State Authority vs. International Norms:

Impacts of Legitimacy on the Practice of International Human Rights Law*

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Abstract

Human rights have always challenged the meanings and legitimacy of state authority under the context of sovereignty. The expansion of the international human rights law has reflected a growing need to reexamine state authority in terms of human rights protection, and to place further consideration on the legitimacy of multilateral efforts. More importantly, state compliance with international human rights law varies greatly; yet scholars know little about why some states adhere more closely than others. Therefore, this paper is to assess why states have chosen to ignore or comply with the human rights legal instruments available to them to deal with multilateral pressures on human rights advocacy, and what are the exact factors that exert an influence on the practice of international human rights law on the setting of potential tension between international norms and state authority. This paper, thus, places emphasis on how conflicts pertaining to the domestic and international legitimacy of authority greatly account for the nature of multilateral responses to human rights protection, and provides explanations on how the dynamics of legitimacy affect multilateral efforts in a state. This paper (1) argues for the centrality of legitimacy as a driving force for fulfillment of international human rights law. The findings further suggest that (2) a main determinant of effect in international human rights law concerns how multilateral and state actors addressing the legitimate problem determine the practice of human rights norms. (3) International human rights law and regime will continue to play an important role in international relations because of the way in

which they constitute political legitimacy and a source of legal power for human rights protection. (4) The legitimacy of state authority is a more important determinant of state compliance. Multilateral pressures with norm legitimacy are more effective than direct lobbying and persuasion, and international efforts should be finely tuned to the state's compliance to international law, if it is in line with its authority, as well as the building of multilateralism. As a result, (5) scholars should be cautious about claims that enforcement is central to the domestic implementation of international human rights law. As for the implication to human rights studies, (6) many human rights researches from the political perspective are associated with the logic of appropriateness while legal approach places emphasis on the logic of consequences. Future researches might bridge the falsely rationalist-constructivist dichotomy by accepting both logics. As such, richer explanations emerge for determining why states sometimes comply with legal norms and under what conditions.

Keywords: Public International Law, International Human Rights Law; International Relations Theories, International Human Rights Regimes, Norm Domesticalization, State Authority, Sovereignty, Legitimacy, Multilateralism, Intergovernmental Organization, International Nongovernmental Organization

I. INTRODUCTION

States have strengthened and deepened their commitments to international human rights law and norms since the end of the Second World War. In light of this development, Reiff notes that the last fifty years have seen the "precarious triumph of human rights."[1] In the world context, the international human rights legal system is a distinct and central global institution in several ways. First, it is universal in aspiration, applicable to all human beings regardless of their citizenship or residency. Second, the rights involved are commonly seen as rooted in natural law rather than mainly based in the positive contractual specifications of a particular national or supranational constitution or legal system. Third, the system is promulgated by and based in world level structures, such as international governmental and non-governmental organizations, international treaties and declarations, and international discourse.[2] Finally, the scope of application of the human rights norms has greatly expanded, covering many more domains of social life than was the case within nation states. Taken as a whole, the post-Cold War expansion of the international human rights law has reflected a growing need to reexamine state authority in times of human rights protection, and more importantly, to place further consideration on the legitimacy of multilateral efforts.

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1 David Reiff, *The Precarious Triumph of Human Rights*, 8 NEW YORK TIMES 36-41 (1999).

2 Ann E. Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights*, 23 HASTINGS CONST. L. Q. 727, 730 (1996).

Optimism about the law's political importance thus brought human rights to the arena of international politics. As Ignatieff observed, "since the end of the Cold War, human rights have become the dominant moral vocabulary in foreign affairs."[3] However, state compliance with international human rights law varies greatly, yet scholars know little about why some states adhere more closely than others to international legal norms.[4] International norm research has understandably focused on demonstrating that norms matter, but has neglected questions about how they matter and the conditions in which they matter.[5] A neoliberal institutionalist approach in international relations suggests that states adhere to international law and norms when they help resolve functional coordination problems with other states.[6] Nevertheless, re-

3 Michael Ignatieff, *Is the Human Rights Era Ending?*, 5 NEW YORK TIMES 5 (2002).

4 Norms are "standards of behavior defined in terms of rights and obligations" that in the international arena apply primarily to states, *see* STEPHEN KRASNER, INTERNATIONAL REGIMES 3 (1983).

5 Jeffrey Legro, *Which Norms Matter? Revisiting the 'Failure' of Internationalism*, 51 INT. ORGAN. 31, 63 (1997); Gregory Raymond, *Problems and Prospects in the Study of International Norms*, 41 MERSHON INT. STU. REV. 205-45 (1997); Beth Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POLIT. SCI. REV. 819-36 (2000).

6 Advocates of Neoliberal institutionalism argue that states inhabit both material and social environments in international relations, and states undoubtedly desire economic and military power, as realists insist. However, they also interact in a world of interdependence with social understandings and norms, and want to be accepted as legitimate and equal actors within this environment. *See* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984). For further discussions and propositions of neoliberal institutionalism on multilateral norms, *see* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT. ORGAN. 887, 917 (1998); MARTHA FIN-

cent research demonstrates that many international norms do not serve clear functional purposes. Rather than finding legal norms useful for serving functional needs, many states in fact resist many human rights instruments. Therefore, there is no account of the extent to which, and under what circumstances, nation states can deny claims to human rights in times of emergency.

Additionally, the legal provisions for international human rights law are substantial and draw upon constitutional law, international customary law, treaty law, and international criminal law. Nevertheless, there remains a significant gap between the formal institutionalization of human rights and the strength of the international human rights regime as a whole. This gap is obviously widening as many legal instruments and processes have been resisted by some sovereign states with either democracy or authoritarianism. All of these puzzles are especially curious considering that scholars such as Risse and Ropp only recently argued that "human rights have become constitutive for modern statehood; they increasingly define what it means to be a 'state' thereby placing growing limits on another constitutive element of modern statehood, 'national sovereignty."[7]

NEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2 (1996); 周志杰，國內政治與國際人權規範的互動與磨合——從衝突到相容，中國國際法與國際事務年報，17卷，頁92-93，2005年12月。

7 Thomas Risse & Stephen C. Ropp, *International Human Rights Norms and Domestic Change: Conclusion, in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 236 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

State authority today is apparently legitimated more by compliance with international human rights conventions than any eras in human civilization. While human rights may have appeared in the discourse of everyday statecraft, the institutions and legal processes of the international human rights remain shake.[8] For instance, it is curious that no international criminal tribunal has since been used for indicting alleged perpetrators of crimes against humanity or war crimes in the global war on terror. The Israeli-Palestinian case illustrates this point. Frequent reports from human rights organizations have documented and condemned Palestinian suicide bombings against Israeli civilians as crimes against humanity.[9] Nevertheless, legal options for prosecuting alleged criminals under the international customary process appear to be sidestepped. Instead, the Israeli military has pursued policies documented and condemned by human rights advocates as war crimes in their incursion against civilians in the occupied territories.[10] Both of these reports have garnered little international attention. Similar findings can also be drawn from other conflict regions.

A plausible answer to these puzzles centers on the norms governing legitimation of both state authority and multilateral efforts. Human rights have always challenged the meaning and legitimacy of political

8 *See* Simmons, *supra* note 5; 周志杰，「國際人權法及實踐委員會」觀察會議報告，中華國際法與超國界法評論，2卷1期，頁181、186，2006年5月；周志杰，內外有別的人權倡議者？國際人權法在美國的實踐，中華國際法與超國界法評論，2卷2期，頁246-248、252，2006年12月。

9 Human Rights Watch, State Department Fails to Designate Partners as Violators of Religious Freedom (2007).

10 Amnesty International, Government Crackdown on Dissent (2006).

authority under the context of sovereignty. Since its inception, the concept of sovereignty has acquired its universal currency because it delineates between distinct bodies of political authority over specified domains of territory.[11] As Barkin notes:

> *The international normative structure defines states' legitimate social purpose. Change in the accepted constitutional arrangements of legitimate sovereignty is most likely in the aftermath of major international events such as systemic wars, events so cataclysmic that they significantly alter the distribution of capabilities in the international system, while at the same time highlighting new ideas of the role of politics and the state.*[12]

The social constitution of sovereignty was thus challenged by human rights first in the early post-World War II period and then in the post-Cold War period.[13] However, a prime determinant of change in international human rights law still concerns the configuration of state power in the international system as determined by the legitimate factors for political authority.[14]

Therefore, the purpose of this paper is to assess why states have chosen to ignore or comply the legal instruments and norms available to

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11 ROBERT WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY 169-74 (1993).

12 Jeffrey Barkin, *The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms*, 27 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 234 (1998).

13 JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 208-09 (1989).

14 周志杰，同註6，頁88-89、120-121。

them to deal with multilateral pressures for human rights advocacy, and what are the exact factors to influence on the practice of international human rights law in the context of confrontation between international norms and nation sovereignty.[15] By considering Jackson's claim that "the legal status of human beings in international law, as expressed by the law of human rights, is something that has been erected by sovereign states and could also, at least in principle, be dismantled by them,"[16] this paper therefore considers how the dynamics of multilateral human rights law have played themselves in interaction with

15 In this paper, International Human Rights Law is distinguished from the International Humanitarian Law (the Law of War [*jus in bello*]). The former, rather than the latter, is focused by the theme and analysis of this paper. As for the scope and components of International Humanitarian Law, *see* Karl J. Partsch, *Humanitarian Law and Armed Conflict*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol., 933 (1995); 丘宏達，現代國際法，頁1067-1075，2006年9月2版；俞寬賜，從國際人權法、國際人道法及國際刑法研究個人的國際法地位問題，2002年；周志杰，同註8（「國際人權法及實踐委員會」觀察會議報告），頁185。 International Human Rights Law refers to the legally-binding International Bill of Human Rights (IBHR) and Core International Human Rights Instruments (CIHRI), and the non-legally-binding Universal Human Rights Instruments (UHRI). IBHR include Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESR), and two optional protocols for ICCPR. As for the components of the CHRI, *see* Table 1. Also *see* UNHCHR, The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and Treaty Bodies (The Human Rights Fact Sheet No. 30) 1-54 (2005); UNHCHR, International Law, *available at* http://www.ohchr.org/english/law/index.htm (last visited: 2008.12.01); 丘宏達，同前註，頁454-458；廖福特，國際人權法——議題分析與國內實踐，頁5-6、68-69，2005年。

16 ROBERT H. JACKSON, QUAS-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 111 (1995).

with sovereign states, and whether these multilateral human rights legal instruments and framework constructed since their inception will continue to play some role in shaping state behavior. An emphasis will be placed on how conflicts on the domestic and international legitimacy of authority greatly account for the nature of multilateral responses to human rights protection and affect the interaction of nation states with multilateral efforts.

In the following analysis, a short overview of the institutional and legal framework for international human rights will be sketched. It maps the processes available for the protection of human rights in international law. As with law in general, the section analyzes the theoretical criticism on the interplays between state authority and human rights norms. This section firstly focuses on examining how the international legal processes for human rights are employed in sovereign states with considerations given to power and authority. In terms of state's position on external legal norms, various theorists in international relations and law point out that codification does not guarantee compliance or an effective legal system. By focusing on the legitimacy, the third section explores the centrality of legitimacy and legitimization as driving forces for fulfillment of international human rights law. I then consider the roles of states within this framework marked by legitimacy conflicts, and explain how the dynamics of legitimacy affect multilateral efforts in a sovereignty. This paper concludes by drawing implications for the state and multilateral actors in practice of international human rights law, and offering implications for both legal and political studies in international human rights norms as a whole.

II.DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LEGAL SYSTEM

The nineteenth century saw the growth of an individualist social ontology and the recognition of the individual as a political actor. However, participation was limited to those social groups or classes who were reluctantly granted rights because of their contribution to nationalist projects.[17] Therefore, rights were granted only to the nation state. This precept upheld the notion that sovereignty and non-intervention are absolute. Nevertheless, these suppositions were challenged significantly in the aftermath of World War II. As Cassese notes, "respect for human dignity thus came up against its first stumbling-block in [Nazi] Germany's firm stance that national sovereignty could not tolerate any international interference in international affairs."[18] The Holocaust highlighted the fact that many of the heinous acts carried out by nation states against their own citizens were not prohibited by international law. Perpetrators could legitimate genocide as a means of obtaining further national unification.

A. Institutionalization of International Human Rights

The advent of the United Nations (UN hereafter) system in 1945 thus marked a transformative moment in international relations. The UN Charter and the 1948 Universal Declaration of Human Rights

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17 Hudson Meadwell, *The Long Nineteenth Century in Europe, in* EMPIRES, SYSTEMS AND STATES: GREAT TRANSFORMATIONS IN INTERNATIONAL POLITICS (Michael Cox, Tim Dunne & Ken Booth eds., 2001).

18 ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 21 (1990).

(UDHR) fundamentally changed the political ascription of the individual in international politics.[19] No longer were rights accorded to individuals via the nation state only. It was unanimous amongst UN member-states that "individuals were no longer to be taken care of on the international level *qua* members of a group (minority or particular category); they began to be protected *qua* single human beings."[20]

Moreover, the UN system introduced not only individual rights guaranteed by international law, but also the concept of criminal responsibility for state officials.[21] The International Military Tribunal (IMT) at Nuremberg in 1945 and the Tokyo Trials of 1946 affirmed the principle that individuals have duties to other human beings that transcend those imposed by particular states. As Cassese contends, "state representatives (high-ranking officers, politicians, prominent administrators or financiers, as well as men in charge of official State propaganda) could also be made answerable in international gatherings for gross misconduct. Those men were no longer protected by state sovereignty."[22] Significantly, these crimes were tried against individuals rather than states or entire populations. The trials at Nuremberg and To-

19 Michael Posner, *Foreword: Human Rights and Non-Governmental Organizations on the Eve of the Next Century*, 66 FORDHAM L. REV. 627 (1997); 王玉葉，歐洲法院與人權保護，頁2，2000年；李孟玢，論世界人權宣言之基本性質與法律效力，中正大學法學集刊，1期，頁334-335，1998年7月；丘宏達，同註15，頁451-452。

20 CASSESE, *supra* note 18, at 384; *see also* 鄧衍森，從歐洲人權法院的實踐論國家主權與人權保障，載：法治與人權，頁65-66，2006年。

21 Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27 (1996).

22 CASSESE, *supra* note 18, at 64-65.

kyo thus illustrate the formative institutionalization of conventions against genocide, war crimes, and crimes against humanity that are designed to place constraints on the legitimate use of force.

However, human rights represent more than regulations governing the use of force. Human rights also expand the parameters of state responsibility. On a very basic level, human rights help to define the "rules under which people who pursue diverse goals in a complex, rapidly changing and highly interdependent world might hope to live in dignity and peace."[23] The construction of an international human rights legal system thus began soon after the advent of the UN system. According to Donnelly's definition, "[human rights] regimes are political creations set up to overcome perceived problems arising from inadequately regulated or insufficiently coordinated national action."[24] Donnelly further argues that the international human rights regime and law arose from a growing 'moral demand' within international society met by a group of states that were willing to 'supply' international institutions to regulate the behavior of states against gross violations of human dignity.[25] Regime construction was pursued as an attempt to formalize international affairs and regulate state behavior on human rights issues.

As Donnelly argues, "the most striking pattern is the near-complete absence of international human rights regimes in 1945, in contrast to the presence of several in all the later periods… we can also

23 Michael Freeman, *Human Right, Democracy and Asian Values*, 9 THE PACIFIC REV. 358 (1996).

24 DONNELLY, *supra* note 13, at 210.

25 DONNELLY, *supra* note 13, at 210-11.

note the gradual strengthening of most international human rights regimes over the last thirty years."[26] Although the UDHR provided the nominal framework for subsequent human rights instruments, the International Bill of Human Rights was created to explicate the procedural definitions of human rights and to ideologically appease the rival superpowers of the Cold War.[27] The International Bill of Human Rights (IBHR) was later followed by particular conventions on genocide, women's rights, refugees, the rights of the child, and torture to name only a few.[28] With these subsequent human rights instruments, the so-called "core international human rights instruments" have formed crucial elements of international human rights law (see Table 1). Although the process was protected, the core instruments entered into practice as legally binding for all party states. Their ratification led to the creation of supervising bodies and committees in the UN system for the express purposes of monitoring the implementation and enforcement of the all core instruments.[29]

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26 DONNELLY, *supra* note 13, at 153.

27 *Supra* note 15.

28 *Supra* note 15. UNHCHR, The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and Treaty Bodies.

29 UNHCHR, Human Rights: A Basic Handbook for UN Staff 3 (1997); 陳隆志、黃昭元、李明峻、廖福特，國際人權法——文獻選集與解說，頁2-51，2006年；廖福特，同註15，頁69。

Table 1: Names and Signatures for Core International Human Rights Instruments*[30]

Name of Law	Year of Open to Sign	Number of Signature (till January 2009)
International Covenant on Civil and Political Rights, ICCPR	1966	153
International Covenant on Economic, Social and Cultural Rights, ICESCR	1966	160
International Convention on the Elimination of all Forms of Racial Discrimination, ICERD	1966	173
Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW	1979	185
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT	1984	146
Convention on the Rights of the Child, CRC	1990	193
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ICRMW	1990	40
ICCPR-OPT1	1976	111
ICCPR-OPT2	1989	57

30 For the details of parties lists for specific treaties, please *see* "Human Rights" of the Multilateral Treaties Deposited with the Secretary-General, *available at* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last visited: 2009.02.20).

* This table does not include the UDHR.

**This Table is organized by the author and is based on following sources: (1) "Chapter IV" of the Multilateral Treaties Deposited with the Secretary-General, *available at* http://treaties.un.org/Pages/ParticipationStatus.aspx (last visited: 2009.02.20); (2) UNHCHR, Status of Ratification of the Principal International Human Rights Treaties, New York: United Nations, (June 16) 2006, *available at* http://www.unhchr.ch/pdf/report.pdf (last visited: 2008.10.28); (3) UNHCHR, The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and Treaty Bodies (The Human Rights Fact Sheet No. 30), Geneva: Office of the United Nations High Commissioner for Human Rights, 2005, pp.1-54; (4) UNHCHR, International Law, *available at* http://www.ohchr.org/english/law/index.htm (last visited: 2008.10.28).

***"Ratification" in this Table also includes the parties of "Succession" or "Accession."

B.Diplomatic Cooperation and Multilateral Efforts

These formal bodies are also supported by parallel developments in diplomacy. Established in 1946, the UN Commission on Human Rights remains the central forum for negotiating international human rights issues and official documents. Shaken by the fall of the Berlin Wall and the decline of Cold-War bipolarity, events such as the reunification of Germany, the collapse of the USSR, democratization in Eastern Europe, Asia and Latin America, the Tiananmen Square Massacre, and the end of apartheid in South Africa led to an increasing belief in the global pertinence of the human rights project.[31] The office of the United Nations High Commissioner for Human Rights was established in 1993, giving the High Commissioner the mandate to deal directly

[31] For further discussion, please *see* Wendt, 1992: 391.

with all governments on all issues relating to human rights in a personal capacity rather than as a state representative.

As previously noted, the end of the Cold War led to speculation that human rights were becoming constitutive of state sovereignty. Although the September 11th event has since challenged this assumption, optimism over the salience of human rights was nonetheless plausible given some of the developments in international law, particularly in the post-Cold War period. As Bassiouni argues, "traditional sovereignty-based arguments against the recognition or application of internationally protected human rights are no longer valid because of the vast array of applicable treaties, the customary practices of states, and the legally binding nature of general principles of international law which, in this context, represent the convergence of treaties, customs, national legislation, and *jus cogens*."[32] A variety of legal processes are thus available in international law to indict suspected perpetrators of human rights violations. The expansion of international criminal law is most notably illustrated with the near prosecution of Augusto Pinochet in a municipal court, and the trial of Slobodan Milosevic in The Hague. For better or for worse, these developments reflect a growing trend toward the 'externalization of justice' in the international sphere as the norm in ways that transcend traditional notions of sovereignty.[33]

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32 Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT. L. 238 (1993).

33 Mark A. Drumbl, *Juridical and Jurisdictional Disconnect*, 12 FINNISH YEARBOOK OF INT. L. 131-53 (2001); Chandra Lekha Sriram & Brad R. Roth, *Introduction: Externalization of Justice— What Does It and What is at Stake?*, 12 FINNISH YEAR-

The advent of the International Criminal Court (ICC) is one such development that attempts to avoid the problems previously associated with *ad hoc* tribunals. The ICC was launched with the adoption of the 1998 Rome Statute, although its foundations stem from the postwar trials at Nuremberg and Tokyo. The promotion of individual human rights is central to the Court's mandate albeit limited to prosecuting acts of genocide, war crimes, and crimes against humanity including sexual violence.[34] As the statute falls under the domain of treaty law, the court acts as an extension of the international customary laws governing human rights protection.[35] In the long run, the permanent court will be supposed to possess authority as well as the national judicial proceedings of any state party to the ICC and any state after direct referral by the UN Security Council.[36]

Overall, the international human rights legal system consists of enforceable core treaties, unenforceable declarations and treaties, monitoring and advocacy bodies, as well as informal and formal diplomatic

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BOOK OF INT. L. 3-7 (2001).

34 John R. Bolton, *Courting Danger: What's Wrong with the International Criminal Court,* 54 THE NATIONAL INTEREST 60-71 (1998); Mahnoush H. Arsanjani, *Developments in International Criminal Law – The Rome Statute of the International Criminal Court*, 93 AM. J. INT. L. 22-43 (1999); Danesh Sarooshi, *The State of the International Criminal Court*, 48 INT. COMP. L.Q. 387-401 (1999).

35 ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 80 (2004); Ved P. Nanda, *The Establishment of a Permanent International Criminal Court: Challenges Ahead*, 20 HUM. RIGHTS QUART. 414 (1998).

36 United Nations Department of Public Information, Setting the Record Straight: The International Criminal Court (1999), *available at* http://www.un.org/News/facts/Iiccfact.html.

processes. The individual has become a legal subject entitled to the procedural right to access international tribunals or initiate proceedings before an international body for the purpose of ascertaining whether the State in question has violated the treaty.[37] The entitlement of individual human beings to make claims in international law for legal remedy marks a novel development. However, despite this significant change in the legal order, violations continue as the international community proves only marginally more adept at coordinating efforts to enforce human rights in the post-Cold War period than in previous decades. Legal scholars and human rights experts have too often neglected how power and interest affect the constitution of the legal order and how legal processes actually function politically.

III.THEORETICAL DEBATES: STATE POWER AND INTERNATIONAL HUMAN RIGHTS LAW

A.Criticism on the Effect of International Human Rights Law

Some criticisms have been launched pertaining to the general efficacy of the legal provisions for human rights. Legal criticisms are based on four main arguments: (1) procedural rights are not granted *a priori* but only through treaties which can only pertain to party states; (2) procedural rights of individuals' petitions are quite different from those under domestic systems, because the international bodies responsible for their adjudicating are generally not judicial in character although they may behave in accordance with judicial principles; (3) interna-

37 Janina W. Dacyl, *Sovereignty Versus Human Rights: From Past Discourses to Contemporary Dilemmas*, 9 JOURNAL OF REFUGEE STUDIES 153 (1996).

tional proceedings are often hindered by limitations concerning the collection and admission of evidence; and (4) verdicts are often unenforceable.[38] Despite these criticisms, Cassese argues that "the existing international systems for protecting human rights which depend on the initiative of the very beneficiaries of the right in question are no less effective than other international devices for ensuring compliance with international law. One should therefore not be discouraged by the paucity of international mechanisms based on individuals' petitions."[39]

Moreover, legal claims can be made on the basis of international customary law that all states have international human rights obligations regardless of whether or not they are party to human rights treaties. The international customary process can support the argument that, by ratifying the UN Charter, all member states accept the general human rights obligations outlined in Articles 55(c) and 56 such that subsequent human rights treaties merely elaborate upon those obligations rather than transform them.[40] This debate is predicated on the role and definition of power in the international customary process. According to Byers, "it is a debate about the exclusive competence which States have traditionally had to apply power in respect of all matters within their borders which do not affect other states, and the ability of international society to challenge the exclusivity of such applications through customary rules."[41]

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38 ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 101-02 (1986).

39 *Id*. at 102-03.

40 MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 43-44 (1999).

41 *Id*. at 45.

B. Power, Sovereignty, and Human Rights Law

Unfortunately, a divide has tended to stifle cross-disciplinary research between scholars of international law and international relations.[42] Since Hans Morgenthau's influential writings on the subject from the mid-1940s, subsequent theorists of the latter tradition have, on the whole, remained skeptical of international legal processes.[43] In particular, Morgenthau believes in the weakness of the international legal order in the absence of centralized authority and the tendency of formal law to be corrupted by power, and hence bear little association with political outcomes.[44] To Morgenthau, "international law is a primitive

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42 Stephen J. Toope, *Emerging Patterns of Governance and International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 91-108 (Michael Byers ed., 2000).

43 Hans J. Morgenthau is the founder of classic realism in international relations. He defines the core principles of international politics by arguing: "Whatever the ultimate aims of international politics, power is always the immediate aim. The struggle for power is universal in time and space and is an undeniable fact of experience." With his famous work, *Politics Among Nations,* published in 1948, Morgenthau declares war on legalistic and moralistic interpretations and provides the realist theory. In terms of international norm, he argued that international law and morality are constraints on the struggle for power. He also applies realist philosophy to human rights issues and stresses the need for enforcement and practical morality. He tried to explain the tensions between moral principles (i.e. multilateral norms) and political necessities (i.e. national authority and interests) in world politics. *See* Afred J. Hotz, *Morgenthau's Influence on the Study of International Politics*, *in* TRUTH AND TRAGEDY: A TRIBUTE TO HANS J. MORGENTHAU 316-21 (Hans J. Morgenthau, Kenneth W. Thompson & Robert J. Myers eds., 1984); HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1978).

44 *Id*. at 279-88; Andrew Hurrell, *International Law and the Changing Constitution of*

type of law resembling the kind of law that prevails in certain preliterate societies" because of its decentralized nature that renders it an ineffective mechanism in the struggle for power and peace in international relations.[45] This divide is fueled further by what Antonio Cassese and others call the "end of the magnificent illusion." It became increasingly clear by the late 1990s that the UN Charter was unable to provide effective answers to the problems of international and internal conflict.

Yet these assumptions discount the influence of law on state behavior. International law is not a system of absolute legal rules that lack central authority and the means of enforcement. International law is instead a system of legal relations.[46] Thus, while international relations delves to some degree into the effect of power on legal processes, it often neglects the effect of law in shaping power relations in the first place. As Hurrell argues, "legal rules and relations are important, then, in so far as they constitute the game of power politics. But they are also important more directly in stabilizing and legitimizing the power of particular actors."[47] Hurrell's criticism is directed principally against realism. He argues further that:

International Society, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 328 (Michael Byers ed., 2000).

45 MORGENTHAU, *supra* note 43, at 281.

46 Philip Allott, *The Concept of International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 74 (Michael Byers ed., 2000).

47 Hurrell, *supra* note 44, at 330.

> *Neo-realists fail to appreciate the importance of norms and of law to the analysis of power. They mistakenly view norms, rules, institutions, and values as mere reflections of material forces. Power remains central to the analysis of international relations, but power is a social attribute. To understand power we must place it side by side with other quintessentially social concepts such as prestige, authority, legitimacy and legality. Indeed, it is one of great paradoxes that, because it so resolutely neglects the social dimensions of power, realism is unable to give a full or convincing account of its own proclaimed central category.*[48]

While Morgenthau recognized the distinction between legitimate and illegitimate power, he perhaps did not take the implications of this distinction far enough. He states, for instance, that "legitimate power, which can invoke a moral or legal justification for its exercise, is likely to be more effective than equivalent illegitimate power, which cannot be so justified. In other words, legitimate power has a better chance to influence the will of its objects than equivalent illegitimate power."[49] Law must therefore not be measured in absolute terms, but by its relative effect on social power relations.

An analysis of human rights practice in international arena must consequently account for the role of the international human rights legal norms in shaping power relations between states. Needless to say, state authority and inter-state interactions are crucial in determining the extent to which it can shape power relations.

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48 Hurrell, *supra* note 44, at 330.

49 MORGENTHAU, *supra* note 43, at 35.

While human rights are no less 'real' than material interests, state policy nonetheless tends to be based on objectives that are more readily tangible.[50] These insights do not suggest, however, that human rights make no contribution in shaping the power relations of international politics. Indeed, historical examples show the contrary, as in the case of decolonization. Despite the Cold War tensions, "by the mid-1960s, Afro-Asian states formed the largest voting bloc in the UN. These countries, which suffered under colonial domination, had a special interest in human rights."[51] Human rights were emphasized as justifications against colonial rule. Moreover, these trends led to the creation of the International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature and ratification in 1965 and adopted in 1969. Human rights were clearly crucial in establishing a new post-colonial order and the international acceptance of the racial equality norm. Notable research conducted by Klotz demonstrates that this human rights principle has abetted the development of the international norm against apartheid in South Africa, which cannot be explained on purely instrumental grounds.[52] Human rights thus derive their import not from material resources, but from their ability to challenge on normative grounds the organization of power and authority that ostensibly legitimates certain types and applications of violence.

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50 JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 137 (2002).

51 *Id*. at 7-8.

52 AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995).

This is not to say that human rights can be divorced from power. Indeed, the growth in the international human rights law has been achieved only through incremental gains and setbacks in the bargaining process between numerous political actors over several decades. Power, interest, and political will have been involved at every stage. As witnessed during the Cold War, human rights were even subject to periodic manipulations by the powerful states. Power and inequality place strain on the international legal order because large and powerful states have options. They have the power to shape the agenda of international law and international institutions and to use direct coercive power in support of their own interests. Yet these considerations do not license the claim that human rights have lost all meaning simply because they are susceptible to periodic manipulations of power and interest. Human rights regimes remain a source of legitimacy from which the victims of oppression and brutality can assert legal claims against alleged perpetrators. By limiting certain forms and applications of coercive power, human rights narrow the range by which states can legitimately exercise force. Even powerful states are thus constrained by the 'settled norms' of international human rights obligations.[53、54] States must endorse and abide by these obligations or at a very minimum, pay lip service to and provide justifications against them.

Therefore, the question of human rights practice is not whether the era of human rights has come and gone, but whether human rights mul-

53 A "settled norm" exists where any argument or act which contravenes or opposes the given norm is commonly regarded as requiring special justification.

54 MERVYN FROST, ETHICS IN INTERNATIONAL RELATIONS 105 (1996).

tilateralism will play a role in shaping legitimate state action. More than a question of measuring mere compliance with international human rights standards, this is a question about the political will within international society to enforce international human rights law. It is a question about whether the multilateral legal norms can gain sufficient legitimacy to mitigate the resistance from states and whether or not the tasks of norm legitimation on the setting of domestic-international interplays will have any significant implications. Analysis must consequently turn to how human rights will impact the behavior of certain types of states.

C.State Responses to International Legal Norms

Whether and how international legal norms influence states is a matter of sharply contrasting views among theorists in international human rights studies.[55] Realists are quite skeptical of the influence of international law for well-known reasons, including fear of cheating, state concerns for relative gains, and the brute power fact that states simply have more resources than transnational or intergovernmental actors.[56] From a power perspective, we should not expect unwanted norms such as human rights to have much influence over states. States have no natural incentive to cooperate with other states on human rights, and human rights groups have few material resources to induce compliance. Even when states impose sanctions on norm-violating gov-

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55 Legro; Raymond; Simmons, *supra* note 5.

56 For a summary of this line of argument, *see* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT. SECURITY 5-49 (1994).

ernments, realists argue that sanctions fail for three reasons.[57] First, strong nationalism allows even weak states to withstand international pressure. Second, states can use substitution or other methods to mitigate the damage of sanctions. Third, leaders can protect themselves by shifting the harm from sanctions onto politically marginal groups.

Constructivists and neoliberal institutionalists, on the other hand, argue that international institutions can have a profound effect on state practices, even in difficult issue areas such as human rights.[58] In this view, "States are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world. States are *socialized* to want certain things by the international society in which they and the people in them live."[59] Recent constructivist theories meet realist half-way by arguing that states inhabit both material and social environments.[60] States undoubtedly desire economic and military power, as realists insist, but they also

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57 Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT. SECURITY 93 (1997); Clifton Morgan & Valerie L. Schwebach, *Fools Suffer Gladly: The Use of Economic Sanctions in International Crises*, 41 INT. STUD. QUART. 27-50 (1997); TOM NAYLOR, PATRIOTS AND PROFITEERS: ON ECONOMIC WARFARE, EMBARGO BUSTING, AND STATE-SPONSORED CRIME (1998).

58 *See* Risse & Ropp, *supra* note 7; John Meyer, John Boli, George Thomas & Francisco Ramirez, *World Society and the Nation-State American*, 103 J. SOCIO. 144-81 (1998); KEOHANE, *supra* note 6.

59 FINNEMORE, *supra* note 6.

60 Finnemore & Sikkink, *supra* note 6, at 887-917; Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1-38 (Thowas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

interact within a web of social understandings and norms, and want to be accepted as legitimate and equal actors within this environment. Realizing this fact, multilateral actors socialize states into adopting international norms through a combination of social, political and economic pressure, rational discourse and advocacy, and a gradual process of domestic institutionalization.[61] States respond to these methods because of their interests in maintaining their power, their identities as states, and their desire to be included as legitimate members of the international community.

Both realists and constructivists predict that the influence of international norms is relatively uniform across different states, though in very different ways. Realists suggest that multilateral norm influence is uniformly close to nothing, while constructivists emphasize that norms and institutions have a strong and homogenizing effect on all states. It is fair to say that international human rights norms can have powerful socializing effects on states, while state authority also have significant impacts on practices of human rights law.[62] This paper rejects the implication that all states are equally susceptible to socialization. Rather, legitimacy and legitimization of international efforts on human rights constitute key condition variables that determine the extent of international norms influence on state behavior. In this view, which fits with a liberal approach to international relations, we should expect significant variation in state responses to international norms even when pressures

61 Risse & Sikkink, *id*.

62 David Weissbrodt & Teresa O'Toole, *The Development of International Human Rights Law*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-88 (Beth Andrus & Sonia A. Rosen eds., 1988).

to comply are uniformly quite high.[63] Such arguments respond to Keohane and Martin's commonsensical remark that "institutions sometimes matter, and… it is the worthy task of social science to discover how, and under what conditions, this is the case."[64]

Additionally, utilitarian models of political behavior dictate that states seek to change their commitments to the norms if it suits their interest. However, such an alteration is potentially dangerous for two main reasons. First, reconstituting the legal norms threatens the established conventions that define common standards of appropriate behavior in the treatment of individuals. The dismissal of the international human rights instruments thus invites division or instability in the international order. The norms' decline therefore poses significant implications on protection of human rights. Bell's comparative legal study of civil and religious conflict has shown that those peace accords which have ultimately failed are those that have made little or no allowances for human rights provisions.[65] While more empirical work undoubtedly needs to be done on the subject, it is reasonable to hypothesize that blatant disregard for human rights norms has only served to exacerbate the conflict. Pursuing multilateral and legal options for the persecution of alleged war criminals and perpetrators of crimes against humanity may therefore be a more viable long-term avenue for mitigating escalation. As Krasner notes, "conventions, even though they are entered into vol-

63 Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT. ORGAN. 513-53 (1997).

64 Robert Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT. SECURITY 39-51 (1995).

65 CHRISTINE BELL, HUMAN RIGHTS AND PEACE AGREEMENTS (2000).

untarily and even though they have no provisions for enforcement, can alter domestic authority structures by introducing external sources of legitimacy."[66] Indicting alleged perpetrators in an international court will provide this external source of legitimacy, and can therefore alleviate the costs of coercion and help to bring domestic actors into congruence with international norms.

Second, a reconstitution is potentially destabilizing for the international order because it forces a division between advocates and opponents. In other words, a reconfiguration places strain on the international legal system as a whole, as well as on the prospects for multilateralism. International law provides stability and order to international relations by imparting a framework for action and expected outcomes by which interests may be pursued.[67] As Charney states, "the international community has a need for rules to impart a degree or order, predictability and stability to relations among its members. The rules of the system also permit members to avoid conflict and injury, and promote beneficial reciprocal and cooperation relations."[68] Thus, Hurrell emphasizes that all political actors including "strong states need law and institutions to share burden and to reduce the costs of promoting their interests by coercion. Even imperfectly legitimated power is likely to be much more effective than crude coercion."[69]

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66 STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 121 (1999).

67 Arthur Watts, *The Importance of International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 5 (Michael Byers ed., 2000).

68 Jonathan Charney, *Universal International Law*, 87 AM. J. INT. L. 532 (1993).

69 Hurrell, *supra* note 44, at 344.

IV.LEGITIMACY AND MULTILATERAL EFFORTS ON INTERNATIONAL HUMAN RIGHTS LAW

A.Linkage of Legitimacy and Human Rights Multilateralism

Issues of legitimacy structure debates on multilateral effects of human rights practices at two levels. First of all, states may accept or refuse the legitimacy of multilateral authorities in making decisions, monitoring states, creating standards and using control mechanisms.[70] Secondly, states have to position themselves on the legitimacy of human rights affair. Hence, legitimacy battles came to be fought on other grounds, next to the authority debate, conflicts played themselves out over substance, action/non-action, and compliance, finally over the shape of multilateral efforts.[71]

Confrontation on the ground of legitimacy is thus key to understanding international status quo and change on human rights norms. This state of affairs is amplified by the main features of human rights multilateralism, which make it especially prone to such conflicts. It is highly fragmented, disseminated and proliferating, without any centralized decision-making. The development of human rights law is consequently piecemeal and always in the process of being complemented, without any linear pattern but rather as a mix of stalemates, continuity and breakthroughs. Outcomes are evolutionary, in the sense that the fate

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70 Authority is defined in its triple dimension of formal prerogative, possession of knowledge (to be an authority in a field) and a status giving influence over others. On the questioning and dispersion of authority at the international level, *see* Strange (1996).

71 DONNELLY, *supra* note 13, at 210-12.

and course of a decision or mechanism will not necessarily resemble anything near its makers' initial intent or expectations as various actors seize opportunities and (re)shape them - again without any linearity or centralization, but on the contrary with competing and entangled visions about the role of international regimes.

Any new multilateral development on human rights norms thus requires the emergence of new legitimacy spaces for debate and decisions. Once this happens, actors with an interest in or specialized on the proposed issue can use this space. Now the key to this process is the active delegitimization or the loss of legitimacy of the status quo. As Przeworski underlines regarding transition to democracy, a loss of legitimacy by the existing situation is greatly facilitated by the emergence of a credible alternative.[72] This underlines the importance for actors to be skilled in the art of navigating, playing and using the multilateral human rights system.[73] Moreover, as legitimacy is never definitely acquired and stable for any actors, legitimization is an equally relevant approach to understanding practices of international human rights law. In particular, human rights organs can bureaucratize and institutionalize themselves but yet hardly ever render their work commonplace and routinely legitimate as both adversaries and friends will constantly seek to orient if not challenge its procedure and substance.[74] Furthermore, as

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72 Adam Przeworski, *Some Problems in the Study of Transition to Democracy*, *in* TRANSITIONS FROM AUTHORITARIAN RULE. PROSPECTS FOR DEMOCRACY (Guillermo O'Donnell, Philippe Schmitter & Laurence Whitehead eds., 1986).

73 JAMES N. ROSENAU, DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION (Princeton University Press, 2003); *see also*周志杰，同註6，頁119。

74 Kathryn Sikkink, *The Emergence, Evolution, and Effectiveness of the Latin Ameri-*

legitimacy conflicts are bound to polarize any collective decision-making and constantly threaten to paralyze it, actors constantly play strategies of politicization and depoliticization as they see fit.

B.Functional Need for Legitimacy

While international human rights regimes and actors do need some stable legitimacy for the system to be able to function, states also functionally need legitimacy for multilateralism in three cases. In the first situation, states may want to use criticism of the human rights record of an enemy or an adversary. Robust multilateralism is the best way to produce such internationally public, credible third-party criticism for partisan purposes. A second type of functional need for legitimization results from some states' endeavor to carve their diplomatic niche (out of a mix of convictions and interest) and foster their own legitimacy by supporting human rights multilateralism: If you make your international standing partly rely on support for multilateral human rights norms and institutions, legitimizing these is a must to ensure a "return on investment". A third type of functional legitimization in favor of multilateralism proceeds from the "human rights constellation", the set of actors specialized on and/or committed to human rights, i.e. human rights International Nongovernmental Organizations (INGOs), Intergovernmental Organizations (IGOs) secretariats, independent experts and some pillar states.[75] Indeed, international efforts needs legitimacy to be able

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can Human Rights Network, *in* CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA 61-62 (Elizabeth Jelin & Eric Hershberg eds., 1996).

75 Risse & Sikkink, *supra* note 60, at 28-29.

work (with support, funding and minimal consensus), to be independent, autonomous, assertive and credible and, in the end, to be effective.[76]

These three functional needs, though proceeding from different actors and intents, are mutually reinforcing as any increased legitimacy of the system makes further efforts of legitimization more appealing. It is thus common to observe joint enterprises of legitimization. In some cases, actors have distinct but related goals (a typical case is the recurring alliance between a middle power, key international human rights INGOs and IGOs). In other situations, some actors find themselves in lasting interdependency (e.g. human rights organs and INGOs have shared goals and complementary functions and resources).

The great beneficiary of this configuration is the human rights constellation whose place, autonomy and power only grow as the tests of legitimacy stay center stage. This situation has been favorable to innovations regarding the problem of torture, because change is brought about either by decisive moves on part of empowered insiders, i.e. an individual, a group or a structure with the authority and legitimacy to make such changes, or by outsiders with leverage and connections to decision-makers, or by some combination of both.

On the one hand, human rights multilateralism modifies, classically established links between powers, including soft power, and resources, by requiring states to adjust and use sector-specific resources suited to legitimacy challenges. The resources basis for such con-

76 IGO's autonomy is understood in the double sense of setting their own norms and of self-sustained independence for their secretariat staff, organs and experts.

strained power is then necessarily reduced and usually very different from the basis for bilateral or unilateral power in fields other than human rights.[77] Similarly, the nature of resources needed for legitimization only partly dovetails with classical cases: while economic and financial strength will certainly help states be engaged with IGOs, other resources such as expertise, especially legal expertise, in the matters at hand are at least as likely to be conducive to legitimization. Conversely, power may bring its owner some resources (e.g. funding, connections), but the latter will still be determined and constrained by multilateral obligations. Legitimacy will increase that state's resources in human rights multilateralism but may not pay back much in terms of resources useful to power elsewhere.

On the other hand, two anomalous links appear in human rights multilateralism. First of all, being powerful and exercising one's power may well be a handicap in the quest for legitimacy. Multilateral legitimacy for states implies their submission to multilateral norms on authority, i.e. restraining, containing and channeling domestic and international power. Consequently, power in and by itself will not automatically yield positive outcomes but rather frequently constitute fertile ground for suspicion and delegitimization, whereas in soft power scenarios, legitimacy would be increased by the use of power.[78] Conversely, legitimacy will probably lead to more influence, but cannot really buy power in the human rights field, because more legitimacy in the eyes of IGOs, INGOs and peers implies less use of domestic power

77 Risse & Ropp, *supra* note 7, at 260-61.

78 KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

and international power (cooperation with multilateral control and channel led use of peer pressure).[79] Contrast this phenomenon with the frequent empowerment of INGOs which are legitimate in multilateralism.

V.LEGITIMATE IMPACTS OF STATE AUTHORITY ON HUMAN RIGHTS MULTILATERALISM

Considering the role of states in light of the importance of legitimacy in the multilateral practices of human rights law,[80] it turns out that the bright line in the sand between democracies and other regimes, each having its distinct power, interests and resources, is not the most relevant classification to understand their respective roles in human rights multilateralism where states occupy the triple place of founders, subjects (with a monopoly on some prerogatives such as voting) and objects.[81]

A.Triggering Effects for Multilateral Human Rights Legal Practices

As foundational subjects of the system, states are in a position to

79 Risse & Sikkink, *supra* note 60, at 38.

80 This paper focuses on states' behavior within multilateralism, but the role of INGOs and experts in this realm as well as social dynamic outside IGOs should be emphasized as a major source of changes since 1945 in international affairs. For instance, Amnesty International's two worldwide campaigns against torture in the 1970s and 1980s left an unmistakable mark on collective deliberations and was a fertile matrix for the INGO world. For a synthesis on the history of the fight against torture and its players, *see* NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1999).

81 *Id*.

be a driving force using the leverage of legitimacy to open up space for collective debate and decision.[82] This role has been decisive because once the human rights issue is placed on the agenda, its rhetorical, political and ethical weight make it difficult for other states to ignore.

Whether it originated from top-level political will or domestic social pressure, this pioneering role has consistently been played by democracies, especially middle powers, and no authoritarian regimes have taken such steps in the multilateral efforts on human rights: While not all democracies engage in such behaviors, this is where democracies and their societies seem indispensable. This role is amplified by key states' double membership in the UN and a regional IGO with human rights institutions, which enables these democracies to move issues and ideas back and forth to advance them. European and Inter-American IGOs, steered and moved by determined persons and groups, play a complementary role and, in some instances, offer a testing ground for pioneering projects such as the European visits system to protect personal rights.[83] Democracies thus founded a regional IGO (the Council of Europe) with a strong mandate, strong institutions and the potential to fight violations of civil and political rights. They proposed multilateral treaties against human rights abuse and followed up with negotia-

82 Risse & Sikkink, *supra* note 60, at 8.

83 Chih-Chieh Chou（周志杰）, Legalization of Human Rights and Democratic Norms in International Organizations: Comparative Investigation on the European Union, Council of Europe, and the Organization of American States. Paper presented at the 20th World Congress of the International Political Science Association, Fukuoka, Japan, July 9-13, 2006.

tion leadership and contribution.[84] They initiated the creation of some effective multilateral mechanisms against human rights abuse (such as country-specific and thematic Special Rapporteurships), admittedly with variable intents and expectations.

In the case of South Africa, multilateral pressure gradually drove the compliance of human rights by the leaders of minority rule. South Africa stands as the most prominent target of transnational human rights campaigns and international pressure in the late 20th century.[85] Despite United States (US hereafter) support for South Africa until the mid-1980s, UN-mandated sanctions first imposed in 1962 cost the country 2.8 percent a year throughout the 1960s to 1980s.[86] When the US finally imposed sanctions in 1985, they cost South Africa an additional 0.8 percent per year. At the same time, South Africa suffered high levels of isolation throughout this period. India first challenged apartheid during the first meeting of the UN Human Rights Commission in 1946, and by the 1960s, South Africa was a pariah state routinely marginal-

84 For instance, the position of Sweden and the Netherlands on the Convention Against Torture, CAT, and Costa Rica and Switzerland on the Optional Protocol to the CAT, OPCAT, *see* Burgers and Danelius (1988), and Association for the Prevention of Torture (2004: 33-62).

85 Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions against South Africa*, 49 INT. ORG. 451, 478 (1995).

86 GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2nd ed. Washington: Institute for International Economics, 1990). GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES (2nd ed. Washington: Institute for International Economics, 1990).

ized from most of the world's diplomatic activity.[87] From 1946 to the Soweto riots in the mid-1970s, however, conditions in South Africa made the government resistant to change.

Although Western ideals of human rights and democracy circulated in South Africa, religious and political leaders justified and defended the political system by appealing to nationalism and racial superiority in ways that won the normative approval of white South Africans. The National Party, which built and championed apartheid, enjoyed widespread normative approval in the 1960s. In November 1977, the UN Security Council made the previously voluntary arms embargo mandatory. When South Africa responded in superficial ways, international actors increased the pressure again in the mid-1980s.[88] Symbolic pressures included awarding the Nobel Peace Prize to anti-apartheid activist Bishop Desmond Tutu, and launching the Free South Africa Movement at the South African embassy in Washington, D.C. More concrete measures included new sanctions from the US and Europe that banned direct investment in South Africa, loans to the South African government, imports of key South African materials like coal and steel, and exports of oil and some computers. Most surprising were the decisions of commercial banks to tighten lending policies in the mid-1980s, ensuring that South Africa was "effectively cut off from international

87 Audie Klotz, *Making Sanctions Work: Comparative Lessons*, *in* HOW SANCTIONS WORK: LESSONS FROM SOUTH AFRICA 264-282 (Neta C. Crawford & Audie Klotz eds., 1999).

88 ROBERT M. PRICE, THE APARTHEID STATE IN CRISIS: POLITICAL TRANSFORMATION IN SOUTH AFRICA, 1975-1990, at 220, 223 (1991).

capital markets."[89]

In response to the international pressures and the shifting attitudes among white South Africans, the Nationalist Party became increasingly concerned with the legitimacy and long-term stability of the apartheid regime. P.W. Botha became prime minister in 1978, proclaiming a "new dispensation" and "apartheid is dead." Gaining international legitimacy was one of the most fundamental goals of Botha's administration.[90] Unfortunately, direct force and extreme repression once again took center stage soon after the Constitutional reforms were approved in 1983. Indeed, it was the effort to implement these reforms that triggered widespread and often violent domestic protests that swept South Africa from 1984-86.[91] In the face of strong international pressures and in the midst of these declining security threats, the "internationalist-reformer" wing of the National Party ascended to power in early 1989 as F.W. de Klerk replaced Botha first as party leader and then as state president.[92] After confirming his leadership in a September 1989 general election, de Klerk stunned the world on February 2, 1990 by announcing the unbanning of the African National Council (ANC) and other prominent opposition groups, the end of the state of emergency, the release of Nelson Mandela and other black leaders, and an invitation to negotiate a

89 *Id*. at 220, 236.

90 PRICE, *supra* note 88, at 145, 146.

91 David Black, *The Long and Winding Road: International Norms and Domestic Political Change in South Africa*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 92-93 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

92 PRICE, *supra* note 88, at 213.

new power structure.[93] By mid-1990, government-ANC talks were in full swing. With the security situation resolved and with public opinion solidly behind the reform process, de Klerk signed a democratization pact in late 1993 that ensured majority rule and extended human rights guarantees to all South Africans.

B.Halting Factors for International Norms and Multilateral Efforts

However, both democratic and non-democratic states have also launched initiatives to maintain the status quo or even to force the multilateral human rights efforts to turn back while trying to avoid delegitimization by conducting their actions behind the scenes, sheltering themselves in silence and non-cooperation, masquerading by using the multilateral repertoire or challenging the legitimacy of multilateral authority and the illegitimacy of rights abuse. They have thus led concerted attacks against multilateral institutions and/or of human rights INGOs and sought to undermine, subvert or co-opt them.[94] Procedures-savvy states have likewise been able to preventively stall any opening (even a purely formal one), sink an initiative by killing it from the start before any debate and before mobilization to delegitimize them could

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93 TIMOTHY D. SISK, DEMOCRATIZATION IN SOUTH AFRICA 81-85 (1995).

94 For instance, the attitudes shifting from ignorance, denial and cover to admit and unofficial compensation by the Japanese government on the "comfort women" issue in World War Ⅱ justify national resistance against multilateral NGOs' efforts under the name of legitimacy of state authority. For further discussion, *see* Chih-Chieh Chou（周志杰）, *An Emerging Transnational Movement in Human Rights: Campaigns of Nongovernmental Organizations on "Comfort Women" Issue in East Asia*, 5 J. ECON. & SOC. RESEARCH 153, 181 (2003).

take off.[95] The best example remains the no-vote motion China had repeatedly been using at the UN Commission on Human Rights to prevent its human rights records from ever reaching the agenda. Indefinitely postponing decisions and burying a proposal ever deeper into subgroups is also a favorite tactic, as delegitimizing these less visible actions is harder for INGOs and IGOs than taking on blunt behaviors. When states feel that they had no legitimate choice but to acquiesce to the creation of a mechanism, they devote much energy and creativity to seeking to render it toothless, non-independent and non-universal in its scope.

Another case which is more likely to demonstrate national authority is the US Despite its leading role in establishing human rights standards and institutions in the end of the World War Ⅱ, Washington has been extraordinarily reluctant to submit itself to legal obligation under multilateral human rights treaties and insisted American supremacy of sovereignty on the issue of demosticalization of international norms. Aside from the UN Charter, the US has only ratified four of several core human rights conventions. One critic noted that "in an attempt to ensure that the treaties effected virtually no change in domestic law, the United States ratified…subjected to a series of reservations, understandings and declarations… and declared them 'non-self-executing.'[96]" More significantly, US judges have, with a few exceptions, generally exhibited great reticence in making use of international standards in

95 Jeffrey T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, 3 EUR. J. INT. RELAT. 476-77 (1997).

96 United States of America Amnesty International, Rights for All. New York: Amnesty International Publications 132 (1995).

their decisions and have even appeared ignorant as to the application of international human rights law. Former US Supreme Court Justice Harry Blackmun criticized the Court's opinions as showing "something less than a decent respect to the opinions of mankind" and that "at best, the Supreme Court enforces some principles of international law and some of its obligations some of the times."[97]

In *United States v. Alvarez-Machain*,[98] for example, the Supreme Court narrowly constructed an extradition treaty between the US and Mexico in order to avoid conflict with executive action. US Drug Enforcement Agency (DEA) agents have arranged for the kidnapping and transport to California of a Mexican doctor whom they suspected in the murder of a DEA agent. The Court refused to interpret the treaty in light of customary international law, which prohibits the action of one state on the territory of another state. Instead, it concluded that the kidnapping violated neither US law nor the US-Mexico extradition treaty. Similarly, in *Sale v. Haitian Centers Council, Inc*.[99] the Supreme Court upheld an executive order authorizing the summary return of boat people to Haiti. It found that the order did not violate either Article 33 of the UN Protocol Relating to the Status of Refugees or §243(h) of the US Immigration Act, both of which provisions prohibit the return of refugees to territories where their lives or freedom would be threatened. The Court refused to follow the advice of the UNHCR and asserted that neither provision applied to US actions committed outside of its territo-

97 American Society of International Law Newsletter 1 (1994, Mar.-May): 6-9.
98 *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).
99 *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155 (1993).

rial waters.

Stemming from these cases, many democratic and non-democratic states have never given up attempts at displacing or distorting the illegitimacy of rights abuse to replace it with new values (e.g. cultural relativism) and/or excuses (e.g. US' challenge to multilateral norms with American exceptionalism and its attempts to downgrade its imperative and non-derogable character) under the name of state authority.[100]

C.States as Source Providers and Diplomatic Players for Human Rights Practices

Beyond their power of initiative, states are also engaged with human rights multilateralism on an ongoing basis, which provides democracies and non-democracies with permanent and recurring opportunities to make the system work but also to derail it. In the latter case, states mostly seek to find the less illegitimate ways to act.

States are expected to contribute their share of the regular IGO budget and can decide to give additional voluntary funding. On this matter, publicizing your voluntary contribution can increase not just your leverage on IGOs' agenda but also your legitimacy and your influence as well as carve you a thematic niche and raise your profile - hence the persistence of earmarking. Conversely, withholding or threatening to withhold regular contributions is a sure way of being delegitimized, especially for more powerful and richer states. A good way for states to

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100 For further discussions on China's approach of human rights, *see* Chih-Chieh Chou（周志杰）, *Bridging the Global and the Local: China's Effort of Linking Human Rights Discourse and Neo-Confucianism*, 44 CHINA REPORT. 139, 152 (2008). As for American exceptionalism, *see* 周志杰，同註8，頁243-248。

quietly prevent IGO organs from functioning properly without risking much public wrath is to perpetuate the chronic underfunding and budgetary precariousness of human rights multilateralism.[101] On the other hand, solid financial relationships have developed between some states and the IGOs they regularly fund, which greatly reinforces the functional relationship between durably committed states and IGO secretariats and experts. Many democratic states (e.g. Canada, Denmark, France, Switzerland) also fund international, regional and national human rights NGOs. In a sense, they build a clientele and partly orient its agenda in a delicate balancing game between interference and the functional need to preserve INGOs' autonomy. Non-democracies, except some democratizing ones, usually do not fund human rights NGOs and may rather channel money to government-sponsored NGOs. Pushing masquerading proxies into the multilateral game pays tribute to the legitimacy of human rights NGOs and organs but the illusion never holds long and will usually backfire through delegitimization of the patron state.

Beside financial supply, the other key resource and vulnerability for human rights IGOs is the number and quality of its personnel, both its secretariat staff and its independent experts. Democratic and non-democratic states dedicated to human rights or multilateralism thus nominate and/or support qualified, competent, politically savvy, independent persons as experts and as secretariat staff and try to remedy the chronic understaffing of human rights organs. This is a way of raising one's profile, influence, personal connections and legitimacy, while here again, due to the logics of legitimacy, the more independent the

101 Risse & Sikkink, *supra* note 60, at 8.

expert is, the less such gestures will earn the state leniency from the expert or secretariat member it supported. Whereas it is not easy for INGOs and IGOs to stop, counter and campaign on low-quality nominations from hostile state, it proves harder and harder for those states to follow this course as the legitimacy of independent and effective IGOs as well as participants' stakes and interest in them increase.[102] Decidedly maintaining understanding, however, an illegitimate behavior that is hard to delegitimize to its low visibility and entanglement with broader multilateral reform problems (overstaffing in other organs among them).

Moreover, legitimacy and diplomatic battles are then fought around the presentation, sponsoring and support of thematic or country-specific resolutions. Non-cooperating states may want to block resolutions before any discussion (with a no-vote motion) or afterward (abstention, negative vote, veto when relevant) or to politicize them for purely partisan purposes. States also conduct multilateral diplomacy to defend a position on the collective efforts for human rights practices by building alliances and coalitions with like-minded peers, exerting peer pressure, taking the lead or the chair of a meeting or negotiation and producing contributions and drafts.[103] The pressure of legitimacy makes it complicated for states opposed to collective decisions against torture to use hard or even soft power at this stage, as INGOs may seek to publicize and denounce not only their position but also their negotia-

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102 Steven Chan. & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POLIT. SCI. REV. 853-872 (1994).

103 Finnemore & Sikkink, *supra* note 6; Simmons, *supra* note 5.

tion tactics. On the other hand, states determined to undermine a decision often stay inside a negotiation and present watered down proposals. This often proved effective in its nuisance power and irregularly effective in its results, but this is a risky strategy as far as any abuses are concerned: participating will expose a specific state to INGOs' scrutiny and publicity, to the pressure of those states sponsoring and supporting the development as well as legitimize the process they are taking part in.

D.States as Parties to Comply or Resist Legal Norms

As mentioned earlier, states are also parties to multilateral obligations and engagements, yet another position enabling them to help or hinder the system within the parameters of legitimacy. On the one hand, states decide on the degree of their (non-)compliance, starting with the signature and ratification of treaties and protocols and the possible addition of reservations.[104] They subsequently have to choose if and to what extent they will fulfill their obligations and submit to the various (semi-)judicial bodies and multilateral review mechanisms.[105] While most democracies and many democratizing states fare better in this test, most authoritarian regimes but also some democracies fail it. Not fulfilling multilateral obligations and remaining an outsider to legal commitments is usually very costly in terms of legitimacy, because public criticism comes not only from human rights INGOs but also explicitly from IGO experts.

104 SLAUGHTER, *supra* note 35, at 79-80.

105 Cooperation then includes sporadically or permanently inviting experts to visit their state, publicizing experts' comments, responding to questions, requests and urgent appeals, complying with recommendations, allowing individuals to file complaints.

from IGO experts.

States can also ask for IGOs' technical assistance, although most countries do not request it and some non-democracies make a highly ambiguous use of it between bona fide need for help and mala fide quest for aid money and avoidance of the other, more constraining multilateral procedures.[106] This issue is usually not much an object of (de)legitimization due to the relatively limited size of programs involved and their non-exclusiveness with multilateral criticism, unless the user state occupies a special status in human rights or broader diplomatic debates (such as in peace operations or with states considered to be pariahs by some or most of their peers).

On the other hand, a state decides on its degree of cooperation with and support for multilateralism, which can earn it legitimacy in the eyes of the whole human rights constellation and other cooperating non-democracies. Indeed, cooperation and support prominently entail defending the autonomy, place and legitimacy of IGOs and human rights INGOs and fostering a dialogue and some coordination with human rights INGOs and IGOs as a gesture of goodwill and dedication.[107] This policy, which again will not earn its follower any leniency but some influence, contacts and knowledge, is mostly followed by those leading democracies that support human rights multilateralism, have invested into it and need it to be functional. Close contacts and dialogue

106 Checkel, *supra* note 95, at 473-95.

107 Andrew P. Cortell & James W. Davis Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT. STUDIES REV. 65-87 (2000); Andrew P. Cortell & James W. Davis Jr., *How Do International Institutions Matter? The Domestic Impact of International Rules and Norms*, 40 INT. STUD. QUART. 451-78 (1996).

with the secretariats are also attractive to non-democratic states which need assistance from it in navigating the system and may need it to be effective for partisan purposes. Non-cooperating democracies and non-democracies do not hold any such dialogue, which does not cost them legitimacy as such but does alienate them from the human rights constellation and its resourceful networks (expertise, knowledge, information). Trying to exert pressures on the actors, on the other hand, is certainly a quick road to delegitimization by the targeted actors and supportive states.

Whether states act as providers, players or parties in multilateral human rights efforts, states have to vote accordingly on many occasions, a moment when their positions must be publicized and thus most exposed to delegitimization by INGOs and, sometimes, by IGO experts. States regularly use the shield, tool and dynamics of regional voting (e.g. European Union or African Union) and block voting.[108] Publicity of the vote also explains many democratic and non-democratic states' frequent abstention instead of a negative vote when the matter is the fight against torture. States' positive vote will on the contrary be a stance praised and legitimized by human rights NGOs and experts unless it turns out that serious caving in or "trading" on other human rights issues happened.[109]

Examining how multilateralism works within the political and functional legitimacy parameters therefore shows the specific role of

108 Chih-Chieh Chou, *supra* note 83.

109 Chih-Chreh Chou, *supra* note 83; Cortell & James, *supra* note 107; Chan. & Tate, *supra* note 102.

some democracies, the relative cooperation of some authoritarian states and the opposition from other democracies and non-democracies at the initiative stage as well as regarding established collective procedures and decision-making.

VI.CONCLUDING REMARKS

Individual rights emerged during the nineteenth century in Europe amidst revolutions in government and science that gave way to an individualist social ontology. Individual rights during this period were reluctantly granted to groups of individuals as a result of their demonstrated sacrifices on behalf of nationalism. Human rights proper arose in the aftermath of World War II, precisely to replace the nationalistic foundation of rights. This latter set of rights, which gives credence to the notion of national self-determination and the homogenous nation-state, culminated in the destructive horrors of the Holocaust. Human rights were thus constructed to help mitigate international devastation and instability by instituting rules which granted rights to all individual human beings regardless of civil, political, social, or economic disposition. The advent of human rights under the UN system hence introduced the idea of sovereignty as responsibility.

The findings of this paper suggest that a main determinant of effect in contemporary international human rights law concerns how multilateral and state actors governing the legitimate problem determine the practices of human rights norms. As human rights promoters stand to benefit from a strengthening of multilateral processes and institutions, sovereignty stands to resist external pressure by weakening the multilateral conventions with legitimate challenge. However, international

human rights law and regime will continue to play an important role in international relations because of the way in which they constitute political legitimacy and a source of legal power for human rights protection.

The analysis also illustrates that different types of states derive legitimacy and power from different sources. Rather than providing a vindication for neo-utilitarian theories, this insight lends itself to the reflectivity foundations of constructivism.[110] It provides evidence for a relational basis of power. Moreover, the analysis throughout this paper has shown that micro-level phenomena such as the creation of institutions or patterned interactions between actors can cause system-wide changes that place constraints on the state power and hence mitigate international anarchy. The creation of the international human rights

110 The advocates of Constructivism argue that multilateral norms and international institutions can have a profound effect on state practices, even in difficult issue areas such as human rights. In this view, "States are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world. States are socialized to want certain things by the international society in which they and the people in them live". Recent constructivist theories meet realists halfway by arguing that states inhabit both material and social environments. States undoubtedly desire economic and military power, as realists insist, but they also interact within a web of social understandings and norms, and want to be accepted as legitimate and equal actors within this environment. Realizing this fact, transnational actors socialize states into adopting international norms through a combination of social, political and economic pressure, rational discourse and advocacy, and a gradual process of domestic institutionalization. States respond to these methods because of their interests in maintaining their power, their identities as states, and their desire to be included as legitimate members of the international community. For further discussions, *see* FINNEMORE, *supra* note 6; Finnemore & Sikkink, *supra* note 6; Risse & Ropp, *supra* note 7; Risse & Sikkink, *supra* note 60, at 1-38, and Meyer et al., *supra* note 58, at 144, 181.

law has had such an effect. Thus, Waltz's proposition for an inflexible dichotomy between hierarchy and anarchy in international political theory may not actually be useful.[111] Wendt may therefore be right in asserting that "anarchy is what states make of it."[112]

More significantly, consistent with realism's traditional emphasis on power politics and unitary states, analysts often argue that international norms require enforcement by economic or military power to be effective.[113] While not denying that multilateral legal enforcement can be useful, this paper suggests that legitimacy of state authority is a more important determinants of state compliance. This argument is convinced by the cases of American exceptionalism, China's asserted relativism, and Japan's shifting attitude towards "comfort women" issue. Therefore, international efforts and international law themselves alone are usually not strong enough to induce state compliance in issue areas like human rights, and power differentials between pressuring states and targeted states cannot explain which states comply and which do not.

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111 For Waltz's arguments on this issue, *see* discussion at Page 22 & 23. As a representative scholar of realism, Waltz as well as other realist are quite skeptical of the influence of international norms for several reasons, including fear of cheating, state concerns for relative gains, and the brute power fact that states simply have more resources than transnational or intergovernmental actors in an anarchic international environment. From a power perspective, we should not expect unwanted norms such as human rights to have much influence over states. States have no natural incentive to cooperate with other states on human rights, and human rights groups have few material resources to induce states' compliance. *See* WALTZ, *supra* note 78.

112 Alexander Wendt, *Anarchy Is What States Make of It: the Social Construction of Power Politics*, 46 INT. ORGAN. 391-425 (1992).

113 Stephen Krasner, *Sovereignty, Regimes and Human rights*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 139-67 (Volker Rittberger ed., 1993).

As a result, scholars should be cautious about claims that enforcement is central to the domestic implementation of international human rights norms.

Conversely a liberal approach that incorporates domestic variables provides better answers to questions about the effectiveness of international human rights law. States integrated in the same international normative environment and subjected to similar pressures respond very differently. In particular, this paper finds that state authority matter more than domestic beliefs or regime type. The South African case shows that multilateral pressures with norm legitimacy are more effective than direct lobbying and persuasion, and that international efforts should be finely tuned to the state's compliance to international law, if the country is convinced that multilateral efforts are in line with its authority. International actors can increase their legitimacy by diffusing legal norms through social and cultural contacts, and can live with state authority by regarding the targeted state as a partner to facilitate the practices of human rights law.

In terms of methodology considering the potential tension between legal and political approaches in the study of international human right law, this paper suggests avenues of research that could help bridge the "rationalist-constructivist divide" by accepting both the logic of consequences and the logic of appropriateness.[114] Many norms scholars from the political perspective have emphasized the causal importance of communication, persuasion, and changing cultural understandings. As a result, norms are associated with logics of appropriateness while legal

[114] Checkel, *supra* note 95; FINNEMORE, *supra* note 6.

approach is associated with the logic of consequences. This is a false dichotomy. Focusing on norms as an explanatory variable does not deny that states act in strategic ways on norms ratification and domesticalization, and a focus on power relationship of conventions building need not imply that states ignore concerns for appropriateness. In reality, states use both types of logic (consequences and appropriateness), and scholars who places emphasis on one rather than another "slight the multiple roles norms play in social life."[115]

In fact, the two logics often interact to produce the same outcome, and it becomes difficult or impossible for scholars to separate out their effects. In many states, the normative expectations of multilateral efforts (i.e. INGOs, IGOs, and foreign states) informed the ruling regime what actions were appropriate. The government may partially adopt appropriate actions on law compliment as an instrumental way to ensure its long-term stability. It is naive to deny that the regime acted in self-interested ways, and it is equally untenable to deny that international human rights law informed the regime's understandings of appropriate behavior. Actually, legal studies focusing on consequences and political studies emphasizing appropriateness both appear to misstate the nature of norms' influence. When the logics are combined, richer explanations are more likely to emerge for why states sometimes comply with norms and under what conditions.

115 Checkel, *supra* note 95, at 488.

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國家權威與國際規範
——合法性因素對國際人權法在實踐上之影響

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摘 要

人權向來對國家權威構成挑戰。隨著國際人權法在普世化、制度化與內國化上的擴展與深化，重新檢視國家權威所恃之主權正當性與國際規範所建構之多邊正當性，以及兩者磨合對主權國家遵從國際人權法的影響日益重要。故本文析論影響國家遵從國際規範與國際人權法實踐的關鍵因素，並解釋國內與國際權威之正當性衝突對多邊人權主義及其規約實踐所造成之影響。本文之論證顯示：⑴權威之正當性是履行國際人權法的主要動因，而且⑵國際人權法之實踐及由此所產生之效力，取決於多邊人權建制及主權國家對正當性問題之妥善處理；⑶縱使國際人權建制具有實質效用，乃仰賴其能否建構人權保障所需之內、外部政治權威及法源，然而，⑷國家利益並非影響其遵從人權規範之意願與強度的決定性因素，國家權威是否具有正當性亦是必要條件。而且，⑸具規範正當性之多邊壓力較遊說與道德勸說更為有效。是故，⑹人權法規之國內實踐取決於多邊建制之正當性與國家權威的相容程度，而非僅為前者施壓或後者（非）自願順從之結果。循此，⑺國際人權研究可兼採理性主

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義與建構主義之邏輯。亦即結合政治分析所專注的規範適當性與法制途徑所重視的法規效果，方能為相關命題提供更完整之解釋。

關鍵詞：國際公法、國際人權法、國際關係理論、國際人權建制、規範內國化、國家權威、國家主權、多邊主義、正當性、政府間國際組織、國際非政府組織