ‘The Limits of Reputation on Compliance’ [2009] 1(2) *International Theory* 323.

¹⁸⁰ Guzman, ‘Reputation and International Law’ (n 172), 72.

¹⁸¹ For example, in September 2013, following an incident in Damascus during the Syrian Civil War, in which government forces were alleged to have used chemical weapons in a civilian area, the international community was revolted and demanded that Syria become a party to the Chemical Weapons Convention. Because the Convention is so widely acknowledged among states, and because its subject matter is not contentious, the reputational damage of being seen to ignore the norm was significant.

governed by an area of law that remains contentious, or where those obligations are outlined in international treaties rather than regional treaties, we would expect reputational sanctions made by the international community to have less of an effect on a state's reputation.¹⁸² This might be rooted in a subject matter's contentiousness mitigating its influence. But while the international community might want to apply strong sanctions in relation to contentious issues, as this will more clearly express disapproval at the state's failure to ratify, this approach may be counter-productive: the contentiousness of the issue coupled with the strength of the sanctions might further deter states from ratifying.

But rather than focusing on reputational harm as an incentivising tool for achieving ratification and compliance, it might be more appropriate to focus on the reputational benefits that can accrue to conciliatory states. If the international community wants states to ratify treaties, and if the reputation model assumes that states are motivated by reputation, then affording ratifying states a reputational benefit satisfies both the interests of states and the international community.

However, one problem with this interpretation is that the predominant reputational gains would accrue to first movers and genuine ratifiers. First movers, even if ratification is not genuine, would attain a benefit because the international community assumes ratification is genuine: it has too few states with which it can compare the first state's genuineness to be able to make a proper assessment of whether that first state's ratification is *bona fide*. In cases in which early ratifiers are afforded a reputational benefit without also altering their domestic standards, we would expect the international community to be more cautious about lauding subsequent ratifiers. Instead, the international community might desist, despite the ability to measure the genuineness of ratification growing in line with the number of ratifiers. This is assumed to reduce the benefits of ratification for states unwilling to alter their domestic standards. Accordingly, superficial ratifiers are less likely to ratify, given the reduced benefit of doing so. The existence of information asymmetries between the international community and ratifying states mitigates the role of reputation as a tool of achieving increased treaty-uptake. If the international community lags

¹⁸² Reputational sanctions will be less effective in this case because the international community would be punishing states for failing to comply with obligations that are not clearly defined and in relation to an area of area that has not yet received universal backing.

congratulatory statements until such a time as the genuineness of a state's ratification can be ascertained, superficial ratifiers will be deterred from ratifying. Evidently, on the back of this analysis, reputation plays an important role in the ratification of treaties. Self-interested states are capable of becoming states parties to treaties if a reputational gain accrues to them, while the international community, concerned about achieving universal ratification cannot determine the genuineness of state ratifications and is at the mercy of a state's self-interest unless it lags affording greater reputation to ratifying states.

II. Law and Economics Approaches

While power, domestic contexts, non-state actors, institutions, reputation, and cooperation may all play a role in the development of international law and in the decision to ratify human rights treaties, the existing law and economics literature dealing with the establishment of international law bring many of these influences together and contends that international law is based on the desire of states to maximise their welfare and the need to formalise cooperation within a treaty framework.¹⁸³ We are able to read this interpretation in light of the preceding IR-based approaches, and to contextualise that understanding around law and economics arguments.

The utilisation of the principle of welfare maximisation in the context of scholarly analysis of domestic law assumes that the normative goal of law should be to ensure that the overall utility enjoyed by all subjects is at its highest.¹⁸⁴ Legislation should not be introduced and judicial decisions should not be handed down if they affect this situation such that utility is lowered in some way. In transferring this analysis to the international setting, the contention is that little or no

¹⁸³ This is broadly outlined in Trachtman, *The Economic Structure of International Law* (n 2); much of the analysis relating to the application of law and economics to international law comes from this source.

¹⁸⁴ For a background on the normative aspects of this approach, Anthony T Kronman, 'Wealth Maximization as a Normative Principle' [1980] 9 *Journal of Legal Studies* 227; see, for overview of the role of welfare maximization in law and economics, Francesco Parisi, 'Positive, Normative and Functional School in Law and Economics' [2004] 18(3) *European Journal of Law and Economics* 259.

difference exists between individuals and states. Essentially, both entities are assumed to make decisions based on whether those decisions aid their overall welfare. Whereas welfare may be a relatively easy concept to grasp in its application to individuals, in that those individuals might be wealthier, happier, or freer, its relevance with respect to states is more abstract. Can states, as entities constituting the sum of the preferences of their citizens,¹⁸⁵ be analogised as having positive or negative welfare? That those states are made up of many individuals with separate preferences makes it difficult to measure the state's overall welfare. Democratic governments making decisions in line with the preferences of the majority of their citizenry are assumed to be maximising welfare. This we could conceivably phrase as internal welfare, in the sense that the decisions made by the government on the international setting align with the interest of the majority and accordingly benefit the state as a whole in a democratic sense. Accordingly, welfare maximisation, from this perspective, can be seen to explain idealist arguments that contend that states use domestic preferences to guide international engagement: if pursuing domestically-guided policies on the international level aids the state's internal welfare, idealist approaches can be welfare enhancing.

Alternatively, welfare could be measured as an external issue: when a state makes a decision that decision has repercussions for how the state is received by the international community, meaning that, from this perspective, welfare and reputation are synonyms. As a state's reputation increases or decreases, so too does its welfare. In this light, states are viewed not as entities bringing together the preferences of their constituents but as entities with preferences themselves. Indeed, aside from reputation, power could be analogised as another form of welfare: improving one's international power will be welfare enhancing for each respective state, but might not be *Pareto*-improving for the international community as power cannot be created but merely redistributed.¹⁸⁶ Using power as a maxim for welfare maximisation therefore fails as an explanatory approach

¹⁸⁵ This problem is well elaborated in Richard C Eichenberg, 'Domestic Preferences and Foreign Policy: Cumulation and Confirmation in the Study of Public Opinion' [1998] 48(1) *Mershon International Studies Review* 97; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (n 102).

¹⁸⁶ Redistributing power among states can be *Pareto* improving if the states that lose power value it less than the states that gain power.

in relation to why international law emerges on a general level. If states are rational, they should be able to recognise that power cannot be created and that welfare maximisation based on power might be inefficient if concentration of power is the outcome.

A further argument, stemming from institutionalism, could be made that international law comes about and maximises welfare because it enables states to negotiate around issues that prevent welfare being maximised. During negotiation of treaties and institutions, it's suggested, there are a number of stages. First, countries negotiate how they will negotiate. Second, countries agree 'rules of non-coercion, property rights, and contract.' This makes subsequent negotiation easier. Thirdly, institutions are put in place that will reduce transaction costs further.¹⁸⁷ Such institutions indicate the desire of states to reduce the costs of negotiation and to maximise welfare, with human rights treaties, among others, becoming 'transactions in authority',¹⁸⁸ according to which a state's ratification indicates its acceptance that the domain of human rights will no longer be exclusively governed by that state alone.

This transfer of authority, however, is only permissible if it is *Pareto* optimal. Trachtman has stated that 'if the barriers to bargaining are eliminated, and parties reach no bargain, we may assume that there was no Pareto-improving bargain available'.¹⁸⁹ Such a conclusion presents an anomaly for negotiations over international law, as its perspective is somewhat black and white: it simply assumes that treaties are not negotiated because the treaties do not improve overall welfare. This fails to take account of external influences and variables, such as the heterogeneity of the parties or each party's resolve that particular conclusions are reached. By contrast, the failure to form an international treaty or establish an institution might not stem from a failure to achieve a *Pareto* improving outcome, but may be rather rooted in the greater commitment of certain players to not agreeing than in the commitment of other players to agreeing.

¹⁸⁷ Trachtman, *The Economic Structure of International Law* (n 2) 10

¹⁸⁸ Trachtman, *The Economic Structure of International Law* (n 2), 14.

¹⁸⁹ George Norman and Joel P Trachtman, 'The Customary International Law Supergame' Working Paper 2004, Tufts University (9 March 2004), accessed 10 August 2013, 18

Put very simply, if global welfare maximisation is a necessary criterion for explaining treaty formation, such that the treaty will 'maximize [...] net gains',¹⁹⁰ an absence of an international treaty governing a particular area of human rights implies, firstly, that states do not want to create international law in that particular area, and secondly, that to regulate on the international level does not result in net gains for the international community.

If international law only materialises when it is in the interest of states (irrespective of what drives those interests) then the emergence of international law over the past number of centuries, as a distinct body of law, would need to be explainable on that basis. Whereas state interaction was previously based on customary international law, there was a gradual trend toward codification.¹⁹¹ Goldsmith and Posner frame this development in game theoretic terms, suggesting that 'many instances of observed CIL may be understood in terms of bilateral cooperation along the lines of a bilateral prisoner's dilemma game'.¹⁹² According to this viewpoint, codification of what were previously informal rules can be understood from the perspective that parties to treaties want to ensure that defection is avoided, and presumably that they want to maximise welfare. But in order to mitigate defection, states must be able to engage with one another with limited information, as it is costly to enquire about the actions and preferences of other states. In this way, the formation of a treaty is done somewhat blindly. States are armed only with the information they acquired in the customary setting and are aware that compliance in the treaty setting may differ. In periods following the formation of an initial treaty, however, states become better informed about one another, acquiring information about each other's preferences and activities, with this leading to a reduction in information asymmetries and facilitating easier resolution of treaty breaches.

This assessment of the emergence of treaties, generally, forms the central assertion of the law and economics literature dealing with this issue. Treaties are assumed to increase state incentives to cooperate, as the cost of learning about state preferences and the likelihood of breach decreases under formalised rules

¹⁹⁰ Trachtman, *The Economic Structure of International Law* (n 2), 15.

¹⁹¹ For an excellent overview of this matter, see HWA Thirlway (ed), *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1st edn, Martinus Nijhoff 1972)

¹⁹² Norman and Trachtman, 'The Customary International Law Supergame' (n 189), 5.

and institutions. One could therefore argue that maximising welfare becomes easier as more treaties emerge, as falling information asymmetries will expedite treaty formation under *Pareto* improving conditions. This suggests that the number of human rights treaties in place would grow over time, as the cost of negotiating falls. This has been somewhat borne out in practice, as states have not shown a tendency to form all treaties in early periods.¹⁹³ On top of this, falling information asymmetries allow states to act more strategically, such as by lodging reservations, objections, and by making submissions to periodic review reports. Taken together, these assorted arguments indicate the importance of information and its availability in both the treaty formation and treaty monitoring process.

But if we consider codification as a means of moving state-to-state interaction away from the prisoner's dilemma setting, the implication is that shirking is the preferred option by both states. That shirking results in externalities for the other party makes it theoretically more appealing, despite its inefficiency.¹⁹⁴ While defection may result in short term gains, the long-term consequences of not cooperating are assumed to outweigh those initial gains. Formalising rules and putting in place institutional structures to monitor compliance increase the cost of shirking and makes it more appealing for both parties to cooperate, with cooperation assumed to indicate a preference for long-term gains over short-term gains. The formal nature of treaties in comparison with the greater uncertainty of customary international law reflects the expectancy that adherence to the former will be stable for a longer period. That stability of adherence assumes, though, that parties can communicate, that information as to compliance is available, and that a somewhat close relationship exists.¹⁹⁵ These conditions must have been firstly met for customary international law to emerge, and secondly, for those customs to be formalised into international law as we know it today.

¹⁹³ As of 1970, three treaties had been drafted; by 1980, another treaty had been added to that list; by 1990, another three treaties were available to states to ratify; in the decade up to 2000, a new treaty was drafted, while another two were drafted between 2000 and 2010.

¹⁹⁴ For a good overview of the various strategies open to players in this scenario, see Robert Axelrod, 'The Evolution of Strategies in the Iterated Prisoner's Dilemma' in Cristina Bicchieri, Richard C Jeffrey, and Brian Skyrms (eds), *The Dynamics of Norms* (1st edn, Cambridge University Press 1997)

¹⁹⁵ Trachtman, *The Economic Structure of International Law* (n 2), 89-95

Formalising rules therefore follows a continuum from a Hobbesian world to a world of clearly defined rules governing state behaviour and state-to-state interaction. Having said that, if no institutions are put in place does this mean that negotiation efforts have been a failure? In other words, are formalised structures always the preferred institutional design? To a certain extent, the heterogeneity of the parties to treaty negotiations can also be a factor in the success or failure of those negotiations. As Trachtman points out, the payoffs from complying in a prisoner's dilemma situation vary and the tendency to defect will depend on the asymmetries between the parties.¹⁹⁶ In addition, the number of parties to treaty negotiations is also an important variable: as more parties take part in negotiations, the gains from defecting are expected to increase. The continual emergence of new states in the twentieth century would have been expected to heighten those gains, as more could be attained when one defects from a larger group than when one defects from a smaller group. Is it, however, realistic to contend that defecting from human rights treaty negotiations or treaties themselves can be beneficial if those treaties deal with internal matters? A defecting state could continue to pursue its own interests and would not have to take account of the wishes of the international community or of the pronouncements of particular treaty bodies. Remaining outside of the treaty system or breaching one's obligations brings greater welfare to these states than being inside the system. The gains from defection can be therefore analogised as the ability to pursue domestic human rights policies not influenced by international law and the ability to externalise costs onto other states. Treaty formation as a contractual analogy fits within this understanding, and is relied upon at various points later in this analysis.

This reading of the emergence of international human rights treaties attempts to link the existing game theoretic approaches to international law with the desire of all states to maximise their welfare. When overall global welfare will be maximised as a result of a treaty's formation, states will form that treaty and establish the relevant institution to monitor state compliance. All of this assumes that formalisation will be *Pareto* improving and an efficient outcome.

¹⁹⁶ Trachtman, *The Economic Structure of International Law* (n 2), 88.

III. Analysis

This chapter has mostly attempted to analyse IR scholarship relating to how states engage about human rights matters on an international level. As such, there are no conclusions to be drawn. Instead, we can only analyse what has gone before and attempt to frame this within the existing law and economics literature. The discussions in the preceding sections have attempted to do just that by examining potential explanations for why states might form and ratify international human rights treaties and comply with their treaty obligations. What is clear is that ratification should not necessarily be equated with compliance, meaning that although some of the arguments used to explain ratification might also explain compliance, other explanatory approaches might be required.

Thus, for example, a number of explanations exist in the literature to help us grasp this complex issue: states might comply because they view the relevant international law as legitimate,¹⁹⁷ compliance might be explainable through a game-theoretic analysis, such that states might adhere to their treaty obligations on the basis of reciprocity, retaliation, or concern for their reputation,¹⁹⁸ or, and rejecting rationalist approaches, it might be that compliance stems from treaties playing instrumental and expressive roles.¹⁹⁹ Equally, ratification and compliance can be viewed as being the logical outcome of a decision to cooperate in a formal setting.

Both the decision to ratify and the decision to comply can be analysed through a variety of approaches, although central to the present discussion has been the borrowing of approaches from IR scholarship. The classification of the state as a 'black box' that seeks to pursue its own interests assists objective analysis as scholars are able to focus their attention on the inter-state dynamics that result in particular preferences emerging on the international level. This rejects the idea of

¹⁹⁷ Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' [2006] 100 *American Journal of International Law* 88

¹⁹⁸ As has been discussed, this will only play a role if the reputational benefits can be garnered by the states (i.e. if the international community cares and if it can observe state activity).

¹⁹⁹ Murray Edelman, *The Symbolic Use of Politics* (2nd edn, University of Illinois Press 1985); Margaret E McGuinness, 'Exploring the *Limits* of International Human Rights Law' [2005] 34 *Georgia Journal of International & Comparative Law* 393, 398.

state preferences as being the outcome of the interaction between various stakeholders on the domestic level, who engage with one another and indicate their policy priorities and the means by which these approaches might be achieved, with the state then ratifying or not according to those expressed domestic preferences. Instead, the 'black box' viewpoint views ratification and compliance as removed from domestic influences. But while idealism and rationalism might appear in conflict with one another, we discussed how this perception could be addressed.

On the surface, too, comparing rationalist approaches with constructivist models, which put greater emphasis on a state's desire to act out social norms and values,²⁰⁰ indicates that the division between the two theories lies in rational choice theory's focus on intrinsic self-interest and constructivism's focus on more worldly and tangible issues (e.g. adherence to a social norms). However, this should not preclude either model influencing the other, and nor should it preclude the co-existence of both models as explanatory in enabling us to understand adherence to international legal obligations.²⁰¹ In fact, acknowledging that rational choice approaches and constructivist models need not be viewed as conflicting allows us to better appreciate the dynamics of state adherence. Rational calculations as to the costs and benefits of treaty ratification and compliance fall on how the consequences of one course of action or another will affect a state's welfare, with this calculation influenced, by necessity, by the value a state places on the norms governed by the respective treaty. In this way, rational models inherently rely on idealism's focus on the subjective value of particular ideals and how this should be acted out internationally as well as relying on culture and social constructions, from constructivism.

Over-emphasising rational calculations may therefore result in overlooking important variables. If we accept that analysing treaty ratification and compliance is best served by applying a confluence of approaches from IR, we might be better able to arrive at a concrete theory to explain ratification and compliance decisions. In doing that, however, we must be careful not to blur the

²⁰⁰ Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in Robert J Beck, Anthony C Arend, and Robert Vander Lugt, *International Rules: Approaches from International Law and International Relations* (1st edn, Oxford University Press 1996).

²⁰¹ Stefan Oeter, 'Toward a Richer Institutionalism for International Law and Policy: A Comment on Kenneth Abbott's Recent Work' [2008] 1 *University of Illinois Law Review* 61, 65.

lines between the different models. Instead, each approach should recognise the distinct factors influencing a state's ratification function from rationalist, constructivist, liberal, or idealist angles. We can distinguish between factors influencing states by terming them 'intrinsic' and 'extrinsic'. Intrinsic factors are identified, in this interpretation, as those factors that can influence a state's decision with respect to how it acts on the international stage and which are inherent to the state. These factors are intrinsic to each state because they can mould how a state approaches its ratification decision and are factors that define a state's identity. In combining rationalism and idealism, we can conceive of a situation in which a state's ethnic make-up may determine how highly the state regards protection of minorities, with treaties guaranteeing such rights likely to be either backed or shunned depending on the value a state places on protection and on the costs of that approach.²⁰² By contrast, extrinsic factors are those factors that do not form part of a state's characteristics, such as conditionality in the European Union,²⁰³ and which are assumed to influence a state's tendency to ratify – or comply with – a particular international instrument.²⁰⁴ In contrast with intrinsic factors that might influence how a state values a particular ideal, extrinsic issues are largely beyond the state's control and must be taken into account with this in mind.²⁰⁵ Applying a rational cost benefit analysis therefore requires that states assess the (extrinsic) nature of treaty structures in light of the state's (intrinsic) valuation of the treaty's subject matter. In this way, the respective influences of institutionalism and idealism in relation to social norms

²⁰² For an overview of this issue more generally, see Marc Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of Minorities* (1st edn, Oxford Commentaries on International Law 2005); Marc Weller, Denika Blacklock and Katherine Nobbs (eds), *The Protection of Minorities in Wider Europe* (1st edn, Palgrave Macmillan 2008).

²⁰³ Conditionality is the principle that states must fulfil certain criteria before they can be accepted as members to the European Union.

²⁰⁴ For an overview of how conditionality in the case of accession to the European Union affected state perceptions of minority rights issues in Eastern Europe, see James Hughes and Gwendolyn Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' [2003] 1 *Journal of Ethnopolitics and Minority Issues in Europe* i; Gwendolyn Sasse, 'The Politics of EU Conditionality: The Norm of Minority Protection During and Beyond EU Accession' [2008] 15(6) *Journal of European Public Policy* 842.

²⁰⁵ Extrinsic influences are only beyond a state's control to the extent that the state cannot affect these influences during multilateral state negotiations. Once extrinsic influences become part of a treaty's structure, a state's ability to affect such on influences is mitigated.

and state preferences are indelibly linked to state ratification and compliance decisions. In addition, as socialization through international engagement, the power of states, and liberal opportunities for cooperation alter those intrinsic state preferences and valuations, so too will the state's rational calculations be altered.

From a different perspective, this connection between rationalism and constructivism can be used to explain treaty formation and ratification from a law and economics perspective, as the need to cooperate and to control defection (i.e. compliance) will increase the more a state values cooperation (which will be influenced by its intrinsic social setting) and will be dependent on the formal structures that will facilitate cooperation (which will be the outcome of institutional bargaining). If welfare is maximised as a result of these various permutations, we expect treaties to emerge and we expect the game to be replayed in relation to both ratification and compliance.

By viewing the various approaches as being interrelated, we can see that they can assist one another in explaining the development of international treaties and subsequent state decisions. This chapter has attempted to survey the various IR approaches to the emergence of international treaties and state ratification and compliance decision. As we have shown, the explanatory heritage is rich and varied, and allows us many bases upon which to build our theories and in which to place our assumptions. Part II and III of this dissertation therefore go on to build on the strong theoretical foundations elaborated in this chapter.

Section II Formalising Treaties

When states come together to form international human rights treaties, the task of drafting the treaty will be arduous. Drafters will have to consider the treaty's normative goal, how to frame the respective rights, whether a treaty body will be established, the periodicity of periodic reporting to that body, how members to the treaty body are elected, and whether a dispute settlement mechanism will be established (either at the time of the treaty or at all). In relation to all of these permutations, we assume that treaty drafters are aware that their actions can affect a state's decision as to whether it ratifies the treaty or not. Perhaps the most important cost affecting a state's decision to ratify and influencing its level of compliance will be the presence or absence of a treaty body, and whether that body solely deals with monitoring (through periodic review) or also engages in adjudication (through a dispute settlement mechanism). Below we outline the basic structures of the core human rights treaties,²⁰⁶ indicating whether inter-state and individual complaints mechanism are formed alongside basic treaties or later, alongside an optional protocol (OP), and whether states opt in to recognising the treaty body's authority in the respective area or if recognition is part of ratification itself.

²⁰⁶ International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention to Eliminate All Forms of Discrimination Against Women (CEDAW); Convention Against Torture (UNCAT); Convention on the Rights of Persons with Disabilities (CRPD); International Convention for the Protection of All Persons from Enforced Disappearance (CED); Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Convention on the Rights of the Child (CRC).

Table 1: Treaty Structures

Treaty	Committee	Inter-State	Individual
ICCPR	Art 28	OP1, opt-in	OP1
ICESCR	OP	OP, opt-in	OP
ICERD	Art 8	Art 14, opt-in	Art 14, opt-in
CEDAW	Art 17	Art 29, opt-out	OP, opt-out
UNCAT	Art 17	Art 21, opt-in	Art 22, opt-in
CRPD	Art 34	Art 22	OP, opt-out
CED	Art 26	Art 32, opt-in	Art 31, opt-in
CMW	Art 72	Art 76, opt-in	Art 77, opt-in
CRC	Art 43	OP, Art 12	OP

From this table,²⁰⁷ we see that there is no clear structure to the formalisation of human rights treaties and treaty bodies: while the treaties create committees to monitor state adherence through the periodic review system, the granting of adjudicatory power to these committees, at the initial drafting stage, is more limited.

Thus far, we have attempted to describe the emergence of international human rights treaties from a variety of perspective and have framed these around assumptions from rational choice theory. Underscoring that rational choice is a state's utilisation of a cost-benefit analysis in arriving at its ratification and compliance decision. States are assumed to measure the gains and losses of their decisions and are assumed to act in light of those presumed variables. Of the benefits available to ratifying and complying states, a reputational benefit may be attainable, while on a level that applies less cynicism to state motivations, the possible lower likelihood that other states will not violate their international commitments is another clear benefit.²⁰⁸ What is central to all of these issues is how human rights treaties are structured. In this section, we take on the role of treaty drafters and examine how our choices will affect state decisions, how our choices will affects international human rights standards, and how our choices fit with theory from law and economics.

²⁰⁷ A caveat: the individual complaints mechanisms to the CRC and CMW are not yet in force.

²⁰⁸ States committed to a treaty's provisions might mistakenly assume that all other states are also committed to the treaty's provisions and might undercalculate the likelihood of noncompliance.

Chapter 3: Treaty Drafting

Whereas the section detailing existing law and economics approaches looked the efficiency of the actual process of treaty formation on an international level, in the sense that transferring regulatory authority is assumed to be *Pareto* optimal, the following analysis focuses more on the question of efficiency in international law, according to which we consider whether efficiency might be an intrinsic normative criterion around which human rights treaties might be structured. What is attempted in this section has received limited attention by law and economics scholars.²⁰⁹ We attempt to address this gap in the literature by examining the drafting of human rights treaties in relation to four issues that are likely to arise during a drafting process: universal ratification, article framing, flexibility tools, and progressive realisation. We analyse these drafting issues through the lens of efficiency and by applying rational choice theory to state decision-making.

I. Universal Ratification

The use of universal ratification as the normative goal of drafting human rights treaties assumes that drafters and the international community want all states to ratify treaties, a policy that has been termed ‘the globalization of freedom’.²¹⁰ Despite this, though, there is limited academic discussion about the normativity of universal ratification and little by way of UN documentation outlining this policy. It seems to have simply been an accepted approach in the international treaty-formation system.²¹¹ This assumes that ratification is the

²⁰⁹ Anne van Aaken, during a presentation at the University of Hamburg in October 2010, discouraged the application of efficiency to international law and suggested that scholars applying law and economics tools to international law would be better off focusing on the application of rational choice theory.

²¹⁰ Koh, ‘The Spirit of the Laws’ (n 21), 26.

²¹¹ For some work related to universal ratification, see Ineke Boerefijn, ‘Denunciations of Human Rights Instruments Jeopardises Universal Ratification’ [1998] 16 *Netherlands Quarterly of Human Rights* 3; Uta Oberdorster, ‘Why Ratify? Lessons from Treaty Ratification Campaigns’ [2008] 61 *Vanderbilt Law Review* 681.

central aim, irrespective of whether the ratifying states respect or disregard human rights principles. Such a perspective assumes that international treaties are intrinsically beneficial, and overlooks the motivations of states parties. It assumes that norms spread through close interaction – reflecting arguments about socialization – and ignores the incentives of states themselves. The argument that states can ratify treaties without the intention of aligning their domestic standards with the standards outlined in the treaties appears immaterial.²¹² What's more important is that overall ratification is maximised. Thereafter, the dynamics of state-to-state interaction and the reach of the monitoring body are assumed to influence state decisions.

However, in order for universal ratification to be achieved, we assume that treaties are structured in such a way that ratification will be appealing to all states. Given the diversity of states that can potentially ratify, this may be difficult, as structuring a treaty that appeals to all states is mitigated by the heterogeneity of those states. Nonetheless, if we assume that rights-respecting states prefer rights-disregarding states as states parties to treaties, but that the international community cannot fully screen a state's expected level of commitment, then we would expect treaties to be structured in such a way that they induce ratification from states with poor human rights standards. This will likely involve vague treaty provisions and the establishment of largely non-intrusive monitoring mechanisms. This approach has been criticised on the basis that

sacrificing greater compliance to obtain greater participation is a problematic strategy for a legal system characterized by weak enforcement mechanisms and ample opportunities for shirking treaty commitments.²¹³

In order to achieve the normative goal of universal ratification, therefore, we assume that treaty drafters will draft to the mean: they will structure treaties more 'softly' than they otherwise might, were all states rights-respecting. In this way, not structuring human rights treaties optimally (i.e. with clear provisions

²¹² Unless states have to align their domestic standards with the treaty standards, their commitments are not credible. See Beth Simmons, 'International Law and State Behavior: Commitments and Compliance in International Monetary Affairs' [2000] 94 *American Political Science Review* 819; Beth A Simmons and Allison Danner, 'Credible Commitment and the International Criminal Court' [2010] 64 *International Organization* 225.

²¹³ Laurence Helfer, 'Nonconsensual International Lawmaking' [2008] *University of Illinois Law Review* 71, 97.

and a strong treaty body) suggests that a level of human rights protection might exist beyond which it is inefficient for drafters to prescribe. By prescribing human rights standard above a certain (efficient) level, standards may be set too high and states may be deterred from ratifying. Treaties are therefore tailored in such a way that all states are incentivized to ratify. In this case, the marginal ratifier – the last state that would not ratify a more strongly structured treaty – is assumed to be determinative. It is assumed that it is better to have states as ratifiers than not, but it is also assumed that universal ratification cannot be achieved alongside strong treaties. Accordingly, this perspective suggests that striving for universal ratification necessarily requires recognition by treaty drafters that an efficient level of treaty ratification exists.

But rather than solely focusing on universal ratification as the normative goal, drafters are assumed to have the option of striving for the normative goal of maximum effectiveness. In this case, the emphasis on effective treaties suggests that treaties can be structured more strongly: treaty provisions can be written more clearly and monitoring mechanisms can be more intrusive. While these approaches are assumed to have a direct and causal bearing on effectiveness – and on state practices – the most pressing disadvantage is that this approach limits the number and diversity of potential ratifiers. States cautious about a treaty's provisions are unlikely to ratify treaties demanding that domestic standards change. Only those states that are genuinely committed to a treaty's ethos will be incentivized to ratify. Although our proposed normative goal emphasises an effective treaty, the undercurrent of the model sets efficiency of ratification as the normative goal. It accepts that certain states will not ratify stronger treaties, but contends that giving consideration to such states during the drafting process results in treaty instability. Focus is instead given to rights-respecting states alone, which, as states parties, continue with their domestic policies of providing strong human rights standards. Other states may become parties to the treaties as their preferences and morals change and as they improve their standards. Ratifying is therefore a credible signal in this model,²¹⁴ unlike in a model that uses universal ratification as its foundation.²¹⁵ Ratification signals a

²¹⁴ For an overview of the role rights can play as signalling devices, see Daniel Farber, 'Rights as Signals', [2002] 31(1) *The Journal of Legal Studies* 83.

²¹⁵ We assume that ratifying a treaty that has been drafted according to the normative goal of universal ratification is not credible because of its weaker structures.

state's commitment to the treaty's goal and its acknowledgement that sovereignty will be ceded over certain matters. But while sovereignty will be ceded, the states parties to such treaties are assumed committed to high human rights standards. Ratification is assumed to be a rational response to the treaty put forward by the treaty drafters: as standards are aligned states are assumed to incur few costs from ratification.

In this way, by focusing on drafting an effective treaty based on an efficient number of states parties, rather than on striving for universal ratification, drafters are able to both achieve respect for human rights, at least among ratifiers, and ratifying states are able to pursue their own interests. Such states are assumed to be concerned about human rights protection and maximising their welfare; achieving both depends on the characteristics of the other members of the group (i.e. the other states parties). Acting in the interests of the group, such as through adhering to one's obligations, requires either that the group is small in number or that coercion is possible.²¹⁶ A smaller number of states parties – or the presence of a powerful state – will therefore facilitate state adherence to treaty requirements. As Trachtman points out in relation Olson's work on collective action:

Olson based his perspective on the assumptions that the benefit of cooperation declines with the number of players, that the costs of monitoring increase with the number of players, and that the costs of organizing retaliation increase with the number of players.²¹⁷

This might justify the argument that an efficient number of states parties to a treaty exists, as both the cost of negotiations and the diversity of preferences of the different states can prevent agreement being reached, while the inclusion of states not committed to a treaty's ethos undercuts its stability. Trachtman further contends that 'the equilibrium number of states will tend to be small when the gain from cooperation is large, and large when the gain from cooperation is small'.²¹⁸ Treaties with a larger number of states – the goal of universal ratification – are assumed to result in a lower average human rights standard among the

²¹⁶ Mancur Olson Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (revised edition, Harvard University Press 1971); Joel M Guttman, 'Understanding Collective Action: Matching Behavior' [1978] 68(2) *American Economic Review* 251; see also Elinor Ostrom, 'Collective Action and the Evolution of Social Norms' [2000] 14(3) *Journal of Economic Perspectives* 137.

²¹⁷ Trachtman, *The Economic Structure of International Law* (n 2), 90.

²¹⁸ Trachtman, *The Economic Structure of International Law* (n 2), 133.

constituent states, meaning that the collective benefit is not expected to result in fewer violation or externalities. By contrast, a smaller number of states parties to a treaty, all of which are assumed committed to the treaty's ethos, will result in a higher average human rights standard among the constituent states. A more effective treaty is achieved at the cost of fewer states parties.

To mitigate free-riding under a normative goals of an efficient number of states parties, it must be possible to exclude non-parties from the benefits that result from the treaty's formation. Conceivably, this can be achieved if all states parties are geographically close and politically integrated. This facilitates monitoring and deters shirking. In situations in which these criteria are not met, free-riding by non-parties will be possible and a treaty's normative goal will not be attainable. This suggests that maximising – at least in theory – a treaty's effectiveness will only be possible in regions in which states cooperate and in which the equilibrium human rights standard is relatively high. The effectiveness of the European system, which has been widely heralded as a success,²¹⁹ might be explained in this way.

All of this suggests that universal ratification cannot be achieved alongside an effective treaty system because achieving universal ratification necessarily requires that compromises are made and that the treaty's equilibrium human rights standard is lower than it otherwise could be. By contrast, if treaty drafters focus on a treaty's effectiveness and accept that this will lead to the exclusion of states with substandard human rights provisions from the treaty system, we would expect to find a more stable treaty with higher standards among the constituent members. Universal ratification is therefore inefficient at improving global human rights conditions because free-riding is possible and compromises must be made.

²¹⁹ As shown in Helen Keller and Alec S Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' 2008 *Faculty Scholarship Series*. Paper 88.

<http://digitalcommons.law.yale.edu/fss_papers/88> accessed 6 September 2013; Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' [2002] 13(3) *European Journal of International Law* 621; Andreas Follesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' [2009] 40(4) *Journal of Social Philosophy* 595.

II. Framing Articles

When drafting human rights treaty, we assume that drafters have to decide a number of issues relating the treaty's article. The principal issues, which we consider here, will be whether rights are positive or negative and how specifically the articles are drafted. In our analysis, we assume that universal ratification is the normative goal of treaty drafters and that a treaty body will not be institutionalised in the same period as the treaty.

A. The Nature of the Rights

The cost of ratifying – and complying with – a human rights treaty is likely to be dependent on whether the human rights that form the subject of the relevant treaty are positive or negative. Positive rights are those rights that require governmental action in order for their provision on the domestic level, with it being unlikely that the rights will be provided to citizens without the state introducing legislation, funding particular policies, or introducing taxes.²²⁰ In this category, some examples include the right to an adequate standard of living,²²¹ which incorporates rights relating to food, clothing, and housing at a subsistence level.²²² Such rights confer on states an obligation to take proactive steps to ensure that citizens are provided with these rights and that they can enjoy their protection in the domestic system. Crucially, though, within that description of positive rights as requiring proactivity on behalf of the state, states are likely to incur costs in the fulfilment of their legal obligations.²²³ Guaranteeing citizens the

²²⁰ See, generally, Stephen Holmes and Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New Edition, WW Norton 2000).

²²¹ UDHR art 25; ICESCR art 11.

²²² The intricacies of this definition and its relevance to broader social concerns are detailed in David Copp, 'The Right to an Adequate Standard of Living: Justice, Autonomy, and the Basic Needs' [1992] 9(1) *Social Philosophy and Policy* 231.

²²³ Separate to the direct costs of implementation, such as changing domestic legislation or state practices, there are also the indirect costs associated with uncertainty as to how these positive obligations will be interpreted by judges on the domestic level, such that the judges determine the level of state action required in order for a right to be provided for. See Jonathan Feldman, 'Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government' [1992] 24 *Rutgers Law Journal* 1057; Ran Hirschl, "'Negative'

right to food might require that states interfere in the domestic food processing industry,²²⁴ while guaranteeing the right to housing is likely to require that the state facilitates the building of social housing.²²⁵ States that attempt to provide citizens with positive rights might accordingly sometimes run into financial difficulties in the pursuit of those goals, assuming the achievement of the goals requires significant domestic efforts. Wealthier states might face lower costs than poorer states in improving the standards afforded to citizens, even if both states have the same standards at the outset. As an example, let us consider the right to adequate food.²²⁶ Guaranteeing citizens the right to food will require that states direct resources toward the promotion and fulfilment of that right; we assume that because wealthier states have a greater availability of resources, it will be easier to direct resources to the provision of the right to food, while we also assume that the greater institutional strengths that come with being wealthier states enable these states to adapt more easily.²²⁷ By contrast, poorer states face exactly the opposite difficulties when attempting to provide their citizens with the same level of human rights standards: they find it difficult to finance a better provision of rights and struggle with institutional capacities and technical know-how. A divergence is therefore expected between wealthy and poor states, as despite both starting off from the same point, reaching each additional level is assumed to be either easier or harder, depending on a state's wealth and institutional make-up.

In relation to positive rights, then, it is entirely conceivable that wealthy states would be more likely to comply with treaties providing for such rights, although ratification patterns might not necessarily follow in the same vein: poorer states

Rights v "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' [2000] 22(4) Human Rights Quarterly 1060.

²²⁴ An overview of such approaches is provided in C Peter Timmer, 'Food Price Policy: The Rationale for Government Intervention' [1989] 14(1) Food Policy 17.

²²⁵ There is a long heritage and connection between human rights and social democracy, manifested through social housing. See Bo Bengtsson, 'Housing as a Social Right: Implications for Welfare State Theory' [2001] 24(4) Scandinavia Political Studies 255.

²²⁶ This right is widely protected under various international and regional instruments. Some examples include CRC arts 24(2)(c) and 27(3); CEDAW art 12(2).

²²⁷ A wealthier state's assumed greater adaptability is assumed to stem from its position further along a continuum of development, such that it has 'learned by doing' through that development process.

eager to improve their provision of positive rights might ratify in order to show commitment to the treaty's goals, or might do so on the basis that, despite the costs of positive rights, providing for these rights might be more easily achieved if the state is a party to the treaty than if it is not. By becoming a party to the treaty, the state might gain technical knowledge from the wealthier states parties and may be able to gradually provide for the treaty-mandated standard at lower cost.²²⁸ This reflects a constructivist perspective that suggests that treaties are capable of facilitating a transfer of expertise among states, and that being a state party assists the receiving of this knowledge-transfer.

But whereas positive rights are therefore argued as being costly for states to guarantee to their citizens, guaranteeing negative rights forms a different case. Negative rights are those rights that require that states not interfere in the lives of their citizens, but that they instead apply a hands-off approach. In this category, most of the provisions of the ICCPR are negatively framed, requiring, for example, that states provide for freedom of expression,²²⁹ the right to privacy,²³⁰ and freedom of association.²³¹ For states, providing for these rights demands that they refrain from taking any steps that will infringe upon them, unless these can be justified.²³² In this respect, negative rights are cheaper for states to provide to their citizens, as they demand non-interference, which is more easily achievable than specific and structured policies. State institutions are mandated with the task of desisting from engaging in policies that would limit the ability of the state's citizens to exercise their rights to freedom of expression or freedom of association. Actions that should be avoided would include the introduction of legislation countering these freedoms or more indirect approaches that frustrate

²²⁸ This assumes, though, that interaction between states within the treaty system takes place, and that this interaction will assist the transfer of technical know-how between states. This is certainly not a guarantee and has not been widely found during the course of this research.

²²⁹ ICCPR art 19; ECHR art 10

²³⁰ ICCPR art 17; ECHR art 8

²³¹ ICCPR art 22; ECHR art 11

²³² The ECHR allows states to restrict rights in a number of limited cases (public interest etc.), but these restrictions are also subject to limitation (ECHR art 18); for an analysis of some of the case law in the area, see Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' [1999] 62(5) *The Modern Law Review* 671.

citizens' enjoyment of their rights, such as restrictions on rights that might facilitate enjoyment.²³³

Nevertheless, the provision of negative rights might not always be without cost, and to assume that it does is oversimplification. In order to provide for rights that require state non-interference, states may need to alter domestic legislation,²³⁴ they may need to upskill bureaucrats,²³⁵ or they may need to educate their citizens.²³⁶ These measures, despite the rights themselves requiring that the state take a step back, can be both financially and politically costly. Political costs might arise if the rights in question come into conflict with each other: for example, the right to freedom of expression can conflict with the right to freedom of religion.²³⁷ Under such circumstances, providing for negative rights requires a tentative balancing of the interests of different groups existing in a state, with all groups desiring that their particular preferences be taken into account.²³⁸ Evidently, therefore, negative rights – while requiring states to refrain from taking particular actions – can also involve various costs.

Depending on the subject matter of the particular treaty under consideration, we would expect ratification and compliance costs to vary. Treaties guaranteeing positive rights are likely to be more costly for states with limited resources than for states with more extensive resources, although in both cases the requirement that the state take action to guarantee that the rights are provided for is likely to result in costs being incurred. For treaties whose subject matter largely consists of negative rights, we expected fewer costs to be incurred, as these treaties mandate

²³³ For example, a right to join a trade union might facilitate freedom of association, freedom of assembly, and freedom of expression, but if this right is restricted then so too might the others be.

²³⁴ See, for a treaty-specific overview, Janet E Lord and Michael Ashley Stein, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' [2008] 83 Washington Law Review 449.

²³⁵ This will be more costly the more institutionalized the respective human rights practices in each state and the greater the divergence between treaty provisions and state practices.

²³⁶ Such as through citizens advice offices and public campaigns.

²³⁷ The best example of this is the conflict that pertained in relation to the publication of cartoons depicting Mohammed in Denmark in 2005; See Robert Post, 'Religion and Freedom of Speech: Portraits of Muhammad' [2007] 14(1) Constellations 72.

²³⁸ How this plays out is discussed, with particular reference to group that are unorganized, in Arthur T Denzau and Michael C Munger, 'Legislators and Interest Groups: How Unorganized Interests get Represented' [1986] 80(1) American Political Science Review 89; compare Putnam *Diplomacy and Domestic Politics* (n 33).

state non-interference; however, as discussed, the politicised nature of many negative rights can result in ‘audience costs’²³⁹ for states parties that protect such rights. Accordingly, it is difficult for treaty drafters to predict the likely consequences of framing a right as positive or negative, as state heterogeneity and the treaty’s subject matter will strongly influence how either a negative or a positive framing will be received.

B. Article Specificity²⁴⁰

Related to the question of how treaty drafters may address the nature of the rights they are including in a treaty, we also assume that treaty drafters need to consider how specifically they will frame the various articles. We assume that greater specificity in article design requires greater transaction and organisational costs: more meetings will be required and staff will need to be engaged for longer periods. Treaty drafters are assumed to face a dilemma: detailed treaties take longer to draft and more clearly outline the human rights standards expected of ratifying states, but result in a lower level of ratification by states with poor standards, while less detailed treaties take less time to draft and are less specific in their outline of the standards expected of ratifying state, but result in a higher level of ratification by all states. This is explained as follows:

Table 2: Drafter Decisions

Specificity	Transaction Costs	Result
Low	Low	Higher Ratification
High	High	Lower Ratification

All treaty drafters are assumed to be aware of this incongruity during the drafting process. More detailed treaties will deter ratification by states with domestic human rights provisions that conflict with the proposed treaty’s express standards because the greater detail increases the costs of compliance for those

²³⁹ James D Fearon, ‘Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs’ [1997] 41(1) *Journal of Conflict Resolution* 68, 70.

²⁴⁰ This section is an altered version of a contribution to an edited book. See Daragh Mc Greal, ‘Drafter Decision-Making in International Human Rights Treaties’ in David Keane and Yvonne McDermott, *The Challenge of Human Rights: Past, Present and Future* (1st edn, Edward Elgar 2012).

states. By contrast, complying with more broadly drafted provisions is more easily achievable. But while treaty drafters might wish to draft a treaty as specifically worded as possible, doing so is assumed to result in fewer ratifications under the normative goal of universal ratification as there is a disincentivising effect of specifically worded treaty articles. Drafting committees, aware of the effects of detail on state ratification decisions, must decide to what extent the treaties are detailed.

Based on our challenge to the traditional normative goal, we conceive of two scenarios: treaty drafter either structure treaties so as to achieve the challenged normative goal of universal ratification or they structure treaties with effectiveness in mind. This assumes, also, that heterogeneity of preferences between treaty drafters exists, which may contradict the actual reality of the composition of drafting committees: it may rather be that all drafters share the same preference of universal ratification. If we assume, nonetheless, that drafter preferences differ, we are able to distinguish between different stages of drafting. At the first stage, drafters face negotiation costs: some parties to the negotiation – those that are most eager to draft treaties with clear and strict human rights pronouncements – are likely to drive a hard bargain, while other parties – those that are more concerned with achieving universal ratification – will seek more vague treaties if they recognise that specificity deters ratification. This game, in which the drafting committee bargains over how to write and structure the treaty, takes time. Each party takes strategic positions pursuant to its own outlook, thereby delaying potential negotiation. Article specificity will also be influential on the issue of whether a dispute settlement mechanism will be established, and whether the body charged with monitoring state adherence has the freedom to interpret treaty articles as they wish.

In elaborating upon the approach to be taken in deciding the level of article detail, we apply the concept from the economics of contract law whereby contracts are left with gaps when the transaction costs of filling those gaps outweigh the ex post costs of allocating loss by the likelihood of loss.²⁴¹ Importantly for the present project, this approach has been extended to international law, with Trachtman suggesting that sometimes treaties may be left vague.²⁴² Treaty specificity is therefore a function of the likelihood the treaty will

²⁴¹ Cooter and Ulen, *Law and Economics* (n 57), 181.

²⁴² Trachtman, *The Economic Structure of International Law* (n 2), 49.

be breached coupled with the costs of determining the loss of that breach, which is the cost of establishing the difference between the treaty's requirements and the state's legal standards. In applying this to human rights treaties, this suggests that when there is a strong possibility that states will breach their treaty obligations, and when loss from breach is acute (i.e. if breaching results in significant externalities), rights should be framed specifically. By contrast, gaps may be left in treaties when filling those gaps during the drafting stage involves higher costs than the costs that might materialise if the treaty is breached *ex post*. When treaty drafters expect that it will be difficult to agree on an article's specificity, and when they anticipate that it will be cheaper for treaty bodies to determine breach at a lower cost in the future, it is more efficient to leave the treaty vague. To many human rights scholars this may seem anathema; they might conjecture that specifically worded articles should never be sacrificed. However, if it is cheaper for treaty bodies to interpret treaty articles than it is for the drafting committee to fully clarify the meaning of such articles at the time the treaty is being drafted, then our law and economics approach mandates that framers should leave treaties vague.

This assumes, however, that a treaty body is in place in order to make determinations as to treaty violations, and also that it has authority to receive complaints.²⁴³ In most instances relating to human rights treaties, dispute settlement mechanisms are not established alongside the treaty itself, despite some treaties calling for their establishment.²⁴⁴ Instead, dispute settlement mechanisms are generally formed pursuant to optional protocols to the initial treaty, although it is never known whether or when those optional protocols will actually be drafted in pursuant periods.²⁴⁵ This leads to a situation where treaty drafters are in limbo with regard to the extent of the provisions in the initial treaties. Not knowing whether and when a dispute settlement body will be in place to adjudicate on treaty issues *ex post* affects treaty drafters' decision sets.

²⁴³ Treaty bodies are limited, under the periodic review system, in their ability to fill gaps in treaties because they engage with states only at specific periodicities.

²⁴⁴ Not all treaties call for the establishment of complaints mechanisms but most include provisions for the establishment of monitoring bodies. See CRPD (n 16) art 34 and CRC (n 22) art 43.

²⁴⁵ Although the creation of an individual complaints mechanism alongside the treaty itself can be seen in at least one case: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 14.

Instead of being able to opt for either more or less detail, the balance is tilted toward treaties with more detail, as it will be unclear whether gaps will be filled in future periods. This increases the costs of treaty drafting and lowers the likely treaty ratification levels. By having treaty drafting and optional protocol drafting as two separate games, an inefficiency results: treaties are drafted with greater detail when it might have been more efficient to leave gaps in the treaty.

In putting this in practical terms, we consider a hypothetical treaty in relation to the right to food, which is outlined in international treaties²⁴⁶ and has been discussed by the Special Rapporteur, who stated that:

The right to food is the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.²⁴⁷

We simplify this analysis in order to present a better picture of our discussion, and instead suggest that treaty drafters must decide between the right to food, F , and the right to nutrition, N , with these rights being subject to the obligation that they be respected, protected, and fulfilled.²⁴⁸ When respect is the issue we assume that the right is akin to a negative, such that respect refers to the state allowing access to the right, whether that is food or nutrition. Respecting the right to food (F -) is analogised as not interfering with access to food and this is assumed to be more costly for states than is non-interference with access to nutrition (N -):

$$C(T_{F-}) \geq C(T_{N-})^{249}$$

²⁴⁶ ICESCR art 11.1 (as part of the right to an adequate standard of living), art 11.2 (framed as a right to be free from hunger).

²⁴⁷ UNHCR 'Report of the Special Rapporteur on the Right to Food' (16 March 2006) UN Doc E/CN.4/2006/44, 4.

²⁴⁸ Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' UN Doc E/C.12/1999/6.

²⁴⁹ The cost of ratifying a treaty with an obligation to not interfere with the right to food is greater or equal to the cost of ratifying a treaty with an obligation to not interfere with the right to nutrition.

where $C(T)$ refers to the cost of ratifying a treaty that includes the relevant right. As food is a broader definition, we assume that it is more likely that a state's domestic actions might infringe a population's access to food. A treaty that includes a right that solely requires the respecting of the right to food would be therefore more costly than one mandating the respecting of a right to nutrition. However, when positive obligations are brought into the equation, the situation changes. Protection and fulfilment of treaty obligations is assumed to impose positive obligations on states.²⁵⁰ If a state must act proactively, the right to nutrition will be more costly than the right to food because more resources will be required in relation to ensuring the former rights is guaranteed than would be the case regarding the latter right. If protecting and fulfilling suggests that a state must ensure individuals have food (T_{++}) or nutrition (N_{++}), we assume providing for the right to nutrition is more costly than providing for the right to food:

$$C(T_{N++}) \geq C(T_{F++})$$

Once these positive and negative factors are included in the treaty article, the ultimate right, $T_{(N++)-(N+)}$ or $T_{(F++)-(N-)}$, whether it is the right to food or the right to nutrition, will be a composite of the obligations to respect, protect, and fulfil. On this basis, we assume that the inclusion of the right to nutrition will increase the marginal costs of ratification more than the inclusion of the right to food:

$$C'(R(T_N)) > C'(R(T_N))$$

This is rooted in the assumption that having to provide for the right to nutrition brings about greater costs than having to provide for the right to food. Ergo, article specificity can matter to the cost of ratifying a treaty.

To extend the analysis further, however, we now consider a situation in which drafters may choose between a human right guaranteeing freedom from hunger, H , a right guaranteeing freedom from malnutrition, M , and a right guaranteeing

²⁵⁰ Lorenzo Cotula and Margaret Vidar (FAO Legal Office), 'The Right to Adequate Food in Emergencies' FAO Legislative Study (2002), 27-37.

freedom from starvation, *S*. Framing a right using the terminology ‘freedom from’ in relation to matters related to food is assumed to confer obligations on states.

Firstly, we assume that hunger relates to a lack of basic foodstuffs, meaning that hunger is a function of food, such that

$$H(F) \text{ where } F \in [0,1]$$

secondly, we assume that malnutrition does not necessarily stem from a lack of food, although it may, but rather stems from a poor unbalanced diet, such that

$$M(N) \text{ where } N \in [0,1]$$

and thirdly, we assume that starvation is a function of both a lack of food and a lack of nutrition.

$$S(F + N) \text{ where } F, N \in [0,1]$$

As from the preceding analysis, we make the same assumption that, on balancing the obligations to respect, protect, and fulfil, the overall obligation on states will be positive. In this light, the costs of providing for these rights increase as the right provided for moves from freedom from hunger to freedom from malnutrition to freedom from starvation.

$$C(T_{S+}) > C(T_{M+}) > C(T_{H+})$$

We assume that states are required to ensure that these rights are fully provided for, meaning that resources will be required to be spent when infringement of the rights becomes more pronounced. Ergo, a state will have to expend more resources to prevent starvation than it will have to expend to prevent hunger or malnutrition. Treaty drafters should consider this in their decision set. The inclusion of the more specific right (i.e. the right to nutrition or the right to be free from starvation) will increase ratification and compliance costs, and therefore ratification is lower when rights are framed more specifically.

In situations in which the drafting committee is facing high transaction costs, we would expect less specificity and the determining of specificity to be allocated to the treaty body *ex post*. When costs are low and when deterrence from greater specificity is low, we assume the right will be framed in greater detail. Resultantly, the specificity of the human rights enshrined in the treaty is a function of the costs of bargaining for more specificity at the drafting stage plus the costs more specificity places on potential ratifying states (through deterring ratification) minus the costs of adjudicating on the relevant right *ex post* (as adjudication over specifically worded articles will be easier).

However, unless drafters know that a treaty body will be present *ex post* then they will be more inclined to draft articles more specifically. This suggests that treaties and treaty bodies should be created at the same time, as drafters are then in a position to choose the most efficient means of framing the treaty's articles. They would be afforded the freedom to draft the articles either vaguely or specifically and can leave gap-filling to treaty bodies where appropriate.

In reality, though, this is not the case: optional protocols creating adjudicatory bodies are often drafted later. This could stem from a belief that to indicate during the drafting of the treaty that an adjudicatory body will be formed at a later stage might deter states from ratifying the treaty. Equally, though, establishing treaty bodies and dispute settlement mechanisms in later periods can also enable treaties to be written at a cheaper cost. Further, if rights are less specifically worded, states may be more likely to ratify, since they might under-calculate the costs of dispute settlement gap-filling.

If this analysis holds, then the traditional approach has followed an inefficient path. Treaties with less specifically worded treaty articles but with a dispute settlement bodies in place that can determine specificity at a cheaper cost *ex post* may experience a higher level of ratification than traditionally constituted treaties. This is assumed to stem from the state's assessment of the treaty and its calculation of the costs and benefits of ratifying the treaty. States compare their provision of human rights against the extent of the human rights standards enshrined in the treaty. When rights are specific, and when states provide similar rights, they will ratify the treaty, irrespective of the existence of a dispute settlement mechanism. Given the linearity between the state's provision of human rights and the expectations of the treaty, the presence of an adjudicatory body becomes irrelevant.

When, however, a state's provision of human rights does not meet with the expectations of the treaty, the specificity of the rights matter. More specifically framed rights may deter ratification because the reputational benefits of ratifying the treaty are more muted than if a division between the state's and the treaty's rights were not so evident. This is contrasted with the case of treaties with less specifically framed rights, which are assumed to see greater ratification from states with a substandard provision of human rights.

In this analysis, we assume that vague treaties come with treaty bodies or dispute settlement bodies because treaty drafters were unable to agree upon specificity and so they elected to leave the specificity to ex post adjudication, while the treaties that specifically outline human rights in great detail do not form adjudicatory bodies contemporaneously.

Consequently, we might contend that states with poor human rights standards might be deterred from ratifying the more vague treaties, given the adjudicator's existence. However, the central assertion is that such states might ratify those treaties to gain a reputational benefit but will fail to fully internalize the costs of ex post regulation. This they do because although they are aware that their own human rights provisions are substandard, they measure substandard in relation to the phrasing of the human rights in the treaty. In reality, they should be measuring substandard in relation to what the treaty drafters would have agreed upon had there been no transaction costs during the drafting stage.

Therefore, by leaving treaties vague drafters push states with substandard human rights provisions toward using the treaty as the fulcrum around which those states measure substandard. These states thereby carry out a skewed cost benefit analysis and ratify treaties with vague human rights provisions but with ex post adjudication present. Vagueness coupled with an adjudicatory body may therefore induce ratification by states with poor human rights standards, as these states cannot determine the optimal standard.

Table 3: Design Payoffs

Treaty Design	State Motivations
Vague articles with adjudicator	Incentivise good & bad
Specific articles with adjudicator	Highly incentivise good, deter bad
Vague articles without adjudicator	Incentivise bad, somewhat good
Specific articles without adjudicator	Incentivise good, deter bad

This analysis points to some interesting policy conclusions. For instance, if we are eager to achieve ratification from states with poor human rights standards, and if the transaction costs of negotiating treaty terms more specifically are high, then we should draft treaties with ‘gaps’ and leave the gap-filling to ex post adjudication.

It is important to stress that this approach is general and stylised. We assume that the normative goal of treaty drafters is to achieve universal ratification, rather than accepting that there might be an efficient number of states parties, as was proposed above. Presently, the focus has been on how to achieve ratification from states with poor standards, whereas we previously focused on achieving ratification from states with good standards. In both cases, however, more vaguely drafted treaties should be subject to higher levels of ratification, as the states will fail to internalize the future costs of the gap-filling by the (simultaneously-created) adjudicatory body, focusing instead on the gains from ratifying a treaty at all. All of this points in one direction: if universal ratification of human rights treaties is the normative goal and if drafters find it difficult to draft a treaty with specific rights, then ex post adjudicators should be allocated the role of determining optimal human rights standards.

III. Flexibility Tools

The cost of ratifying a human rights treaty is assumed to be influenced by the extent to which states can mitigate the strength of those treaties, which is chiefly facilitated by the Vienna Convention’s reservations provision, which defines a reservation as

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.²⁵¹

²⁵¹ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (Vienna Convention) art 2(1)(d); for the procedure for making a reservation to a particular treaty, including what is permissible and what is not permissible, see arts 19 – 23.

In this respect, while treaty drafters are at the mercy of the Convention to an extent, we nonetheless consider ‘flexibility tools’²⁵² both as a treaty design feature and for the manner in which they can affect state motivations in relation to treaty ratification.

A. State Valuations

Formulating²⁵³ a reservation to a human rights treaty reduces the area of domestic policy covered by the treaty’s provisions and mitigates the extent to which monitoring and adjudicatory bodies can assess domestic human rights standards. Framed another way, reservations afford states greater freedom to determine their own level of protection in specific areas of human rights. We do not intend to enquire about the legality of treaty reservations, as this has been subject to both scholarly debate and comment by international bodies.²⁵⁴ Instead, we assume that formulating a reservation indicates the value a state places on being able to regulate particular human rights matters itself. Thus, for example, a number of states that have Islam as their principle religion have been shown to tend to formulate reservations to the Convention on the Elimination of All Forms of Discrimination Against Women.²⁵⁵ Such states are assumed to value regulation of the rights covered in that Convention highly, and are prepared to suffer the reputational costs that come with formulating reservations. But while the

²⁵² Laurence R Helfer, ‘Flexibility in International Agreements’ in Jeffrey Dunoff and Mark A Pollack (eds), *International Law and International Relations* (1st edn, Cambridge University Press 2012), 177.

²⁵³ We use this terminology following the Vienna Convention art 19, while its distinction from ‘make’ (as we might naturally say) is discussed in Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (PhD dissertation, Uppsala University Press 1986), 199.

²⁵⁴ Catherine J Redgewell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’ [1997] 46 *International and Comparative Law Quarterly* 390; UN Human Rights Committee ‘General Comment No. 24(52); Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in relation to Declarations under the Article 41 of the Covenant (1994) UN Doc CCPR/C/21/Rev. 1/Add.6.

²⁵⁵ Michele Brandt and Jeffrey A Kaplan, ‘The Tension Between Women’s Rights and Religious Rights; Reservations to CEDAW by Egypt, Bangladesh and Tunisia’ [1995] 12(1) *Journal of Law and Religion* 105; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 14.

reputational benefit of ratifying a treaty with reservations is more muted than ratifying without reservations, the normative goal of universal ratification means that reputational benefits are still accruable, irrespective of reservations having been formulated. As the international community wants states as parties to the treaties, reputational rewards will still be granted to ratifying states.

In this respect, formulating a reservation can put states in a position where they do not internalize a treaty's full costs. And while the costs of ratifying a treaty fall as the number of reservations made to a treaty increase, we assume there will be diminishing marginal returns of each additional reservation. States will formulate reservations until the marginal cost of doing so outweighs the marginal benefit. This suggests there is an optimal number of reservations to a human rights treaty, in that going beyond a certain limit – formulating too many reservations – eventually becomes too costly. A number of factors are expected to be taken into account when determining the marginal return from making an additional reservation. Marginal returns might be reliant upon the additional likelihood and cost that other states will object to the lodged reservation, with a greater number of objections assumed to reduce the benefit of the reservation. So while Iraq's reservation to its ratification of CEDAW indicated how highly it valued regulating matters itself,²⁵⁶ it was on the basis of its reservation to Article 2, which relates to implementation measures,²⁵⁷ that a number of states objected.²⁵⁸

B. Objections

We therefore assume that there will be interaction between states that reserve and states that object, with an absence of an objection within twelve

²⁵⁶ Iraq stated that its ratification 'shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention', CEDAW 'Meeting of States Parties to CEDAW' (23 June 2006) UN Doc. CEDAW/SP/2006/2, 14.

²⁵⁷ The implementation measures relate to how a state will give effect to treaty provisions, in the sense that it will 'pursue' policies 'without delay' and that it will 'ensure' 'conformity' by its 'public institutions'.

²⁵⁸ Among those objecting were Germany, Netherlands, and Sweden.

months of the reservation assumed to imply acceptance of the reservation.²⁵⁹ Inter-state interaction can accordingly take a number of forms: tacit consent, formal acceptance, informal objection, and formal objection. We assume that potential objectors must choose between these options when electing how to object, and also assume that objections either increase in line with an increasing number of reservations, or objections decrease as reservations increase. In relation to the former situation, objecting states might desire that treaties do not lose their effectiveness in their entirety, and might accordingly value all objections equally as this will indicate to reserving states that no leeway will be given regarding reservations. In the case of the latter situation, objecting states may be more inclined to object to a smaller proportion of reservations on the basis that a targeted approach might be more effective.

If we equate the treaty situation with contract law, we see that making an objection to a reservation signals the objector's commitment to that contract and its desire that the contract is adhered to. If reservations act as means by which a reserving state makes an alteration to a contract such that the contract is 'new',²⁶⁰ then acceptance of that reservation would result in the contract becoming 'as binding and obligatory as if it were inserted in the body of the instrument'.²⁶¹ States can, however, object in either the treaty (contractual) setting, by entering an objection, or the non-treaty (extra-contractual) setting, such as by exerting political pressure on the reserving state. States objecting in the latter setting may view opposition within the treaty setting as an implicit indication that the state is open to renegotiation of the treaty, or a tacit acceptance of the reserving state's position. This may suggest that states that object to reservations and states that do not are not wholly heterogeneous. The difficulty in differentiating between states that contractually object because they oppose the reserving state's position and states that extra-contractually object because they oppose the reserving state's position reduces the ability of the international community to determine the value a state places on objecting.

²⁵⁹ Termed the 'Twelve-Month Tacit Consent Rule', in Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention of Discrimination Against Women' [1991] 85 *American Journal of International Law* 281.

²⁶⁰ Jose Maria Ruda, *Reservations to Treaties* (1975 *Receueil des Cours*), 190.

²⁶¹ As stated in a case from the US dealing with contractual matters; see *Doe et al v Braden* 16 How 635, 656 (US 1853).

Furthermore, observability can be made more difficult if we consider that objections to reservations can also be interpreted as an indication that the contract between the states is unenforceable. If the Vienna Convention asserts that objections result in the treaty article to which a reservation has been formulated becoming unenforceable as between the reserving state and the objecting state,²⁶² we could argue that objecting might be a cheaper means of formulating a reservation, even if it would only apply to the reserving state.²⁶³ We assume that it is cheaper to enter an objection than to enter a reservation because the reputational costs of entering the former are lower than the reputational costs of formulating the latter. This suggests that when the costs of reserving outweigh the benefits and when benefits of objecting outweigh the costs, states will object. This assumes, though, that there will be a reservation in place to which a state can object. Such situations pertain as a result of the varying pay-offs for each state. States that value reserving highly will reserve, with those that don't value reserving as highly as first movers objecting to those reservations instead. By objecting, second movers make the relevant treaty provision unenforceable between both states, which makes the objection, in effect, a weak reservation. Its limited scope as only being relevant to the reserving and objecting states limits its value.

Clearly, then, objecting to a reservation can be worthwhile given another state's reservation as well as from the perspective that lodging an objection can be explained as a genuine policy in itself. This argument contends that formulating reservations and making objections are functions of the pay-off each state expects from the relevant approaches, with each pay-off reliant on the strategic approaches of other states. All of this suggests that there are flaws in the system of making objections. Instead of providing states with a clear platform upon which they can indicate their opposition to the position of the reserving state, a sub-game can emerge in which reservations can take the form of objections. The sole platform available, therefore, for states that genuinely oppose reservations is in the extra-contractual setting. This will take the form of pressure

²⁶² Making an objection, unless the objecting states elects that the treaty will not be enforceable between the two states, means that 'the provisions to which the reservation relates do not apply as between the States to the extent of the reservation', Vienna Convention (n 253) art 21(3).

²⁶³ 'Reserving' in the form of an objection is applicable only to the reserving state and not to the international community generally.

being applied at the political level, with states that are seemingly committed to the treaty provisions exercising their objections on this plane.

Importantly, though, we should recognise the limits of this analysis to the real world: how do we analogise an objection to another state's reservation as a weak reservation if human rights treaties are non-reciprocal?²⁶⁴ While reservations can bring benefits in terms of lower monitoring costs et cetera, the bilateral nature of objections is far more restrictive in bringing benefits. Conceivably, states that border each other can make objections to the other state's reservation if doing so makes the relevant treaty provision unenforceable between the two states and if there is an inter-state dispute settlement mechanism in place to receive complaints. Otherwise, though, the theory's real world applicability is likely limited.

C. State Incapacity

In addition, formulating reservations can also serve the function of signalling a state's commitment to the relevant treaty but its inability to fully provide for all rights covered in the treaty. This may be due to financial constraints or institutional problems. The decision to formulate a reservation could therefore signal a state's detailed inspection of a treaty and its view that, at that time, it cannot fully provide for all the rights in that treaty. Formulating a reservation reduces the cost of ratifying the treaty and may enable the state to focus its attention on correcting the institutional framework so that the reservations might be withdrawn once that framework is in place. Such states would therefore reserve in order to reduce the pressure applied by treaty bodies (which would not investigate the state's protection of the right covered by reservation), as well as reducing the costs of adjudication with respect to other states and individuals that may wish to make complaints about the state provision of the right covered by the reservation.

When states make reservations but clearly intend to put in place the institutional framework that will enable the rights to be provided for, as well as enabling the

²⁶⁴ The issue of non-reciprocity is discussed in Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' [2000] 11(3) *European Journal of International Law* 489, 500.

reservation to be withdrawn, then reserving might be efficient: the grace period reduces costs imposed on all parties below the level of costs that would be applicable in the absence of a reservation. In this respect, efficiency is achieved when, given the state's costs of correcting the domestic institutions, the reduced costs of treaty body regulation and the reduced costs of dispute settlement adjudication outweigh the costs on the promisees (the citizens of the reserving state and the international community) of having to wait for the state to improve its level of protection of the right covered by the reservation.

This reflects an application of productive efficiency, in that the state is afforded leeway not to adhere to its commitments in the short term, and to use its resources elsewhere during the 'grace period', but to gradually alter domestic institutional frameworks so that obligations can be adhered to in future periods. Such efficiency is only achieved, though, when the state is committed to the treaty provision in the medium and long-term, which is likely the case with emerging democratic states.

If we accept that reservations can be efficient in those contexts, however, then where does this leave objecting? If states fail to object, either inside or outside the treaty setting, to reservations from states with institutional problems, on the basis that these states will be afforded a grace period, then perverse consequences might pertain. By affording leeway to states that have signalled their long-term commitment to a treaty but that have also signalled their short-term incapacity to adhere, an uncertain situation may arise. Under a system of grace periods, states have incentives to indicate their inability to adhere in the short term, provided this indication is accepted by the international community such that it reduces pressure on the state to comply. States with no intention of aligning their domestic institutional standards with international standards could use this system strategically. As the international community cannot determine the genuineness of a state's long-term intentions, superficial ratifiers can gain reputationally while incurring lower monitoring costs in pursuant periods. In this way, affording states leeway to improve their standards can be counter-productive if states take advantage of the reduced political pressure exerted on reserving states.

D. Overview

This section has argued that the various explanations as to why states make treaty reservations are worthy of further investigation. The following table is intended to present the anomalous situation facing the international community in attempting to determine which states are genuine in their actions and which are not.

Table 4: State Identities (Reservations)

Reserving States	Objecting States
<ul style="list-style-type: none">. High Valuers. Long-term commitment, short-term incapacity. Superficial long-term commitment, short term incapacity	<ul style="list-style-type: none">. Genuine Objectors. Strategic Objectors

The ability to lodge a reservation to a human rights treaty is an inherently useful tool for the international community to determine the seriousness with which its treaty-partners take their treaty obligations. But while reservations can signal a state’s commitment or lack of commitment to particular rights or its capacity or incapacity on the basis of institutional problems, the true nature of these signals cannot be fully garnered and reservations can be read as a means of ‘qualified ratification’.²⁶⁵

States that make reservations reduce the costs of committing to the treaty because costs relating to institutional change and being potentially subject to litigation are not fully internalized. In addition, making a reservation is efficient from a broader contractual point of view, because it pushes contracting parties toward optimal reliance. The international community and the citizens of the reserving state, as promisees to the treaty, are encouraged to rely optimally on the commitments of the relevant state because reservations signal the state’s intent regarding the particular provisions. States that do not make express reservations but that fail to fully comply with their treaty obligations face the

²⁶⁵ See Eric Neumayer, ‘Qualified Ratification: Explaining Reservations to International Human Rights Treaties’ [2007] 36(2) Journal of Legal Studies 397.

danger of having other parties to the treaty relying heavily on their assumed commitment. Ergo, reservations discourage promisees from inefficient reliance. Secondly, have also suggested that objecting to a reservation does not necessarily signal a state's disapproval of the reservation. Instead, objecting can a means for states to more cheaply make reservations, at least with respect to states that have lodged reservations. Thirdly, we have suggested that states committed to strong human rights standards face a difficult means of encouraging other states to increase their domestic standards. Exercising disapproval inside and outside of the contractual setting, it has been argued, will have different costs and benefits for those states. Finally, it has been suggested that reservations can be efficient when the state is unable to provide for the relevant rights in the short term but committed to the rights in the long term. Equally, though, if the international community accepts this premise, it has been argued that states will act strategically and take advantage of that acceptance. These various arguments have assumed rational action on behalf of states, and have been made by teasing through the likely outcomes of reserving or not reserving. The merit of the above-developed theories requires further analysis.²⁶⁶

²⁶⁶ It has been noted elsewhere that 'another avenue for future research is an exploration of the role that reservations to ratification play and whether they inhibit or promote greater respect for human rights', Hathaway 'Do Human Rights Treaties Make Difference?' (n 23), 950.

IV. Progressive Realisation

In a world with finite resources, economics assumes that individuals must decide how to allocate those resources among a variety of uses.²⁶⁷ Thus, for example, a child must decide which comic book to purchase with his/her pocket money; an industry manager must determine whether to take on another employee or to give current staff overtime; and an athlete must decide whether running an extra mile or using that time to rest will be better preparation for the upcoming race. In essence, we all must decide, on a daily basis, whether to pursue one action or another, given limits on time, energy, and money.

In the case of states, this situation is equally applicable: a state can invest in damming a river to provide more water or it can educate citizens about water conservation; a large tax increase can be applied to a small number of wealthy citizens or a small tax increase can be applied to many thousands of lower paid earners; more roads can be built or more public transport services can be provided. In each of these cases, a policy decision requires the prioritising of one approach over another on the basis that resource limitations mandate that all policies cannot be pursued. In balancing how to allocate resources among those different policies, we assume that states are making social policy decisions.

This is extendable to the area of human rights law. States, if we assume they are committed to human rights principles but simultaneously face resource constraints, might need to elect to pursue the provision of one area of human rights over another. In this respect, the concept of 'progressive realisation', which requires that states attempt to guarantee to their citizens the rights provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR), recognises that limited resources are likely to handicap states in achieving this goal:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation,

²⁶⁷ For interesting arguments and counter-arguments about efficiency and law, see the debates and approaches outlined in Richard S Markovitz, 'Legal Analysis and the Economic Analysis of Allocative Efficiency' [1980] 8 Hofstra Law Review 811; Richard A Posner, 'A Reply to Some Recent Criticism of the Efficiency Theory of the Common Law' [1981] 9 Hofstra Law Review 775; Richard S Markovitz, 'Legal Analysis and the Economic Analysis of Allocative Efficiency: A Response to Professor Posner's *Reply*' [1982] 11 Hofstra Law Review 667.

especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁶⁸

In recognising that states will not be able fulfil their obligations immediately, as to do so would require significant resources, progressive realisation makes reference to the resource constraints paradox found in economics. By affording states the leeway to take 'appropriate measures' in light of their 'available resources', reference is made to efficiently allocating resources. States are assumed to attempt to maximise human rights standards, given their resource constraints.²⁶⁹ We assume that states prioritise the protection of those rights that they value the most, with value a synonym for a state's commitment to each particular human right. However, when dealing with treaties that provide for rights that do not fit any clear specific subject area, but which are more general and encompassing such as is the case with the ICESCR, it can be more difficult to determine, at the outset, to what extent states will be committed to their various obligations. Monitoring the extent to which a state progressively realises rights can facilitate the resolution of information asymmetries between states parties and the international community and has an on-going signalling effect.²⁷⁰ States are able to use their resources to gradually improve their human rights standards, although this necessarily requiring that all rights cannot be fully guaranteed in each period. If resource availability improves, such that states are able to allocate increased absolute levels of resources – rather than proportionate levels – to different areas of human rights, then we expect that standards will improve: a higher absolute allocation facilitates improving standards whereas a higher proportionate allocation suggest that standards are slipping elsewhere.

²⁶⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

²⁶⁹ Implicit in this is the assumption that the state does actually allocate resources in a manner that maximises standards. For an assessment of state compliance to this requirement, see Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' [1994] 16 Human Rights Quarterly 693.

²⁷⁰ Provided commitments to progressive realization are being monitored by the international community.

This distinction addresses the crucial issue in allocating resources to human rights protection. Unless the availability of resources constantly increases, states will be required to address a conflict of equalities, as improving protection in one area of human rights might require lowering protection in another area.²⁷¹ Therefore, this need to allocate resources among various areas of human rights protection assumes that a hierarchy of human rights exists.²⁷² By linking limited resources, resource allocation, and conflicting equalities, we are rejecting theoretical conceptions based on moral absolutism.²⁷³ Instead, we assume that, in cases in which resources are limited and in which states cannot provide optimal human rights standards, resources might be allocated to those areas of human rights protection in which the state can most efficiently achieve higher standards. Further, resource allocation also relates to the very essence of human rights law as requiring both protection and promotion: the former assumes that a state's legislation and its apparatuses ensure that rights will not be breached while the latter obliges states to ensure that citizens are made aware of their rights.²⁷⁴ Upon a state's commitment to its treaty obligations, it is likely going to be required to firstly ensure protection of the treaty provisions and secondly to promote awareness of those rights among its citizens and public servants. In allocating resources toward adherence to treaty obligations, states must therefore consider both the cost of aligning domestic and international law and the cost of promoting these rights on the domestic plane. If a state can easily align its legislation and can guarantee adherence but if it is likely to face difficulty in

²⁷¹ Norberto Bobbio, *Era Dos Direitos* (1st edn, Campus 1992), 21.

²⁷² A good overview of this issue can be found in both Theodor Meron, 'On a Hierarchy of International Human Rights' [1986] 80(1) American Journal of International Law 1; a more intricate analysis of this issue is detailed in Dinah Shelton, 'Normative Hierarchy in International Law' [2006] 100(2) American Journal of International Law 291; Alison Dundes Renteln, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights' [1985] 7(4) Human Rights Quarterly 514; Alison Dundes Renteln, 'Relativism and the Search for Human Rights' [1988] 90(1) American Anthropologist 56; Michael J Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' [1997] 19(3) Human Rights Quarterly 461.

²⁷³ This rejection can be traced back as far as Bentham; for a more recent analysis, see Alan Gewirth, 'Are there any Absolute Rights?' [1981] 31(122) The Philosophical Quarterly 1.

²⁷⁴ For an overview of how promotion and protection of human rights are governed by the various arms of the UN, see OHCHR 'Promotion and Protection of Human Rights' <<http://www.ohchr.org/Documents/Publications/Compilation2.1en.pdf>> accessed 7 March 2011.

receiving backing from citizens, then allocating resources to the protection of the right will be inefficient. Rather, the right might be better served by being firstly promoted, such as through public education, and thereafter alignment of domestic and international law might take place.²⁷⁵

Fundamental to this discussion on resource allocation has been the contention that states are limited in their capacity to fulfil their obligations by their financial situation, as we have assumed improving human rights standards can be costly, with financial costs depending on the need to align domestic standards and the need to train public servants. Financial costs might therefore restrict additional improvements in a state's human rights standards. While poorer states are likely to find it more challenging than wealthier states to reach a higher level of human rights protection overall,²⁷⁶ the marginal cost of an additional level of protection of a positive right is assumed to be greater than the marginal cost of an additional level of protection of a negative right. Accordingly, poorer states can more easily allocate their limited resources among assorted negative rights than they can among assorted positive rights, assuming it is a binary choice. Picking and choosing which treaties to ratify can facilitate efficiently allocating resources among different treaty-mandated obligations. By doing so, poorer states can achieve higher levels of human rights protection exclusively in those human rights areas to which they have made commitments. While this might distort the picture of a state's commitment to human rights protection generally, it might simply reflect a poorer state's desire to efficiently

²⁷⁵ Consider, for example, the UK in recent years: despite having a long-standing commitment to human rights and having transposed the ECHR into domestic law, the state faces significant pressure to leave the Convention. Repeated Court rulings are criticized in the media and by the political establishment, including by government parties. The UK, if we assume it wishes to continue its tradition of human rights protection, might be better served by educating the population about human rights principles first and thereafter continuing to commit to its treaty obligations. This would be a more efficient from of achieving better standards. A response to this tide of pressure against the Court can be found here: Press Release, 'We must stop tarnishing our human rights legacy says former President of the European Court of Human Rights' (*British Institute of Human Rights*, 3 September 2013) <<http://www.bihhr.org.uk/media/we-must-stop-tarnishing-our-human-rights-legacy-says-former-president-of-the-european-court-of-human>> accessed 9 September 2013.

²⁷⁶ The relationship between these issues is detailed in Thomas W Pogge, *World Poverty and Human Rights* (2nd edn, Polity 2007); Neil J Mitchell and James M McCormick, "Research Note: Economic and Political Explanations of Human Rights Violations" [1988] 40(4) *World Politics* 476.

allocate resources and to use this approach to achieve progressively improving standards as financial means improve.

Randolph et al. (2009) have utilised such an approach in their work on creating a framework for measuring and comparing state standards in the area of economic and social rights. Their approach:

assesses the extent to which a country is meeting its obligation of progressive realization as the percentage of the feasible level of achievement given the country's resources and imposes a penalty on countries with resources sufficient to fully realize a given right but failing to do so.²⁷⁷

The goal of the research was to rank states according to how their human rights standards stacked up against the standards of other states with similar per capita incomes. In this way, a state's actual level of commitment to human rights is observable, rather than its human rights score garnered from other quantitative sources that do not rank according to resource constraints. In those traditional models, wealthy democratic states might appear to be the states most committed to providing economic and social rights, but this fails to account for their greater availability of resources, which facilitates better standards. The model developed by Fukuda-Parr, Lawson-Remer, and Randolph differs for its facilitation of this distinction: an 'achievement possibilities frontier' for each human right under investigation at each per capita level of income is developed,²⁷⁸ such that a maximum score for each level of per capita income is possible. The maximum score attainable by all states stems from the maximum score ever attained at that level of per capita income. When states are capable of attaining a maximum score but fail to do so, they are penalised.

The model rewards states for efficiently allocating resources such that those resources are put to their best use and penalises inefficiencies in improving human rights standards. The states that place highest on the rankings can be interpreted as those states that are most efficient at maximising human rights

²⁷⁷ Susan Randolph, Sakiko Fukuda-Parr, and Terry Lawson-Remer, 'Economic and Social Rights Fulfillment Index: Country Scores and Rankings' (2009) University of Connecticut Working Paper Series, 6 <<http://ideas.repec.org/p/uct/ecriwp/11.html>> accessed 30 November 2010.

²⁷⁸ Sakiko Fukuda-Parr, Terry Lawson-Remer, and Susan Randolph, 'An Index of Economic and Social Rights Fulfillment: Concept and Methodology', Working Paper 16 <<http://ssrn.com/abstract=1534613232634>> accessed 2 December 2010

standards given resource constraints. Thus, for example, the authors cite Jordan (6th out of 101 states) and Turkey (87th out of 101 states) as ‘medium human development countries’ that show marked differences in their abilities to fulfil their economic and social rights obligations.²⁷⁹ Jordan is comparatively more efficient at protecting these rights than is Turkey. In commenting on Jordan, the authors point out that the state’s economic and social policies have resulted in Jordan ‘performing very well in fulfilling the rights of its citizens to education, health, food, adequate housing, and decent work’, but that women and refugees are somewhat removed from the benefits and are discriminated against.²⁸⁰ So while Jordan might be allocating its resources in such a way that it is achieving notable results in rights protection, the welfare improving nature of this allocation might not be *Pareto* optimal. The scores and ranks, while they suggest state efficiencies in improving standards, do not necessarily suggest that the approach taken is equitable. This conflict between efficiency and equity has been – and will continue to be – central to understanding the approaches taken in this dissertation.

V. Conclusions

In this chapter, we have addressed a number of complex issues relating to the drafting of human rights treaties. We have asked whether striving for universal ratification should remain the normative goal of human rights treaty drafters, as striving for this goal cannot be achieved alongside a strong treaty. The interests of states will trump the ability of drafters to create strong treaties and to achieve universal ratification. In addition, we have pointed out that the nature and specificity of treaty articles can influence whether a state ratifies and have suggested that, if universal ratification is the normative goal, the most optimal way of encouraging ratification by states with poor human rights records is to leave treaties vague and to establish a dispute settlement body simultaneously. This, we argued, will incentivise ratification as states with poor records are assumed to calculate the cost of ratification based on the extent to

²⁷⁹ Randolph, Fukuda-Parr and Lawson-Remer, ‘Economic and Social Rights Fulfillment Index: Country Scores and Rankings’ (n 277), 18.

²⁸⁰ Randolph, Fukuda-Parr and Lawson-Remer, ‘Economic and Social Rights Fulfillment Index: Country Scores and Rankings’ (n 277), 20.

which their domestic standards differ from the standards outlined in the treaty; as the treaty is drafted in a vague manner, states with poor standards cannot determine the real meaning of the article (as if there had been no transaction costs during the drafting process). Thereafter, we addressed the issue of treaty flexibility tools and argued that the way reservations and objections are structured facilitates strategic action by states and makes it difficult for the international community to determine which reservations and objections are genuine. In relation to the issue of progressive realisation, a connection between that issue and the economic problem of limited resources and resource allocation was made. We showed that progressive realisation could be justified using law and economic theory, as it enables states to maximise welfare.

Altogether, this chapter has attempted to tackle central issues in the drafting process of human rights treaties in an entirely novel manner. More research is required to assess how applicable some of these arguments and assumption are to the real world of treaty drafting. If nothing else, the chapter advocates for closer consideration by treaty drafters of the effects of their decisions on state ratification and compliance.

Chapter 4: Protecting Human Rights

One of the cornerstones of international human rights law is the principle that when states parties breach their obligations, provided a treaty body or dispute settlement mechanism is in place to determine the extent of that breach, the state will be expected to provide an effective remedy.²⁸¹ In the absence of a treaty body, punishment might take the form of reputational sanctions,²⁸² the severing of diplomatic ties,²⁸³ the imposition of economic sanctions,²⁸⁴ or even reciprocal action might be taken by other states.²⁸⁵ Evidently, the international community strongly believes in the rule of *pacta sunt servanda*,²⁸⁶ with this being particularly imperative in the case of human rights law, where inalienability is a fundamental concept.²⁸⁷ In the institutionalized treaty body setting, however, providing an effective remedy might take on other forms, which are dealt with in chapter 8.

Presently, we address the protection of human rights in international law using two approaches: the economic analysis of various liability rules and the economic analysis of contract law. In relation to the latter, our foundation is Pauwelyn's (2007) application of Calabresi and Melamed's (1972) seminal work to public

²⁸¹ ICCPR art 2(3).

²⁸² Andrew T Guzman, 'International Law: A Compliance Based Theory' UC Berkeley School of Law Public Law and Legal Theory Working Paper No. 47 (April 2001), 40.

²⁸³ Goldsmith and Posner, 'A Theory of Customary International Law' (n 19), 1174.

²⁸⁴ See, for analysis of some of the effects of such an approach, Patricia Sterling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization' [1996] 11 American University Journal of International Law & Policy 1; Dursun Peksen, 'Better or Worse? The Effect of Economic Sanctions on Human Rights', [2009] 46(1) Journal of Peace Research 59.

²⁸⁵ Reciprocity is a difficult concept to grasp in the case of human rights violations, as the subjects of violations are usually citizens of the violating state. See, generally, Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (n 264).

²⁸⁶ For scholarly analysis of this doctrine, the following are helpful: Josef L Kunz, 'The Meaning and Range of the Norm *Pacta Sunt Servanda*' [1945] 39(2) American Journal of International Law 180; I I Lukashuk, 'The Principle *Pacta Sunt Servanda* and the Nature of Obligation under International Law' [1989] 83(3) American Journal of International Law 513.

²⁸⁷ See, for a clearly-written analysis of this assumption, Jerome J Shestack, 'The Philosophical Foundation of Human Rights' [1998] 20(2) Human Rights Quarterly 201

international law. Pauwelyn's research acts an important starting point in being able to understand law and economics' relationship with this branch of law. In it, he utilises the distinction made by Calabresi and Melamed between various liability rules for legal breaches. Both of those works use 'entitlements' in dealing with legal regimes, rather than 'rights': entitlements can be used to explain how we prefer one party or another in a conflict of interests scenario.²⁸⁸ Pauwelyn explains this on the basis that using this terminology allows for the inclusion of a liability rule in the analysis, rather than 'rights', which might restrict the analysis to consideration of a property rule.²⁸⁹ This chapter equally applies this terminology. In this way, we are moving away from the concept of human rights as legal rights that confer a duty on states not to infringe those rights and are instead suggesting that human rights might be entitlements that can be taken away from us.

To that end, we also examine how human rights might be understood using economic thinking, by suggesting that 'substitute' rights might be one way of resolving protection problems and by examining where the concept of efficient breach from the economics of contract law fits into the human rights context.

²⁸⁸ Guido Calabresi and Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability' [1972] 85(6) Harvard Law Review 1089, 1090.

²⁸⁹ Pauwelyn explains the use of this term as follows: 'Following Calabresi and Melamed, I use the term legal "entitlements" to cover things broader than strict legal "rights". This enables the introduction of liability rules as under a liability rule (say, a pollution tax), I do not have a legal "right" to clean air (which corresponds to a duty not to pollute), only a legal "entitlement" to clean air which anyone can take away for as long as compensation (i.e. the pollution tax) is paid. Thus, my legal entitlement to clean air does not correspond to a duty not to pollute; but rather to a duty to pay a tax in case one pollutes. Put differently, rather than a duty not to pollute, companies then have a right to pollute for as long as they pay the pollution tax'. Joost Pauwelyn, *Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism* University of St. Gallen Law and Economics Research Paper Series 2007-27, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019415> accessed 9 October 2010, 3 (n9).

I. Protection Regimes

In Calabresi and Melamed's work, they emphasised three steps that must be analysed when looking at legal protection in domestic law: allocation of entitlements, protection of entitlement, and back-up enforcement. These levels of analysis look at how legal regimes are structured in relation to the protection of various entitlements conferred on respective entities. In its application to domestic law, the model chiefly relies upon the first two steps. Pauwelyn's application of the existing model to public international law, rather than to domestic law, required adaptation. Accordingly, he built upon Calabresi and Melamed's third step: back-up enforcement. This is more relevant in the international sphere due to the absence of a central government. We address entitlement allocation and entitlement protection here, leaving back-up enforcement to the final chapter so that we are able to continue our approach of analysing human rights issues chronologically from treaty formalisation through to resolution of breach.

A. Entitlement Allocation

Determining to which party various entitlements should be allocated is central to any law and economics research, as much of the discipline's focus rests on conflicts between competing interests: if interests are in conflict then the allocation of entitlements in one direction or another might either appease or worsen that conflict. From the classic law and economics example: the allocation of the right to pollute to the factory owner may aid his or her interest in industrial production and may impede the laundrette owner's interest in providing customers with clean clothes. Equally, protecting the laundrette owner's interest in clean clothes by allocating him or her that entitlement to clean clothes might stifle industrial progress and innovation on the part of the factory owner.

In such a light, we assume that the manner in which entitlements are allocated will have a direct causal impact on the welfare of those parties and on social welfare overall. On the domestic level, allocation takes place through legislation or court rulings, whereas – and herein lies the difference – allocation on the

international level takes places through treaties. The absence of an executive on the international setting indicates that consent is both the stumbling block and the driving force behind the establishment of international treaties and the resulting allocation of entitlements to states and citizens. In some cases, entitlements will be allocated to states, such as the right to use certain waterways, whereas in other cases entitlements might be allocated to individual citizens and whereby protection will primarily be the obligation of the states, thereby creating a vertical relationship such that rights are allocated *through* states *to* citizens: human rights treaties fit this definition.²⁹⁰ This presents a quandary for our analysis, as it is states, as conduits through which entitlements are allocated, that can determine the manner and extent to which those entitlements will be protected. States do this through domestic legislation or institutional structures. In this way, states are both the guardians of human rights and the entities that can most easily expropriate those entitlements. Entitlement allocation is therefore a largely moot discussion in relation to human rights law, because it is conceptually difficult to think of a means of allocating human rights entitlements to citizens that does not involve the state. Under the current system, states can easily ‘expropriate’ entitlements protected under international law by simply restricting rights on the domestic level. This peculiar situation, in which the citizens to whom the entitlements are allocated are reliant upon a state’s commitment to adhering to its obligations, might explain why the protection regime traditionally applied to human rights law is one of inalienability.

B. Entitlement Protection

We follow Pauwelyn’s discussion of the distinct regimes under which entitlements are protected: an inalienability rule, a property rule, and a liability rule.²⁹¹ Under a rule of inalienability, transfer of an entitlement is not possible; under a property rule, transfer is possible; under a liability rule, enforced transfer is possible, as long as compensation is paid afterwards.

²⁹⁰ Pauwelyn, ‘Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism’ (n 289), 52.

²⁹¹ *ibid* 23-34.

Pauwelyn's novel contribution is his discussion of the role of inalienability rules and liability rules. Essentially, the question turns on when the property rule – the preferred rule in international law²⁹² – might be inappropriate. Inalienability, for example, might be a more appropriate rule in cases in which externalities would be more pronounced in case of violation, as it is assumed to be unlikely that any state will be willing pay to for the right to violate such highly regarded and protected entitlements in order to externalise costs. Inalienability rules, therefore, go hand in hand with peremptory norms, with this accordingly indicating that morality and inalienability are also indelibly related.²⁹³ Human rights obligations enshrined in international treaties are inalienable rights, as breaches of the rights in those treaties are generally not permitted.²⁹⁴ It is this crucial issue that we now address, as the concept of inalienability, with its roots in morality, conflicts with the economic principles of welfare maximisation and allocative efficiency. If we reimagine human rights outside of this moral and ideological setting, it might be possible to consider the effects of protecting them under either the property rule or the liability rule. In borrowing directly from Pauwelyn, he suggests that the central issues when devising entitlement protection rules are:

- (1) Can states freely transfer their entitlements under international law or should they at times be prohibited from doing so (making the entitlements inalienable)? If so, when, why and how should such inalienability be imposed?
- (2) Can one state simply take or destroy the entitlement of another state, subject to compensation (liability rule or take-and-pay principle), or should certain entitlements only transfer if the holder willingly agrees (property rule or principle of mutual consent)? In other words, when, why and how should international law be protected by a property rule? And when, why and how should international law be protected by a mere liability rule?²⁹⁵

²⁹² *ibid* 23.

²⁹³ Meron, 'On a Hierarchy of International Human Rights' (n 272).

²⁹⁴ While breaches are not permitted, we have elsewhere discussed the role played by reservations, objections, and derogations in reducing the cost of ratification and in making certain treaty provisions unenforceable. It can be fairly argued that these flexibility tools are essentially akin to breaching obligations.

²⁹⁵ Pauwelyn, 'Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism' (n 289), 17.

This, though, causes problems, as conceiving of a human right as something that might be transferable is theoretically difficult. Nonetheless, we proceed in this vein, and by following these questions we emphasise the different outcomes and varying stakeholder incentives that materialise under the different rules.

Irrespective of the setting, we presently challenge the assertion that human rights might be inviolable and instead propose that they can be conditional. In some circumstances, we argue, it might be permissible – indeed possibly necessary – for states to breach their obligations under international human rights law. We justify this theory on the basis that, in certain circumstance, obliging a state to commit to its treaty obligations will be inefficient if the resources used to achieve that commitment could be put to a more efficient use in a different capacity. We base our assertion on the economic argument that promisors should not be required to adhere to contracts when the costs of adhering outweigh the promisee's benefits from adherence.²⁹⁶ If the resources that would have been used in executing a contract can be put to be better use elsewhere, then it is likely to be efficient not to uphold the contract. Equally, though, contracts cannot be unilaterally broken without compensation being given to the promisee, such that we should 'think of the remedy as the "price" paid by the promisor for breaching the contract'.²⁹⁷ This suggests that contracts will be breached when the promisor values breach higher than the compensation the law requires be paid. Conversely, though, the higher the compensation the lower the incentive to breach. Breaching contracts is therefore a function of the value each party places on performance and the price of the breach. Rational promisees are assumed to be indifferent between breach and performance when the compensation they receive meets the value they place on performance.

²⁹⁶ This approach is discussed and detailed in Robert L Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' [1969] 24 Rutgers Law Review 273; Ian R Macneill, 'Efficient Breach of Contract: Circles in the Sky' [1982] 68(5) Virginia Law Review 947.

²⁹⁷ Cooter and Ulen, *Law and Economics* (n 57), 189.

1. Inalienability Rule

In the domestic setting, the creation of incomplete contracts and flexible arrangements as a form of contractual engagement facilitates renegotiation.²⁹⁸ On an international level, incompleteness can facilitate dynamic state-to-state interaction and can provide for ex post gap-filling in institutional settings.²⁹⁹ Protecting entitlements under an inalienability rule, however, with its strict and unwavering nature, reduces the ability of regulators to apply flexible approaches to certain treaty disputes.

The application of inalienability rules to peremptory norms, as against the existence of more open rules in other areas of law, is assumed to be rooted in the value of the issue over which the parties have negotiated: whereas human rights are said to be inalienable, tariff provisions are governed by a liability rule.³⁰⁰

Our goal is to analyse peremptory norms from an economic perspective, as protecting them under an inalienability rule might sometimes result in inefficiencies. Pauwelyn's work in this area focuses on assessing *ius cogens* rules objectively, and suggests that what matters most in these contexts is the presence or absence of a market failure.³⁰¹ The moral importance of an issue is less of a justification for its protection under an inalienability rule than the 'market-based' consequences of not protecting it under that rule. In this way, we move away from a teleological approach that focuses on the nature of human rights norms as something worth striving for and instead we look at the nature and consequences of breaching an obligation. Doing so affords more leeway in terms of finding potential resolutions to such breaches and avoids the potentially stifling nature of inalienability rules.

In some cases, however, we have seen approaches to resolution that nonetheless apply novel perspective to inalienability: proportionality is one such example. The European Court of Human Rights, for instance, has examined expropriation

²⁹⁸ A useful overview is given in Ilya Segal, 'Complexity and Renegotiation: A Foundation for Incomplete Contracts' [1999] 66(1) *Review of Economic Studies* 57.

²⁹⁹ William J Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of the State' [1999] 17(4) *University of Pennsylvania Journal of International Economic Law* 995.

³⁰⁰ Pauwelyn, 'Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism' (n 289), 70.

³⁰¹ *ibid*, 29.

by asking whether it had been proportionate.³⁰² Proportionality as an interpretation of norms contradicts the concept of peremptory norms in a very real way: if norms are inalienable then their interpretation must be absolute. It is contradictory, in these cases, to consider suitability or necessity as a justification for breach, as this would seem at variance with the traditional legal discourse governing inalienability. But despite this inconsistency, proportionality might sometimes be a useful tool for the analysis of inalienable rules: it may aid the circumventing of the inefficiency of these rules. In some cases, breaching commitments to human rights treaties may have been both appropriate and/or necessary. If that is the case, such that deviations from inalienability might be sometimes possible, then we have already moved toward considering other protection regimes.

A related issue is that inalienability is not met with enforcement within the institutional setting, and accordingly a situation exists in which states are expected to adhere to a particular allocation of entitlements but do not face consequences for taking those entitlements. The failure of international human rights treaties to achieve compliance among states parties, despite – or because of – the rights provided for in the treaty being protected by an inalienability rule, requires a re-imagination of how protection of these rights should be dealt with by either treaty drafters or treaty bodies.

2. Property Rule

Protection according to a property rule allows for welfare maximisation, as it enables entitlements to flow to the user that values them the most,³⁰³ it takes account of the heterogeneity of states by affording them the choice as to in whom entitlements are vested,³⁰⁴ it does not require central authority,³⁰⁵ and its utilisation

³⁰² *Jahn and others v. Germany*, European Court Human Rights, Grand Chamber Judgment (30 June 2005) available at <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69560#{"itemid":\["001-69560"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69560#{)> accessed 29 March 2013; this is discussed in a scholarly sense in Ulrike Deutsch, 'Expropriation without Compensation – the European Court of Human Rights sanction German Legislation expropriating the Heirs of "New Farmers"' [2005] 6(10) German Law Journal 1367.

³⁰³ The states that value the entitlement the most can 'buy' those entitlements from the states that do not value the entitlements so highly.

³⁰⁴ Inalienability doesn't account for heterogeneity, for instance, and treats all entities equally, meaning that distinct preferences and valuation do not play a role.

‘aligns with contractual freedom’.³⁰⁶ In essence, one of the property rule’s central benefits is that it requires little central intervention and allows for bilateral state-to-state negotiation. States are able to negotiate between one another as to the allocation of entitlements and those that value those entitlements the most are likely to acquire them.

Where the domestic application of a property rules differs from its international incarnation is the possible absence of compensation and the possible presence tit-for-tat responses: the lack of a central authority facilitates this, as states can more easily elect to pursue their own interest. Pauwelyn notes ‘community costs’,³⁰⁷ however, as a means by which states are held to account for breach in the international setting: these include pressure by the international community and reputational damage. If such forms of punishment are limited, however, states are free to do as they wish. Both punishment and a state’s approach to the relevant issue are likely to depend on the subject matter and the state’s commitment to breach. For example, we can conceive of a situation in which a state engages in fishing activity beyond the geographic limits of its treaty-mandated exclusive economic zone: in this case a property rule would permit such activity if other states – or possibly corporations – agree.³⁰⁸ This might occur if another neighbouring state cannot utilise its own zone in that period, perhaps because of weaknesses in its fisheries industry.

But while this is very plausible, it is more conceptually difficult to envisage how this might operate in a situation in which, for example, a state breaches its obligations under the Convention on the Rights of the Child (CRC). In that case, a property rule would require agreement between the state and the treaty’s

³⁰⁶ While no central authority is required for property based transactions to take place, facilitation of disputes will require a central authority if transaction costs prevent resolution otherwise.

³⁰⁷ Joost Pauwelyn, ‘Hamburg Lectures on Law and Economics’ University of Hamburg, Germany, (28 October 2010) available at <<http://lecture2go.uni-hamburg.de/veranstaltungen/-/v/11465>> accessed 20 September 2013.

³⁰⁸ Pauwelyn ‘Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism’ (n 289), 85.

³⁰⁹ In New Zealand, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 came into force in June 2013 with the aim of protecting the marine environment; critics have suggested, however, that the Act puts a price on the EEZ, such that it is ‘for sale’. See Claire Browning, ‘The Exclusive Economic Zone: For Sale’ (*Forest & Bird Weblog*, 17 January 2012) <<http://blog.forestandbird.org.nz/the-exclusive-economic-zone-for-sale/#more-3442>> accessed 5 September 2013.

promisees (children, other states, and the international community) that the rights would not be provided for. Other human rights treaties might, however, be different: states might pay refugees to leave the host state,³⁰⁹ despite this violating the principle of non-refoulement.³¹⁰ In the case of human rights treaties, however, quite apart from the ethics of this approach, a property rule is inappropriate because it requires coordination between the state, its citizens, and the international community. Significant transaction costs would be involved in this case, as the state would need to negotiate with each entitlement-holder in relation to how they would be reimbursed for ceding a particular entitlement to the state.

In the domestic setting, referenda are means by which a state negotiates with citizens over matters that might often relate to human rights, in that the proposed constitutional changes might either remove certain human rights completely or replace them with other rights.³¹¹ *Pareto* optimal scenarios will not materialise if those on the losing side of the referenda value their preferred outcome more than the value placed by those on the winning side of their preferred outcome. One could conceivably apply this domestic analogy to the international context, as constitutional provisions mirror treaty provisions in many respects. However, the greater number of entitlement holders in relation to treaty-mandated entitlements makes translation to the international context more difficult. Further, unless the relevant treaty is enforceable in domestic courts the question of the replacing of rights, as a compensatory approach, will not be applicable. So while property rules in the domestic context can aid welfare maximisation and the transfer of entitlements, the necessity to negotiate with each respective entitlement holder is assumed to limit its applicability on the international plane.

³⁰⁹ Reuters, 'Israel Slammed for Sending Migrants back to Eritrea: "Grave Violations" of Immigrants Rights, Advocates Say' (*Jewish Daily Forward*, 15 July 2013) <<http://forward.com/articles/180502/israel-slammed-for-sending-migrants-back-to-eritre/>> accessed 13 August 2013.

³¹⁰ 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion', Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 art 33(1).

³¹¹ I.e. The state asks its citizens whether they will cede their entitlement to particular constitutional provisions and might propose changes to that provision.

3. Liability Rule

Liability rules can be directly contrasted with property rules in relation to the overcoming of the transaction costs of negotiation; in particular, this rule is most appropriate in cases in which it is possible for entitlement-holders to hold out or in which it is possible to free-ride. In the domestic context, the possibility for individuals to hold out during negotiations sometimes mandates that that right be forcefully taken away from those individuals; for example, a property owner might flatly refuse to negotiate transfer of a plot of land to a government for a community facility. The strong position of the entitlement-holder enables him or her to extract greater rents from those eager to acquire the entitlement, and allows for strategic action. It is for this reason that government schemes such as compulsory purchase orders exist, in order that hold-out can be circumvented.³¹²

However, as before, significant differences exist between the domestic setting and international setting: the absence of an international executive to enforce the transfer of entitlements from one state to it, in order that entitlements can be put to their most efficient use, does not exist. No world government can demand that states cede their entitlement to pollute: states are more-or-less free to do this as they wish.³¹³ Granted, authorities do exist on the international level that mirror executives on the domestic level,³¹⁴ but their ability to exert control over state activity is far more limited than the ability of governments to control the actions of individuals. Nonetheless, liability rules do exist among the regulatory frameworks of international organisations, such as in relation to investor protection in the World Trade Organisation.³¹⁵

³¹² By dictating that a piece of land has to be sold to the state (largely), compulsory purchase orders get around individuals property owners putting an artificial value on their land.

³¹³ Although efforts have been made to regulate state activity in relation to the release of greenhouse gas emissions, through the United Nations Framework Convention on Climate Change, there is no enforcement mechanism, although binding limits on greenhouse gases are applied largely to developed states, through protocols.

³¹⁴ While the UN is akin to an executive in some respects, it is limited by state power and the problem that most of its recommendations are non-binding.

³¹⁵ For some law and economics approaches that seek to explain such rules in the WTO context, see Joel P Trachtman, 'The WTO Cathedral' [2007] 43(1) Stanford Journal of International Law 127; Warren F Schwartz and Alan O Sykes, 'The Economic Structure of Renegotiation and Dispute Settlement in the WTO/GATT System' University of Chicago Working Paper Series (2007) <http://www.law.uchicago.edu/files/files/143.AOS_wto_.pdf> accessed 10 June 2012.

Equally, liability rules on the domestic setting are means by which the problem of free-riding individuals can also be addressed. The construction of the aforementioned community facility is expected – by definition – to benefit the community. That community, comprised of users, entitlement-holders, and buyers, in different proportions, will benefit from the construction of the facility. However, given that some parties are more willing to buy the entitlement than others, those with a lower willingness to pay have an incentive not to buy, but rather to free-ride and to wait until the entitlement has changed hands and the community facility is built. Once again, the existence of an executive on the domestic level, with authority to tax, ensures that this free-riding problem is overcome.

The nature of international law as being a regulatory framework aimed at tackling transnational issues in relation to which free-riding is possible,³¹⁶ means that agreement between states in which sovereignty is ceded to an international institution makes resolution of free-riding problematic as states likely to partake in negotiations are assumed to be less likely to free-ride. Indeed, this difficulty in arriving at agreements also explains why liability rules sometimes exist in the domestic setting: if society were to function in such a way that individuals and governments were to have to constantly negotiate over how best to resolve breaches, the transaction costs involved would make it prohibitively expensive for society to function effectively. It is for this reason that a liability rule exists on the domestic level.

Reflecting the domestic context, multilateral negotiations become evermore difficult as the number of states in the world grows. Under those circumstances of increasing transaction costs, it might be conceivable that liability rules would become more appropriate rules for protecting entitlements and resolving treaty breaches. Naturally, however, the rule's usefulness is limited by the absence of a world executive that might apply it. Hence, the application of a liability rule to international law becomes more valuable as it becomes more difficult to negotiate over how to resolve breaches and yet it becomes more difficult to negotiate the institutionalisation of this rule as more states emerge and as those state do or don't participate in negotiations. Hence, a circular problem exists. In the WTO, a

³¹⁶ In the case of the use of waterways, for example, free-riding by upstream riparian states in major coordination problem, Hilary Sigman, 'International Spillovers and Water Quality in Rivers: Do Countries Free Ride?' [2002] 92(4) American Economic Review 1152.

liability rule exists in order to overcome the high transaction costs of having to negotiate with all member states to the GATT or to overcome hold-out:³¹⁷ it allows states that wish to unilaterally increase their tariffs in relation to certain products to do so, but requires that the state thereafter pays for this permission, perhaps either by reducing a tariff in relation to another product or by being the victim of a retaliatory process. This gets around the issues of having to negotiate on both a bilateral and multilateral level, facilitates welfare maximisation, and fulfils the Kaldor Hicks criterion as states can make good their breach ex post.

Such provisions are hard to conceive of in international human rights treaties, if one takes a traditional perspective. A state that wishes to reduce its level of protection of a certain human right is unlikely to be permitted to do so on the condition that it compensates for that lower level of protection, such as by increasing its protection of another area; but why not? The application of a liability rule would allow states to act in this way. In that light, we later discuss the appropriate damages regimes for breaches of human rights treaty obligations. Presently, however, we extend the current analysis and ask how liability rules might work in practice.

II. Rights as Substitutes

If we link our previous discussion of resource allocation with our preceding assessment of liability rules, we can conceive of a situation in which human rights can be substitutable: if it is difficult or costly to protect one right, it might be possible to protect another right that shares characteristics with the first more easily or at a lower cost. This reflects both that concept of ‘take-and-pay’ and resource allocation. In addition, though, two types of substitutes must be recognised: perfect and imperfect substitutes.³¹⁸ Perfectly substitutable human rights would be rights in relation to which citizens and the international

³¹⁷ Pauwelyn ‘Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism’ (n 289), 70.

³¹⁸ For a technical economic analysis of the distinction between these two, see Jason F Shogren and Dermot J Hayes, ‘Resolving Differences in Willingness to Pay and Willingness to Accept: Reply’ [1997] 87(1) American Economic Review 241.

community would be indifferent: a state's failure to provide one right could be accommodated for by its success in providing another right, and whereby this satisfies *Pareto* optimality. We assume perfect substitutes are most likely to arise when a state's interests and the interests of its citizens and the international community are aligned, but whereby limited resources constrain fully providing for that right. As long as the equilibrium level of human rights protection – given the state's resources – remains the same, promisees should be equally content with a perfectly substitutable right.

However, this is highly stylised. In reality, and in a world in which achieving universal protection of human rights is a stated goal,³¹⁹ citizens and the international community are unlikely to be indifferent between various rights. Under conditions of constrained resources, however, we assume protecting the preferred rights might not be possible, while perfect substitutes might not be always available. In certain circumstances, states will subsidise their inability to provide for one human right with provision of another right, but whereby this fails to satisfy *Pareto* optimality. Imperfect substitutes would be more likely to arise when the state's preferences diverge from those of its citizens or the international community, with this assumed to be the case when a state is not fully committed to a treaty's ethos or to maximising human rights protection. In those cases, the state supplants its failure to provide for one human right with provision of a related but not identical human right. We assume that rights are scaled and that an increasing amount of resources is required at each additional level of protection on this scale.

As an example, we consider that the right guaranteeing protection against slavery and the right guaranteeing protection against compulsory or forced labour might be substitutable if we recognise the distinctions between the two.³²⁰ If the former relates largely to an individual's status, which may include an

³¹⁹ See, generally, Richard A Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (1st edn, Routledge 2000).

³²⁰ For an overview of European case law in which these issues are dealt with both together and separately, see European Court of Human Rights (ECHR), 'Key Case-Law Issues: Prohibition of Slavery and Forced Labour: Article 4 of the Convention' (December 2012); for academic research further strengthening the contention that these two issues are distinct, see Benjamin B Ferencz, *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (1st edn, Indiana University Press 2002) and Daniel A Novak, *The Wheel of Servitude: Black Forced Labor after Slavery* (1st edn, Kentucky University Press 1978).

obligation to work, and the latter relates largely to an obligation to work with no status necessarily attached, we can differentiate between the two on the basis of a proprietary distinction. If we assume that an individual is more likely to be subject to compulsory or forced labour than to slavery, a state may find it easier to allocate resources toward protecting individuals against slavery than against forced labour: mitigating slavery might be achievable through criminalising its proprietary aspect, whereas alleviating forced labour would require that resources are invested in investigative approaches. If states do not have the resources to undertake such approaches, guaranteeing protection against slavery may be an imperfect substitute for guaranteeing protection against compulsory or forced labour.

Equally, a similar analysis could be applied to freedom of association and freedom of assembly, which are protected both together and separately in international and regional treaties.³²¹ We might differentiate between the two on the basis that freedom of association affords citizens a participatory right, enabling them to formally engage with other citizens in relation to a collectively held belief, but whereby freedom of assembly affords citizens the right to come together to express collectively held beliefs but with no requirement that this be formal. Mostly, forming organisations will facilitate the expression of a group's ethos more easily by reducing the transaction costs of coordination; this suggests that association is likely to be a component of assembly and assembly is likely to be an outcome of association. States might only provide for one of these rights if they cannot also provide for the other. In relation to assemblies, there may be increased financial costs associated with policing assemblies in public places,³²² while facilitating collective association associations may result in political costs.³²³ If citizens are indifferent between the rights – at least in the short term – then they might be perfect substitutes: states can assign resources toward the provision of one right rather than the other. If citizens are not indifferent between

³²¹ In the European Convention, both rights are protected in article 11, while under the ICCPR the rights can be found in article 21 (assembly) and article 22 (association).

³²² For an analysis of the trade-off between these issues, see Robin Handley, 'Public Order, Policing and Freedom of Assembly' [1986] 7(2) *Journal of Legal History* 123.

³²³ Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (1st edn, Cambridge University Press 1994); Gene Sharp, *The Politics of Nonviolent Action, Part Two: The Methods of Nonviolent Action* (1st edn, Porter Sargent Publishers 1973).

the two rights, then preferences will not be satisfied with the protection of only one of the rights.

Evidently, improving standards in a world with finite resources is restricted by a state's availability of resources, by the nature of the rights as positive or negative, and through the requirement that rights are not just protected, but also promoted. Adherence to treaty-mandated obligations would be dealt with differently by each state, assuming a heterogeneous availability of resources. In cases in which states cannot fully provide for one right, then a substitute right might be appropriate, at least until the state's resources improve.

As mentioned, the problem of limited resources and efficient allocation is closely related to the question of the appropriateness of a liability rule as the default protection regime: if a state has limited resources but is committed to protection of human rights generally, that state may wish to adjust its resource allocation so as to fit its domestic constraints. The following stylised example in relation to a hypothetical state illustrates this.

Our state is relatively poor and with a young population. The resource constraints the state faces mean that it may be incapable of providing for the rights of this burgeoning demographic, despite the state being generally committed to human rights protection. Owing to significant demographic change, the state finds that its resources do not facilitate achievement of the same level of protection for young people as had been previously achievable. As it becomes clear that the state cannot provide for all of the rights protected under the Children's Convention, and as renegotiation with all states parties to the treaty would be prohibitively difficult (as under a property rule), we suggest that the state might unilaterally 'take' the entitlements protected in the CRC. The state would breach its treaty obligations to the international community and to its citizens. To balance this, we assume that the state is required to compensate for its failure to adhere to its obligations. In a perfect model, compensation would be equal to breach.

While abstract, this is an application of a liability rule to international human rights law: it allows states to breach their obligations but to 'pay' for this. What's important, however, if we extend the GATT application of a liability rule for breach of obligations to our model, is that the 'payment' made must be equivalent to the breach and that it must rectify the assumed harm caused to the international community and the other stakeholders.

The state is assumed to be able to achieve the same overall level of human rights protection by improving protection in other areas, in which the marginal cost of improving standards might be lower. To that end, we assume that by reducing the human rights protection afforded to young people – on the basis of resource constraints and increasing costs at each level of protection due to demographic change – the state will be able to increase the level of protection afforded to other sections of society – which we assume relates to the older population on the basis of the changing demographics – to such a degree that an equilibrium level of protection will be reached.³²⁴ In other words, it substitutes its protection of the human rights of large section of society (young people) with protection of the human rights of a smaller section of society (older people) and whereby the equilibrium level of protection remains the same. The state's availability of resources and the heterogeneity of its population are assumed to be determinative in its ability to achieve an equilibrium level of protection. The unilateral taking of the entitlement, however, will also have consequences for the international community. Assuming that that community is content with the state reallocating protection across society, no moral outrage is expected. However, if externalities materialise, such that lower protection levels for children result in a higher number of younger refugees fleeing to other states, then greater moral outrage among states with younger populations or in states more committed to the protection younger citizens might affect the preferences of those states for a liability rule. In this way, while a breach of treaty obligations according to a liability rule might not reduce overall protection within the state itself, the global equilibrium may be lowered.

In this sense, it is imperative that it is possible to monitor the degree to which states are shirking on their commitment to the rights enshrined in international treaties. In reality, however, it borders on impossible for a monitoring body to determine whether a state has subsidised its lack of commitment to one human right with its strong commitment to another human right. But while welfare maximisation might exist in this case, assessing the stability of that continued commitment might not be possible. What remains

³²⁴ It will increase, in this example, if the overall valuation of the rights afforded to the older population is higher than the valuation of the rights afforded to the younger population. This takes account of the size of the respective groups. This does not account for the valuation placed on rights protection by parties not in each respective group.

central to this discussion on the possible application of a liability rule and the relevance of substitutes to breaches of international human rights law, therefore, is the question as to whether a liability rule results in a *Pareto* efficient allocation of rights. A state's decision not to strive for the provision of high levels of protection across all areas of human rights, but to pick and choose the rights that it can provide for, must fulfil *Pareto* efficiency. So while the size of the youth demographic might be larger, the gains made by the higher level of protection of the human rights afforded to the older generation should equal or outweigh those losses.

This analysis of the relevance of a liability rule and substitutes to human rights law has shown its application would pose both normative and theoretical challenges. States would be permitted to breach their treaty obligations if, in doing so, they pay compensation to the parties whom they have harmed. That compensation has been analogised as a substitute human right, and whereby its provision ensures that the state's overall level of protection remains stable. We follow this approach further in a chapter 8 by investigating how other forms of compensation might be paid in human rights contexts.

III. Efficient Breach

By applying the contract law perspective alluded to throughout this dissertation, such that we assume that states are promisors that have contracted into an international human rights treaty and that individuals and the international community are promisees who rely on state adherence for the benefits of the treaty to accrue to them, we are able to use this analogy to examine the relevance of efficiency to treaty breach. States, as promisors, may be allowed to breach their treaty commitments when the benefits of doing so outweigh the cost of liability imposed by a treaty body and when those costs put the promisees in the same situation they would have been in had the treaty been fully complied with. To give this some context, consider Article 62 of the Vienna Convention, which alludes to efficient breach:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for

terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.³²⁵

On the general level of international law, therefore, efficient breach is alluded to but is severely restricted, as states must be able to justify their termination using carefully framed restrictions.

In analogising the link between efficient and human rights law, we rely upon some important assumptions. Firstly, we assume there is a treaty body in place that can adjudicate on the form and extent of compensation transferrable to the promisee. Secondly, assuming a treaty body has been established, we assume that it has jurisdiction to adjudicate on the issue at hand (i.e. has the state accepted the adjudicator's jurisdiction to monitor compliance or to receive petitions, such as by ratifying an optional protocol). Thirdly, we assume that the treaty body can correctly calculate the level of compensation that will make promisees indifferent between breach and performance.³²⁶ In practice, all of these assumptions might not hold. In addition, situations might sometimes arise in the domestic setting which alter the cost function of aligning domestic and international law. When these occur, it might be efficient for the state to breach its treaty commitments. We assume that these situations arise because of

³²⁵ Vienna Convention (n 253) art 62.

³²⁶ When dealing with compensation awarded to promisees, we are mainly referring to individuals, rather than the international community. In chapter 8, we go into more detail about the forms of compensation applicable.

unfortunate or fortunate contingencies.³²⁷ Fortunate contingencies make non-performance more profitable: they are situations in which the benefits from not aligning domestic and international law are greater than the gains from doing so. However, we are chiefly concerned with unfortunate contingencies, which are those situations in which the costs of complying with international human rights law are higher than the benefit of not doing so. When the citizens of the relevant state can be compensated somehow, states might be permitted to not comply and to put their resources to other uses. The costs of complying with a treaty vary by state: some states might find it easier to align their level of human rights protection with international standards, which is likely to be influenced by the political structure of the state, the strength of the legislature, or the ease with which the judiciary applies international standards. States with strong governments willing to align domestic and international standards may attempt to do so, but a concurrent slow and burdened judiciary may stifle that.

Ergo, both the costs of adhering to international law and the necessity to make changes to the domestic political or legal constituency are high. Rather than aligning its domestic law with international law, the state might be allowed to breach and to compensate thereafter. In this case, we do not consider the link between a liability and substitute rights, as that assumes that the equilibrium level of protection remains the same.

Efficient breach, in our application of its domestic relevance to human rights law, instead examines the conditions under which breach will be dealt with in the absence of substitutes. For instance, let us consider a hypothetical right to same-sex marriage. Under the substitutes theory, substitutes (likely imperfect) might include a right to civil marriage or civil partnership. But the substitutability of each relevant right will depend on the demand individuals place on each right as well as the costs of introducing that right. While a state might be committed to a hypothetical treaty providing for marriage for all, the value placed by certain domestic constituents on the right not being provided for might be higher than the value placed by other domestic constituents on the right being provided for. The costs of adhering to treaties covering subject matters that are not well established in the international human rights discourse will be a

³²⁷ Cooter and Ulen, *Law and Economics* (n 57), 238-245.

function of the extent to which domestic constituents oppose such a right.³²⁸ Such constituents increase the cost of compliance because they might increase domestic instability. In such circumstances, breaching treaty obligations might be efficient if it quells domestic instability in such a way that this alleviates the likely costs that would be incurred by promisees if breach were not to take place and if the domestic instability were to result in greater violations of individuals' rights. Efficient breach therefore has a very close connection with certain provisions of international human rights law that permit breach in certain circumstances, and which are generally termed 'limitations' or 'restrictions'. Thus, for example, the ICESCR mandates that

The states parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society.³²⁹

Equally, a very similar provision can be found in, among others, the American Convention on Human Rights.³³⁰ We can compare the references to restricting rights in both treaties with the provision in the African Charter on Human and Peoples' Rights which suggests that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.³³¹ So while the ICESCR provision makes reference to democratic principles in the scope of permissible restrictions that would allow efficient breach, the African Charter is more ambiguous about how those restrictions will be judged. If restrictions are to be used solely so as to indicate the limits of rights, then a more ambiguous framing will afford greater leeway to

³²⁸ It is likely to be cheaper to violate a right that is not well established in human rights law than it is to violate a well-established right, as there will be less moral outrage and fewer potential complainants.

³²⁹ ICESCR, art 4.

³³⁰ 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society', American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Charter) art 32(2).

³³¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 27(2).

judges in human rights courts to determine the boundaries of those restrictions *ex post* (i.e. to determine when efficient breach is permissible). In that way, the members of the African Commission on Human and Peoples' Rights are freer to determine whether a breach of an inalienable rights could have been justifiable under given circumstance than, in our example, members of the Committee on Economic, Social and Cultural Rights.³³²

To restrict judicial or quasi-judicial bodies from exercising authority to make judgments about when it might be permissible to violate inalienability rules, provisions exist to constrain that authority. States are therefore both afforded latitude to breach and judicial and quasi-judicial bodies are granted freedom to make findings of breach, but both are constrained in their ability to do so; one such example of this restriction on using an international treaty to justify breach of one right over another can be seen in the ICCPR, which states that

nothing in the present Convention may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.³³³

But on top of clauses that limit *ex post* broad interpretations by states or narrow gap filling by judicial or quasi-judicial bodies on a general level, many human rights articles contain specific terms that restrict the ability of states to allow breaches of inalienable rights; these are often drafted using the terms 'public health', 'public morals', 'public safety', 'public order', 'in a democratic society', 'national security', and 'rights and freedoms of others'.³³⁴ If these provisions are too restrictive, it could be conceivable that inefficiencies will result if states are required to adhere to treaty obligations when it might be more efficient to breach. For those ICCPR rights for which limitations might be permissible, however, those limitations are expected to fulfil strict requirements, such that they must 'be interpreted strictly and in favor of the rights at issue', they must be 'interpreted

³³² Noting, of course, that, at present, the Committee has no authority to receive complaints and accordingly such a situation would not arise in practice.

³³³ ICCPR, art 5.

³³⁴ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4, Annex (1985).

in the light and context of the particular right concerned', and they should not be 'applied in an arbitrary manner'.³³⁵ These restrictions are framed so as to limit states expropriating inalienable entitlements.

In practice, a number of judgements of the various regional bodies implicitly allude to concepts related to efficient breach. In a case examining restrictions on freedom of expression and the right's protection in the American Convention on Human Rights, the Inter-American Court found that

limitations must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.³³⁶

By referencing 'ends', we can make a connection between the flexibility of such restrictions and the conditions under which efficient breach comes about. If states consider that the 'ends' of breaching will result in welfare maximisation overall, given the permutations inherent in that assessment,³³⁷ then breach could be justified. In facilitating flexibility in relation to restrictions, the African Charter is particularly liberal. Article 6 mandates that freedom should not be deprived 'except for reasons and conditions previously laid down by law', and Article 8, in relation to freedom of religion and conscience, dictates that 'no-one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms'. Such 'clawback clauses',³³⁸ enable states to limit rights through domestic legislation and therefore afford states more free rein to breach their obligations. While an argument can be made that these provisions are efficient under certain circumstances, states might not always apply domestic legislation in light of whether it fulfils the efficient breach criterion. The efficiency of the Charter's provisions is therefore dependent on a state's commitment to democracy. In Africa, where democratic principles did not fully develop in the

³³⁵ *ibid.*

³³⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion 5, Inter-American Court of Human Rights Series A No 5 (13 November 1985), point 37.

³³⁷ These will relate to the heterogeneity of the state's citizens, the different values citizens place on the right at issue, and, among other things, the externalities (good and bad) that will stem from a restriction.

³³⁸ Sandhiya Singh, 'The Impact of Clawback Clauses on Human and Peoples' Rights' [2009] 18(4) *African Security Review* 95.

second part of the twentieth century,³³⁹ we could predict that assigning interpretation to states would increase the likelihood of inefficient breach. However, such provision have been qualified by the African Commission on the basis that

To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.³⁴⁰

Essentially, restrictions on rights must be 'legally established, non-discriminatory, proportional, compatible with the nature of the rights and designed to further the general welfare'.³⁴¹ In this way, the Commission has outlined the criteria under which restrictions are permitted and, by extension, clarified the parameters with which efficient breach should fall. But whereas a restrictive framework for allowing efficient breach might lead to inefficiencies if states cannot breach when it might be inefficient, they are not as restrictive as the absolute protection afforded to non-derogable rights such as freedom from torture,³⁴² and which alludes to the debate about whether such rights might be sometimes breachable.³⁴³ Non-derogability is assumed to be appropriate for those rights valued most highly by the international community, the breaching of which are assumed to cause grave externalities.³⁴⁴ Considering efficient breach in

³³⁹ For example, between the early 1950s and 2000 there were 85 coup d' états in African states.

³⁴⁰ *Media Rights Agenda and Others v. Nigeria*, AHRLR 200, African Commission on Human and Peoples' Rights (October 1998), point 66.

³⁴¹ Icelandic Human Rights Centre, 'Alteration of Human Rights Treaty Obligations' <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/theconceptsofhumanrightsanintroduction/alterationofhumanrightstreatyobligations/>> accessed 15 August 2013.

³⁴² ICCPR art 4; ECHR art 3; UNCAT art 2; for a detailed analysis of the latter treaty, see Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (1st edn, Oxford University Press 2008).

³⁴³ The most prominent proponent of this view is Alan Dershowitz, see Alan M Dershowitz, 'Want to Torture? Get A Warrant' *The San Francisco Chronicle* (22 January 2002) <<http://www.sfgate.com/opinion/openforum/article/Want-to-torture-Get-a-warrant-2880547.php>> accessed 15 November 2010.

³⁴⁴ Despite this point, commentary on non-derogable rights has not entirely ruled out the possibility that they might also be subject to a hierarchical ranking. See, for example, the

these contexts runs into greater difficulties than considering efficient breach in the case of human rights more generally. Whereas efficient breach might be welfare maximising in certain circumstances, this is assumed not to be the case with non-derogable rights.

The concept of efficient breach therefore presents an interesting case study in the application of law and economics to international human rights law. Evidently, a connection can be made between the two issues. When situations arise such that the cost of complying is higher than the benefit of not complying, we have argued that breach will be efficient. However, the divergence in the treaties between the conditions under which restrictions and limitations – which we have analogised as legal terms for efficient breach – are permitted, means that findings of efficient breach are likely to vary according to the treaty in relation to which a breach has been alleged. A closer alignment of these provisions across treaties would aid states in understanding, *ex ante*, the requirements that must be met for efficient breach to exist.

IV. Conclusions

The traditional understanding human rights as inviolable has been challenged in this chapter. This is not to say that states should be allowed to breach their obligations at will, but rather that the protection regimes applied in human rights law should be reconsidered in light of the substitutability of human rights and in light of the consequences of being required to adhere to obligations when it might be inefficient to do so.

Partly, such thinking already exists in the various protection regimes, as states are permitted to breach obligations in certain circumstances. In that light, an element of efficient breach already exists. However, analogising treaties as contracts enables us to get a better grasp of how to understand efficient breach, as relevant situations might arise outside of times of, for example, national emergencies. Indeed, the concept of substitute rights therefore exists as a halfway

discussion of this issue in Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' [2001] 12(5) *European Journal of International Law* 917.

point between contractual efficient breach and the treaty setting: if it is unpalatable to consider efficient breach outside of the confines of a national emergency, might provision of an imperfect substitute right be acceptable? States that are capable of substituting provision of one human right with provision of another will benefit more from a liability rule than those that cannot. They will be able breach their obligations in one area but to improve their provision of rights in another area, with this ability assumed to be dependent on the state's domestic particularities, such as the strength of its domestic institutions, the role of non-state actors, and the level of accountability across all areas of society. This suggests that substitute rights can be appropriate in certain circumstances; we suggested that treaty bodies should consider the existences of substitutes as way of resolving breaches and upholding protection – as much as is possible – in cases in which states breach.

Chapter 5: Creating Institutions

The establishment of treaty bodies to address violations of human rights law through the examination of periodic reports submitted by states parties, and through the lodgement of complaints by states or individuals, is assumed to have the aim of deterring human rights violations *ex ante* and resolving breaches *ex post*. This is conditional, however, on how the treaty body is structured, how periodic reports are written and submitted, how many states engage with the process, and how complaints can be made. Treaty bodies do not exist alone in international relations, but rather form part of an often-complex system of coordination between different regulatory entities tasked with monitoring compliance with a wide range of treaties and domains of law. Each body's structure and composition is assumed to be the outcome of negotiations between treaty drafters – with heterogeneous preferences – about how that regulation should take place. In the following analysis, we aim to examine the institutionalised regulatory setting of treaty bodies. In doing so, we aim to enquire about how treaty bodies are structured and intend to propose means by which these bodies might be differently structured so as to address their failings in deterring violations and to improve their ability to achieve compliance.

I. Regulatory Authority

We have previously applied the economic concept of efficiency to a number of areas of human rights law, and presently extend this approach further: is the institutionalised human rights monitoring framework efficient? One approach to this issue could be ask why regulatory authority is vested in an international entity rather than being left to national bodies. In the following analysis, however, we analyse on what level human rights matters can be regulated and assume that our normative goal is to allocate regulatory authority to the entity that can regulate most efficiently and whereby efficiency is defined as the ability of the regulator to achieve the internalization of externalities at the lowest cost.

Historically, we might look at human rights problems and issues and conclude that the establishment of regulatory regimes is a relatively new development.³⁴⁵ Elsewhere in this dissertation we have analysed the emergence of the treaty regimes through IR and law and economics scholarship, while we have also suggested that the rise of international human rights law might be explainable on the basis that it assists the internalization of externalities. Up until relatively recently, regulating human rights violations was, principally, the preserve of each sovereign state,³⁴⁶ although obvious examples exist to show that violations in one state were regulated – through military action – by other states and the international community.³⁴⁷ Under these circumstances, we could conceivably assert that vesting regulatory authority over human rights issues in just one party can be justified if that party is the party that can most efficiently deal with the situation at issue. In real terms, the aforementioned historic regulation of human rights abuses by the state with the strongest military can be explained in this way, as this may be the party that may be able to prevent human rights abuses at the lowest cost. This assumes intervention by one (or more) state(s) into the domestic affairs of another achieves the internalization of externalities better than if the regulation were left to the state itself or to the international community (such as the UN). In addition, the decision by certain states to legislate for the provision of universal jurisdiction in its domestic legal system³⁴⁸ might also be

³⁴⁵ Ishay, *The History of Human Rights* (n 25) 173-245

³⁴⁶ The importance of sovereignty as a determining variable in international law is huge; interesting analysis is available in W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' [1990] 84(4) *American Journal of International Law* 866; Paul W Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order' [2000] 1 *Chicago Journal of International Law* 1.

³⁴⁷ As noted in the introduction, World War II is the most pressing example of an international effort to regulate rights violations. While this appears abstract on its own, it should be read in light of the much-debated 'responsibility to protect'; see Richard B Lillich, 'Intervention to Protect Human Rights' [1969] 15 *McGill Law Journal* 205; David Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace'' [2004] 11(1) *International Peacekeeping* 59; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm' [2007] 101(1) *American Journal of International Law* 99.

³⁴⁸ While this has not been a universal approach by all democratic states, the practice has nonetheless increased on a general level. A discussion of these developments can be found in Naoimi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' [2000] 35 *New England*

interpreted as an efficient allocation of regulatory authority if that state can efficiently prosecute for human rights violations in other states. Such an approach, though, is likely to result in free-rider problems and therefore might not be efficient at all.³⁴⁹

When such problems arise, it will be difficult to determine whether regulation might be allocated to a state because it can more efficiently regulate (such as through military power) or if the allocation stems from the state valuing regulatory authority highly. From the perspective of maximising welfare, states should cede regulatory authority over human rights issues when those rights are more highly valued by the international community than by the particular state. Otherwise, the vesting of the regulation in that state is not *Pareto* optimal. When ownership of the right – manifested through the allocation of regulatory authority – is valued more by the individual state, the rights are being put to their optimal use if the state is the sole regulator of that activity. This equally holds if the international community is allocated regulatory authority.

So while efficiency in regulation might be the preferred normative approach, state preferences and valuations can trump that. If a state values regulating a particular right highly – such as, for example, in relation to women's rights³⁵⁰ – then it will be unlikely to cede authority to an international body, even if this is possibly more efficient.³⁵¹ That states can essentially eclipse efficient regulation by placing a high value on regulatory authority alludes to the influence sovereignty exerts on the formation of international law.

Nonetheless, irrespective of that normative hurdle, regulatory efficiency is not an unheard of concept in the structures of international law: we see it in

Law Review 311; M Cherif Bassouni, 'Universal Jurisdiction and International Crimes: Historical Perspective and Contemporary Practice' [2001] 42(1) Virginia Journal of International Law 81.

³⁴⁹ Eugene Kontorovich, 'The Inefficiency of Universal Jurisdiction' [2008] 1 University of Illinois Law Review 389, 398.

³⁵⁰ The decision by certain states not to ratify CEDAW can be interpreted as a way for those states to signal the value they place on being solely responsible for the regulation of matter covered by that convention.

³⁵¹ It might be more efficient for the treaty body to regulate this matter as it is more likely to be able to arrive at objective conclusions, as it may be subject to less bias and political influences. But this should not rule out the possibility of regulatory capture or bias on such bodies, with this being a definite avenue for further research.

complementarity in the case of international criminal law³⁵² and through the exhaustion of domestic remedies in the case of international human rights law.³⁵³ Complementarity facilitates regulatory efficiency in the presence of an international regulatory framework by mandating that the International Criminal Court can only assert its authority under specific conditions.³⁵⁴ In this way, national courts are assigned regulatory authority as the bodies that can most efficiently regulate, but an international court is assigned authority under conditions of regulatory failure.³⁵⁵ Equally, the necessity that applicants to human rights treaty bodies have exhausted domestic remedies also fulfils the criterion of regulatory efficiency: national bodies are assigned regulatory authority unless a case is not satisfactorily resolved on the domestic level. In this case, regulatory capture – such as in the form of politically motivated judgements³⁵⁶ – can undercut regulatory efficiency, as we assume that human rights issues are better resolved on the domestic level.³⁵⁷ Both of these examples allude to the nature of international treaties as being secondary from an efficiency and hierarchical sense, but of both being primary in cases in which domestic regulation fails.

³⁵² Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, preamble; this is discussed in Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' [2001] 23 Michigan Journal of International Law 869; William M White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' [2008] 49 Harvard International Law Journal 53.

³⁵³ ECHR art 35; ICCPR art 2.

³⁵⁴ Rome Statute (n 352) art 17.

³⁵⁵ I.e. Regulatory failure would be reflected in the failure of a state to detain an individual for whom an ICC arrest warrant has been issued. A practical example can be seen in the failure of a number of states to arrest or surrender Sudanese President Omar Al Bashir to the ICC. In December 2011, Pre-Trial Chamber I of the ICC referred two African states (Malawi and Chad) to the UN Security Council for their failure to arrest or surrender to do this. Previously, the Chamber had referred Chad, Djibouti, and Kenya for the same reason. This reflects regulatory failure on the part of the States Parties to the Rome Statute.

³⁵⁶ These are assumed to be unwanted intrusions by states into domestic legal systems. For a good overview, though, of this issue and the broader public policy issues surrounding it, see Michael E Levine and Jennifer L Forrence, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' [1990] 6 Journal of Law, Economics & Organization 167.

³⁵⁷ Judges in domestic courts are assumed to be better informed about domestic practices and to be affected by those practices (as citizens of the relevant state). In addition, resolution on the domestic level might afford contentious judgements greater legitimacy.

Allocating regulatory authority to an international treaty body is therefore assumed to fulfil the efficiency criterion if national regulation fails.

Essentially, this analysis suggests that there are three possible approaches to structuring regulation of human rights issues. Firstly, regulatory authority can be allocated to the single party that can most easily regulate: this reflects a pre-World War II situation with limited formal international cooperation, but in which hegemonies could assert their comparative advantage in efficient regulation through military intervention. Secondly, regulatory authority can be vested in an international treaty body that asserts its efficiency when regulation fails on the domestic level. Thirdly, we can explain the vesting of regulatory authority in one entity or another through the assumed value each entity places on that authority.

In addition to this, the vesting of regulatory authority in a treaty body may not, in and of itself, correlate with the vesting of regulatory authority in the entity that can most efficiently regulate. A second stage in the analysis is required, such that we must consider the extent to which the treaty body is indeed the most efficient regulator. This will depend on the treaty body's design and structure, issues that are addressed in the following sections.

II. Institutional Design

The number of international institutions tasked with monitoring state compliance to each respective treaty and subject matter, as well as the diversity of those subjects, presents scholars with a rich tapestry from which they can draw conclusion about the successes and failures of different approaches. However, apart from some exceptions,³⁵⁸ analytical work examining the inner functions of these institutions has been sparse. The work that has been carried out, and which has principally involved the examination of international organisations from IR

³⁵⁸ Barbara Koremenos, Charles Lipson, and Duncan Snidal, 'The Rational Design of International Institutions' [2001] 55(4) *International Organization* 761; Kenneth W Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' [1998] 42(1) *The Journal of Conflict Resolution* 3.

perspectives,³⁵⁹ fails to fully satisfy the requirements of legal researchers, who are more concerned with understanding state compliance or non-compliance than examining state-to-state dynamics. The existing literature helps us to better appreciate the political motivations behind various state decisions, while institutionalism facilitates understanding why formal institutions emerge,³⁶⁰ as well as how regulation can be structured.³⁶¹ Having previously argued that the inclusion of monitoring mechanisms in treaties is likely to deter states with poor standards from ratifying, we extend that approach here by suggesting that particular structures might be received differently by each respective state. If there are diverse structures in many international regulatory institutions, they cannot be explained by coincidence: rather they are assumed to be the outcome of bargaining between – and among – treaty drafters and states.

In addition, the diversity of the various bodies can also be analysed from another perspective: why are they divided along international lines, regional lines, subject-specific lines, and general lines? Why is there an absence of a single international institution tasked with monitoring state compliance in all areas of human rights?³⁶² The absence of such a ‘unified standing treaty body’, as proposed by the High Commissioner for Human Rights,³⁶³ must be explainable on the basis

³⁵⁹ Some influential pieces include Friedrich Kratochwil and John Gerard Ruggie, ‘International organization: a state of the art or an art of the state’ [1986] 40(4) *International Organization* 753; Peter J Katzenstein, Robert O Keohane, and Stephen D Krasner, ‘*International Organization and the Study of World Politics*’ [1998] 52(4) *International Organization* 645.

³⁶⁰ The emergence of several international and supranational institutions has been subject to extensive analysis by scholars working in institutionalism. This author found a context-specific overview helpful in getting an insight into its practical relevance: Donald J Puchala, ‘Institutionalism, Intergovernmentalism and European Integration: A Review Article’ [1999] 37(2) *Journal of Common Market Studies*

³⁶¹ Julia Black, ‘New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making’ [1997] 19(1) *Law & Policy* 51; Fabrizio Gilardi, ‘Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms’ in Jacint Jordana and David Levi-Faur, *The Politics of Regulation: Institutions and Regulatory Reforms for the Ages of Governance* (1st edn, Edward Elgar 2004).

³⁶² An attempt to answer this question can be found in Geir Ulstein, ‘Do We Need a World Court?’ in Ola Engdahl and Pål Wrange (eds), *The Law as it was and the Law as it Should Be* (1st edn, Brill 2008); Manfred Nowak, ‘The Need for a World Court of Human Rights’ [2007] 7(1) *Human Rights Law Quarterly* 251.

³⁶³ United Nations, ‘Concept Paper for the High Commissioner’s Proposal for a Unified Standing Treaty Body’ (22 March 2006) UN Doc. HRI/MC/2006/2.

that its establishment would not be, or have been, *Pareto* optimal. But if this is the case, then the present situation of disparate bodies should fulfil that criterion. Despite this, the following analysis suggests that the existence of disparate bodies tasked with monitoring compliance in distinct subjects or in particular regional areas may result in duplication, expertise, efficiency, inefficiency, or myriad other outcomes. With such manifold possible outcomes, it is difficult to both determine which are genuine and to suggest optimal treaty body structures. Further, optimality is also a function of the normative goal of treaty body establishment: achieving universal ratification might demand that treaty bodies take a hand-off approach, so as to encourage ratification, while achieving an effective treaty system might require treaty bodies to be more investigative in their approaches. We have dealt with these normative issues previously in relation to the drafting of treaties and consider the issues again here in relation to treaty body structures.

Resolving the issues that plague the disparate system must be understood in light of that system: a single monitoring body existed in 1970, whereas now seven bodies exist.³⁶⁴ This increase occurred both alongside the emergence of many new states (127 states were UN members in 1970 compared with 193 in 2011),³⁶⁵ and alongside the end of the Cold War and the emergence of a heightened global emphasis on liberal democratic principles and peace,³⁶⁶ and greater respect for human rights.³⁶⁷ Under such circumstances, an increasing number of monitoring bodies might be explainable on the basis that the growth in the number of states might broaden the distribution of human rights standards in the world.³⁶⁸ This might have required a higher number of monitoring bodies to facilitate this increased diversity and to accommodate state preferences. States that were capable of adhering to treaty obligations in one area of human rights

³⁶⁴ The most extensive work detailing the developments of – and relating to – the treaty bodies can be found in Anne F Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (1st edn, Kluwer Law 2001).

³⁶⁵ United Nations, 'Growth in United Nations Membership, 1945-present' (internet page) available at <<http://www.un.org/en/members/growth.shtml#1970>> accessed 23 July 2013.

³⁶⁶ Francis Fukuyama, *The End of History* (reprint edn, Free Press 2006).

³⁶⁷ This has been quantitatively proved on a general level, see David L Cingranelli and David L Richards, 'Respect for Human Rights after the End of the Cold War' [1999] 36(5) *Journal of Peace Research* 511.

³⁶⁸ We are using distribution in the economic sense, such that we mean that the diversity between the standards in different states might have grown.

law may have been keen on the establishment of treaty bodies in those areas. Separately, however, the proliferation in the number of these bodies might also be rooted in falling costs of monitoring state adherence, such that technological changes since 1970 may have made monitoring easier.³⁶⁹ Equally, the increase in the number of NGOs in the world is likely to have reduced the cost of resolving information asymmetries between states and the international community.³⁷⁰

Whatever the reason for the increase in the number of disparate treaty bodies, their existence requires analysis. In carrying out that analysis, we largely follow Guzman, whose work on the establishment of international organisations has heavily influenced the present assessment.³⁷¹ He suggests that international organisations share four functions.³⁷² Firstly, they provide a space in which states can come together to negotiate and where the previously nefarious concept of the institution grows walls and a roof. Secondly, they perform functions that are visible, positively (mostly) contributing to the world through directed action. Thirdly, international organizations exist on the international stage in much the same way as many states do. As well as being the outcome of political negotiations, they are also political actors: they take stances in relation to various issues, they release press releases commending agreeable processes, and they criticise opponents.³⁷³ This is all activity that states undertake and which international organizations also engage in. Finally, and something which is central to the present topic, international organizations are or can be (quasi-) judicial bodies that resolve dispute and make case law.³⁷⁴

In light of these propositions, we are chiefly interested in the final function of international organisations, and specifically in the *ex ante* regulatory structures that are assumed to monitor – and influence – compliance. We analogise treaty

³⁶⁹ See, generally, Metzel, 'Information Technology and Human Rights' (n 162)

³⁷⁰ See, in which they emphasise the increased importance of NGOs in recent decades, Richard Devetak and Richard Higgott, 'Justice Unbound? Globalization, States and the Transformation of the Social Bond?' [1999] 75(3) *International Affairs* 493.

³⁷¹ This influence stems from an hour-long presentation Guzman made at the European Association of Law and Economics Annual Conference at the University of Hamburg in September 2011. Available online at <<http://lecture2go.uni-hamburg.de/konferenzen/-/k/12603>> accessed 05 June 2013.

³⁷² *ibid.*

³⁷³ *ibid.*

³⁷⁴ *ibid.*

bodies and periodic review as *ex ante* regulation on the basis that periodic reporting does not require an alleged violation to have taken place in order for it to function, unlike the case of dispute settlement mechanisms, which require the presence of alleged violations before they can be used. We frame the current situation of disparate treaty bodies around a hypothetical unified standing treaty body,³⁷⁵ which is similar but not identical to the High Commissioner's proposed model.³⁷⁶ The purpose is to examine the advantages and disadvantages of the current and proposed systems. In doing so, Guzman's 'IO Design Studio' approach,³⁷⁷ according to which there are six design choices open to states when they are creating international organizations, is instructive. These choices reflect a variety of possible approaches, with the different approaches likely to result in different outcomes for the states concerned. Electing for one approach or the other is assumed to have an effect on ratification and compliance. When designing treaty bodies, we expect that treaty drafters will consider the normative goal of the body's establishment: the difficulty for scholarly analysis is establishing the nature of that normative goal. We previously addressed this hurdle through differentiating between the assumed traditional approach and the economic approach. Universal ratification as a normative goal, we argued, was incompatible with an effective treaty system: heterogeneous state preferences meant that treaties could not achieve both ratification and compliance. States with bad human rights standards would only ratify if it meant they did not have to alter their domestic standards. Through Guzman's 'IO Design Studio', we are again reminded of the conflict between normative goals and practical realities. He suggests that when designing organisations, designers can choose between the following:

1. Action vs policy;

³⁷⁵ Our hypothetical unified standing treaty body is akin to a single treaty body that will monitor adherence to all treaties equally.

³⁷⁶ For some excellent analysis of the treaty body system and the changes (both proposed and realised to how it functions, see Francoise J Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' [2007] 7(1) Human Rights Law Review 7; Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' [2009] 9(2) Human Rights Law Review 203; Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (1st edn, Cambridge University Press 2000).

³⁷⁷ Guzman, 2011 EALE Lecture, Hamburg (n 371).

2. Narrow vs broad scope;
3. Silence vs speech;
4. Non-binding vs binding rule-making;
5. Low vs high voting requirements;
6. Easy vs hard exit.³⁷⁸

Each design choice is assumed to aid or hinder an institution's normative goal. Thus, for example, being able to easily exit a treaty framework (6) – in our case being able to avoid treaty body investigation – is assumed to facilitate universal ratification as states cautious of the body's power and Equally, if a treaty body can arrive at decisions about a state's level of adherence easily (5) – such as if the voting requirements are low – then states may be deterred from recognising the authority of the treaty body to monitor its level of compliance.³⁷⁹ These design choices can be analysed relatively easily for their assumed impact on state decisions, on the basis that they can increase or decrease the cost of compliance. We can largely set them aside from our analysis as to whether disparate bodies or a unified body might be a more appropriate institutional setting for monitoring state compliance with human rights treaty obligations. Rather, the more relevant design permutations are those governing whether the institution will be vocal and whether its decision are binding, the extent to which its mandate is policy-oriented, and whether the scope of its regulatory authority is narrow or broad. These design features are discussed below.

A. Institutional Activism

Submitting periodic review reports for consideration will involve greater risks if the treaty body is not required to remain silent, but can rather voice its concern about the state's human rights standards (3), while these risks will be increased further if the body's decisions are binding on the state (4). In addition, whether the treaty body's mandate is one focused on action or policy will also

³⁷⁸ Guzman, 2011 *EALE Lecture, Hamburg* (n 371).

³⁷⁹ For example, Article 9(2) the Vienna Conventions states that 'the adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule', meaning that treaty adoption, at least, cannot be easily achieved. If institutions apply the same rule we would expect them to be more cautious about engaging with states.

likely influence how states deal with criticism and compliance. We analyse these design choices on the basis that the more liberal approaches facilitate the body's activism and bearing in mind that treaty bodies can be either disparate or unified. The creation of a human rights body *could*, in theory, entail the creation of an institution that is vocal: if its purpose is to regulate state activity in the area of human rights, then vocality *should* be one of its intrinsic characteristics. We would expect treaties establishing quieter institutions to receive greater backing than treaties establishing more vocal institutions. Once again, though, we should note the distinct nature of human rights treaties as compared with other treaties, in that ratification always carries with it the undeterminable risk that a state will be subject to criticism or investigation.³⁸⁰ In this sense, analysing treaty bodies for their reserved or vocal nature is somewhat arbitrary. Nonetheless, it might be possible to encourage ratification while also – at least in the long term – protecting vocality.

Under a disparate system in which new treaties and treaty bodies emerge in subsequent periods, we assume that states determine how they will engage with each respective treaty body based on the cumulative level of criticism they received in all preceding periods. When that level of criticism is high, states are assumed to be more likely to be deterred from ratifying treaties and optional protocols, and engaging with treaty bodies. However, as the number of treaty bodies increases, the effect of each additional level of criticism becomes more diluted.

If treaty bodies remain more muted in early periods, states are incentivised to ratify and to recognise the body, with this enabling such bodies to become more aggressive in their criticisms over time. In order to maximise long run ratification, review bodies might wish to alter the frame of early period ratifying countries with poor standards, in order that they undercalculate the true cost of recognising the treaty body's authority. By taking a more muted stance during early periods, treaty bodies encourage states to frame costs around the present level of treaty body activism, which minimises the deterrent effect of ratification. Pursuantly, a greater number of treaties are ratified in subsequent phases. As this

³⁸⁰ Simmons and Danner implicitly refer to this issue in their assessment of the ICC, when they state that human rights treaties differ from the ICC on the basis that the former are somewhat devoid of bite, whereas the ICC has 'teeth', Simmons and Danner, 'Credible Commitment and the International Criminal Court' (n 212) 244.

happens, and as the supply of treaties becomes exhausted (until all potential human rights treaties are in force), treaty bodies can increase their level of criticism. While this approach minimises long-term ratification deterrence, the emphasis on silence in early periods also minimises short-term effectiveness. Hence the evident trade-off between activism and ratification. As additional periods pass, and as the body is assumed to be able to become more active and critical in its engagement with states, it must also determine how that engagement should manifest itself.

In this respect, we are reminded of the question as to whether coercion or persuasion might be a more appropriate approach. A coercive viewpoint would suggest that treaty bodies can actively influence state behaviour, as states will believe that adherence will benefit them, having assessed how other states have counselled them and with this having led to their cost benefit analysis changing.³⁸¹ On the other hand, though, the angle of persuasion suggests that states are made to frame the contentious issue around a norm known to them (e.g. landmine debate framed around indiscriminate nature of the bomb).³⁸² From this perspective, recognition of treaty bodies is both endogenous and exogenous. It's endogenous in the sense that acceptance is internal, happening on the domestic level through government choice, even if that is influenced by external factors; separately, it is exogenous because, as with acculturation, 'the actor's social environment' is also subject to influence by the international community.³⁸³ Meanwhile, if acculturation better explains how states arrive at ratification decisions than do coercive or persuasive explanations, on the basis that it 'may strengthen social pressure by enhancing the legitimacy of a sanctions',³⁸⁴ we could equally apply this concept to examine how treaty bodies engage with states. The appealing thing about the acculturative argument is that it helps explain the benefits of states coming together in the name of cooperation. Standards spread – and presumably improve – because of social interaction. Treaty bodies are assumed to be able to use this knowledge toward their successful functioning.

³⁸¹ This assumption has received backing in Leonard J Schoppa, 'The Social Context in Coercive International Bargaining' [1999] 53 *International Organization* 307, 310.

³⁸² Richard Price, 'Reversing the Gun Sights: Transnational Civil Society Targets Land Mines' [1998] 52 *International Organization* 613, 622-630.

³⁸³ Goodman and Jink, 'How to Influence States: Socialization and International Human Rights Law' (n 156) 638.

³⁸⁴ *ibid*, 684.

Through understanding that states are more receptive to acculturative arguments, the nature of a treaty body's vocalism can be adjusted accordingly. Disparate bodies might be more appropriate conduits through which this 'adjusted vocalism' can be applied. Such bodies, which are mandated with addressing particular areas of human rights law, might be better able to apply acculturative approaches, as these bodies will be able to use their comparative expertise to encourage states to alter their standards and to adhere to their treaty obligations. By contrast, a unified standing treaty body will find it more challenging to apply acculturative approaches, as this would require expertise in a several areas of human rights law.

In addition, disparate treaty bodies are also less likely to suffer from their vocalism: vocalism in relation to a specific area of human rights law might not deter states from engaging with other bodies as the vocalism would be subject-specific. Accordingly, there are fewer externalities from vocal disparate bodies than there are from a vocal unified standing treaty body, which, as the sole treaty body monitoring adherence to all treaty obligations, would suffer from its own vocalism.

We equally assume that whether a decision by a treaty body is binding or non-binding will also affect how a state interacts with that body. Binding decisions are assumed to be more costly than non-binding decisions, as these will require the state to align its domestic standards with those outlined in the respective treaty. The binding nature of the ECtHR, such as through the Court's ability to influence domestic legislation,³⁸⁵ might be assumed to deter ratification. However, as this treaty is linked to regional integration – through the Council of Europe – and in a region with a strong commitment to human rights principles, the influence of binding decisions as a deterrent factor will be somewhat

³⁸⁵ Tomas L'alik, 'Understanding the Binding Effect of the Case-Law of the ECHR in Domestic Legal Order', International Conference: Effectiveness of the European System of Protection of Human Rights, Warszawa, Sejm, April 18-19, 2011, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951830> accessed 3 July 2013; Eckhart Klein, 'Should the Binding Effect of the Judgments of the European Court of Human Right Be Extended?' in Paul Mahoney, Franz Macher, Herbert Petzold, and Luzius Wildhaber (eds), *Studies in Memory of Rolv Ryssdal* (1st edn, Carl Heymanns 2000).

mitigated. Regional integration linked with strong treaty body provisions can therefore facilitate greater compliance.³⁸⁶

Guzman uses 'action' and 'policy' to distinguish between the options open to an organisation in relation to how it will pursue its goals, such as whether that will involve either campaigns, policy recommendations, and targeted campaigns, but little by way of didactic influence, or whether it will be vested with the authority to shape national policy through regulatory power and quasi-judicial functions. States cautious about establishing a body with far-reaching powers will prefer something 'softer', but whereby ratification will still provide the state with a reputational benefit upon recognition of the body's authority. In this respect the establishment of some human rights treaties almost as aspirational documents and without monitoring mechanisms or dispute settlement procedures might be seen as a means by which states are offered a treaty for ratification but whereby the treaty is devoid of the costs of a policy-oriented institution with a clear mandate to improve human rights standards among its states parties. If monitoring mechanisms and dispute settlement procedures follow the initial aspirational treaty, ex post judicialization may be a means of turning action-based entities (i.e. the aspirational document) into policy-based organisations.

In this way, states are encouraged to ratify the initial aspirational treaty, viewing it as soft and somewhat devoid of power, and are later offered the possibility of becoming subject to regulation in relation to that treaty. Drafting disparate treaties lacking a policy-oriented mandate may facilitate achieving universal ratification, as states will be unable to determine whether a policy-oriented monitoring body will be later established. In addition, if policy-oriented bodies are later established, then states will rationally cede to regulation in those areas of law to which they can adhere. In this way, the existence of disparate action-oriented and policy-oriented bodies will result in self-selection among ratifying states.

All of this indicates the role institutional activism can play in influencing both state ratification decisions and in achieving compliance; the central point is that disparate bodies and a unified body will achieve distinct outcomes

³⁸⁶ Pamela A Jordan, 'Does Membership Have Its Privileges? Entrance into the Council of Europe and Compliance with Human Rights Norms' [2003] 25(3) Human Rights Quarterly 660; Steven Greer and Andrew Williams, 'Human Rights in the Council of Europe and the EU: Toward 'Individual', 'Constitutional' or 'Institutional' Justice?' [2009] 15(4) European Law Journal 462.

according to the approach they take. Designing more active and less active institutions should therefore take account of regional integration, the normative goal of institutionalisation, and the socialising approaches that are most likely to achieve compliance in the context of states parties' preferences.

B. Institutional Scope

The most important design choice relevant to our analysis is whether we afford treaty bodies a narrow or broad scope. Narrow scope relates to the situation as it currently stands, whereby disparate bodies exist and are mandated with regulating specific areas of human rights law. Meanwhile, we analogise broad scope with the mandate of a unified standing treaty body, which would be allocated the role of regulating all areas of human rights law equally, similar to the European system.³⁸⁷ It should be noted, though, that the unified system, as proposed by the High Commissioner for Human Rights, would not necessarily involve a single body, but might involve regulation by 'chambers or working groups along treaty, thematic, or regional lines'.³⁸⁸ Nonetheless, given the uncertainty of the proposals, and so as to simplify the analysis, we use unified treaty body as a synonym for a single body regulating all areas of human rights. Designing a treaty body with a mandate to take a broad or narrow scope will result in varying outcomes. Below, we briefly posit how each approach will be received by ratifying states and highlight the advantages and disadvantages of the distinct design features.

³⁸⁷ While it is generally accepted that the European system is an strong and very useful entity, it has also been accused of being a victim of its own success. Concentrated authority might not be preferable if it results in structural inertia. See Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' [2008] 19(1) *European Journal of International Law* 125.

³⁸⁸ United Nations, 'Concept Paper for the High Commissioner's Proposal for a Unified Standing Treaty Body' (n 363), 13.

1. Functional Matters

While some organisations, such as the UN General Assembly, might be restricted by their broad scope to deal with specific issues in a targeted manner, and might lose out to more narrowly focused bodies on the basis of expertise,³⁸⁹ their broad mandate might also result in economies of scale. The total costs of running subject-subject treaty bodies may be higher than those of running a single unified body that has been afforded a broad mandate. That broadly focused body is assumed to be able to benefit from lower operational costs, on account of fewer employees and lower capital costs, while it might also benefit from lower transaction costs. In addition, treaty bodies with narrowly framed scopes might suffer from another ailment: the tragedy of the anticommons.³⁹⁰ Under this model, the existence of many rightsholders results in underproduction, and whereby the model's problems lie in, among other things, the difficulty in coordinating collective action.³⁹¹ The existence of several entities with authority to regulate specific areas of human rights law might prevent overall human rights standards improving. This would occur if too many bodies were to have responsibility for dealing with issues that would be more efficiently dealt with by a single body. In this way, the existence of several bodies with narrow scope might bring with it the danger of underregulation.³⁹² The presence of several monitoring bodies or dispute settlement mechanisms may result in two outcomes. Firstly, these entities may find it more difficult to carry out their functions effectively, if they cannot make determinations that relate to issues beyond their specific remit. Secondly, individual citizens might find it more difficult to make claims that their rights have been violated, as violations may have cross-topic characteristics, and as this will necessitate the

³⁸⁹ We do not consider the role of comparative expertise among disparate treaty bodies. Designing treaty bodies with a narrow scope (and the assumed expertise of its members) might facilitate the subject matter receiving an excellent level of attention from individuals committed to that specific area of human rights.

³⁹⁰ Michael Heller, 'Tragedy of the Anticommons: Property in the Transition from Marx to Markets' [1998] 111(3) *Harvard Law Review* 621.

³⁹¹ Russell Hardin, *Collective Action* (3rd edn, John Hopkins University Press, 1993); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1st edn, Cambridge University Press 1990).

³⁹² Trachtman, *The Economics of International Law* (n 2), 34.

making of claims under each relevant mechanism, which would be more costly. Under these circumstances, it would be better to vest the right to monitor human rights practices and to receive complaints in a single body, as this would resolve the problem of too many rightsholders exercising their mandate over different areas of human rights.

On top of this, vesting authority in a single body can also alleviate another potential problem of a disparate system: forum shopping. We assume this is likely to be problematic as the number of treaties grows and as interdisciplinarity between formerly distinct areas of human rights law increases. A greater number of treaty bodies covering a larger number of treaties facilitates the making of strategic claims by individuals who allege violation of more than one treaty. If a single incident of human rights abuse has involved violations of several treaties, then alleged victims might make claims to those bodies from which they expect to be highly rewarded. A unified body is likely to mitigate this ability. Further, if this situation holds, and if the implication is that disparate bodies compete for claims, then separate, narrowly focused treaty bodies may have incentives to compensate victims with greater rewards. Again, a unified treaty body would resolve this inter-agency competition by monopolizing the claims market without necessarily adversely affecting the ability of claimants to make claims.

These three issues (economies of scale, underregulation, and forum shopping) present some simple examples of the practical functional problems of designing either a disparate system or a unified system and would require consideration by institutional designers concerned about creating a strong treaty body system.

2. Sectional Interests

While we can conceive of a situation in which a unified body divided along ‘treaty, thematic, or regional lines’³⁹³ would be able to retain some of the advantages of the disparate system, we can also conceive of a situation in which the interaction between states and the unified body would be general in nature. This might dilute the attention paid to subject-specific institutional problems and could have two possible effects.

Firstly, it could be that monitoring of all areas of human rights may be less politicized, as the general nature of the interaction between the state institutions and the treaty body may reduce the incentives for sectional interests to become involved in the process, as there would be fewer political rewards available through becoming involved. But secondly, it may be that the general nature of the recommendations from a broadly focused unified body might result in states with particularly poor human rights standards in certain areas being able to escape monitoring of those areas. In this way, a standing treaty body that exercises jurisdiction over all human rights matters may actually weaken the process by which standards are improved through dialogue and the addressing of issues on a one-to-one basis.

The reduction in the incentives for sectional interests to become involved in discussions with a general body with a broad scope could result in varying outcomes. States that wish to improve their standards in certain areas, but which are often restricted from doing so because of domestic preferences, may find it easier to make changes when the monitoring body engages with the state about all areas of human rights protection. The assumed reduced influence of sectional domestic interests should provide the state with greater leeway in this regard. For example, let us assume that a state wishes to improve its level of human rights protection for women, such as in relation to reproductive rights, but that sectional interests exist that oppose this.³⁹⁴ Were the Committee on the Elimination of Discrimination against Women to engage with the state on this matter, it is likely that the sectional interests opposing a liberalization of rights would voice

³⁹³ United Nations, ‘Concept Paper for the High Commissioner’s Proposal for a Unified Standing Treaty Body’ (n 363), 13.

³⁹⁴ These sectional interests do not form a majority, but rather, perhaps, a vocal minority. Were they to form a majority, it is unlikely that the state’s preferences would differ from those of the majority, assuming state preferences are the confluence of all domestic preferences.

their opposition. This would cloud the interaction between the state and the monitoring body. However, were a standing body with authority to monitor all areas of human rights protection to engage with the state, and if it were to discuss the state's adherence to all areas of human rights law, with one area being reproductive rights, the state would be likely to be freer from sectional influence and more easily able to engage with the treaty body about that issue.

Equally, however, the reduction in the incentives for sectional interests to become engaged with bodies with a broad scope could afford states greater leeway to disrespect subject-specific rights under a unified system. According to this theory, the subject-specific nature of the current system incentives sectional interests concerned about better human rights protection to become involved in the monitoring process: NGOs are assumed to submit briefs and recommendations in relation to a state's commitment to certain specific areas of human rights.³⁹⁵ However, were the system to be altered such that engagement were to relate to more general issues, these sectional interests would have lower incentives to push for better human rights protection in the areas of human rights on which they normally focus. In this way, the existence of a unified body rather than subject-specific bodies might result in less pressure from interest groups on states with poor standards. Such states may be accordingly able to escape attention being brought to the areas of human rights that require the alignment of domestic and international standards.

While this ability to undercut the overall system of human rights protection would exist under a unified treaty body, it still exists under the current system: states are presently able to select the treaties to which they will become party and the monitoring bodies whose authority they recognise. In this way, whereas the present system frustrates the ability of sectional interests to become involved in areas of human rights to which states are not committed, a unified system would not frustrate that ability but would rather mitigate the incentives of these sectional interests to become involved. This analysis somewhat counters the stated ambition of the unified system, which holds that 'the specificities of each treaty must be preserved and [...] should not be diminished.'³⁹⁶

³⁹⁵ An overview of NGOs and their interaction with states is provided in Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (1st edn, Hart Publishing 2011).

³⁹⁶ United Nations, 'Concept Paper for the High Commissioner's Proposal for a Unified Standing Treaty Body' (n 363), 4.

In order to ensure that a unified body is both strong in its ability to improve human rights standards on the domestic setting and to ensure that it does not lose its capacity to focus on specific subject matters, the treaty body must be designed carefully. The incentives for sectional interests to engage with treaty bodies need to be preserved under a unified system. These incentives would be somewhat ring-fenced were the unified system to follow the proposal that the system would be divided along thematic lines.

3. Mission Creep

Designing treaty bodies in a world of increasing globalization is likely to be risky if the subject matter is one that is progressively becoming influenced by other factors. As the increasingly globalized world leads to greater interconnectivity between different disciplines and subject matters, such that new approaches to human rights issues are required,³⁹⁷ and as that globalization reduces the barriers between disciplines that might have previously been distinct, and as it creates new areas that require regulation,³⁹⁸ there is a danger that disparate treaty bodies monitoring different areas of human right law might be subject to mission creep. Treaty bodies set up to focus solely on certain human rights issues might start to engage in regulation of other issues, on account of the increasingly interdependent nature of global interaction. The more narrow the scope of the body's regulatory ambit, the less the damage that can be caused by mission creep, we assume. If the Committee on the Elimination of Racial Discrimination goes beyond its scope, the consequences for the states parties to the Convention will not be as grave as a situation as one in which an entity with a broader scope, such as the Human Rights Committee, goes beyond its ambit. In the first case, the existing narrow scope is simply broadened slightly, whereas in the latter case a body with an existing wide ambit further increases its area of focus.

³⁹⁷ See the discussion given to emerging issues in this area in Dinah Shelton, 'Protecting Human Rights in a Globalized World' [2002] 25 Boston College International Comparative Law Review 273.

³⁹⁸ For example, the Migrant Workers Convention would have been inconceivable without the vast increase in the number of individuals working and living outside the state of their birth, which is a by-product of globalization.

On the other hand, however, the costs of institutions going beyond their scope might decrease with the broadness of the institution's scope, such that there are diminishing marginal costs of institutional activism. This, we assume, depends on the nature of the institution's actions. States that ratified the Racial Discrimination Convention may have done so due to its limited scope, so activism by the Committee such that, for example, it begins to focus less on ex post resolution of treaty breaches and more on ex ante affirmative action type of approaches might be very costly for those states in which racial discrimination may not be prevalent but in which racial inequality is. By moving away from dealing with ex post resolution of breaches and toward ex ante prevention, such a treaty body is increasing both its scope and the cost of compliance.³⁹⁹ A more broadly focused institution that goes beyond its scope may not result in the same level of costs for states that have recognised its authority. For example, a decision by the Human Rights Committee to deal with breaches of obligations enshrined in the ICESCR might not be as proportionately costly as the broadening of the mandate of narrowly focused bodies, as states that have recognised the authority of a broadly focused institution may be less likely to be put out by mission creep by that institution. Conceptually, therefore, a narrowly focused institution going beyond its scope can be more costly than a broadly focused institution doing likewise. However, this has been countered by Guzman, who states that, when referring to an organisation's scope, 'if you're narrowly tailored, the damage that you can do if you go beyond what you're supposed to do is relatively small. If you've got a broad mandate, you can do much more harm'.⁴⁰⁰ That this contention counters the suggestion put forward here should not necessarily debar the proposed theory. Each could equally hold. Mission creep from bodies with either narrow or broad scope could be more costly, depending on the nature of the creep and the treaty body's area of focus. Fundamentally, globalization and treaty body design are indelibly interlinked: carrying out the latter requires careful consideration of the role of the former.

³⁹⁹ The cost of compliance would increase in this example because the treaty body would be creating new expectations of states, in that it would be moving from examining racial discrimination to examining racial inequality.

⁴⁰⁰ Guzman, 2011 *EALE Lecture, Hamburg* (n 371).

III. Regulator Composition

Quite apart from the question about how one institutional design will be appropriate to a disparate treaty body system and how another will be appropriate to a unified system, unless we establish how treaty body members, as regulators, are elected,⁴⁰¹ we will not achieve any kind of compliance. In the High Commissioner's proposals for a unified treaty body, it was stated that

The experience of the current system suggests that treaty bodies, composed of part-time, unremunerated experts nominated by States parties from among their nationals and elected by States parties for fixed renewable terms, have been uneven in terms of expertise and independence, as well as geographical distribution, representation of the principal legal systems and gender balance.⁴⁰²

It is imperative, it has been widely argued, that legitimacy in the unified system is guaranteed.⁴⁰³ Part of that legitimacy is assumed to depend on treaty body composition. To address that issue, the following analysis attempts to assess the present situation and proposes an entirely new and novel approach for consideration.

Our starting point is the fact that all members elected to treaty bodies must be both independent and highly knowledgeable about the relevant treaty's subject matter.⁴⁰⁴ The necessity that treaty bodies are comprised of impartial individuals with expertise about the treaty's subject matter facilitates regulatory efficiency on the international level. If we equate efficiency in regulatory authority with an entity's ability to mitigate externalities, then such experts are likely to be able to advise states on the most appropriate means by which they can adhere to their treaty obligations. The composite knowledge of such treaty

⁴⁰¹ All committees have a replacement periodicity of four years, while their size varies; for example: CEDAW (23 members), CERD (18 members); CAT (10 members).

⁴⁰² United Nations, 'Concept Paper for the High Commissioner's Proposal for a Unified Standing Treaty Body' (n 363), 9.

⁴⁰³ See, for critiques of the proposals, Michael O'Flaherty and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body', 7(1) Human Rights Law Review 141

⁴⁰⁴ United Nations, 'United Nations Reform: Measures and Proposals' (26 June 2012) UN Doc. A/66/860., 16.

bodies is assumed to involve comparative expertise in relation to domestic transposition, institutional weaknesses, and legislative change. Such expertise is likely to assist states in their (assumed) attempt to comply with their treaty obligations.

However, we nonetheless assume that the filling of treaty bodies with independent experts might result in varying outcomes. On the one hand, it could be argued that states are incentivised to cede regulatory authority to the international level, as impartiality will be guaranteed. The independent experts, unaffiliated with the states of which they are citizens, are assumed to be objective and not subject to influence from their respective governments. This independence makes regulatory capture more difficult for those states that wish to achieve this. The information asymmetries that therefore exist between states parties and the relevant treaty body in relation a body's likely approach are likely to affect both state decisions and treaty body engagement. If treaty bodies must consider how states will respond to their decisions and recommendations, this might affect the efficiency of the bodies' regulatory authority: such bodies might not be able to regulate as efficiently as they otherwise might were they not required to consider state decisions. Effectively, having to take into account how states will react to recommendations will tie the bodies' hands. Independence is assumed to mitigate this.

Despite that, whether such independent experts are the most appropriate conduit through which efficient regulation can be achieved is also worthy of consideration. While such treaty bodies benefit from the expertise of their members, there is no consideration – necessarily – given to the expertise of these individuals at *efficient* regulation. Deep knowledge of an issue about how states can improve their human rights standards might not necessarily equate with knowledge of how heterogeneous states can improve their standards. The necessity that treaty body members are independent might exclude from election individuals who might have specific knowledge about how states can best align their domestic standards with their international obligations. The independence requirement can accordingly reduce the composite level of treaty body expertise. If, instead, treaty bodies were to be comprised of individuals with specific expertise, garnered through having worked in national governmental institutions on improving human rights standards and on changing legislation, then we might expect the average expertise of treaty body members to increase. Having

treaty body members representing their states, rather than being independent, would of course bring with it the challenge that members would be politically motivated and that regulatory capture would be possible. Certain states might receive less attention or criticism than others, if those states have close relations with states that have seats on the monitoring body.⁴⁰⁵

This analysis suggests that a trade-off must take place. Treaty bodies can be comprised on truly independent experts with no governmental affiliations but who have been nominated by their national government, or they can be comprised of individuals who previously worked for their national governments but who act independently as members of the treaty body, or they can be comprised of individuals with an express affiliation to their national governments and who do not act independently. The potential politicization of the process is the main drawback of the third approach, although it incentivises states most concerned about human rights protection to push for their nationals to be elected as members. Ergo, a race to the top situation might materialise, with the average level of expertise likely to rise and the average state commitment of the national governments of treaty body members also assumed to increase. By contrast, emphasising independence reduces the incentives for rights respecting states to have their nationals elected to the treaty bodies,⁴⁰⁶ with this resulting in lower average treaty body expertise.

To address this paradox, such that treaty bodies – as they are currently constituted – are not necessarily comprised of members with expertise in *efficient* institutional change, but whereby treaty body members as state representatives may have greater expertise but may be more politically motivated, an alternative approach is proposed: treaty bodies might be comprised of individuals representing states that have been ranked highly – at least in the case of economic and social rights – on the Fukuda-Parr et al. ESRF index.⁴⁰⁷ States would be rewarded for their resource-constrained human rights standards with a seat on the treaty body. The body's members would reflect the comparative advantage of

⁴⁰⁵ While the UN Security Council is an imperfect example, the role played by the United States in blocking resolutions addressed to Israel is an obvious case in which regulatory capture is somewhat applicable and in which politics can play a role in an organisations independence.

⁴⁰⁶ As they will be less able to influence the body to hold rights-disregarding states to a higher level of accountability.

⁴⁰⁷ We discussed this previously in relation to progressive realization, showing that this index ranked states for their human rights standards and according to their per capita income.

heterogeneous states with varying available resources in achieving good human rights standards: in other words, their efficiency in human rights protection. Further, the availability of seats on the treaty body would be divided into different bands, according to per capita levels of income; this would ensure that comparative efficiency at different levels of income is incorporated into the treaty body's cumulative expertise. This is to ensure that expertise in achieving improvements in standards at different levels of per capita income can be tailored according to the states parties' level of per capita income. Thus, for example, the 2012 Core Country SERF Index, which excludes high income states, ranks the following states in the top ten for their achievements in fulfilling their social and economic rights obligations:

Table 5: SERF-based CESCR Composition

SERF RANK 2012	STATE	2009 GDP PER CAPITA (2005 PPP\$)	REGIONAL GROUP
1.	Ukraine	5,763	Eastern European Group
2.	Uruguay	11,937	Latin American & Caribbean
3.	Jordan	5,113	Asia-Pacific Group
4.	Croatia	16,298	Eastern European Group
5.	Belarus	11,590	Eastern European Group
6.	Kyrgyz Rep.	2,084	Asia-Pacific Group
7.	Moldova	2,606	Eastern European Group
8.	Argentina	13,272	Latin American & Caribbean
9.	Costa Rica	10,104	Latin American & Caribbean
10.	Bulgaria	11,401	Eastern European Group

If we compare the preceding rankings with the national rankings of the actual members of the Committee on Economic, Social and Cultural Rights, and by removing high income states and Russia (due to insufficient data) from the analysis, we notice the Committee is largely composed of states that do not excel in the SERF Index.

Table 6: Current CESCRC Composition

SERF RANK 2012	STATE	2009 GDP PER CAPITA (2005 PPP\$)	REGIONAL GROUP
3.	Jordan	5,113	Asia-Pacific Group
5.	Belarus	11,590	Eastern European Group
9.	Costa Rica	10,104	Latin American & Caribbean
13.	Brazil	9,438	Latin American & Caribbean
28.	Ecuador	7,051	Latin American & Caribbean
33.	Egypt	5,365	African Group
34.	Algeria	7,410	African Group
37.	China	6,206	Asia-Pacific Group
43.	Colombia	8,251	Latin American & Caribbean
71.	Cameroon	2,038	African Group
72.	Mauritius	11,848	African Group
85.	India	2,993	Asia-Pacific Group

There are some important problems with this analysis.

1. Firstly, we are assuming that a correlation exists between a state's ranking and a member's expertise or knowledge. There may be no correlation whatsoever, although we assume states nominate individuals 'with recognized competence in the field of human rights';⁴⁰⁸
2. Secondly, members of the committee act independently,⁴⁰⁹ rather than acting to reflect the comparative efficiency of their national government at fulfilling treaty obligations;

⁴⁰⁸ OHCHR, 'Review of the Composition organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (28 May 1985) ECOSOC Resolution 1985/17.

⁴⁰⁹ *ibid.*

3. Thirdly, the analysis fails to take account of the requirement that the make-up of the committee reflects the regional groups;⁴¹⁰
4. Fourthly, significant differences exist in the level of per capita income of the top ten states on the SERF Index.

In addressing the first and second concerns, the model proposed here suggests that treaty bodies should reflect comparative national efficiencies at fulfilling human rights obligations and that members should be expressly elected as representatives of those national governments. On the third point, we have thus far paid little attention to regional groupings, which are central to how the United Nations operates.⁴¹¹ While paying attention to regional groupings undercuts the impartiality of the SERF Index, as some states that are ranked highly might be excluded from our analysis if they are located in regions with other high ranking states, ignoring these groupings can have other consequences. For example, of the ten highest-ranking states in table 5, five are located in either Eastern Europe or in the former Soviet Union. This can be explained by the findings of Sadurski (2002), who showed that states in that regions display a strong commitment to protecting education, social security, and healthcare.⁴¹² Accordingly, structuring a treaty body around the SERF rankings might afford states within this region too much regulatory power, despite them having theoretically earned it. Their comparative national efficiency may be rooted in regional or cultural advantages, rather than in more recent and nuanced institutional approaches to improving standards in the area of economic and social rights. In addressing the fourth point, a truly effective treaty body would be capable of displaying comparative efficiency in improving human rights standards across a wide range of per capita levels of income. And while this does, in fact, materialise in the SERF Index, in the sense that the states display diverse levels of per capita income, this is coincidental.

To this end, we propose a treaty body structure that continues with the model presently applied, but takes account of the merits of the present system. Ergo, our

⁴¹⁰ *ibid.*

⁴¹¹ This is not a new development but can be traced back several decades. See Norman J Padelford, 'Regional Organization and the United Nations' [1954] 8(2) *International Organization* 203.

⁴¹² Wojciech Sadurski, 'Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part I: Social and Economic Rights', European University Institute, Department of Law, Working Paper 2002/14.

treaty body is comprised of those states that ranked highest on the SERF Index within their regional group, but whereby we have ensured that there is variance between the level of per capita income of each state within its regional group.

Table 7: SERF-based CESCRC Composition (by Regional Groups)

SERF RANK 2012	STATE	2009 GDP PER CAPITA (2005 PPP\$)	REGIONAL GROUP
1.	Ukraine	5,763	Eastern European Group ⁴¹³
2.	Uruguay	11,937	Latin American & Caribbean
3.	Jordan	5,113	Asia-Pacific Group
6.	Kyrgyz Rep.	2,084	Asia-Pacific Group
11.	Guyana	2,979	Latin American & Caribbean
13.	Brazil	9,438	Latin American & Caribbean
15.	Jamaica	6,941	Latin American & Caribbean
16.	Kazakhstan	10,427	Asia-Pacific Group
22.	Tunisia	8,347	African Group
32.	Liberia	371	African Group
33.	Egypt	5,365	African Group
40.	The Gambia	1,238	African Group

We assume that a treaty body such as this would be better capable of advising states within their region on how to most efficiently improve their human rights standards – in this case progressively realising economic and social rights – given their resources. These states have ranked highest among the states in their regional groups and we could therefore expect that individuals representing these states and with expertise about those state institutions would be able to use their expertise in their capacity as treaty body members.

This model is an entirely new approach to designing the make-up of treaty bodies and addresses many of the concerns of the present system. It rewards institutional innovation on behalf of states, it facilitates efficient regulation according to a state's per capita wealth, and it takes account of regional differences. Its flaw is that, in its current incarnation, it is a structure limited to

⁴¹³ Only one state from this group is included in our model as only one state from this group has a seat on the present Committee but has a level of per capita income that requires inclusion in the SERF Index, or for which data is available.

the Committee on Economic, Social and Cultural Rights, as it is to the provision for these rights that the SERF Index relates.

IV. Conclusions

In this chapter we have taken two distinct approaches. Firstly, we teased out the advantages and disadvantages of a unified standing treaty body as opposed to the current system of disparate treaty bodies, and have showed that changing to a unified standing body will not be necessarily *Pareto*-improving. Disparate bodies suffer from being subject to sectional interest, they have the advantage of having subject-specific expertise, they are less likely to benefit from economies of scale, and there may be underregulation if there are too many bodies with a narrow ambit. Meanwhile, a unified standing treaty body may face exactly the opposite kinds of advantages and disadvantage. In effect, we cannot determine the exact likely outcome of a unified body, but we do rather advocate for a closer investigation of the gains and losses, in an institutional sense, from such a move.

Secondly, we examined how treaty bodies are traditionally structured (i.e. comprised of independent experts) and have argued that this model can be improved upon. By proposing that regulatory authority – through a seat on the Committee on Economic, Social and Cultural Rights – should be allocated to those states that are ranked highest on the SERF Index, we have made a link between an objective measurement about a state's human rights record, given its resources, and regulatory efficiency. This model, we have suggested, would ensure that the Committee would be comprised of individuals from states with experience in improving human rights protection at various level of per capita income. Through this, the Committee would be able to advise distinct states about how to improve their human rights standards in an income-dependent and region-specific manner.

Both of these approaches introduce an interesting understanding to the analysis of human rights treaty bodies. The proposal to restructure the Committee on Economic, Social and Cultural Rights, in particular, is something

that requires more in-depth academic research,⁴¹⁴ and also establishes a platform upon which a more investigative and practical-oriented study might be carried out. While it offers an exciting alternative to the current approach for filling Committee seats, its present applicability is limited to that Committee.⁴¹⁵

This chapter's contribution to the dissertation, as a whole, is important: if treaty bodies act as the gatekeepers to better human rights standards, a carefully planned institutional design will give them the keys to achieve that. The entirety of Section II has attempted to outline novel approaches to interpreting human rights treaties through economic theory. We proceed with our analysis to Section III, and aim to ask how questions about treaty design and institutional structures are dealt with in the setting of compliance control.

⁴¹⁴ For example, the same approach to regulatory authority could be applied to the system by which Special Rapporteur positions are filled. Thus, for example, states that rank highest on subject-specific rankings could be afforded the right to have one of their nationals made a Special Rapporteur for that specific subject.

⁴¹⁵ As we are using a ranking relating to social, economic and cultural rights, we cannot fairly transfer our assumption onto other areas of human rights, such as civil and political rights.

Section III Compliance Control

Having previously discussed how the inclusion of various treaty design structures might affect state ratification and compliance decisions, as well as how those various structures might affect the effectiveness of the process of advancing overall human rights protection, we now move on to the issue of compliance control in human rights treaties. Aspects of this section are natural extensions of the previous. For example, treaty bodies manage periodic review and, where applicable, complaints mechanisms, while a unified standing treaty body would also likely involve unified reporting, which we look at here. However, whereas we were more interested in the efficiencies of various treaty designs and institutional structures in the preceding section, this section focuses more on how compliance with treaties is monitored. In addition, whereas we were treaty and institutional designers above, below we are largely self-interested states. Compliance with human rights treaties is a difficult subject to analyse because of state heterogeneity, treaty-structure heterogeneity, and a large number of treaties. To simplify our analysis, we reduce state heterogeneity to three 'state-types': established democracies, emerging democracies, and non-democratic states. Further, we extend our preceding assessment of a unified standing treaty body to the question of unified periodic reporting (as distinct from universal periodic review), and assess dispute settlement mechanisms on a very superficial level. Finally, we address enforcement as a question relating to how compensation might be calculated. That chapter should be read in light of our preceding analysis of – and utility of – the availability of substitute rights as remedies for rights violations.

Chapter 6: Periodic Review

In extending the preceding analysis of how to design treaty bodies to the periodic review system in particular, we should bear in mind that the distinction made between disparate treaty bodies and a unified body is somewhat different in this case: periodic review for each separate treaty is complimented by the universal periodic review system.⁴¹⁶ Having previously analogised a unified treaty body as being responsible for monitoring adherence to all treaties, we note that this is distinct from the universal periodic review system on the basis that our unified model would replace the existing disparate system, rather than compliment it. We continue with this assumption in the following analysis, excluding universal periodic review from consideration.

The periodic review process is a complex system of interactions between, for example, the Human Rights Committee and the respective states,⁴¹⁷ involving the submission of initial reports,⁴¹⁸ periodic reports,⁴¹⁹ Concluding Observations,⁴²⁰ and the following up on a state's adherence to those Observations by a Special Rapporteur.⁴²¹ Such a process takes time, is costly, and has been criticised for its inefficiencies:

⁴¹⁶ This system is analysed at length in Purna Sen (ed), *Universal Periodic Review of Human Rights: Towards Best Practice* (1st edn, Commonwealth Secretariat 2009); Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' [2007] 7(1) Human Rights Law Review 109.

⁴¹⁷ A good commentary can be found in Alex Conte and Richard Burchill (eds), *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd edn, Ashgate Publishing 2013); Sarah Joseph, Jenny Schultz and Melissa Castan, *International Covenant on Civil & Political Rights: Cases, Commentary & Materials* (2nd edn, Oxford University Press 2005).

⁴¹⁸ OHCHR, 'Rules of Procedure of the Human Rights Committee' (24 May 1994) UN Doc. CCPR/C/3/Rev/3, rule 66; the requirements expected of states in relation to state reports required updating on account of state non-compliance, which were outlined in OHCHR, 'Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights' (26 June 2001) UN Doc. (CCPR/C/66/GUI/Rev.2).

⁴¹⁹ *ibid*, rule 66.2.

⁴²⁰ *ibid*, rule 71; for an excellent overview of this matter, see Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' [2006] 6(1) Human Rights Law Review 27.

⁴²¹ *ibid*, rule 71.

The current working methods of the Committee allow for the annual consideration of fifteen to eighteen reports, which is roughly half of the number of reports that should be submitted according to the decisions of the Committee. If all States were to submit their reports on time, the Committee would need to adjust its working methods, for instance by meeting in two parallel chambers simultaneously. This, in turn, would have financial implications.⁴²²

Such criticism cuts to the core problem of the periodic review system: states are essentially free to engage or not, depending on their level of commitment to human rights protection. The following analysis examines a unified reporting model and explores the issues of punctuality and submission periodicity in the present system and likely ways of resolving those issues under a unified system.

I. Unified Reporting

Among the more obvious benefits of a unified reporting system, as distinct from the present disparate system, is that it might be more efficient: states will no longer submit reports to separate bodies that might contain overlapping information. If reports submitted to separate subject-specific treaty bodies give both a general overview of the human rights situation in that state and very detailed information about the subject matter monitored by the relevant treaty body, then efficiency savings could be made if states were to submit a single report to a unified body, with that report containing both a general overview and detailed information on the state's adherence to its different treaty obligations. On the other hand, though, it could be equally argued that submitting reports to the disparate treaty bodies might lead to efficiencies in submission if states learn, through repeated submission, to be more succinct in their analysis of their level of adherence to their treaty obligations. Accordingly, the cost of preparing reports for submission to the respective monitoring bodies might fall as the number of monitoring bodies to which reports must be submitted increases. State

⁴²² Martin Scheinin, 'The International Covenant on Civil and Political Rights' in Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (1st edn, Cambridge University Press 2007), 59.

institutions should become more familiar with the requirements of each monitoring body, and should be able to prepare each report in an ever-decreasing period of time. In this way, punctual submission would be assumed to be more likely for those treaties that are drafted later in the timeline of the emergence of human rights treaties. Changing to a unified system will not, therefore, result in efficiency savings if states submit detailed reports on time. In such a situation, changing to a unified system is not *Pareto* optimal. Instead, the period after the changeover may result in reports being submitted later, as the state prepares to alter its technical capabilities so that it can submit to a unified body rather than to disparate monitoring bodies.

Under the current system, different arms of the United Nations use the various reports published by the disparate treaty bodies in order to better appreciate the human rights contexts facing the constituent states,⁴²³ while in many case these separate entities also participate in the reporting and reviewing process itself.⁴²⁴ Subject-specific monitoring bodies, through facilitating the dissemination of detailed analyses to each UN unit, enable the streamlining of state-specific policies by those units: more targeted approaches can be taken and problem countries can be addressed. The challenge, from a unified standing treaty body perspective, would be ensuring that information asymmetries do not exist between the 'old' disparate bodies and the 'new' unified body, while it is also imperative that asymmetries do not develop in the relationship between the states and the unified monitoring body and between the unified monitoring body and the various UN entities. Such asymmetries might exist if a unified body does not have the same incentives as disparate bodies to disseminate targeted information. Alleviating these concerns requires an institutional design that takes account of the efficiency savings of a unified system but that also provides for expertise in specific subject areas, in order that information asymmetries do not materialise (as was discussed in chapter 5). It may be that the unified system,

⁴²³ 'For example, the United Nations Children's Fund (UNICEF), which facilitates State and national stakeholder engagement in the reporting process relating to the Convention on the Rights of the Child, uses the output of the Committee of the Rights of the Child as a programming tool, and approaches the reporting exercise as dynamic occasion for assessment and dialogue with States, United Nations entities and NGOs which results in a framework for State accountability for implementation of their treaty obligations', United Nations, 'Concept Paper for the High Commissioner's Proposal for a Unified Standing Treaty Body' (n 363), 7.

⁴²⁴ *ibid.*, 6.

when examining reports, allocates certain time for discussion of specific subjects and invites relevant experts and UN bodies to participate in the process. In this way, the efficiency savings are preserved while asymmetries are mitigated.

Repeated interaction between the state, the monitoring body, and a variety of stakeholders can also facilitate the resolution of information asymmetries and an improvement in domestic standards: once the monitoring body makes its position clear the state will make its position clear, with the monitoring body likely to respond to that with altered proposals about how standards can be improved. This engagement aids open discussion and frustrates the ability of the respective parties to act strategically. It prevents the emergence of situations in which states with poor human rights standards can escape attention entirely, as states parties are obliged to interact with the monitoring body. However, while this system is supposed to ensure that respect for human rights improves, the bodies have little authority – in the case of this over and back interaction – to mandate that states follow one course of action or another. Essentially, under any periodic review system, states are able to undercut the body's authority by simply ignoring its recommendations. As has been discussed previously, reputational sanctions are likely to be the only sanctions open to the monitoring body to penalise states that ignore treaty body recommendations.⁴²⁵ Under a unified system, the body might have more freedom to criticise states than under a disparate system: legitimacy might increase under a unified system on the basis of concentrated authority. However, a move from a disparate system to a unified system will remove the ability of states to forum shop, as they can no longer selectively engage with those treaty bodies with which they benefit from complying. Concentrated authority, while increasing legitimacy, can therefore mitigate the incentives for states to engage in the reporting process.

Identifying the exact structural weaknesses of treaty bodies is hampered by their general uniformity. We can only postulate as to why adherence to treaty body pronouncements is sparse. Evidently, unified reporting would bring both benefits and risks, when compared with the current disparate system. Our brief assessment here has indicated that the advantages of the current system in facilitating interaction between states and treaty bodies may be lost under a unified reporting model.

⁴²⁵ Guzman, 'International Law: A Compliance Based Theory' (n 282), 72.

II. Report Submission

But while analysing unified reporting in an abstract manner is problematic, we presently elect to address two central issues in periodic reporting: the punctuality of those reports and the periodicity of submissions. In order to propose distinct approaches in relation to how the submission of reports might be strengthened, we distinguish between three groupings of states likely to be involved in the periodic review process: established democracies, emerging democracies, and non-democratic states. These classification are somewhat simplified but aid our analysis by reducing the heterogeneity of states to three state-types. By distinguishing between states like this, it is possible to theorise how the monitoring body might best engage with each state, assuming that varying levels of engagement and the nature of that engagement will result in different outcomes. We justify distinguishing between states on the basis that not all states cooperate with treaty bodies equally,⁴²⁶ but rather that it is the states that are more committed to human rights protection generally that are more likely to cooperate.⁴²⁷ The approach taken here is simple: treating states equally is inefficient as it might involve the use of resources on states that would nonetheless adhere and would result in fewer resources being available for assessing the adherence of states that are less likely to comply in the absence of monitoring. By differentiating between states in this way, the proposed approaches are argued as being more dynamic and responsive to state needs.

⁴²⁶ 'The countries of Western Europe commonly regarded as strong rule of law states— France, Norway, Finland, Denmark, Sweden—have been the most prompt and responsive in implementing the HRC's Views. Unsurprisingly, these states also have the fewest number of communications against them. However, certain states, such as Spain, that are generally regarded as having a sophisticated approach to the rule of law have only selectively complied with the committee's decisions.' Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations 2010), 129.

⁴²⁷ Scheinin 'The International Covenant on Civil and Political Rights' (n 422), 60.

A. Punctuality

As can be seen from the following table, the level of punctuality of periodic review reports submitted to the various treaty bodies varies greatly. Some states submit reports on time, some states submit reports with minor delays, and some states don't submit reports at all.

Table 8: Level of Punctual Submission in Periodic Review System⁴²⁸

Overdue reports as of 3 May 2011

	Periodic reports		Initial reports	
CAT	28	18%	30	20%
CCPR	61	40%	30	18%
CERD	78	44%	14	8%
CEDAW	38	20%	15	8%
CESCR	45	28%	38	23%
CMW	4	10%	22	50%
CRC	51	26%	3	1,5%
CRC- OPAC	0	-	51	36%
CRC- OPSC	0	-	72	50%
CRPD	0	-	41	42%
Total	305		316	

Submitting late or failing to submit at all reduces the costs of monitoring for those states lacking an intention to improve their human rights standards. By holding back on submission, states are able to maintain information asymmetries between the treaty body, the international community, and the state itself. The former two entities will therefore find it more difficult, although it is obviously

⁴²⁸ This table is taken from: OHCHR, 'State Parties' Reporting Procedures under International Human Rights Treaties' Informal Technical Consultation for States Parties to International Human Rights Treaties, Sion Switzerland (12-13 May 2011) <http://www2.ohchr.org/english/bodies/HRTD/docs/Sion_report_final.pdf> accessed 3 August 2013, 4.

still possible,⁴²⁹ to learn about the human rights situation in each state. In the absence of complaints and inquiries, treaty body knowledge is a function of submission punctuality and report quality. The two, however, should not necessarily be assumed to correlate. Reports might be on time and detailed, on time and lacking detail, late and detailed, and late and lacking detail. From this we can assume one of two possibilities: states that submit punctual reports may be those states most concerned about their own level of human rights protection and the level of protection in other states, or punctual submission might reflect a state's bureaucratic efficiency, in that it can prepare and submit reports quickly.

In the former case, submission is a means of ascertaining one's own level of protection in comparison with the respective treaty's provisions and, assuming other state also submit punctually, establishing the level of protection in other submitting states in the same period. Here, a correlation is assumed to exist between a report's punctuality and a state's genuineness about commitment. In the latter case, however, punctual submitters might simply be those states that quickly compile a report outlying their level of protection, but whereby the level of protection varies greatly. Thus, for example, a state with poor human rights standards might be a punctual submitter, although its report might not be of the highest standard. Rationally, if the state is unconcerned about its level of protection but if it values the rewards from being seen to cooperate (through punctual submission) more than the costs of treaty body criticism on the back of report submission, then submitting punctually is a rewarding approach.

This distinction between commitment and bureaucratic efficiency suggest that states can be rights respecting and bureaucratically efficient (established democracies), rights respecting and bureaucratically inefficient (emerging democracies), rights disregarding and bureaucratically efficient, and rights disregarding and bureaucratically inefficient. The latter two states are somewhat stylised as simply non-democratic states.⁴³⁰

⁴²⁹ Non-state actors, such as Human Rights Watch, can play a valuable role in highlighting human rights violations in different states. For an overview of the role and effectiveness of NGO engagement with the UN system, including with specific reference to Human Rights Watch, see Kerstin Martens, *NGOs and the United Nations: Institutionalization, Professionalization, and Adaptation* (PhD Thesis, Palgrave Macmillan 2005).

⁴³⁰ In reality, non-democratic states can have varying levels of bureaucratic efficiency. Efficient bureaucracies would facilitate non-democratic governments in controlling citizens and civil

From this analysis, the current system is assumed to result in a pooling equilibrium, as treaty bodies cannot determine, at the outset, the category to which each state belongs. This pooling equilibrium means that genuine submitters and strategic submitters cannot be easily distinguished, and that reputational rewards for punctual submission might be misapplied. This suggests that review bodies are somewhat limited in the extent to which they can incentivise punctual submission, penalise late submission, and criticise state records in both scenarios. Taking a more muted stance appears to be the sole approach treaty bodies can take. If treaty bodies are constrained in their ability to engage with states regarding their punctuality, then engagement will remain the preserve of states that submit punctually, such that political pressures is assumed to be applied by punctual states to non-punctual states. As this would exist outside the institutional setting, it may not be as effective as the application of pressure from within the institutional setting. However, since we have already suggested that the institutional setting would be inappropriate on the basis of the pooling equilibrium and the possible deterrent effect of criticism, an alternative approach is necessary and would require the rewarding of punctuality and the facilitating of engagement between the reporting system and states. Ergo, were states to be rewarded for punctual submission with a seat on the treaty body – and thereby with the ability to influence late submitters – a race to the top situation might materialise in terms of punctual submission. States that submit punctually, and provided their reports are high quality,⁴³¹ would be able to monitor the punctuality and quality of late-submitting states. However, as we have previously discussed restructuring treaty bodies so that regulatory capture can be avoided and so as to reward states for their human rights standards given their resources, an altered approach is required for improving punctuality. The establishment of a committee or chamber – as part of a treaty body – dedicated to assisting states in improving the punctuality of their submissions, and which would be comprised of representatives of states that have shown an ability to submit punctually given their resources, might be a positive step.

society; meanwhile, in states moving toward failed state status, inefficiencies in the state's bureaucracy might be more prevalent.

⁴³¹ This would ensure that punctual submitters with domestic bureaucratic efficiency but otherwise not committed good human rights standards would be excluded; this ensures that there is no reward for bureaucratic efficiency alone, but only when combined with high quality reports.

Mirroring the extension of the Fukudu-Parr et al. model applied in relation to treaty body composition, this application suggests that states that are capable of submitting punctually but which face resource constraints in relation to submission would be afforded a seat on a 'Punctuality Committee'. We would analogise a state's wealth with its bureaucratic efficiency,⁴³² and would generate country scores – similar to the approach taken by Fukudu-Parr et al. – as a composite between state wealth and the punctuality of submission. For example, if a wealthy state and a poorer state both submit their periodic report exactly on time, and if both reports have similar levels of detail, then we would prefer the poorer state to the wealthier state when forming the 'Punctuality Committee'. Normatively, we justify this approach on the basis that it rewards states that face resources constraints but which show commitment to punctual submission and thereby incentivize such states to continue submitting punctually. A seat on a 'Punctuality Committee' would enable these states to assist other states in submitting reports on time and would increase their reputation.

However, a challenge facing this proposal is that states rewarded with seats on the 'Punctuality Committee' would suffer from their own success if they were to assist other states in submitting more punctually and if those states were then to become more punctual given their resources. Theoretically, the second states would replace the assisting state. Therefore, rational states on punctuality committees only have incentives to aid other states to improve their punctuality to a certain point: improvements in punctuality beyond that point might result in the committee member being overtaken in terms of its resource-limited punctuality.

While imperfect, and while it requires significant work to develop country scores, this approach does propose an interesting means by which a race to the top situation can be established. States with limited resources but committed to human rights protection would be rewarded for their efforts in submitting punctually and would be able to facilitate more punctual submission by other states. It is important to recall the importance of punctuality in report submission and the way in which it can resolve information asymmetries quickly. Any model

⁴³² This is not to say that the domestic institutions of poor states cannot work effectively. But we assume that effective and efficient bureaucracies are more likely in wealthier states, and also among the wealthier of poor states.

that improves punctuality and addresses asymmetries between states and treaty bodies is a positive step.

B. Periodicity

Related to the question of the punctuality of periodic reports is the question of the periodicity of those reports: the former may very well depend on the latter. Shorter periodicities in several different treaty regimes might put states under pressure in their attempts to submit reports on time, while longer periodicities might facilitate timely submission. The periodicities of the various treaty bodies are outlined in table 9.

*Table 9: Periodicities of Periodic Reports*⁴³³

Treaty	Initial report due	
	(following ratification) within	Periodic reports due thereafter every
ICERD	1 year	2 years ¹
ICESCR	2 years	5 years ¹
ICCPR	1 year	4 years ¹
CEDAW	1 year	4 years
CAT	1 year	4 years
CRC	2 years	5 years
ICRMW	1 year	5 years
CRC-OPSC	2 years	5 years or with next CRC report
CRC-OPAC	2 years	5 years or with next CRC report
CRPD	2 years	4 years
CED	2 years	as requested by CED (art. 29(4))

⁴³³ United Nation, 'United Nations Reform: Measures and Proposals' (n 404), 21.

The establishment of a unified treaty body would require that states submit reports in relation to all areas of human rights in ‘a single reporting cycle’,⁴³⁴ rather than submitting separate reports at different intervals. The submission of a single composite report at a defined periodicity would have the advantage of enabling states to prepare well in advance for the submission. In addition, it may be both financially and administratively cheaper to compile a report at a single defined periodicity, rather having to compile reports at varying periodicities, as is the situation under the current system.

But while periodicities vary, this is not to say that simultaneous submission will not occur. Rational states committed to human rights protection should ensure that reports are not due simultaneously, so that their reports can be assessed separately and so that they can attain the reputational benefit related thereto. Equally, states that are not committed to human rights protection can benefit from having several reports due for submission in the same year, as submission of one report might cloud out submission of another. Equally, though, this might make it easier for treaty bodies to compare the level of protection in one subject area with the level of protection in another, and in the same period.

In reality, we may be reading too much into the system’s ability to function well. Reports are rarely submitted on time,⁴³⁵ and the reporting system is structured in a haphazard manner, such that ‘there is no coordination among the treaty bodies in relation to the scheduling of report consideration’.⁴³⁶ Only the Committee on Enforced Disappearances (CED) is obliged to take other bodies into account when making observations and recommendations,⁴³⁷ with this assumed to provide states parties with an efficient and streamlined system in relation to that treaty. Otherwise, there is limited formal incentivising of most treaty bodies to consider the findings of other bodies. As this policy is not applied uniformly across all treaty bodies, it will be the CED alone that acts to provide states with an appropriate and well-structured system.

⁴³⁴ United Nations, ‘Concept Paper for the High Commissioner’s Proposal for a Unified Standing Treaty Body’ (n 363), 11.

⁴³⁵ *ibid*, 7.

⁴³⁶ *ibid*, 8.

⁴³⁷ International Convention for the Protection of All Person from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4, art 28.2.

This failure to coordinate report consideration is secondary, however, to the failure to coordinate report periodicity. The former relates to inter-body cooperation, whereas the latter takes place during the drafting stage. At that point, it is not clear how periodicity is arrived at, as it varies from two years,⁴³⁸ to four years,⁴³⁹ to five years.⁴⁴⁰ A periodicity of two years for the submission of reports to the Committee on the Elimination of All Forms of Racial Discrimination (CERD) might be explained by the fact that the Convention whence that Committee originates was one of the first post-war international human rights instruments and was drafted at a time when protecting human rights was viewed as new and prescient,⁴⁴¹ which may have been more easily achievable through a shorter periodicity.

However, in the case of racial discrimination, the carrying out of which relates to a society's ingrained belief system and inequality, we assume that it is unlikely that significant societal change will take place within a two year period. Periodicity should provide states with an opportunity to improve upon their current human rights standards without affording them leeway not to alter their domestic legislation or standards. If periodicity is too short, inefficiencies will result because states will have to submit reports with little new information to add to their previous report and this will have to be assessed and reviewed by the monitoring body; if periodicity is too long, states might make less of an attempt to improve their standards than they might have otherwise made, had pressure been exerted by the relevant monitoring body.

The concept of efficiency savings can be therefore used as justification for structuring periodicities in one manner or another. One approach in this respect is to align periodicities across bodies that monitor similar human rights issues. For example, both the Racial Discrimination Convention and the Migrant Workers Convention share similar characteristics, in that they both oblige states

⁴³⁸ ICERD.

⁴³⁹ CEDAW, CAT, ICCPR (periodicity varies but four years has been the general periodicity applied, although has been recently changed).

⁴⁴⁰ ICESCR, CRC, CMW.

⁴⁴¹ Described as 'the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation', in UN GAOR Supp. (No. 18) (statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination), UN Doc A/33/18 (1978), 18.

to protect the human rights of individuals and groups that might have limited political clout in the respective states. By requiring that states submit their reports about their efforts to adhere to both of these treaties in the same year, efficiencies are achieved in the state's bureaucracy and discovery costs about protection issues are reduced for both monitoring bodies, assuming there will be crossover between the issues addressed by both.

A second example of a means by which the disparate system might be improved upon could be the alignment of the reporting periodicity of the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) and the Convention of the Rights of the Child (CRC). As before, aligning these periodicities would result in savings – financial, time, and bureaucratic – for both the state and the respective monitoring bodies. An argument in favour of such an approach might be that these conventions also share similarities, in that the plight of women and children in relation to rights-based issues are often related: these include respect for the rights of civilians during wartime,⁴⁴² trafficking of women and children,⁴⁴³ and protection from such practices as female genital mutilation.⁴⁴⁴ Both conventions share the goal of enhancing protection for sometimes-marginalised individuals and groups, and both would likely benefit from being monitored within a similar context. Standalone monitoring of CEDAW and CRC fails to recognise both the relationship between the two conventions and the savings that can be made through such a process. Not only would this process be cost saving, but it might also result in better protection in both areas, as the respective monitoring bodies will be able to frame their assessments in the context of one another.

⁴⁴² See, for example, Susan McKay, 'The Effects of Armed Conflict on Girls and Women' [1998] 4(4) *Journal of Peace Psychology* 381.

⁴⁴³ Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children (adopted 12 December 2000, entered into force 25 December 2003) UN Doc. A/55/383; an excellent overview of this protocol and its effectiveness can be found in Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' [2001] 8(2) *Human Rights Brief* 30.

⁴⁴⁴ This is a highly contentious issues in the human rights discourse, as shown in Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case-Study' [1988] 7 *Law and Inequality* 367; Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' [1990] 12(4) *Human Rights Quarterly* 486.

In the absence of a unified system, aligning periodicities for treaties that share similarities is one means by which a more efficient and effective system can be achieved. With efficiency savings, however, come the risk that uniform periodicities might be inappropriate for certain areas of human rights. Apart from the example given, situations might materialise whereby certain subjects suffer. Striking a balance between efficiency in the reporting and monitoring process – as is the goal of a unified system – and accounting for the nuances of each distinct treaty subject – as is the undercurrent of subject-specific treaties – is a difficult challenge.

One potential means of addressing that challenge could be to reject uniform periodicity for all states entirely, and to instead adjust the periodicity of report submission on the basis of each state's respective level of human rights protection. Such an approach has been somewhat applied in relation to the ICCPR, where there is no specific reporting periodicity, but whereby the Human Rights Committee can adjust the periodicity as it sees fit.⁴⁴⁵ This approach provides the Committee with greater leeway in terms of how it engages with states, and allows it to take a more nuanced approach in its interactions.⁴⁴⁶ In its report detailing the 104th session, 'the Committee decided to increase the periodicity granted to State parties for their reports to up to a period of six years'.⁴⁴⁷

⁴⁴⁵ 'Article 40 of the Covenant gives the Human Rights Committee (HRC) discretion to decide when periodic reports shall be submitted. In general, these are required every four years', United Nations, 'Concept Paper for the High Commissioner's Proposal for a Unified Standing Treaty Body' (n 363), 8.

⁴⁴⁶ This level of subtlety is extended to allowing requests for special reports in cases in which the human rights situation quickly worsens, as outlined in Rule 66.2 of the Rules of Procedure (n 418).

⁴⁴⁷ UNGA Report of the Human Rights Committee: Volume I, UN Doc. A/67/40 (Vol. I), paragraph 78.

Table 10: Periodicity of Reports due in 104th Session.⁴⁴⁸

State party	Date of examination	Due date for next report
Norway	October 2011	2 November 2016
Dominican Republic	March 2012	30 March 2016
Guatemala	March 2012	30 March 2016
Iran (Islamic Republic of)	October 2011	2 November 2014
Jamaica	October 2011	2 November 2014
Kuwait	October 2011	2 November 2014
Turkmenistan	March 2012	30 March 2015
Yemen	March 2012	30 March 2015

In the table above, we see that periodicity has been adjusted for a number of states, but that none have been afforded a six-year periodicity. By enabling the Committee to determine the periodicity of periodic reports on a state-by-state basis, the Committee is in a better position to monitor compliance, to assist states in being able to improve their level of commitment, and to foster soft approaches that might aid the socialization of these states around a social norm. The Committee has a number of options open to it when deciding how to engage with states, with these options varying according to a state's inherent commitment to the treaty's ethos. In order to extend analysis of this provision to the treaty system generally, we utilise our previous categorization of states under established democracies, emerging democracies, and non-democratic states.

⁴⁴⁸ *ibid*, paragraph 102.

III. Tailored Engagement

Interacting with states in different manners, according to the state's commitment to democracy and human rights, is assumed to be the most efficient means of monitoring commitment and fostering compliance. Tailored engagement is context-dependent, state-specific, and cost reducing. However, as we show in the following analysis, what each state-type desires in terms of the regularity of periodic review is the polar opposite of the periodicity to which each state-type ought to be subject. States with strong human rights provisions desire regular submission periods in order to gain reputationally and in order for states with weaker provisions to be nudged towards compliance, while states with weaker human rights provisions require more regular submission periods but are fearful of this due to assumed reputational costs. We therefore need to assess how this paradox can be addressed. The follow table outlines the approach we propose in relation to how treaty bodies might better engage with states parties.

Table 11: Proposed Tailored Engagement in Periodic Review System

State-type	State Characteristics	Approach	Periodicity
Established democracies	High standards, commitment to ethos	Critical of failures; emphasis on moral role	Never/Infrequent
Emerging democracies	Low standards, commitment to ethos	Provision of technical assistance, 'buddy' system	Medium-term timescale
Non-democratic states	Low standards, no commitment to ethos	Socialization, constructivist approach	Frequent

A. Established Democracies

States with strong human rights standards are assumed to be committed to the goals of the respective treaties to which they have become parties and are assumed to not require monitoring of their level of adherence: these states would

adhere to their obligations in the absence of a monitoring body as adherence is the natural tendency of such states. However, these states will rationally prefer if monitoring bodies assess adherence, as monitoring – assuming it highlights the state's adherence – should provide the relevant state with a reputational benefit. Monitoring of such states, though, is inefficient: it costs the monitoring body time and money, and also costs it in terms of opportunities: allocating resources to the monitoring of states with good standards means that resources are unavailable for the monitoring of states with bad standards, at least in the same period. However, if states with an obvious commitment to human rights are excluded from the process – on the basis that it is inefficient – then this may harm the system's legitimacy (as states with poor standards can point to the absence of states with good standards to justify a lack of cooperation) and it may hinder the system's effectiveness (as optimal adherence is no longer so readily identifiable). In this respect, while excluding rights-respecting states from the process might facilitate efficiency, it will not be *Pareto* optimal if the consequence is that states with lower standards do not engage on the basis of the system lacking legitimacy. Nonetheless, if we mandate that states with an obvious commitment to human rights be afforded longer periodicities between report submissions, these states are afforded a reputational benefit when submission takes place, the system's legitimacy remains intact, and more time and resources are available for the monitoring of states with poor human rights standards. It is important, however, that established democracies are not afforded free reign, such that the submission of reports is rare. Instead, periodicity should be monitored to ensure that standards are not falling on account of the longer periodicity (i.e. longer periodicity, as the policy, should be regularly assessed). The purpose of treating established democracies differently is to allow for more in-depth monitoring of states with poor standards, but if complacency occurs, then this will undo the positive effect of allocating more attention to states with poor standards. In this respect, although the proposal suggests that established democracies should be allowed to submit reports more infrequently than other states, the treaty body system should nonetheless continue to additionally monitor the adherence of these states in an informal capacity. This could be done by allocating to a small number of treaty body members the responsibility of ensuring that the human rights standards in established democracies are not slipping on account of the longer periodicity. Under a unified treaty model in which the regulators

comprise representatives of those states with good human rights standards given their resources, we would allocate authority to informally monitor established democracy adherence to those established democracies that are ranked highest in the SERF Index. Established democracies would be monitored more informally so as to reduce transaction costs, mitigate opportunity costs, and ensure legitimacy is not lost.

B. Emerging Democracies

Some states may wish to improve their human rights standards but find it difficult to achieve this owing to institutional weaknesses and a lack of technical know-how. We have analogised these states as emerging democracies on the basis that they are committed to human rights principles but frustrated by lagged institutional weaknesses. For such states, periodicities might be structured in such a way that they are incentivised to attempt to improve standards by a periodicity that allows for improvement but which is short enough to facilitate tackling and criticising complacency. If five years is the periodicity generally applied as it stands, our tailored model might require that emerging democracies submit their reports, for example, every three years.

Equally, the manner in which the bodies engage with such states might also be of relevance. Rather than criticising the level of state adherence – which may be more appropriate for established democracies in which standard fall – treaty bodies might be better advised to provide these states with technical assistance.⁴⁴⁹ In this way, the states are not criticised for their human rights standards, but are rather given assistance with respect to how standards can be improved. This approach should, in theory, gradually improve standards in these states, as they become more aware of the institutional and legal frameworks that aid better human rights standards and protection. This approach would be aided by the composition of the body as including representatives of states with high standards given resources constraints: these representatives are assumed to be able to use their expertise at certain level of per capita income to assist emerging

⁴⁴⁹ Such an approach could be viewed as being similar to the use of Provisional Observations in cases in which the Committee assesses compliance in the absence of a periodic report (Rules of Procedure, Rule 70 (n 418)). In those cases, the Committee's observations are intended to assist the state in being able to improve its commitment to the reporting process.

democracies in their pursuit of better standards. Conceivably, treaty bodies will likely include committee members from emerging democracies with high standards.

In addition, another approach in relation to monitoring of these states might be to link each emerging democracies with another emerging democracy that has been ranked more highly on the SERF Index. This ‘buddy system’ would be akin to an informal application of the SERF Index-based regulatory approach. Linking these states together might result in technical knowledge flowing from the former state to the latter, and might improve the knowledge base of the state with the lower standards. Given that the assisting states are assumed to have similar resources to the states with the institutional weaknesses and lacking the technical knowledge, this cooperation may be more beneficial to the assisted state than if the cooperation were to be with a wealthy established democracy.

On top of this, the relevance of NGO engagement might also be helpful in aiding emerging democracies in their pursuit of better human rights protection. Given that it has been argued that ‘there is great variation in the degree of NGO involvement in the consideration of reports’,⁴⁵⁰ the system might require changes so that NGO contributions are more strategically utilised. If submissions from NGOs are sporadic,⁴⁵¹ and if states can’t determine whether an NGO will contribute to that state’s periodic review process, this lead to uncertainty on behalf of the state and the monitoring body. If NGOs were solely permitted to make submissions to the periodic reports of emerging democracies, this would resolve a number of issues. Firstly, it would resolve the information asymmetries between the respective stakeholders and would make it clearer to all parties – including established democracies and non-democratic states – that NGO engagement is reserved for reports from emerging democracies. Secondly, it would allow NGOs to focus on the improvement of human rights in states committed to the ethos but in which achieving adherence is beset by institutional

⁴⁵⁰ Scheinin, ‘The International Covenant on Civil and Political Rights’ (n 422), 59.

⁴⁵¹ In the specific context of NGO engagement with the European human rights process, it has been stated that ‘NGOs and [NHRIs] across Europe are not fully aware of the possibilities, nor of the mechanics, of engaging in this process’, Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (n 426), 96; for an overview of more general criticisms levelled at NGOs in the past see Rachel Brett, ‘The Role and Limits of Human Rights NGOs at the United Nations’ [1995] 43(1) Political Studies 96.

problems. By focusing attention on such states, transnational NGOs are likely to be able to assist these states in achieving their goals, as they will have experience working in numerous states and different contexts and can use this experience in a targeted manner. Thirdly, this approach would free established democracies and non-democratic states from the attention of NGOs, at least in relation to the periodic review procedure. In the case of the former, these states are expected to have robust domestic checks and balances that will ensure adherence to high human rights standards, whereas in the case of non-democratic states we would expect the contributions of NGOs to be ignored by such states and so engagement would be ineffective. In this way, restricting NGO engagement to emerging democracies ensures that their resources are used most efficiently. This approach to emerging democracies, which acknowledges their preferences and weaknesses, might be a more appropriate technique than one that treats all states equally and may be more efficient at achieving improvements in the human rights standards of these states.

C. Non-Democratic States

On the face of it, if non-democratic states aren't concerned about the provision or protection of good human rights standards, then the level and manner of a treaty body's interaction might be immaterial. The tendency when dealing with such states might be to criticise their lack of commitment and to demand improvements in their national institutional and legal frameworks. Such an approach is assumed to be inefficient because it requires the expending of significant resources on states that are likely to ignore such didacticism. Instead, a more appropriate procedure might be to attempt to use the periodic review mechanism to socialize such states around the social norms the relevant treaty attempts to protect. This is an even softer form of interaction than the approach taken with respect to emerging democracies, as the interaction doesn't focus on a state's level of adherence to the treaty requirements but instead attempts, through constructivist approaches, to improve the state's appreciation for the values of the norms the treaty protects. Attention is not given to the state's institutional problems: to do so would lead to focus being applied to the wrong issue. Instead, interaction between the state and the treaty body would be more normative in nature, beyond the level of the reality of the state's practices. It

could be argued, very fairly, that this approach ignores the gravity of these states' human rights standards, and that, by not emphasising these practices, treaty bodies condone them or fail to assist the citizenry of these states. While a strong argument, it might be equally correct to counter that unless these states are conditioned to accept the social norms the treaty protects then addressing practical issues will not be worthwhile (efficient).

On top of this, periodicity may also be of relevance: longer periodicities may result in the impetus for improving recognition of the social norm being lost. During the period between the interactions between the monitoring body and the state, the state may have failed to internalise the dynamics of the engagement. Instead, shorter periodicities have two benefits: firstly, as discussed, the shorter the periodicity the greater the opportunity for the monitoring body to socialize the state around the relevant social norms; secondly, shorter periodicities, if the engagement between the monitoring body and the state is managed carefully, can be framed as a means by which the state's international reputation is improved. In this latter case, if the treaty body system structures engagement in such a way that it is not viewed by the international community as a critical approach, but rather one of socialization, and if this occurs on a regular basis, then states in this category might see incentives in engaging. Engagement increases the state's reputational stock, as it is seen more often at meetings with the monitoring body and at the centre of the international organisation's power base. Separately, while the state may view this increased level of engagement as positive – assuming the engagement is not critical but rather socializing – the increase in engagement may also increase the expectations of the international community, which assumes that the state's cooperation signals its willingness to improve its standards. As such expectations increase, it becomes more difficult for the state to later renege on its assumed greater willingness to participate in the monitoring process.

While very theoretical – and perhaps challenging for purists – this perspective represents a novel approach to engagement with non-democratic states in the periodic review system. Equally, it essentially ignores the essence of the review system, and rather suggests that this mechanism be utilised as a tool through which socialization might be achieved. This, too, might be unpalatable for many.

IV. Conclusions

Periodic review acts as a means by which state adherence to human rights treaties can be monitored and facilitates the resolution of information asymmetries between treaty bodies, the international community, and states parties to the various international human rights instruments. The great diversity between the various periodic review mechanisms means there is no coherence to the system and means that states can rationally choose the review mechanisms to which they want to submit. Essentially, it has been argued, state preferences stump the system working effectively.

Alterations to the system can be made, however: the periodicities of reports to treaties that share a similar subject matter can be aligned; periodicities can be adjusted to reflect a treaty's subject matter and the assumed time it takes to implement better human rights standards in that particular area; engagement with states can be tailored according to a state's 'type'; and states that submit punctually, given their resources, can be rewarded with a seat on a punctuality commission. The establishment of the latter entity, based on the SERF Index utilised in chapter 6, would be a significant step in taking advantage of state self-interest in the advancement of better standards and more punctual submission in the periodic review procedure.

But while these proposals are a rather large step for a system that appears badly organised and subject to state preferences, a much simpler step would be to require treaty bodies to consider the reports submitted to other bodies in their assessment of a state's commitment to human rights on a general level (as is the case under CERD). But given that even this rather small change might require significant bureaucratic effort and political will to implement, the propositions that have been put forward here would appear a long way away from being realized.

Nonetheless, recognising state self-interest as a crucial factor influencing the periodic review system's problems has provided us with some interesting insights into how the system can be enhanced. While the proposals themselves are not stepping-stones toward a better and more effective system, they are nevertheless building blocks on which further analysis can be carried out.

Chapter 7: Dispute Settlement

It has been stated that one of the key problems facing international human rights treaties is the contention that oversight mechanisms are weak.⁴⁵² When this takes place, states are able to ratify such treaties at low cost. But why is this the case?

As with the periodic review system, both the inter-state complaints mechanism and the individual complaints mechanism are means of compliance control. But whereas compliance in the latter case depended on the treaty body's structure and the periodic review system, dispute settlement mechanisms are forms of contingent regulation, as assessment of compliance, in these cases, requires that complaints be made in relation to an alleged breach. Unless a complaint is lodged, a state's activities can go somewhat unchecked. A distinct advantage of this approach is that the states and the individuals that are affected by the treaty-violations will have higher incentives to attempt to have those violations resolved as soon as possible. Whereas treaty bodies mandated with authority to receive periodic review reports are assumed to be concerned about violations and about the consequential externalities that might result, they have fewer incentives to have violating states expeditiously desist from breaching.

This gap between the incentives of affected states and individuals and treaty bodies stems from those bodies not having to fully deal with the externalities caused by breach, which are assumed to flow to other states and individuals. This institutional design, whereby treaty bodies have inadequate incentives to resolve breach during periods outside the monitoring period of periodic review may result in some violations going unchecked and is solely reliant on the incentives of the affected states and individuals to have these violations resolved. In this way, we assume that contingent regulation can facilitate compliance control in periods other than those in which periodic review reports will be monitored. What follows is an assessment of the principle structures that govern both the individual complaints system and the inter-state system.

⁴⁵² Oona A Hathaway, 'Testing Conventional Wisdom', [2003] 14 *European Journal of International Law* 185, 186.

I. Individual Complaints Mechanisms

The anomaly of individual complaints mechanisms is trying to understand why states ratify treaties or optional protocols that establish such mechanisms, as the gains from doing so are not immediately clear. As with other aspect of human rights treaties, the inclusion of an individual complaints procedure can alter the cost function of states considering ratification. States with poor human rights provisions evidently face greater costs of ratifying such treaties, as individuals should, in theory, be able to lodge complaints to treaty bodies arguing that the state party has violated their rights or breached its obligations. For these states, there is obvious reputational damage if complaints are lodged, irrespective of whether a treaty body finds that a violation did or did not take place. Ergo, the costs of individual complaints mechanisms relate not only to the cost of being found to be in breach of treaty obligation, but also to the *prima facie* cost of a complaint being submitted to a dispute settlement mechanism.

In this light, treaties with individual complaints mechanisms are inherently more costly than treaties without such mechanisms. As with our other regulatory structures, the cost function with respect to individual complaints mechanisms will vary according to the characteristics of each particular state. States with poor human rights provisions face higher costs than those with good standards, and are therefore expected to be less likely to ratify. In this section, we detail some of the more specific nuances governing individual complaints mechanisms and outline how their inclusion or exclusion during the treaty design phase can affect the mechanism's success at deterring and rectifying rights violations. Most of the analysis we carry out here is in relation to the ICCPR.

A. The Actionability of Rights

When drafting human rights treaties, drafters have a choice both in relation to how they frame the rights in the treaty (as discussed in chapter 4), and the extent to which they permit and limit the actionability of those rights by potential complainants. Article 1 of the ICCPR guarantees that

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁴⁵³

Its inclusion presents an interesting quandary: why did the ICCPR's drafters include, especially during the period of decolonialization in the 1960s, a right that expressly confers on all subjects to the treaty an entitlement to self-determination? The inclusion of such a right may have deterred states with either colonies or ethnic minorities with ambitions of statehood from ratifying the Convention, as the cost of ratification – if such a right is actionable – is heightened. Ratification could, if we stretch our argument significantly, facilitate claims for statehood. Of course, the actionability of all rights enshrined in the treaty, not just the right to self-determination, is dependent on the relevant state having also ratified the Optional Protocol,⁴⁵⁴ meaning that the cost of the right to self-determination only comes into effect once the OP has been ratified.

This two-stage process provides states with the possibility of attaining the reputational benefits that come with ratification without having to deal with the potential costs of being subject to claims from groups seeking to assert their autonomy. However, despite this, 'all peoples' have not been able to make claims in relation to this right, as the Human Rights Committee, despite having emphasised the right's importance,⁴⁵⁵ 'has systematically refused to examine complaints based solely on article 1'.⁴⁵⁶ An anomalous situation has therefore been created: the Convention – and the Committee – recognise collective rights but refuse to accept complaints on the basis that the complaints mechanism only permits complaints from individuals.

⁴⁵³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 199 art 1(1).

⁴⁵⁴ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302.

⁴⁵⁵ CCPR 'General Comment No. 12 (Article 1: The right to self-determination of peoples)' (13 March 1984), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1, paragraph 2.

⁴⁵⁶ Anna Batalla, 'The Right to Self-Determination – ICCPR and the Jurisprudence of the Human Rights Committee' in *Symposium on "The Right to Self-Determination in International Law"* (29 September – 1 October 2006, The Hague, Netherlands) available at <<http://www.unpo.org/downloads/AnnaBatalla.pdf>> accessed 1 July 2013, 2.

Nonetheless, the Convention does guarantee the right to vote⁴⁵⁷ and recognises minority rights,⁴⁵⁸ both of which have been subject to complaints by individuals⁴⁵⁹ and both of which house within them an implicit reference to self-determination, as both allude to collective-based conceptions of either autonomy itself (the rights of minorities) or of means by which autonomy might be achieved (the right to vote). In this way, rights that relate to collective issues are afforded to individuals, but actual collective rights are themselves barred. The Committee's refusal to receive complaints from individuals relating to the right to self-determination on the basis that it is a collective right and not an individual right⁴⁶⁰ may be interpreted as a means for the Committee to avoid dealing with politically-charged issues by relying on a treaty's open-endedness. In addition, the failure, or decision, by the treaty's drafters not to explicitly define the meaning of 'all peoples' could be interpreted as the drafters electing to leave 'gap-filling' to the Committee.⁴⁶¹ By leaving the meaning of the term uncertain, drafters may have incentivised states that might have been otherwise cautious about ratifying to ratify.

However, one reading of 'all peoples' might suggest that the rights of colonized peoples are respected: to explicitly refer to 'all peoples' suggests a distinction may exist between different classes of peoples and between different societies. By making a distinction like this, there is an implicit recognition that inequality between races and ethnicities exists, although this reading has been rejected by the Committee.⁴⁶²

But if we simply interpret the provision as it framed, such that we assume that treaty drafters intended to afford groups the right to self-determination, then the later mitigation of this right by the Committee suggests an inconsistency

⁴⁵⁷ ICCPR art 25.

⁴⁵⁸ ICCPR art 27.

⁴⁵⁹ For example, relating to the right to vote, *Yevdokimov & Rezanov v. Russian Federation*, (21 March 2011) UN Doc. CCPR/C/101/D/1410/2005; and relating to the rights of minorities, *Bulgakov. Ukraine*, (29 July 2010) UN Doc. CCPR/C/99/D/1799/2008.

⁴⁶⁰ Batalla 'The Right to Self-Determination – ICCPR and the Jurisprudence of the Human Rights Committee' (n 456), 2.

⁴⁶¹ In the sense that drafters may have felt that the Committee would have been able to arrive at an interpretation of self-determination more easily than the drafters (from chapter 4).

⁴⁶² *Concluding Observations of the Human Rights Committee on Azerbaijan*, (3 August 1994), UN Doc. CCPR/C/79/Add.38; A/49/40, paragraph 4.

between drafter-intention and regulator-interpretation. If this is the case, such that the ICCPR's drafters intended that the collective rights enshrined in the treaty would be actionable under the OP but that the Committee later determined that this would not be the case, then the situation reflects a principal-agent problem.⁴⁶³ The principals (the drafters) may have drafted the treaty and the OP with a clear goal in mind, but the agents (the members of the HRC) may have failed to interpret the treaty and the OP in the manner that the drafters had intended for it to be interpreted. In this way, a chasm may have developed between original intent and consequential interpretation. However, a principal agent problem may equally have developed between the international community (as the principals) and the drafters (as the agents), as it could be interpreted as being unlikely that the international community, during the period of decolonization, would have wanted 'all peoples' to refer to colonized peoples. Any interpretation in that direction would therefore have been indicative of a division of intentions. Despite this, the situation remains that collective rights are not actionable under the OP,⁴⁶⁴ although it may be possible for individuals who form part of 'peoples', groups, or minorities to claim what are essentially collective rights by making claims relating to the rights of minorities.⁴⁶⁵ It is therefore somewhat possible for collective rights to be claimed, but the ability to do so remains constricted by the Committee's cautiousness and the OP's provisions.

The actionability of rights, therefore, is a function of the degree to which the intentions of drafters and regulators align, the extent of an article's specificity, and the presence of other treaty provisions under which a complaint could be

⁴⁶³ For a specific assessment of this issue in international organizations, see Darren G Hawkins, David A Lake, Daniel L Nielson and Michael J Tierney (eds), *Delegation and Agency in International Organizations* (1st edn, Cambridge University Press 2006); Roland Vaubel, 'Principal-Agent Problems in International Organizations' [2006] 1(2) *The Review of International Organizations* 125.

⁴⁶⁴ *Berbard Ominayak, Chief of the Lubicon Lake Band v. Canada* (26 March 1990) UN Doc. Supp. No. 40 (A/45/40); for a more specific assessment of the issues raised in this case, see Dominic McGoldrick, 'Canadian Indians, Cultural Rights and the Human Rights Committee' [1991] 40(3) *International and Comparative Law Quarterly* 658; for a general overview of matters relating to the issues of the case, see Elsa Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' [1994] 16 *Human Rights Quarterly* 58.

⁴⁶⁵ CCPR 'General Comment No. 23: (Article 27: The rights of minorities), (8 April 1994), UN Doc. CCPR/C/21/Rev.1/Add.5, paragraph 7.

made. Importantly, we see that what is outlined in a treaty might not necessarily equate with what is actionable in practice.

B. Ius Standi

Relating to the preceding reference to ‘all peoples’, the permitted identity of complainants, regulated according to *ius standi* and which requires that a victim’s nearness to the alleged harm is clear, can hinder claims from being brought and can affect ratification decisions. *Ius standi* can apply to (1) an individual, (2) an individual and subsequently others, (3) a group of people, (4) a class action (in some domestic courts), (5) objective law on behalf of the public interest, or (6) NGO complaints known as altruistic law.⁴⁶⁶ Of these possibilities, some complaints bodies might only accept submissions from individuals who have been directly affected by the alleged treaty breach, whereas some bodies may extend the permissible identity of complainants to third parties, such as NGOs.⁴⁶⁷ The concept, though, of *actio popularis*, is largely restricted in treaties establishing complaints mechanisms,⁴⁶⁸ while we would assume that limiting the permitted identity of complainants to those individuals directly and personally affected by the alleged violation minimises ratification costs. We would expect optional protocols allowing claims by anyone other than individuals directly involved to be subject to limited ratification because states will recognise the added costs of ratifying such treaties. Costs are greater because the potential number of complainants is greater.

In keeping, however, with the issue of resource-availability, two possible scenarios can be posited. Firstly, we might find a negative correlation between the resources available to individuals and the state’s level of ratification: states whose constituent individuals have a greater availability of resources will be less likely to ratify because those individuals will be more capable of pursuing a claim. However, this can be countered by the second scenario, which rejects the

⁴⁶⁶ These issues are discussed at length in Anne van Aaken, ‘Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions’ Max Planck Institute Collective Goods Preprint 2005-16.

⁴⁶⁷ The range of these possibilities, and their relevance to justice, are outlined in Alfred P Rubin, ‘*Actio Popularis*, *Jus Cogens* and offences *Erga Omnes*?’ [2000] 35 New England Law Review 265

⁴⁶⁸ van Aaken (n 466), 27.

counter-intuitivity of the first on the basis that the states whence these individuals come are more likely to be wealthy and more likely to be democratic, and therefore less likely to be subject to complaints.⁴⁶⁹ The costs of legal advice, litigation, and the availability of lawyers may be important permutations determining the overall cost facing potential complainants. States, though, can determine the rules of the game: effectively they can control the price and supply of legal advice and the pool of lawyers available to potential complainants. In that respect, states can potentially reduce the costs of ratification by ratifying the relevant protocol but by simultaneously regulating the domestic costs individuals face in making complaints.

Meanwhile, if making a complaint against a state for a breach of its treaty obligations is an attempt to claim a private good (reparation) and if it provides the international community with a collective good (better practices and a fulcrum around which standards can be measured),⁴⁷⁰ then restricting *ius standi* can limit both private and collective social benefits. If, however, the costs and difficulties of bringing complaints are high, such that individuals have incentives to free-ride,⁴⁷¹ then this individual rationality will lead to collective irrationality, with no complaints being made. Resultantly there will be under-enforcement.

To address this, incentives must exist for entities other than individuals to make complaints, while this should also be formalised in the treaty provisions. If *actio populari* were not limited to individuals as claimants, but were rather extended to groups, such as NGOs, we assume that the greater access these entities have to resources will enable claims to be made through the complaints mechanism.⁴⁷² In this way, solely a collective good is generated, as the NGO attains no 'personal' benefit from a successful claim, save for potentially greater exposure and a larger share of the market for claims. Structuring *ius standi* in this way facilitates inter-NGO competition and is likely to therefore increase the quality of the applications to the complaints bodies and, if appropriate, reduce the costs of making complaints. Fundamentally, though, an individual

⁴⁶⁹ Relying on the assumption that wealthier states will be more democratic.

⁴⁷⁰ van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' (n 466), 5 and 8.

⁴⁷¹ *ibid.* 5

⁴⁷² van Aaken (n 466) discusses this issue in relation to the European system, showing that Article 34 is fairly open in relation to the identity of permissible complainants, 33.

complainant must still be named under an *actio popularis* claim, meaning that NGOs cannot act fully alone and that collective benefits cannot be the sole reward. Indeed, and returning to the first issue, allowing an NGO to make a complaint on its own standing, without having been directly affected, is assumed to make it more costly for states to ratify, as ratification would open states up to complaints from faceless complainants.

As a result, our analysis comes full circle: *ius standi* is restricted in human rights treaties so as to incentivise ratification, but the best means by which breaches can be resolved – through *actio populari* – would greatly deter ratification. Returning to the normative goal of universal ratification, we can appreciate that limiting the identity of potential claimants can facilitate this goal. However, if an effective treaty system is the preferred normative goal, then claimant-identity might be expanded beyond its current limits. To that end, the Inter-American system allows groups of individuals to bring complaints to the Commission,⁴⁷³ while a similar provision is found in the African Charter.⁴⁷⁴ While positive approaches, those systems have the administrative barrier of a commission for individuals to overcome.⁴⁷⁵ Nonetheless, unless the pool of potential complainants is widened, breaches of violations are likely to go unchecked.

C. Exhausting Domestic Remedies

As discussed throughout, an evident divide can be shown between the incentives of states with good human rights standards to push for individual complaints procedures and the incentives of states with poor standards not to have such mechanisms included in treaties. This follows from the previously discussed concept that democratic states face greater domestic pressure as well as having, *prima facie*, better legal systems. Meanwhile, undemocratic states, as states with poor human rights provisions, face a greater likelihood that they will be subject to individual complaints.

⁴⁷³ Diego Rodriguez Pinzon, 'The "Victim" Requirement, The Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System', [2001] 7 ILSA Journal of International and Comparative Law 369, 373

⁴⁷⁴ African Charter, art 55.

⁴⁷⁵ van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' (n 467), 33.

Importantly, though, for complaints to be permitted under the various mechanisms, the complaints will usually have to have fulfilled a number of criteria, such that domestic mechanisms will have had to have been exhausted.⁴⁷⁶ In some cases, such as when potential complainants are deterred from pursuing their complaints on the international level because of the unreliability of the domestic legal system, states with poorly constructed legal systems might be therefore indifferent between accepting individual complaints mechanisms and not. For these states, they gain reputationally by recognising the individual complaints mechanism but do not suffer the same costs from such ratification, as fewer complaints will actually be lodged. Rational states with poor human rights provisions have no rational incentive to correct for their judicial problems. For these states, the gains from ratification have already been internalised while the costs of being subject to individual complaints are lower than would otherwise be the case were the state to have a more efficient legal system. Ergo, a negative correlation between judicial efficiency and ratification rates might exist.

An important caveat must be made, however. While it is suggested that individuals will be deterred from attempting to exhaust particularly cumbersome domestic remedies, provisions exist to overcome these hurdles. If the individual can show that exhausting domestic remedies would be ineffective, then it may be possible for the complainant to nonetheless submit a complaint. This is a means for the complainant to overcome the costs of exhausting domestic remedies, which are assumed to be a function of the efficiency of the legal system. The complainant must still indicate to the complaints body the steps that were taken to exhaust those remedies,⁴⁷⁷ even if exhaustion was not fully achieved. Such a provision is assumed to deter some individuals from pursuing claims as far as to the complaints mechanism, but the assumption is that fewer will be deterred than under a model that requires that domestic remedies are fully exhausted. This leeway is likely to increase the costs of ratification for states lacking judicial efficiency.

In determining the potential costs of ratifying a treaty with a mechanism that affords leeway with respect to exhausting domestic remedies, we assume that states estimate the degree of likely leeway that will be afforded based on the degree of leeway shown by other complaints bodies that have been operating in

⁴⁷⁶ ICCPR art 41(c); ECHR art 26.

⁴⁷⁷ Optional Protocol to the ICCPR art 5(b).

all preceding periods. The emergence of human rights treaties as an iterated game is assumed to result in states basing calculations in one period on the experienced costs in preceding periods. If states are assumed to determine the leeway of complaints bodies in relation to the admissibility criterion based on observing the leeway shown by other complaints bodies, bodies established in early periods have incentives to be less lenient. In this way, more restrictive criteria regarding admissibility will encourage states to frame the assumed criteria in present and future periods around the artificial criteria applied in preceding periods. Leniency as to admissibility is therefore determined by the number of periods that have already passed. As more complaints bodies are established, and as the supply of complaints bodies is exhausted, we assume that the likelihood that an individual will have his/her complaints admitted despite domestic remedies not having been exhausted increases. This reflects a strategic approach open to treaty bodies to incentivise ratification by states with poor human rights standards and badly functioning legal systems.

D. Legal Aid Provisions

Unlike in many areas of domestic law, legal aid is not a well-developed concept in international human rights law and complainants to complaints mechanisms are expected to finance the complaints themselves.⁴⁷⁸ This is an anomalous situation, as a number of treaties make reference to legal aid, on the domestic level, as a right.⁴⁷⁹ In that setting, legal aid will be granted in cases in which the issue revolves around a conflict between an individual and the state. The state accordingly supports an individual in making a claim against itself, in the interest of transparency and fairness.

In an international setting, the absence of legal aid provisions in human rights treaties might be explained in a number of ways. Firstly, if complaints are made

⁴⁷⁸ 'But with the exception of the ECtHR, legal fees are not explicitly recoverable in case of winning and, again with the exception of the ECtHR, there is no legal aid provision for those parties who cannot afford to bring a petition otherwise', van Aaken 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions' (n 466), 18.

⁴⁷⁹ ICCPR art 14(3)(d); ECHR art 6(3)(c); although there is no mention of this in the African Charter (Article 7) and in the American Convention (Article 8) it is mentioned but not addressed.

by individuals who are citizens of – or domiciled in – one state, against an entirely different state, then a binary choice as to which state should provide the aid is possible. Provision by the state of which the complainant is a national or in which the complainant is domiciled could be perceived as a way for that state to tackle the human rights provisions of another state. By financing complaints by individuals against other states, the financing state would be facilitating holding the other state to account. This would be a means by which the state could make an inter-state complaint without the formal nature of making such a complaint, such that it would essentially be an inter-state complaint by proxy.

A second option would be for the complainee to provide for the legal aid, irrespective of the identity of the complainant. In this scenario, states may end up financing claims by foreign nationals. In the past few years, the case of Abu Qatada al-Filistini has been subject to a lot of discussion in the British media and in British public discourse generally: the attention has generally focused on his deportation, his cases at the ECtHR, and the costs to the British taxpayer of his complaints to that institution.⁴⁸⁰ The backlash against providing the complainant with legal aid occurred alongside a period of increased scepticism in Britain about the role of the ECtHR in domestic affairs: in this way, provision of legal aid by a complainee may require a context specific assessment of its merits and whether the impact of such a policy will affect human rights matters in other ways.

Separate to these possible approaches, however, would be for the international community, perhaps through the monitoring mechanism, to provide for a system of legal aid. If we analogise the international community as an executive then this approach would reflect the situation in the domestic setting. Financing would, presumably, come from the complaints mechanism's own finances, while it's assumed that legal aid would be provided – just as it is domestically – to those in hardship.

Whether the proportion of complainants receiving legal aid would be higher in the treaty body context than the proportion of individuals receiving legal aid in the domestic context is not clear. Conceivably it could be: legal aid on the domestic setting is mostly afforded to those accused of perpetrating crimes,

⁴⁸⁰ See, for an objective assessment of this issue, Roger Smith, 'Abu Qatada and Legal Aid' *The Justice Gap* (December 2012) <<http://thejusticegap.com/2012/12/abu-qatada-legal-aid/>> accessed 15 June 2013.

whereas those lodging complaints to human rights bodies allege they are victims. The purpose here is not to address the social position of alleged perpetrators as against alleged victims, or to contend that one is more worthy of legal aid than the other. Instead, we make an analogy between an alleged perpetrator as having allegedly acted and an alleged victim as having been allegedly acted against. In the latter case, where loss appears more pertinent, legal aid can be more easily justified on the basis that it facilitates attainment of a remedy.

In this light, if legal aid is granted to complainants and if it is the international community that provides this aid through the complaints mechanism, then we should consider how that aid is financed.

1. State Wealth

Were wealthy states, which we assume have good human rights standards, to provide the bulk of the finances for legal aid, they would be subsidising claims against states with bad standards. Bad human rights standards might be due to a disregard for the notion of human rights (although then the question returns as to why they have recognised the mechanism), or might be due to institutional weaknesses and/or poverty. If institutional weaknesses stems from poverty, it seems unclear how treaty body decisions are likely to result in those standards improving. In addition, if breaching states are having claims against them financed by wealthy states, wealthy states may be simply putting good money after bad, as standards are unlikely to improve.

2. State Population Size

Population size, too, is an uncertain tool to use. The same argument applies here, in that states with larger populations would simply be subsidising claims against states with bad provisions. The link between population size and financial contribution is logical in a general sense, although it may not be entirely relevant in the case of free legal aid. If we assume no correlation between population size and human rights standards exists, then use of the tool cannot be justified as it penalises states with large populations and good human rights provisions and rewards states with low populations and bad human rights provisions.

3. Incentivise Domestic Efficiency

Apart from these considerations, an additional issue is the link between free legal aid and the exhaustion of domestic remedies. Claimants who have been unable to exhaust domestic remedies because of institutional weaknesses or apathy might be rewarded with free legal aid financed by that state. This would incentivise states to deal with their alleged violations on the domestic level and to avoid being financially burdened on the international level once the exhaustion of domestic remedies has been frustrated. In cases in which it is not institutional weakness that explains the inability of individuals to exhaust domestic remedies, but in which this is rather the result of judicial or political decisions, this approach would essentially be a means of financially penalising regulatory capture on the domestic level.

Once again, though, the state subject to the complaint may not have the financial resources to improve domestic institutions; in this case, mandating that the failure to facilitate the exhaustion of domestic remedies be met with free legal aid on the international level may be moot. In cases in which state finances are limited, it's clear that a cyclical problem emerges whereby institutions are the cause of the problem but limited finances restrict improvements of those institutions. In this manner, this approach also fails to fully correct the problems of legal aid.

II. Inter-State Complaints Mechanisms

Inter-state complaints mechanisms are rarely used by states⁴⁸¹ despite being widely provided for in innumerable international and regional human rights treaties.⁴⁸² Their normative purpose is simple: to allow states to make complaints in relation to the provision of or level of protection of human rights in another state such that that state has breached or has not given effect to the treaty's provisions. A central requirement in this is that both states must have recognised

⁴⁸¹ At a presentation of this research plan at the Irish Centre for Human Rights in May 2011, suggestions were made from human rights academics and lawyers and UN practitioners that inter-state complaints mechanisms are so rarely used that this variable may be omitted.

⁴⁸² ICCPR art 41; UNCAT art 21; CERD art 11; ECHR art 33; ACHR art 45; ACHPR art 54.

the authority of a dispute settlement body to receive complaints of this nature.⁴⁸³ Recognising that authority might be a necessary part of ratifying the relevant treaty or it might involve a second stage, such as ratifying a relevant optional protocol.⁴⁸⁴ Equally, states can lodge reservations in relation to this kind of mechanism, such that they are not to be bound by them.⁴⁸⁵

The requirement that both states involved in a complaint have recognised the body's authority might lead us to assume that those states concerned about human rights protection would recognise the body's authority and that those states less concerned about upholding standards would not recognise the body's authority. However, rather than recognising the body's authority in an unconsidered period, states that desire to make complaints have incentives to recognise the treaty body's authority in the period after the recognition of its authority by a state against which it wishes to make a complaint. This allows for strategic recognition of treaty bodies by states concerned about human rights standards in other states. There is assumed to be a first mover disadvantage of recognising the body's authority, most particularly in the case of states with poor standards, as doing so increases the costs of non-adherence. However, while it might be counter-intuitive, and while it might appear as though there is a first mover disadvantage of recognition, states with poor standards can benefit from recognising the body's authority first. This is achievable through strategic litigation. Below, we discuss this issue and suggest potential reforms.

A. Strategic Litigation

Quite apart from a traditional perspective on the lodging of inter-state complaints, which might suggest that lodging indicates a state's valuation of a particular treaty provision, our present analysis goes beyond this. Conceivably,

⁴⁸³ '[...] No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration', ICCPR, art 41(1).

⁴⁸⁴ For example, Optional Protocol to the International Convention on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), GA res. 63/177, art 10.

⁴⁸⁵ For example, states can make reservation under Article 30(2) to that UNCAT to the effect that they are do not recognise the inter-state procedure. Among others, Afghanistan and Bahrain have made reservations to this effect.

states will rationally make complaints about the activities of other states if making those complaints furthers the interests of the complaining state. For instance, our previously mentioned example of Article 1 of the ICCPR, in relation to the right to self-determination, could allow for strategic litigation. In that case, collective rights for ‘all peoples’ were frustrated by the inability of individuals to make claims asserting those rights under the Optional Protocol that established the complaints mechanism.⁴⁸⁶ In the case of inter-state complaints, it might be possible for states to make complaints in this regard.⁴⁸⁷ For example, states with a majority of one ethnic group could make complaints about the actions of another state in relation to that state’s domestic treatment of the ethnic group dominant in the first state. In other words, it might be possible for a state to strategically litigate so as to pursue its own interest, which in this case relates to advancing the agenda of the minority group in the second state. Such strategic litigation, if claims in relation to Article 1 were to be permissible, would facilitate complaining states in politically agitating for the interests of its ethnic relatives in the second state, but to do so within the treaty setting. By agitating about – and highlighting – the second state’s failure to adhere to its treaty obligations within the complaints mechanism, making a complaint may afford the state’s concerns more legitimacy: the international community may be more receptive to an issue that is subject to an inter-state complaint rather than to an issue that simply forms part of a state’s generic political agenda.

Ergo, the structures of certain treaties and the subject matters they cover can incentivise states to express their concern over treaty breaches in other states within the treaty system. Again, however, these complaints depend on mutual recognition of the dispute settlement mechanism. But whereas we previously pointed to a first mover disadvantage of recognising the body’s authority, we presently point to a first mover advantage of lodging complaints. On the surface, we assume that it is more likely that states with good human rights provisions will complain about states with poor provisions; however, through closer

⁴⁸⁶ *Berbard Ominayak, Chief of the Lubicon Lake Band v. Canada* (n 464).

⁴⁸⁷ This remains very uncertain, although it has been stated that ‘with regard to the inter-state complaints procedure [...] it seems that such claims could, in principle, include an alleged violation of the right to self-determination as recognised in article 1 of the Covenant’, Batalla, ‘The Right to Self-Determination – ICCPR and the Jurisprudence of the Human Rights Committee’ (n 456), 4.

analysis, the opposite might be the case if states with poor standards wish to act strategically. In order to reduce the cost of being subject to a complaint, the inter-state mechanism affords states a first mover advantage and a means by which they can shift the regulatory focus onto other states: if the state likely to be subject to a complaint can foresee that a complaint will be lodged with respect to its treaty commitments, then it will have an incentive to lodge complaints against the state it foresees as being likely to complain. The incentive to ratify treaties with inter-state complaints mechanisms thereby extends to states with poor human rights standards, although this is not on the surface evident.

While most treaty mechanisms are assumed to increase the cost of ratification for states with poor human rights standards, such that they can be deterred from ratifying, the inclusion of an inter-state complaints mechanism might not deter ratification by states with poor human rights standards. If this holds, it suggests that rights-respecting states have an incentive to avoid lodging complaints and to remain passive. This situation develops because of the game the two state-types play: we assume that rights-respecting states will want to complain about the provisions of other states, but we have argued that rational complainees should foresee this and lodge complaints about the complainer *ex ante*, before they are subject to a complaint. Complainees that do not foresee that they will be subject to a complaint have an incentive to lodge complaints *ex post*, after a complaint against them has been lodged. In the latter case, the international community is able to more easily ascertain that complaints lodged *ex post* are not genuine. By contrast, there is insufficient information in the case of *ex ante* complaints to determine whether or not those complaints are strategic.

In essence, states with poorer human rights standards can essentially determine the game's outcome: by acting strategically against rights-respecting states, such as by making complaints first, the incentives for the latter are to avoid making complaints. This results in a prisoner's dilemma situation, as states with poor human rights standards are unlikely to make complaints independent of an incoming complaint from a state with good human rights standards. Equally, the genuine complainers have limited incentives to complain if strategic complainees will counter-complain. This stalemate effectively nullifies the inter-state complaints process and suggests that unless changes are made to the procedure it will remain underutilised.

B. Reform

Thus far, the inter-state complaints mechanisms of international treaties have not yet yielded a single complaint,⁴⁸⁸ although the mechanism enshrined in the European system has been used a few times.⁴⁸⁹ We assume that this vast underutilization is rooted in the nature of the inter-state system as being potentially politicised and in the threat of reciprocity: states are able to make spurious claims about the actions of other states without the legitimacy of those claims immediately verifiable. Instead, verification only takes place once the treaty body considers the complaint. In that way, a state's reputation can be damaged by simply being subject to a complaint as, at that stage, there is no means of assessing the genuineness of the complaint. All states, irrespective of their provision of human rights, attain a more muted benefit from complaining when the responding state acts in kind. In suggesting potential means by which this stalemate can be resolved, the system should be altered so that states have efficient incentive to lodge complaints, which requires that the strategic motivations of complainees be addressed.

The first proposal might be that the approach taken by the ICCPR's Human Rights Committee is extended across all treaty bodies. There, the procedure in place is one that is structured around the facilitation of finding an amicable resolution to the complaining state's grievance, in that the Committee takes a hands-off approach and cannot make judgements about the merits of the case.⁴⁹⁰ The recognition by both states of a 'Conciliation Commission' becomes a requirement for resolution of the case thereafter, with this Commission capable of taking stronger lines.⁴⁹¹ The purpose of this Commission remains the same as that of the Committee: to achieve a friendly settlement. This goal may undercut the possibility of strategic litigation by focusing on resolution of complaints cooperatively, as states will be aware in advance that the emphasis of the Committee and the Commission on non-partisanship is unlikely to accommodate their particular preferences. Such focus on friendly resolution may therefore

⁴⁸⁸ Scheinin, 'The International Covenant on Civil and Political Rights' (n 422), 51.

⁴⁸⁹ See, for example, *Denmark v. Turkey* (Application No. 34382/97); *Ireland v. United-Kingdom* (Application No. 5310/71); *Austria v. Italy* (Application No. 788/60).

⁴⁹⁰ ICCPR art 41(1)(h).

⁴⁹¹ ICCPR art 42(7)(c).

deter strategic litigation, as the rewards from such complaints are likely to be more limited.

Secondly, states subject to complaints could be precluded from entering complaints against those states that lodged complaints until the first complaint is resolved. This would eliminate the ex post strategic incentives of complainees. However, as counter-claiming would no longer be possible, the incentives to lodge strategic complaints ex ante increase: rights disregarding states that suspect they will be subject to genuine complaints will enter strategic complaints more often, thus reducing the cost of being subject to a genuine complaint. As a result, the stalemate would persist.

Evidently, it is a state's ex ante incentives that must be corrected. To achieve this, it is suggested that upon receipt of a complaint, a complainee should have a right of response, and that the complaint and the response would take place behind closed doors.⁴⁹² Upon the complainee's response, both complaints would be made public. This approach would reduce the incentives of rights-disregarding states to lodge strategic complaints, as the responding state would have the ability to respond before the complaint is made public. Ergo, both complaints become public simultaneously, enabling the international community to more easily estimate the likely legitimacy of both complaints. In a two-stage game, such as the current structure, it is more difficult to determine the identity of the legitimate complaint, as legitimacy might be influenced by both the relevant states' human rights provisions and the chronology of the complaints. In a one-shot game, in which both complaints are published simultaneously, the role of chronology in influencing the assumed legitimacy of a complaint is removed. The consequence of this is that the incentives of rights-respecting states to lodge complaints remain in place when the ability of the responding state to act strategically is stifled. In effect, complaining states, under the proposed system, face the same ex post threat that the complainee will respond in kind. However, the ex ante threat of strategic litigation is minimised because states with poor provisions will have no first mover advantage. The upshot of this proposal is likely to be lower levels of ratification, as states likely to be subject to

⁴⁹² This does not address the issue as to whether the proceedings relating to complaints should be public or not, but rather that all inter-state communications should be private until a state that has been complained against has or hasn't responded with a counter-claim.

complaints no longer have the same incentive to strategically complain and to mitigate the costs of being subject to complaints.

III. Conclusions

This chapter has suggested that, despite affording states an expressive tool through which they can signal their commitment to human rights protection on an international level, the limited use of inter-state complaints mechanisms might be explainable through the structure of the system in facilitating strategic action by rights-disregarding states. These states are assumed to be able to determine the rules of the game and to push it toward a prisoner's dilemma situation. To address this, a properly functioning inter-state complaints mechanism would provide states with efficient incentive to make justifiable complaints about another state's failure to fulfil its treaty obligations. This has not yet been achieved. The proposal here suggests that treaty bodies can reduce the benefits of strategic litigation to rights-disregarding states by ensuring that complaints and counter-complaints by rights-respecting states and rights-disregarding states respectively are published in unison.

Separately, individual complaints mechanisms were argued as being underused on account of the significant hurdles complainants must overcome in order to make complaints in relation to a state's alleged breach of its treaty obligations. These hurdles are an inevitable outcome of the politics of international relations, whereby treaty structures reflect state self-interest and the primacy of sovereignty. Resolving these issues is not easy, although one proposal elaborated here has argued that states that fail to facilitate the exhaustion of domestic remedies would be required to provide legal aid to those complainants who have been prevented from attaining an effective remedy on account of domestic legal or institutional barriers.

In addition, we alluded to the role adjudicatory bodies can play in filling gaps in vaguely drafted treaties, and which is related to the discussion in chapter 3 about article specificity. There, and here in relation to Article 1 of the ICCPR, emphasis was given to the efficiency of 'gap-filling' as an incentivizing device for encouraging ratification, as states will measure the cost of a treaty based on how the treaty appears, rather than on how it would appear in a world without transaction costs. Evidently, therefore, adjudicatory bodies can play a crucial role

in the facilitating an efficient human rights system from drafting stage to dispute settlement stage.

What this analysis has lacked has been a closer assessment of the distinctions that exist between treaty bodies and the extent to which they do, and don't, compliment one another. Further research is required in this area, particularly in a qualitative sense, so as to better establish how victim participation can be advanced and state self-interest stifled, in cases in which the latter is not welfare maximising.

Chapter 8: Enforcement

The undercurrent that has flowed throughout this dissertation, and that was established in the early periods of its research, is that underenforcement is a particular problem in international human rights law. This dissertation has attempted to both understand this issue based on analysing the various mechanisms that form part of the international framework and to propose solutions to resolve the perceived problems. But while institutional weaknesses and state self-interest have been argued as being a significant hindrance in achieving an effective treaty system, unless enforcement of judgments and the provision of effective remedies are achievable, any proposals put forward in this dissertation will be moot.

Chapter 4 introduced the idea of human rights substitutes a possible remedy for breaches of treaty obligations, but this is likely to be limited to those situations in which a state has failed to give effect to the treaty provisions, rather than a situation in which a state has actually violated, for example, an individual's human rights.

In this chapter, we briefly enquire as to whether remedies from the domestic context of contract law can be applied to breaches of human rights treaties. At the outset, we recognise that flaws exist in this analogy. Treaties cannot be easily equated with contracts and the nature of human rights violations might require remedies distinct from those applicable to breaches of contract law.

I. Remedies and Sanctions

In dealing with how to structure the remedies (non-punitive) and sanctions (punitive), in a substantive sense,⁴⁹³ that might be appropriate for breaches of treaty obligations, it is possible – although not easy – to apply lessons from the domestic context. There, remedies for breaches of contracts usually relate to specific performance and compensation. From Article 46 of the ECHR, the primary remedy appears to be restitution, as states are obliged

‘(a) to terminate the violation with regards to the applicant, (b) to provide the applicant with *restitution in integrum* (that is restoring the situation prior to the violation), and (c) to take measures to prevent future violations (also with regard to other individuals similarly affected by the violation, for instance by changing law)’.⁴⁹⁴

Determining appropriate remedies for human rights violations is a difficult task, and has been repeatedly reiterated by UN bodies as an issue that requires attention.⁴⁹⁵ It appears that, quite apart from institutional remedies and their appropriateness, human rights violations are principally subject to sanctions, whether bilateral or multilateral.⁴⁹⁶ But while reputational sanctions are limited in nature,⁴⁹⁷ it has also been suggested that economic sanctions, in general, can also be sometimes counterproductive:

The Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1997/35 “Adverse consequences of economic sanctions on the enjoyment of human rights” pointed out that economic sanctions “most seriously affect the innocent population, in particular the weak and

⁴⁹³ Dinah L Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2005), 7.

⁴⁹⁴ Tom Barkhuysen and Michiel L van Emmerick, ‘A Comparative View on the Execution of Judgments of the European Court of Human Rights’ in Tom Barkhuysen, Michiel L van Emmerick, and Piet Hein van Kempen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (1st edn, Martin Nijhoff 1999), 3.

⁴⁹⁵ See, recalling previous resolutions, UN Commission on Human Rights, ‘Resolution 2004/34: The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms’ (19 April 2004) UN Doc. E/CN.4/RES/2004/34.

⁴⁹⁶ Pauwelyn, ‘Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism’ (n 289), 81.

⁴⁹⁷ Guzman, ‘International Law: A Compliance Based Theory’ (n 282), 72.

the poor, especially women and children, (and...) have a tendency to aggravate the imbalances in income distribution already present in the countries concerned.⁴⁹⁸

The appropriate remedy and sanction must be therefore carefully chosen. The applicable remedies for treaty breaches are dependent on the relevant protection regimes in place but alignment between regime and remedy is necessary. A weakness in resolving human rights breaches is the widely applied sanction of 'community costs',⁴⁹⁹ according to which states are assumed to suffer the costs of breaching international law through reputational damage, peer pressure, and political consequences. The extent of the community costs will depend on the level of protection underlined in the treaty or by the monitoring mechanism.⁵⁰⁰ In this way, we can intuitively deduce how the international community might, in theory, respond to breaches by various states:

a breach of an obligation protected by a liability rule and met with sufficient compensation (the price of the breach) should ensure *Pareto optimality*, and all states should be indifferent between the preceding and present periods; a breach of an obligation protected by a property rule and met with the sanction of retaliation by other states – for an unknown period – will not be *Pareto optimal*, most likely, and will be coupled with community costs.⁵⁰¹

Essentially, the crucial difference between a liability rule and a property rule is that the first involves a price and the second involves a sanction. As we have previously discussed the intricacies of both liability rules and property rules in relation to breaches of human rights law, our present analysis should focus on differentiating between prices and sanctions in that context. Prices are assumed to be what states are *prepared* to pay for the possibility of reneging on their treaty commitments whereas sanctions are those costs imposed on a state for reneging on their commitments.

⁴⁹⁸ OHCHR, 'The Human Rights Impact of Sanctions on Iraq: Background Paper prepared by the Office of the High Commissioner for Human Rights for the meeting of the Executive Committee on Humanitarian Affairs' (5 September 2000)

<<http://www.casi.org.uk/info/undocs/sanct31.pdf>> accessed 10 November 2011, 3.

⁴⁹⁹ *ibid*, 85-93.

⁵⁰⁰ *ibid*, 85.

⁵⁰¹ Pauwelyn, 'Hamburg Lectures on Law and Economics' (n 306).

As discussed previously, price might be analogised as the willingness by a state to supplant its protection of one area of human rights law with its protection of another area of human rights law (in the sense that it still reneges on the first area of protection), and whereby this does not lead to a *Pareto* sub-optimal outcome. Sanctions, then, might be analogised as the manner in which the international community responds to a state's reneging on its previous commitment to protect human rights, and whereby this may involve retaliation or community costs. Retaliation, though, is a tenuous concept in the area of human rights law. The action by a state in reneging on its human rights commitments is assumed to affect the international community (for moral reasons),⁵⁰² other states (for moral and potentially practical reasons),⁵⁰³ and the breaching state's citizens (for moral and practical reasons),⁵⁰⁴ all of whom are promisees to the international treaty. Retaliation by other states cannot take the form of a tit-for-tat breach of treaty commitments, as this is unlikely to affect the breaching state in a moral sense; practically, retaliation through tit-for-tat breach might only affect the breaching state in a practical sense if tit-for-tat breach affects the citizens of the breaching state. Consider an example:⁵⁰⁵ State A has ratified the Racial Discrimination Conventions but has failed to adhere to its treaty obligation to attempt to eliminate racial discrimination.⁵⁰⁶ As a result, we assume that certain citizens, Group B, that form a minority in the state continue to be discriminated against. The state is assumed to share a border with another state, State B. We assume that Group B is the majority group in that state and that there is a minority group also, Group A. In retaliation for State A's breach of its obligations under CERD, State B breaches likewise and violates the rights of Group A. It is only under these tit-for-tat conditions that we can conceive of retaliation in relation to breaches of commitments to human rights treaties.⁵⁰⁷ Further, it is not

⁵⁰² The international community can also be affected in a practical sense if it will have to take action to deal with the state's reneging upon its commitments.

⁵⁰³ Other states will only be affected in a practical sense if externalities arise pursuant to the state's actions.

⁵⁰⁴ In the sense that the bundle of human rights available to them has been curtailed.

⁵⁰⁵ This is a similar situation to the one elucidated previously in relation to inter-state financing of individual complaints.

⁵⁰⁶ CERD art 2.

⁵⁰⁷ While this is highly stylized and appears unrealistic, some research has investigated similar activity on a much smaller scale and using game-theoretic concepts: Richard H McAdams,

inconceivable that a race to the bottom situation could occur, such that the levels of protection in the respective states continue to fall for the minority groups.

In such contexts, treaty bodies might find it difficult to determine which remedies might be most appropriate, while the appropriate remedies and sanctions might not only depend on the protection regime in place, but might also depend on the manner of a state's breach, such that the state might have violated specific articles or might have failed to give effect to the treaty provisions. To that end, in determining the potential effects of various remedies for treaty breach, we consider both Cooter and Ulen's work on remedies for breach of contract law,⁵⁰⁸ and Trachtman's extension of the remedies problem to the international context.⁵⁰⁹ Neither of these works examines the applicability of damages for breaches of human rights treaties. As has been elaborated in relation to gap-filling, transaction costs prevent the consideration of all possible future contingencies in the treaty formation process. Among the contingencies that human rights treaties might fail to address are the remedies available when states breach their obligations. Whether the treaties include a menu of potential remedies from which adjudicators can choose, or whether the treaty remains silent, is a question of the dynamics of the treaty negotiating process.⁵¹⁰ Treaty drafters may be aware that the inclusion of certain remedies, such as pecuniary damages, might deter ratification by states that might be likely to breach their treaty commitments. By contrast, the absence of pecuniary damages from the list of remedies may frustrate states that hope that the treaties will deter potential breachers from breaching. In this light, we briefly consider the range of remedies that might be appropriate for breaches of human rights obligations.

'Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination' [1995] 108(5) Harvard Law Review 1003.

⁵⁰⁸ Cooter and Ulen *Law and Economics* (n 57), 177-287.

⁵⁰⁹ Trachtman *The Economic Structure of International Law* (n 2), 137-142.

⁵¹⁰ Article 14, for example, of the ECHR, calls on national authorities to provide victims of breaches with an 'effective remedy', but is silent as to how this should be done. This might be rooted in the treaty drafters failing to agree on the appropriate remedies regime and leaving the gap-filling to the Court ex post.

A. Specific Performance

We assume specific performance is a relatively simple remedial judgement for a treaty body to hand down, but a very difficult judgement for it to enforce. If a state has been found to have failed to give effect to its treaty obligations, specific performance would demand that the state transpose the international treaty into domestic legislation or that it ensures that the judiciary are better informed about the treaty's relevance in national law. The remedy can be welfare maximising if the state's failure to give effect to the treaty provisions is not *Pareto* optimal, which could be construed as being the case if pressure exists on the domestic level to comply. The corollary is that in situations in which domestic pressure not to align legislation with the treaty's provisions is significant, then mandating specific performance might not result in welfare maximisation. In this way, specific performance's appropriateness, from an economic sense, depends on the state's commitment to the treaty in principle and the concurrent domestic pressure for that state to comply. Separately, even if specific performance is appropriate, states are at liberty to ignore the treaty body's decision and to continue with their failure to give effect to the treaty's provisions. But despite that, specific performance might still act as a deterrent for states considering failing to give effect to a treaty's provisions, as the consequences of failing to do so will be clearly outlined in the treaty body's institutional structure.

Clearly, outlining specific performance as the remedy that will be applied will encourage states to give effect to treaty provisions if they exist on the margin and if they wish to avoid the political costs of non-compliance, the administrative costs of engagement with treaty bodies in the periodic review setting, and the financial costs of being subject to complaints by individuals whose rights have been breached by a failure to give effect to particular treaty provisions. Our analysis of specific performance as a remedy for breach is limited because it is largely a weak remedy in the human rights context: states will comply when they want to comply and non-comply when they do not want to comply. The remedy's appropriateness will be limited to contexts in which reputational consequences come with ignoring the treaty body's pronouncements and in which associated issues, such as regional interaction, can push state toward compliance.

B. Damages

Proposing damages as a potential remedy for human rights violations faces a significant challenge in terms of its justification. By even contemplating the provision of damages, we are suggesting that rights violations might be quantifiable. This is problematic from at least two perspectives.

Firstly, it suggests that quantification poses no ethical problems; but by putting a monetary value on a human right we indelibly hint that this right can be 'bought'. Throughout this dissertation, whether explicitly or not, the undercurrent has been that human rights can, indeed, be bought. The emphasis on efficient breach and the questioning of inalienability as the appropriate protection regime both suggest that a value can be placed on human rights. In addition, the application of resource allocation and the proposition that human rights might be substitutable further strengthens the arguments that human rights can be scalable. In this light, the application of damages as a potential remedy for rights violation seems to be simply a natural extension of the approach utilised throughout.

Secondly, if a treaty body is to award damages as a remedy for rights-violations, then we assume that quantification of violations is possible. It's not. The value one individual places on a human right is likely to differ from the value another individual places on that right.⁵¹¹ But while it is therefore conceptually impossible to compare individuals' valuations of their human rights, damages have, in fact, been widely applied in both the domestic and international context.⁵¹² Whether this is an institutionalised approach or an ad hoc application of a range of

⁵¹¹ 'It is true that to offer political rights, or safeguards against intervention by the State, to men who are half-naked, illiterate, underfed and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?', Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (1st edn, Oxford University Press 1969), 4.

⁵¹² For example, the House of Representatives of the Philippines, in 2013, introduced an Act that would provide compensation for the victims of the Marcos regime. This is not an entirely novel approach, but it is a move that reflects a state's desire to right past wrongs. See, Beth Stephens, 'Translating Filártiga: A Comparative and International Analysis of Domestic Remedies for International Human Rights Violations' [2002] 27 *Yale Journal of International Law* 1.

remedies open to a particular court or treaty body varies.⁵¹³ It is likely that damages have been utilised as remedies in such circumstances without consideration of the conceptual problems alluded to here. We further address the issues revolving around the use of damages below, paying particular attention to expectation damages and reliance damages.

Perfect expectation damages provide promisees with compensation to the value they placed on performance of the contract, such that they are ‘*indifferent* between performance and breach’,⁵¹⁴ and such that compensation puts victims in the position they would have been had they relied optimally.⁵¹⁵ Optimality in this case is assumed to be akin to foreseeability in the common law, whereby only reliance that was foreseeable to the promisor is compensable.⁵¹⁶ Regarding treaties, foreseeability of reliance from the state’s point of view is problematic for the adjudicator because the state has an incentive to argue that foreseeable reliance would have been low. A state brought before a treaty body applying perfect expectation damages has an incentive to suggest that it never intended to comply with the treaty’s provisions in the first place, so any kind of reliance was unforeseeable. This, though, could be countered on the basis that an intention to be bound is assumed to exist. If we accept that ‘*perfect expectation damages create incentives for efficient performance and breach*’,⁵¹⁷ properly calculated damages for human rights violations provide all parties to the treaties with efficient incentives to rely, perform, and breach. Such damages mean that the states must take account of the costs its decisions impose on the other contracting parties. Enabling the international community and individuals to thereby claim expectation damages pushes that state toward internalising the cost of non-adherence. Equally, perfect expectation damages deter promisees from overreliance and thereby expecting too much from the state. Citizens and other states are assumed to be able to gauge a state’s likely commitment to its treaty obligations and to optimally rely, which occurs in contract law when ‘the expected gain from additional reliance equals the increase in the value of

⁵¹³ These are both outlined and discussed in: UN Commission on Human Rights, *Compensation for victims of gross violations of human rights* (2 March 1990) UN Doc. E/CN.4/RES/1990/35.

⁵¹⁴ Cooter and Ulen *Law and Economics* (n 57), 226.

⁵¹⁵ *ibid*, 197.

⁵¹⁶ *ibid*, 198.

⁵¹⁷ *ibid*, 190.

performance to the promisee multiplied by the probability of performance'.⁵¹⁸ In applying this to human rights treaties, optimal reliance occurs for the international community and for individuals when the gain from that level of reliance, given the probability of the state complying with its treaty obligations, outweighs the loss of further reliance, given the likelihood the state will not comply with its treaty obligations.

This theory may appear abstract, since the concept of relying on a state's promise that it will comply with international human rights law is hazy. To simplify this, reliance is suggested as being any kind of additional investment the international community or the individual makes pursuant to a state's commitment to its human rights obligations. The greater the apparent commitment shown by a state to adhere to its treaty obligations, and the greater the likelihood the state will continue with this policy, determine the extent to which the individual or the international community should make investments. Under this terminology, investment is a broad concept. For the international community, investment may involve apportioning the state a higher reputational value in relation to its human rights standards or it may involve greater engagement with that state in terms of facilitating improvements to its domestic legislation and standards. Unless the state's commitment to aligning domestic and international law is genuine and stable, then reliance is not optimal. The international community should only invest in assisting states to change domestic law as long as the probability that they will follow through with their pronouncements remains consistent. With regard to individuals, it is inefficient to make investments in, for example, one's personal life unless the state's commitment to the relevant human rights is constant and unless additional investment increases the value of the state's commitment to the individual.

As an example, individuals living in states that are liberalizing marriage rights to accommodate same-sex relationships should only invest to the extent that the state's commitments are credible: expectations should not include same-sex marriage but could include same-sex civil partnerships. Relying on the belief that liberalization will extend to the former and beyond the latter might be sub-optimal and inefficient.

Such formulae, however, are difficult to apply in reality. Determining the probability that a state will adhere to its human rights commitments will be

⁵¹⁸ *ibid*, 194.

hindered by information asymmetries and uncertainty, as individuals and contracting states cannot fully measure a state's public policy intentions. Such calculations, however, at least the calculation of the probability of performance, are not impossible. Instead, one can attempt to estimate the likelihood that a state intends to comply with its obligations under international law by assessing the state's historic level of compliance with such treaties. Although an estimated probability of compliance as a composite score of the levels of displayed compliance with other treaties might assist determining optimal reliance, we cannot rule out changes in a state's preference functions in relation to its treaty commitment.

In addition, commitment to a treaty is likely to be subject-dependent, meaning that simply estimating the probability that a state will adhere to its treaty obligations in this period based on its historic adherence to other treaties in previous periods may be skewed if there is greater differentiation between the treaty subjects. Either way, states with poor records in terms of their commitment to international treaties are assumed to be less reliable contractual partners in each additional treaty game, irrespective of how flawed the composite assessment of the state's commitment will be. To achieve optimal reliance, therefore, the international community might be required to facilitate promisees attaining information about the likelihood of adherence, which is assumed to depend on the state's historic commitment to the treaties to which it is a party. In this way, through the dissemination of information about state compliance, promisees can be aided in relying optimally.

If, however, citizens or other states are hindered in their ability to determine the optimal level of reliance with regard to human rights treaties, either due to the concept's intangibility or a lack of information, we might expect to see over-reliance as a common problem. Individuals, the international community, and other states might not rationally attempt to determine optimal reliance. This becomes important if remedies include reliance damages as compensatory tools, as promisees have incentives to over rely so as to attain greater payoffs. Relying beyond the optimal level results in greater loss and requires that the state compensate the victim for all of that loss, despite reliance being inefficient in this case. Ergo, treaty bodies cannot determine which forms of reliance are strategic and which are genuine. Thus, we assume states contract around a particular human rights subject matter, such as migrants' rights. The treaty provides for

rights for individuals living outside the state of which they are nationals, and guarantees to them a variety of protections. State A becomes a state party to the convention. Individual workers, on seeing the state's assumed intent with respect to migrants' rights, move to that state on a short-term basis with a work permit. These individuals rely upon the state's assumed commitment to adhere to the treaty, and later, if the state breaches its treaty obligations, the individuals are entitled to reliance damages.

In this case, overreliance can only be determined after an assessment of the state's assumed commitment: had it been foreseeable that the state would have breached, the victims could be said to have overrelied. As has been indicated, though, the concept of overreliance in relation to human rights breaches is fraught with ambiguity. But despite that, reliance damages can be an appropriate compensatory tool for human rights violations under certain circumstance. We assume, though, that rational individuals are not expected to overrely in relation to a matter as fundamental and personal as human rights. Although all information as to the likelihood that a state will adhere to its obligations cannot be acquired, individuals are assumed to optimally rely. The only situation in which it might be rational to overrely, would be if doing so could alter the cost function of the breaching state such that it might facilitate a socialization process. For example, we consider a state that ratifies an international treaty providing for women's rights, one right of which affords women 'equality with men before the law'.⁵¹⁹ Despite it being foreseeable to women in a ratifying state that the state has no intention of giving effect to this or other provisions, women overrely,⁵²⁰ and act as if the treaty is in force and attempt to engage in society as if the treaty's provisions apply. On account of the overreliance of women in that state, the state's calculations change and it begins to give effect to a number of the treaty's provisions. In this way, if victims of breaches of human rights violations can be awarded reliance damages, they will rely optimally in all cases except those in which overreliance bring about socialization. Thus, while overreliance might be inefficient if change does not take place, when change does take place overreliance can be welfare maximising.

⁵¹⁹ CEDAW art 15(1).

⁵²⁰ We assume this is overreliance on the basis that a rational assessment of the state's intentions would suggest that the state would not align its domestic standards with the treaty standards.

II. Tailored Remedies

In linking the preceding analysis with some practical problems, we continue with our previous ‘state-type’ classification that differentiates between established democracies, emerging democracies, and non-democratic states. As elsewhere, we delineate in this way so as to aid our understanding of the appropriate regimes that might be applicable to each state-type.

A. Established Democracies

On one level, when established democracies breach their treaty obligations we could reasonably assume that this breach is genuine and intentional, rather than an institutional oversight in the domestic setting. But on another level, it may simply be that: an oversight. In addressing the appropriate remedy treaty bodies might apply, we consider a number of options.

The treaty body could elect not to propose a remedy at all, indeed to not even hear the complaint, but to instead push the parties toward negotiating about how best to solve the breach. This moves the cost of negotiation into the market and reduces the transaction costs of adjudication in cases in which the breaching state has a clear tendency for adhering to human rights norms (in the sense that it is democratic). In such cases, however, treaty bodies must determine the receptiveness of breaching states to resolution outside of the institutional setting, which reduces litigation and agency costs for both states and complainants, and enables arbitration to take place at a lower cost. In order for this to function correctly, all potential applications by parties affected by the treaty-breach should be screened with respect to the likelihood the relevant state wishes for the breach to be resolved. When the breach is the result of a domestic oversight, arbitration might be the more appropriate forum. States will accept arbitration when the benefits of doing so, such as the reduced reputational damages of resolving breach through arbitration or the likelihood that a better bargain can be achieved through arbitration, outweigh the costs, such as the likelihood that resolution of the breach favours the complainant. The clear benefit of arbitration as a potential medium of resolution is that it appears to indicate the state’s willingness to cooperate.

By contrast, we assume that the more formal institutional setting of the treaty body is appropriate for situations in which the breach was not the result of a domestic oversight, but rather an intentional effort to undermine the relevant treaty through concerted action. In such cases, we assume that treaty bodies will apply specific performance as the appropriate remedy. Established democracies are assumed to have the institutional capacity to resolve their breaches relatively easily and are therefore mandated to do so through a remedy of specific performance. This might explain why the remedy applicable for states parties that have failed to give effect to specific provisions of the ECHR are required to alter their domestic legislation: the general commitment of most Council of Europe states to democratic principles might facilitate the handing down of more far-reaching decisions by the European Court. As established democracies are assumed to be receptive to resolution, stronger remedies are appropriate.

B. Emerging Democracies

We assume that emerging democracies have the intention of aligning their human rights provisions with those outlined in the relevant treaty but that they sometimes fail to achieve this as a result of limited resources or political constraints. Emerging democracies are assumed to suffer from these problems in different proportions. Such states are in a difficult position because while they are eager to correct for their treaty breach, they cannot do so at a low cost. Consequently, the treaty body's role is to enable such states to correct their domestic legislation or human rights standards at low cost.

As with established democracies, we assume that the state and the victim have linear preferences: to correct the breach. However, in this case we suggest the remedies may differ. Thus, whereas specific performance was argued as being a suitable remedy in situations in which established democracies breached their treaty obligations despite having the capacity to adhere, we assume that resource constraints or bureaucratic weaknesses frustrate its usefulness in the case of emerging democracies: such states cannot correct for their breaches through specific performance because they cannot finance correction or because of institutional problems. Instead, treaty bodies should suggest remedies that are in line with the state's desire to correct for its breach, but its inability to do so. In this regard, the availability of substitute rights is important: can the state provide

a similar right to the right that has been breached, at low cost. We assume that substitute human rights are only considered when their provision is possible at a lower cost than the cost of providing for the rights outlined in the treaty and when the state cannot fulfil the treaty requirements. This suggests that the substitute rights fit the criterion of the second best.⁵²¹ Given that optimal conditions cannot be met under the first best solution (correcting breach in line with treaty obligations), we suggest that the second best option is to strive for rights that might substitute, as best as is possible, for the optimal right. Substitute human rights are appropriate when the costs of providing substitutes plus the costs imposed on the state from disaffected constituents who sought that the breached right be fully corrected are lower than the costs of providing for that breached right. For example, an emerging democracy struggling to provide for the rights of individuals in its legal system might be subject to a complaint in relation to the conditions in which pre-trial detainees are held.⁵²² The state is assumed to want to correct the breach, but may find it too costly to upgrade prison facilities and educate prison officials. A substitute remedy available to a treaty body, and which acknowledges the state's resource constraints, might be the right to habeas corpus.⁵²³ By providing habeas corpus the state might alleviate some of the issues facing incarcerated individuals.

In this example, we are assuming that it is cheaper for the state to provide for habeas corpus than to provide for better prison conditions. Equally, we are assuming that the right to habeas corpus is not being applied correctly. Treaty bodies therefore also face the contingency as to whether substitute rights are actually available.

A second issue relevant to emerging democracies is that they are sometimes constrained by political issues, and cannot fully act without those shackles. If a treaty breach is rooted in political problems, rather than resource constraints, then we assume that specific performance might be an appropriate remedy, just

⁵²¹ Richard G Lipsey and Kelvin Lancaster, 'The General Theory of Second Best' [1956] 24(1) *The Review of Economic Studies* 11.

⁵²² 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law', ICCPR art 9(1).

⁵²³ 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful', ICCPR art 9(4).

as is the case with established democracies. By framing the necessity to comply as an order from the treaty body, rather than the state's actual preference, these states are able to put the 'audience costs' that stem from political opponents onto the treaty body. Aligning domestic standards with treaty requirements is framed, in this case, as being out of the hands of the emerging democracy. Accordingly, the state is able to mitigate the costs of ex post adherence.

These various proposals evidently suggest that one-sizes-fits-all approach to emerging democracies is inappropriate. Remedies ought to be tailored to the state's limitations, and treaty bodies should take the political pressure in place of these states when doing so facilitates alignment of standards with treaty requirements.

C. Undemocratic States

Quite apart from the discussion as to the role of such states as states parties to human rights treaties, we assume undemocratic states are unwilling to correct for treaty breaches. Equally, some undemocratic states are wealthy (e.g. Qatar), meaning that even if a willingness to correct were to be present, this would depend on the state's particular characteristics. We assume specific performance is entirely inappropriate, as the state will simply elect not to comply. Compensation may be appropriate, if the state is willing, as payment of compensation would be a means through which the state could 'buy' the relevant right off the promisees. By contrast, substitute rights are unlikely to be palatable among non-democratic states. It would only be under changing conditions in the state or the need to appease domestic constituents that rights would be liberalised, or standards aligned. Ergo, treaty bodies have very limited options when it comes to dealing with non-democratic states. Compensation, international pressure, and treaty body criticism are likely to be the approaches taken, although their effectiveness will be limited by the state's resolve and commitment to non-democratic principles.

III. Conclusions

The difficulty in analysing how best to enforce decisions of human rights bodies is the problem that most decisions of such bodies are not binding on states. In this way, the success of various remedies and sanctions at achieving compliance and changes to domestic standards or legislation will be limited.

This chapter has therefore raised more questions than it has answered. By making an analogy between contracts and treaties, we have shown that reliance on a state's assumed promise to adhere to its treaty obligations will only be optimal if one assesses the state's prior adherence to other treaty obligations and its general commitment to human rights.

Such an approach suffers from the obvious problem that it is highly stylised and somewhat hard to conceive of in relation to human rights matters. In that respect, the merits of the analogy lie not in its findings or analysis, but in the connection it makes between law and economic analysis and assessing remedies for breaches of human rights obligations. The analogy does, however, suggest that the international community should do more to highlight state practices, so as to put individuals and the international community on notice in relation to a state's human rights record. This, we argued, would assist optimal reliance and prevent greater loss in cases in which a breach does occur. Separately, though, the analogy also suggests that overreliance can itself push states toward greater respect for human rights principles if that overreliance results in a socializing process. Ergo, the analogy, while problematic, can be viewed positively.

In addition, the chapter has also highlighted the difficulty of determining compensation, it has challenged the inviolability of human rights, and it has also emphasised that remedies for rights violations can be tailored according to state characteristics. This latter assertion is perhaps the most practical finding of the chapter, as it ties together many of the arguments made throughout the dissertation. If states are both rational and heterogeneous, the optimal response is to account for this and to tailor remedies in light of those issues.

Section IV Conclusions

‘Despite its importance within the legal academy, virtually nothing has been written from a theoretical perspective by economically oriented scholars on international human rights law.’⁵²⁴

This dissertation opened with the implication that its contents should be viewed in light of the above quotation. The message was simple: if a doctoral dissertation should contribute to original knowledge, it should do so by ploughing its own intellectual furrow. I believe this has been achieved. We have striven to emphasise the importance of human rights principles in international law, and have traced the origins of human rights treaties from the end of World War II; we have tried to reflect the extraordinary diversity of knowledge existing in the area of International Relations, and have been privileged to read intricate dissections of the dynamics of state interaction; we have borrowed principles from law and economics and have applied them to human rights treaties, and have endeavoured to challenge accepted wisdom. Fundamentally, this dissertation has been about developing new ideas and proposing solutions to some of the central issues in international human rights law: Why do states ratify? Why are treaty bodies restricted in their ability to achieve compliance? Why do states submit periodic reports late? When can a state breach its treaty obligations? These questions hung above this research project from the very beginning, and required the establishment of an analytical framework that was both robust and adaptable. In order to build that framework, we addressed central issues from law and economics, such as efficiency and rationalism, and argued that while our analysis would be interesting and fresh, ultimately it would be imperfect, as we would not be testing our assertions empirically. Nonetheless, we developed a methodology based on an assumption that human rights treaties attempt to solve externality issues, and that these treaties emerge when externalities are grave. Meanwhile, the fascinating explanatory power of realism, liberalism, idealism, and constructivism to elucidate for us how

⁵²⁴ Sykes (n 1)

sovereign states interact and conflict was presented, and we attempted to fit our own assertions about rational states within those theoretical frameworks. But could law and economics, as a distinct social science discipline to International Relations, actually add anything to our understanding of international human rights law? We might have asked whether there was anything left to analyse, as surely each element of international human rights law had been extensively scrutinized already.

But despite that, this dissertation has shown that many issues in international human rights law had remained under-analysed and that many of those areas require significant further analysis. Having developed a methodology for our analysis based on rational choice theory, and having shown that that theory fitted within a rich intellectual heritage related to both economic science and International Relations, we attempted to assess international human rights law along a continuum, examining each process along that route and, where appropriate, proposing solutions to perceived problems. By utilising, as our foundation, the assumption that states act out of self-interest, we were able to simplify our analysis and to approach challenging issues in international human rights law in a less polluted manner. But we also recognised that taking this approach would be likely to weaken many of our assertions. We recognised that states are not solely self-serving, but that they can instead be driven by normative issues and external influences. While such criticisms of the central methodology are fair, and were recognised early on, this should not belittle this dissertation's findings or limit its academic merit.

Our tracing of international human rights law from initial treaty drafting stage to the stage of dispute settlement enabled us to picture our analysis through a chronology, and assisted us in being able to make links between chapters. Innumerable new arguments were made in this dissertation such that we cannot repeat them all.

- We suggested that universal ratification could not be achieved alongside an effective treaty, and that an efficient number of states parties exists (chapter 3);
- We showed that how treaty articles are framed can result in varying levels of costs for states (chapter 3);

- We asserted that ‘gap-filling’ should be left to treaty bodies when it would be too costly to fill gaps in treaties during the drafting stage (chapter 3);
- We argued that vague treaties drafted alongside the creation of a dispute settlement mechanism would achieve ratification by states with bad standards (chapter 3);
- We contended that the genuineness of reservations and objections is difficult to gauge and that objecting to a reservation should be done in the extra-contractual setting (chapter 3);
- We assessed protection of human rights and proposed substitute human rights as an appropriate remedy in certain circumstances (chapter 4);
- We showed that efficient breach exists in human rights treaties – in all but name – but indicated that it varies by treaty (chapter 4);
- We analysed the advantages and disadvantages of a unified standing treaty body over the present disparate system (chapter 5);
- We proposed an entirely new approach to electing members to treaty bodies (chapter 5);
- We assessed periodic review under a unified and disparate system, and proposed that treaty bodies take an approach of ‘tailored engagement’ according to a state’s human rights standards (chapter 6);
- We highlighted some of the problems of the dispute settlement mechanisms by indicating that they allow for strategic action, and by proposing that states that fail to allow the exhaustion of domestic remedies should be required to provide legal aid to affected individuals (chapter 7);
- We argued for a theoretical connection between inefficient reliance and a socialization process (chapter 8);
- We suggested that the appropriateness of various remedies for treaty breaches would depend on the identity of the breaching state (chapter 8).

While this list is not exhaustive, it does give us a picture of the analysis we undertook and indicates that our work has yielded some exciting insights.

The most pressing conclusion that has recurred throughout this dissertation has been the contention that drafting treaties and creating institutions must take account of state motivations and preferences, as these variables will heavily influence how the treaty and its respective monitoring body are received by the states of the world. But this is not to suggest that treaties and institutions are subservient to states' self-serving needs; we have shown that various treaty and institutional designs can actually foster state self-interest toward achieving greater respect for human rights. However, this will only be achieved if treaty drafters and institutional designers recognise the undeniable role played by self-interest in state calculations.

Secondly, another issue that has arisen throughout this dissertation has been the role of efficiency as a methodological tool in law and economics analysis. Previous research dealing with international law utilised efficiency as a means of measuring the process of the codification of law; this dissertation has instead applied efficiency *in* international law by examining various treaty and institutional structures through that lens. This approach was intended as a means of analysing institutional efficiency, and whereby the goal of such institutions is to achieve the internalization of externalities, but whereby we nonetheless recognised that efficiency also required that we allow human rights violations in certain (efficient) circumstances. In this way, we used efficiency both normatively and analytically: this meant that an institutional structure could be analysed for the manner in which it efficiently achieved compliance but whereby attempting to achieve compliance might not be efficient in a general sense. Such a scenario turned out, during the course of this research, to be an inevitable aspect of linking efficiency to the area of human rights law. Each analytical application of efficiency could be challenged on the basis that it conflicts with the normative goal of human rights law. In another setting, we might argue that this reduces the dissertation's value; however, as the approach taken here is entirely novel, we can anticipate that normative and analytical challenges will arise. Such problems are assumed to be an inherent aspect of new theoretical approaches. As further research in this area develops, the difficulties in reconciling analytical efficiency with normative efficiency will become less pronounced. Increased law and economics research will strengthen efficiency as a normative matter, it will result in greater insights about human rights treaties, and it will (hopefully) give credence to many of the theories developed here. In particular, the work on how

institutions are (and could be) structured is an exciting area for further research. The proposal put forward here in relation to the composition of treaty bodies requires assessment as to its real-world applicability, while the question as to whether human rights can be substitutable is another matter requiring analysis.

In addition to these conclusions, we might also point out that focusing on international human rights law along a continuum restricted the degree to which certain matters were investigated. In particular, further research should rely more heavily on UN documentation, on treaty body findings, and on case law from the regional mechanisms. The nature of the dissertation as one linking the economic analysis of law with international human rights law necessitated that our analysis could not have been intricately detailed in each respective area and for each respective chapter. Having to rely upon literature from political science, law, international relations, and law and economics itself meant that UN documentation was secondary to the theoretical literature. In spite of that, however, we have nonetheless relied upon international treaties and particular case studies to quite an extent, so the potential criticism that we have failed to account for the realities of human rights bodies is more limited. Nevertheless, the most pressing issue for further scholarly research remains the linking of academic and theoretical work with more case studies and, preferably, quantitative analysis.

Apart from this criticism, however, I am confident that this dissertation has achieved its goal of developing an intellectually autonomous space in the literature of both law and economics and international human rights law. Human rights are arrows that go straight to the heart of people's feelings and cultural values. They are norms that many have sacrificed their lives to protect, and principles that many more have lost their lives to achieve. I have endeavoured to reflect these values in this analysis and have attempted to initiate a new discussion about human rights issues. Linking human rights law with law and economics, and successfully analysing international treaties using that discipline, indicates the originality of this work.

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