International law as a Mechanism of Global Governance:
Empirical Evidence and Normative Implications

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The spread and thickening of international legal structures is one of the most salient developments in international relations over the course of the past century. In no area of human relations is this more in evidence than in the area of international law designed to protect the rights of individuals vis-à-vis their own governments. I have recently drafted major parts of a book that documents, analyzes, and at least implicitly celebrates this development. In this memo – discussion of which I hope will inspire the writing of the book’s conclusion – I want to place the empirical findings of the book in proper normative perspective. This memo first briefly outlines the findings of my empirical research on the effect of international law (specifically, treaty commitments) on governmental human rights policies and practices. Second, it raises issues about how we should judge the normative significance of the empirical findings. Third and finally, it develops the potential policy implications. I want to discuss with the group what it takes to go from statistical coefficients to normative conclusions about the value of international law as a governing mechanism in the international human rights area.

Empirical Findings:

The book is broken into two major sections. After a discussion about how and why international human rights law appears on the international agenda in the middle of the twentieth century, I ask, why do individual governments commit themselves to multilaterally negotiated legal texts that prescribe how they should treat their own people? The theoretical starting point is straight-forward: commitment anticipates the costs of compliance; hence the primary reason governments ratify treaties is that they support and think they can generally comply with the rights they contain. Evidence supporting this proposition is fairly strong: democracies, left-leaning governments, and states marked by other “western values” (which I approximate with an indicator of the dominant religion – Protestantism, Catholicism) are on average much more ready supporters of the major multilateral human rights treaties than are autocratic, more right wing governments in non-western (e.g., Islamic – in the case of women’s rights) polities.

But preferences are not the whole story: there is some evidence that provides a systematic explanation for “false negatives” – governments that may support the principles of the treaty yet do not ratify – and “false positives” – governments that are not especially enamored of the treaty but ratify anyway. The former may result in part from domestic institutions that raise the political costs of ratification, and the latter likely results from strategic behavior of following a trend within a region in order to avoid political social criticism for lagging behind one’s peers. Indeed, one of the most consistent findings with respect to treaty ratification is that the density of ratifications in one’s region strongly predicts one’s own ratification behavior. A close look at other relationships in the data suggests this probably represents strategic ratification behavior rather than genuine regional socialization.
The second half of the book examines the evidence that the ratification of international human rights treaties influences government behaviors purportedly governed by the treaty regime. I find good evidence that this is the case. Countries committed to the Convention on the Elimination of Discrimination Against Women, for example, provide better education for girls and programs to better guarantee reproductive rights for women. Countries that have ratified the Convention on the Rights of the Child are more likely to eschew child labor, while those countries that have ratified the Optional Protocol on Child Soldiers are more likely to raise the legal conscription age than those countries that have not done so. The Torture Convention does not seem to affect governments everywhere, but does improve practices in countries that are volatile with respect to regime type (in transition, fluctuating between more democratic and more autocratic forms of government). Treaties have effects in these cases because they provide domestic groups with political and legal resources to make rights demands with a somewhat higher probability of success than would be the case in their absence. Treaties matter, largely because they influence the strength, resources, and configuration of domestic political coalitions making demand for change.

Evaluating the Empirical Results:

What are the broader normative implications of these findings? One issue is perennial: these treaties are laws, and law is made by a cartel of the powerful to reflect their interests. If this is the case, can we be satisfied with observing behaviors governed by law? Why focus on these particular rights? Do legal rights have normative priority over other kinds of rights? How do we understand the “importance” of these rights compared to other possible baskets of rights, many of which may not be reflected in international legal agreements at all?

Another set of issues relates to how societies generate the rules by which they collective are bound. This book focuses on negotiated, ratified legal agreements. But does rule-making by treaty have any stronger normative claim than other forms of collective choice? A distinctive feature of treaty-making is its assumption of the value of state consent. Compared to social norms or even to customary international law, neither of which governments ever explicitly consent, treaties may be an especially legitimate form of governance. The explicit option to opt out, or to condition one’s consent through the making of reservations, arguably provides treaties with special normative status vis-à-vis other kinds of international norms.

But if consent is a major criterion for conferring legitimacy on treaties, it is reasonable to ask why it is that these international rules should prevail over domestic ones. Several authors have noted the tension between internationally negotiated agreements – a process over which powerful states typically dominate – and locally generated law that is more tailored to the popular demands of particular polities. One assumption of this project is that it is a good thing if international human rights law changes local practices that would have prevailed in the absence of the externally devised rule. But this does not factor in the potential problem of further removing governance from the demos itself. Arguably, this is not a bad thing if the demos is itself throttled by a repressive ruler. The irony is, though, that as this study itself has illustrated, democratic governments are among the most likely to choose to commit to international human
rights agreements. Where local governance is best, the tendency to delegate to unanswerable external authorities (e.g., the various oversight committees these treaties create) is greatest.

Next we should consider the normative import of the choice to look at government choices as indicators of compliance. Throughout the study I have decided to ask how treaties influence the behavior of public authorities. Is this a reasonable stopping point to assess a treaty’s impact? This decision has caused me to examine for example government policies that provide women access to modern forms of birth control. The social attitudes that affect uptake may in fact be the most serious barriers to real improvements in women’s and children’s well being. The choice to focus on official behavioral indicators – public employment rather than the verdict of the market on the value of women; official acts of torture rather than the physical abuse of children; government policies on child soldiers rather than the practices of brutal extra- or anti-governmental groups – may be suited to the question of the immediate impact of a government commitment, but may miss the mark when it comes to addressing the conditions that most deeply affect the lives of the world’s most abused groups.

_Unintended consequences:_

The study focuses on whether treaties influence authorities to behave in ways prescribed or proscribed by the treaties themselves. Yet it a complete normative account might reasonably be expected to evaluate the broader impact of the treaties, expected and unanticipated; desired and merely tolerated. A number of unintended effects could give pause to the easy conclusion that treaties create net positive benefits when they are complied with. What is the long-run impact of deference to external authority on the development of domestic rule of law institutions? Does the importation of external human rights law enrich or impoverish, strengthen or weaken the indigenous ability to generate genuine responses to new forms of abuse? Does externally generated law sharpen or dull the local normative compass? How long can a polity turn to external rules for legitimacy before they lose the ability to generate it for themselves?

A second unintended consequence is common to all efforts to modify behavior through proscription. Rational calculating actors figure out how to achieve their ends through means that may be “legal”, but hardly moral. Law is ever in the position of trying to catch up with those who are determined to break it. A Convention Against Torture is no longer thought to be enough; officials acting on behalf of the government have found ways to silence their critics that leave no marks, or even a body. The recently negotiated Treaty on Forced Disappearances of Persons is the latest example of an effort to address explicitly one form of circumventive behavior.¹

A third unintended consequence may be the use of “good law” for unintended purposes. These treaties were intended to protect the dignity of individuals, but public authorities could just as well use them to justify programs and policies with other goals in mind. Guaranteeing women better life choices by offering access to modern forms of birth control (Convention on the Elimination of Discrimination Against Women) could potentially be used to justify draconian population control policies. International human rights treaties are usually vague enough to allow for a wide range of interpretations, some

of which may reflect particular political or policy preferences of the government rather than the rights of persons they were ostensibly designed to protect. Human rights treaties can be used for purposes other than protecting the rights of individuals.

Policy implications?

Finally, we should consider the policy implications of the empirical findings described above. Narrowly, the findings only indicate that on average when governments commit their states to an international human rights treaty, their behavior and rights conditions improve according to some indicators we would reasonably expect the treaty to influence. But what does this mean in terms of public policy?

It does not necessarily imply the desirability of treaty proliferation. There is a possibility of rights fatigue and treaty devaluation. The interactive effects of the general density of human rights treaties and compliance with any one of them have not been closely examined in my empirical work. It could be that a dense weave of international legal obligations strengthens the moral climate in favor of individual rights protection, tending to raise rights consciousness along many different dimensions in a mutually reinforcing way. On the other hand, there could be a down side to legalizing every desirable dimension of human rights in treaty form. A plethora of treaties could reduce the focal nature of any one of them, dividing the attention of the rights community and allowing governments who do not wish to comply to “divide and conquer” (or ignore) the political activists demanding treaty compliance.

Nor do the empirical findings – that ratification is on average associated with better rights behavior than non-ratification – imply that universal ratification of all human rights treaties should necessarily be a primary goal of the international community. While some of the findings suggest direct and unconditional effects (the CEDAW and the CRC-OP1 relating to Child Soldiers) the findings with respect to the practice of torture for example show that positive influences are limited to those cases in which regimes are in transition and, presumably, domestic institutions are fluid and in flux. Pressuring stable autocracies to ratify agreements is probably not a useful strategy. The results do suggest, however, that the international legal system as a whole deserves the respect of the major rights-respecting countries. In both their rhetoric and their actions, the United States and others should support and strengthen the international human rights treaty regime, thereby encouraging governments to accommodate and respect the growing domestic rights movements that may develop.

Conclusions:

The purpose of this discussion is to think about how we should place fairly precise (if aggregate) empirical findings into a broader normative context. Any discussion about how these findings might be appropriately normatively framed is much appreciated.