CHAPTER FIVE

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Why Do States Comply (or Not Comply) with Human Rights Treaties?

5.1. INTERNATIONAL INCENTIVES TO COMPLY

In the case of ordinary treaties, the main reason that states comply with their obligations is that they fear that if they do not, other treaty parties will violate their own obligations. As we have seen, this logic does not easily carry over to human rights treaties. If Sweden and Guatemala enter into the Convention Against Torture, and Guatemala then tortures political prisoners, Sweden is not likely to retaliate by torturing its own citizens. It is possible that Sweden and other parties to the Convention Against Torture will take action against Guatemala, in order to compel it to bring its conduct in alignment with the treaty. For example, they could threaten to cut off foreign aid (if they supply foreign aid), or offer foreign aid conditional on improvements in human rights, threaten to withdraw support for diplomatic initiatives favored by Guatemala, drag their feet on an extradition, reduce the number of visas offered to Guatemalans who seek work, and so on.

But it is not so easy. Most countries do not have significant relations with Guatemala, and so have no leverage against it. If Sweden does not give foreign aid to Guatemala, or gives it only a little, then it cannot make a credible threat to withhold aid if Guatemala violates human rights. Indeed, Sweden might feel that if it does withhold whatever foreign aid it gives Guatemala, poor people will suffer, and the government will not be deterred—so it is unlikely to withdraw the aid even in response to serious government wrongdoing. Guatemala's neighbors might have some leverage, as they and Guatemala share interests over migration, fishing rights, and so on, but those neighbors need Guatemala as much as Guatemala needs them. If they threaten non-cooperation over, say, migration, then they hurt themselves. Perhaps, if Guatemala's trade partners banded together and refused to trade with it unless it improved human rights, that would have an effect. But most of a country's trade partners will be its neighbors, who will have the same sorts of problems. In addition, cutting off a country from trade risks impoverishing its population further. And these countries have their own human rights problems, so any complaint about Guatemala's will lack credibility.

Powerful countries like the United States can exert pressure effectively because so many countries rely on them for trade, security, technological assistance, and other benefits. But powerful countries also care about maintaining geopolitical peace. The United States has tolerated human rights violations in many of its strategic allies—pro-Western dictatorships during the Cold War, and most big and strategically important countries today. Other human rights-violating countries like Russia and China (and the United States itself when it used torture in the years after 9/11) are immune to economic pressure.

Even powerful countries often cannot exert sufficient pressure on a human rights violator to cause it to improve its behavior,

because the target of sanctions can often retaliate by improving its ties with the sanctioning countries' rivals. Western efforts to isolate Sudan, for example, failed because Sudan strengthened its economic relationship with China, to which it sold oil. During the Cold War, the United States tolerated human rights abuses in pro-Western countries in the developing world in part because it believed that if it pressured those countries, they would switch allegiance to the Soviet side.

Moreover, even when all states care about human rights violations in a particular state, they face a collective action problem. Although every state may want to end the human rights violations, each state has a strong incentive to free ride, hoping that other states will incur the costs of sanctioning the country in question. This problem of collective action undermines efforts to create effective, independent institutions that enforce human rights. In the absence of a world government, states can cooperate only in decentralized fashion.

The evidence suggests that countries do not consistently cut aid to human rights violators, or otherwise put pressure on them. One study finds evidence that multinational institutions like the World Bank withdraw aid from or stop making loans to countries condemned by the UN Commission on Human Rights (now the UN Council on Human Rights), but the UN Commission did not consistently condemn the worst countries, so this pressure would be uneven at best.

From time to time, a country may be internationally isolated because of its human rights violations. South Africa is the most famous example. Countries isolated it because of its apartheid system, although not because South Africa violated any human rights treaties, as it carefully refrained from entering into them. South Africa officially abolished apartheid in 1990 and held multiracial elections in 1994, which brought to power a government supported

by the black majority. At the same time, South Africa signed and then ratified the core human rights treaties.

Human rights violations also helped inspire support for NATO's intervention in the Balkans during the 1990s. But the intervention was driven mainly by strategic imperatives—NATO members feared refugee flows and other sources of disruption in Europe—as illustrated by the failure to intercede in Rwanda in 1994 during a significantly worse genocide that could have been stopped with fewer military resources. Economic sanctions and military force are generally not used against human rights violators unless they also pose a threat to other countries—North Korea is an example.

Some commentators argue that NGOs are the major source of pressure to comply with human rights treaties. They argue that NGOs like Human Rights Watch and Amnesty International collect funds from people who care about human rights, and then monitor countries and put public pressure on those that violate human rights. NGOs also provide technical assistance to governments that do not understand the treaties, or do not know how to implement them, including, for example, training programs for police and other government officials. NGOs do not face the strategic constraints of large states. Unlike elected officials in democracies, they are free of the pressures of fickle voters and greedy interest groups. And because they are able to gain the attention of the media, they can embarrass repressive governments and force them to improve their compliance with human rights treaties.

But this argument does not survive scrutiny. Because NGOs lack the power to coerce, they ultimately depend on their ability to persuade governments, voters, businesses, and other people and institutions to take action against those whom the NGOs identify as human rights violators. Occasionally, boycotts and other forms of pressure follow from those efforts, but their overall effectiveness is clearly limited.

5.2. DOMESTIC INCENTIVES TO COMPLY

Scholars have argued that states comply with international treaties because of domestic political pressures. One view is that voters (in democracies) or otherwise influential people (in non-democracies) pressure government officials to comply with human rights law. Another view is that interest groups or domestic NGOs pressure elected officials to comply with human rights law.

These arguments have some superficial plausibility. If domestic support exists for ratification of the human rights treaty, then one would think that domestic support would exist for compliance as well. But there is a certain oddness to the argument that domestic pressure or mobilization explains states' compliance with human rights treaties. If domestic pressure can force a government to respect human rights, then it will do so regardless of whether the government enters into a human rights treaty. If it cannot, then it will fail to do so even if the government enters into a human rights treaty. Normally, domestic political pressure causes a government to act (or fails to cause the government act) through domestic political institutions—electoral institutions, or law, or some such thing. If it succeeds in doing this, what does a treaty add?

There are several possible answers. One is that foreign (usually Western) countries put human rights on the domestic agenda by compelling a government to ratify a human rights treaty. This argument has been made about the Helsinki Accords. In the early 1970s the United States, the European countries, and the Soviet Union sought to stabilize their relationship. To this end, they entered into an agreement under which the West recognized the Soviet Union's sphere of influence over Eastern Europe, and the Soviet Union and the Eastern Bloc countries agreed to respect human rights, including the rights embodied in the ICCPR and other human rights treaties

they had signed. The Soviets resisted the human rights provisions during the negotiations, but finally yielded because they believed that the territorial guarantees were more important and that human rights could be managed. However, the human rights provisions turned out to be a major boost for dissident groups throughout the Eastern Bloc. Those groups set up Helsinki Committees, which monitored and criticized the human rights performance of their countries.

The Helsinki Accords may thus have given dissidents hope. Perhaps they believed that consent to the Helsinki Accords signaled a weakening of repression; perhaps it showed that some government officials believed that rights should be respected after all, and thus would give dissidents a sympathetic hearing, or at least not crack down as hard against political dissent as in the past. Or maybe dissidents believed that by entering into the Helsinki Accords, communist governments had boxed themselves in by signaling to their populations that they cared about rights, which may have made it more politically difficult for them to crack down on dissenters.

But it would be almost 20 years before the communist governments fell and were replaced by less repressive regimes. Nor did repression decline in a measurable sense in the years after Eastern Bloc countries entered into the Helsinki Accords. Eastern Bloc countries consistently received the worst Freedom House ratings, between 5 and 7, for more than a decade *after* the signing of the Helsinki Accords. Modest improvements began in some countries (Poland, Hungary) in the 1980s, while other countries (Bulgaria, Romania, Czechoslovakia) did not improve until later that decade. And it was not until 1990 that Freedom House ranked an Eastern Bloc county as "free," rather than "partly free" or "not free." Thus, if the human rights provisions of the Helsinki Accords changed the behavior of the Eastern Bloc governments, it could not have had a very large effect.

Histories of the Helsinki process make clear that whatever role domestic groups played in improving human rights in the communist countries, the major role was played by foreign countries, and, particularly, the United States. President Carter made human rights a focus of American policy, although he pursued it inconsistently; President Reagan linked human rights to his anti-communism, and used it as a cudgel for embarrassing the Soviet Union, while (like Carter) tolerating human rights violations by American allies. These efforts may have helped erode the image of the Soviet Union around the world, and weakened its influence among left-wing groups that had once been under its spell. More likely, however, the damage had been done by its own actions decades earlier—above all, by Stalin's excesses and their repudiation by Khrushchev.

Another popular view is that domestic litigation can cause countries to comply with human rights treaties. The constitutions of some countries provide that certain human rights treaties have constitutional status, potentially giving rise to litigation, though the extent to which such litigation is effective is poorly understood. In the United States, the government has forbidden courts to directly enforce human rights treaties against the government itself, but these treaties can occasionally have legal effect in indirect fashion. Sometimes, when a statute is ambiguous, a court may interpret the statute so as to avoid violating a treaty. But this happens rarely.

A more significant source of litigation is a law called the Alien Tort Statute, which gives courts jurisdiction over suits brought by aliens who were wrongfully injured by people or institutions in violation of international law, including international human rights law. As interpreted by the courts, the ATS does *not* give Americans the right to sue the U.S. (or any other) government for violating human rights treaties; nor does it give aliens the right to sue the U.S. (or any other) government for violating human rights treaties. Aliens can sue government officials (albeit subject to numerous conditions) for, say,

torturing them; but as a practical matter, they cannot obtain damages unless those government officials own judicially attachable property in the United States, and they almost never do. The most successful lawsuits have targeted corporations that were complicit in the human rights violations of foreign governments—for example, an oil pipeline company that allegedly received protection from government troops which committed atrocities. But even these lawsuits usually fail because of the difficulty of showing complicity and disagreement as to whether a corporation can violate international law in the first place. Recently, the Supreme Court all but shut the door on such cases, based in part on a worry that ATS litigation offends foreign countries because it can influence how foreign companies behave in those countries, thus interfering with domestic regulation.[1]

5.3. AMBIGUITY AND INCONSISTENCY

There is another perspective on compliance, which is that the problem is not so much that states violate treaty terms but that the treaties do not create any meaningful obligations. This is so because the treaties are vague; they conflict with each other; and they conflict with other rules of international law. When legal rules are vague, one can easily argue that one complied with them even when one's conduct does not seem to advance the underlying purpose of the rules, which people will disagree about. When legal rules conflict, a person who is subject to them cannot be blamed for failing to comply with any one of them; at best, one can complain that the person did not act in good faith to resolve the conflict in the spirit of the laws, to "balance" the interests that are embodied in different human rights. Thus, a state that attempts to comply in good faith with the treaties would find itself thrown back on its own judgment as to how to advance the public good.

We already identified the vagueness problem in Chapter 2. For example, Article 19(2) of the ICCPR guarantees freedom of expression but then provides that states may curtail that right in the interest of morality and public order. None of these terms are defined. Many countries that have ratified the ICCPR prosecute people who criticize the government. While in the United States such prosecutions would violate the First Amendment, the governments in other countries argue that criticism of the government causes civil strife, disrespect for authority, or violation of moral values. European governments have jailed people who have engaged in hate speech against Muslims, Jews, and other minorities. Countless treaty terms are similarly vague.

The vagueness is compounded by internal inconsistencies in many human rights treaties. In addition to creating a right to work, the ICESCR creates rights to health care, education, and social welfare. States that seek to satisfy these rights must make tradeoffs. Because states have limited resources, money used to provide health care comes from education, or vice versa. The treaty provides no guidance as to how resources should be allocated among programs that advance different treaty rights.

Consider, for example, a country that has a budget of $10 billion. The government spends $5 billion on the military, $2 billion on health care, $2 billion on education, and $1 billion on welfare programs. Many citizens are poor, poorly educated, and in ill health. Does the country comply with the ICESCR? Should the government spend less money on the military—but doesn't that depend on whether it faces a legitimate foreign threat or needs the military for domestic order? Maybe the ICESCR requires the government to raise taxes and spend more money on health, education, and welfare. But how high should the taxes be raised?; what if higher taxes would reduce revenue because of tax evasion or negative effects on economic growth; or what if the public will not support higher taxes?

Should more money be spent on welfare and less on education and health care?

One could, in theory, solve the problem by stipulating that the rights to education and health care are "minimal" rights. But the treaties do not say this, it is not clear what "minimal" means, and if the rights were set at a level that any state could comply with, then the level would have to be so low as to be meaningless for the vast majority of states.

The Committee on Economic, Social and Cultural Rights initially recognized that some countries were too poor to satisfy all these rights, and ruled that those countries would nonetheless be in compliance with the ICESCR as long as they used best efforts to meet their obligations. Subsequently, the Committee ruled that all countries must supply a "minimum core" of those goods and services covered by the rights. But states ignored this interpretation. The South African Constitutional Court rejected the "minimum core obligation concept,"[2] pointing out that a treaty cannot require a state to do the impossible, and concluding that whether a country violates economic rights under the ICESCR depends "on such factors as the economic and social history of a country, its current circumstances, the prevalence of poverty, the availability of land, the degree of unemployment, and the fact of whether an individual lived in an urban or rural environment."[3] The Committee itself said:

> Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.. . . By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.[4]

The extent to which resources constraints modify the duty is not explained.

There are, to be sure, countries that incorporate economic rights into their constitutions. But courts rarely try to enforce those rights, noting that there is no principled way to do so. How to allocate resources among the various needs and demands is a political question, or at least not one that lends itself to judicial involvement. Courts instead treat social and economic constitutional rights as judicially unenforceable "aspirational" rights to be implemented by the government if it chooses. In a few countries, such as Brazil, courts have taken a more aggressive role, but with disappointing results. According to one scholar, the decision to provide judicial enforcement for the right to health in Brazil has resulted in thousands of cases by people claiming a right to high-cost medicines that the government has refused to supply on cost-effectiveness grounds, many of which are not even imported into the Brazilian market. Thus, recognition of a right to health led to cases brought by the relatively wealthy, not cases that have sought greater access to health care for the poor, no doubt because the poor do not have the resources to bring lawsuits.[5]

These problems with so-called positive or social rights are well known. Less well known is that the same problem exists for the "negative rights" in the ICCPR, such as the right not to be tortured. One might think that a state could comply with the prohibition on torture at no cost by refraining from torture. But it turns out that local police officials frequently engage in torture even though they are not authorized to do so. To stop torture, then, the government must not only enact laws, but must also invest resources in investigating allegations of torture, punishing torturers, and purging and retraining law enforcement. Thus, the key question for a state is how much of its resources it must devote to countering torture at the expense of building health clinics and public schools. The treaties

provide no guidance as to how resources should be allocated. If there is no way to distinguish positive and negative rights, and we are skeptical about whether judges can enforce positive rights, then we ought to be skeptical about whether they can enforce negative rights as well. The real question is not the nature of the rights but the extent to which we can trust judges or other enforcing agents to distribute resources between competing rights.

There is yet another problem. Although not all treaty terms are vague, the actual legal effect of even specific norms is often ambiguous because they conflict with terms in other treaties as well as with broader norms of public international law. Consider sections 3 and 4 of Article 9 of the ICCPR:

> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . .
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Whatever else these rights require, they do clearly prohibit a state from detaining people without charging them. Thus, many commentators accused the United States of violating the human rights of Al Qaeda and Taliban suspects by detaining them without charging them and taking them before a judge for a trial. However, the United States argued in response that the ICCPR does not apply to wartime conditions: the Geneva Conventions and other laws of war, which do not require the involvement of courts for detention, are *lex specialis*, and thus override human rights law.

The principle of lex specialis is well established in international (and domestic) law. Different sources of law conflict, and a principle is needed to resolve such conflicts. Many human rights advocates believe that the human rights treaties provide a moral minimum that other bodies of law can never supersede, much like the rights in the U.S. Bill of Rights. However, the human rights treaties themselves do not say this, nor does any other authoritative source of international law. There is no clear resolution of the dispute between the United States and its critics.

Another major challenge to conventional understandings of human rights comes from the "right to development," which has been strongly advocated by China and has been embodied in various legal instruments though not a formal treaty. According to China, the right to development is essentially a right *not* to comply with human rights norms that interfere with the ability of poor countries to grow economically and eliminate poverty. Thus, it is open to China to argue that if it granted the political rights in the ICCPR to its citizens, then political turmoil would result, including possibly civil war, with the result that economic growth would stop and poverty would advance. The argument is not a crazy one. China's authoritarian government has eliminated poverty for hundreds of millions of people over the last 30 years. In light of the lack of democratic traditions in China, and the extraordinary political turmoil that existed in China until fairly recently, there is a risk that if China were to comply with the ICCPR, civil war rather than democracy would result. Of course, this has always been the argument of authoritarians. The point is that the argument is not foreclosed by international law, and even democratic or semi-democratic governments have embraced the right to development.

The right to development puts in stark relief another problem for human rights, which is the proliferation or *hypertrophy of human rights*. The original idea of human rights is that they would protect

only the most significant human interests—in being alive, being free of pain, being free to speak, and so on. But the number of internationally recognized rights has increased exponentially. Some of them—the right to "periodic holidays with pay," say—have been met with skepticism even by people who support the human rights project. The mockery may reflect a certain nervousness. It can't be the case that all human interests are protected by international law, but where to draw the line? Some scholars have tried to respond by creating a hierarchy of rights, arguing that while all the human rights are rights, some are more important, like the right not to be tortured. But this view has been attacked and has had no practical consequences.

A review of the major international human rights treaties reveals that treaties purport to guarantee more than 300 separate human rights, ranging from the right to inherit, to the right to have an interpreter in official proceedings, to the right to freedom of movement, to the right to leisure, to the right to privacy, to the right to join trade unions. The list, which can be found in the Appendix, goes on and on. The number of human rights increased from 20 in 1975, to 100 in 1980, to 175 in 1990, to 300 today.

The hypertrophy of human rights highlights the problem of tradeoffs. If there were only a few rights—for example, the right not to be tortured and the right not to be arbitrarily detained—it would seem simple enough to determine whether states comply with them. But when there are hundreds of rights, states must make complex tradeoffs. States have limited resources—understood broadly to include funds, political will, and institutional capacity—and must allocate them to different projects. A project to reduce torture like a training program for local police necessarily uses funds that could be used to protect religious freedom or increase schooling. The dilemma for human rights enforcers is that they cannot demand that states comply with all rights perfectly, but if they do not, then they

have no basis for criticizing a country's decision to allocate more resources to satisfy one rather than another.

The hypertrophy of human rights results from fundamental disagreement about the public good. The problem is that if significant resources are already devoted to reducing torture, and the marginal dollar has little effect because torture is entrenched in society, then the marginal dollar may be more wisely spent on reducing pollution or strengthening the military or improving the quality of the roads. To justify these allocations of the marginal dollar in the language of human rights, governments must insist the people have a human right not only to be free of torture, but to be free of pollution, foreign threats, or low-quality roads (or more broadly, poor infrastructure that blocks economic development). This is why human rights keep proliferating and in this way render each other meaningless for constraining behavior. The human rights treaties provide no guidance for allocating that dollar, and so instead governments must fall back on making tradeoffs based on their conception of the public good. Human rights treaties can be no more than vague encouragement for governments to govern well—but it is hard to believe that governments already inclined to govern well or governments not so inclined, would change their behavior as a consequence of such encouragement. Because the treaties send conflicting signals and do not explain how one is to make tradeoffs, they could not provide guidance even to a government that was motivated to take them seriously.

This problem is related to a much discussed issue in the literature as to whether human rights should be limited so as to protect a narrow set of human interests (like the interest in not being tortured) or should include a much larger set of interests. Michael Ignatieff, for example, argues that human rights should be understood to consist of a limited set of negative rights sufficient to protect people from "violence and abuse."[6] He has been taken to task by critics who

have pointed out the absence of any normative basis for limiting rights in this way, which simply endorses one controversial strand of the Western tradition of rights. Whoever is right (and I believe the critics are right), the existing human rights regime is vastly more comprehensive. It is not limited to prohibiting the worst violations of negative rights, or to negative rights at all; its inclusion of positive rights of all kinds ensures that countries can justify violations of negative rights as necessary tradeoffs for reducing poverty and securing other goods for their populations. Protecting people from "violence and abuse" means protecting them from starvation, insecurity, and illiteracy, all of which are springboards for private violence directed against innocent people. Securing the negative liberties is neither a necessary nor sufficient condition for achieving those ends. Human rights cannot be limited to negative rights because negative rights are not the most important, or the only ones that count.

The hypertrophy of human rights—the proliferation of human rights treaties, of interpretations of those treaties that find new human rights, of claims about the existence of still more human rights in customary international law—does *not* represent a triumph of human rights, and the erosion of sovereignty, as is so often claimed. It represents more nearly the opposite. The more human rights there are, and thus the greater the variety of human interests that are protected, the more that the human rights system collapses into an undifferentiated welfarism in which all interests must be taken seriously for the sake of the public good.

Ambiguity matters because countries that are not bound by specific legal rules can do nearly anything they want without violating the law. Countries and groups that try to enforce human rights law must select among the rights and enforce the ones that they care the most about. The U.S. State Department, for example, focuses on the major ICCPR rights, and ignores most economic, social, and cultural rights. Similarly, NGOs focus on whatever rights they care about.

Human Rights Watch disregards economic, social, and cultural rights not because they are intrinsically unimportant, but because HRW can provoke a greater public reaction when it identifies specific abusers and victims. According to Kenneth Roth, the executive director of HRW, it is hard to blame anyone in particular for poverty, but it is possible to blame government officials for torture and disappearances. Roth is making a practical argument about public psychology, based on his experience with when HRW reports strike a chord with the public and when they do not—a point that is really about what works politically and what does not work politically, as opposed to what the law requires. To the extent HRW successfully pressures governments, this just means that those governments may transfer resources from poverty prevention to torture prevention. Whether or not this is a good use of resources seems to be a matter of institutional indifference to HRW.

5.4. WHY INTERNATIONAL ORGANIZATIONS ARE NO SOLUTION

Domestic legal systems contain numerous ambiguous and conflicting laws, and yet these laws are often effective in changing behavior. The major reason that ambiguous laws exist in the first place is that the legislature finds it difficult to anticipate future events that it seeks to regulate. Rather than provide detailed rules that govern every possible future contingency, it provides vague guidelines to regulatory agencies or courts, and expects them to issue more precise rules as events unfold, and to reconcile legislative enactments that are in tension with each other.

An example from American law is the Sherman Antitrust Act, a short statute that prohibits people from engaging in "restraint of trade" and from "monopoliz[ing]." Congress left these crucial terms

undefined; over decades, courts and regulatory agencies have created thousands of rules that fill in their meaning. These rules distinguish, for example, ordinary contracts, which by their nature restrain trade, and contracts among competitors to fix prices. Although most statutes are more detailed than the Sherman Act, in the modern regulatory state huge swaths of lawmaking are left to regulatory agencies and courts.

It should be clear that, in principle, international courts or regulatory agencies could play a similar role in giving content to the human rights that are incorporated in human rights treaties and resolving conflicts between them. Indeed, one of the main purposes of setting up the various international human rights organizations—the treaty committees, the UN Commission and Council, the OHCHR—was to provide a mechanism for specifying the content of international human rights. But international human rights laws are as vague today as they were when they were drafted. None of these institutions has managed to issue authoritative interpretations, as domestic courts have for domestic law. Why not?

To answer this question, let's begin with the ECHR, which is the world's most successful international human rights institution. In Chapter 2, I discussed Hirst v. United Kingdom, the case in which the ECHR held that depriving prisoners of the right to vote may violate their rights under the European Convention of Human Rights. The European Convention nowhere says that prisoners have the right to vote; it instead refers generally to the right to the franchise and to political participation. The ECHR's holding must have thus been a surprise to the UK; the holding certainly could not have been anticipated when the UK ratified the European Convention.

This type of expansive interpretation is not uncommon among domestic constitutional courts. The U.S. Supreme Court's interpretations of the First Amendment as well as other vague provisions in the Constitution—rights to "due process," for example—similarly

have involved rulings that could not have been anticipated by the drafters but that reflect evolving norms as well as the ideological propensities of the justices. But the difference between the Supreme Court and the ECHR is that the Supreme Court is an American institution, staffed by American justices, who are appointed by American politicians. From the perspective of the UK or any of its other members, the ECHR is a foreign institution, staffed mostly by foreigners, who are appointed mostly by foreign politicians. While Americans feel that they can trust the Supreme Court to rule in the public interest, it is harder for the British to know whether the ECHR will rule in the UK's interest. The Supreme Court justices understand American cultural and political norms and live in the country to which their rulings apply. For the non-British members of the ECHR, the UK is a foreign country where people do things differently. Thus, American Supreme Court justices have more legitimacy for Americans than the ECHR judges have for the British.

This is not to say that the ECHR cannot succeed. But it is crucial to understand that the ECHR has done as well as it has because it operates in a regional setting in which there is a moral and political convergence among most member states. The ECHR developed a doctrine known as the "margin of appreciation," according to which it provides some but not complete deference to laws of the member states. For example, in the Handyside case, the ECHR turned away a challenge to a prosecution under the UK Obscene Publications Act of a publisher who tried to publish a sex education book for children. In explaining why the prosecution did not violate the freedom of expression article of the European Convention, the Court noted:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion

> on the exact content of these requirements as well as the "necessity" of a "restriction" or "penalty" intended to meet them.[7]

The Court concluded that the relevant government enjoys a margin of appreciation, albeit not an unlimited one. One reason it gave for finding the margin of appreciation was that the domestic laws of the member states were not consistent, and hence that those states lacked "a uniform European conception of morals." Over the years, it has become clear that the margin of appreciation narrows when most states agree that some activity violates human rights, so that the Court's function is to mop up outliers, much as the U.S. Supreme Court does in its Eighth Amendment jurisprudence, where the "unusual" in "cruel and unusual" is defined by reference to the practice of most (U.S.) states.

The margin of appreciation is thus a device for intervening when member states largely agree on an outcome, and for refraining from intervention otherwise. Accordingly, it enables the Court to track majority or, indeed, supermajority, views, and thus retain its political support. The court can actively rule against outliers because most Europeans share a moral outlook.

The margin of appreciation has been rejected by international tribunals despite calls for its application internationally, where the need to respect national differences is significantly more pressing than in Europe. There is a good reason why international tribunals reject the margin of appreciation: if they applied it the way the ECHR did, it would deprive those tribunals of the power to condemn more than a handful of countries, those that could be identified as true outliers in a world of extreme heterogeneity.

Consider, for example, the ECHR's jurisprudence on the rights of gays and lesbians. The ECHR ruled that the margin of appreciation does not justify Russia's refusal to permit a gay pride march in Moscow, but does allow member states to refuse to recognize

same-sex marriage. The different outcomes reflect different levels of consensus. Most member states recognize the right to assembly, but they disagree about same-sex marriage. With 47 member states, including Poland, Russia, and Turkey, no consensus will be reached anytime soon. And yet if the entire world belonged to the ECHR, it would be hard to say that the right to freedom of assembly would encompass gay pride marches, as no such marches are permitted in many countries.

When one moves from the regional ECHR to truly international human rights institutions, like the human rights committees and the Human Rights Council, the distance between the national and cultural character of the body and the national and cultural character of the citizens of a particular member state becomes even more vast. A human rights committee, for example, is staffed with representatives from not just the European countries, but also from Africa, South America, Asia, and North America. This body is much more foreign from the standpoint of, say, the British, than the ECHR is. After all, the ECHR is dominated by people from places like Germany, France, and the Netherlands—where Western-style human rights are entrenched. The human rights committee is a far more diverse place, which means that the average member will have more difficulty understanding or sympathizing with the UK perspective, and will for that reason also be regarded with even more suspicion by the British than the ECHR is. That is why the committees are starved of resources and frequently ignored.

The defamation of religion controversy illustrates these themes. In 1999 the Organization of the Islamic Conference, a group of (currently) 56 Muslim countries, introduced a resolution at a meeting of the Human Rights Commission that was entitled "Defamation of Islam" and called on the UN to monitor "attacks against Islam and attempts to defame it." The OIC believed that the resolution was necessary to counter what it saw as anti-Islamic sentiment in

the West. Western diplomats were able to change the name of the resolution to "Defamation of Religion," but because figures in other major religions have not argued that criticism of those religions should be banned, defamation of religion continued to be associated with Islam. The Commission approved the resolution, and additional resolutions were approved in subsequent years, including after the 9/11 attack, and after a Danish newspaper published cartoons of Mohammed in 2005. In that year, the UN General Assembly also passed a resolution condemning defamation of religion.

Below I list the countries that voted in favor of or against, or abstained with respect to, two resolutions before the UN Commission (in 2001) and the UN Council (in 2010). The 2001 resolution was passed by a vote of 25 to 18, with 9 abstentions. The 2010 resolution was passed by a vote of 20 to 17, with 8 abstentions.

2001 Resolution

In favor: Algeria, Argentina, Brazil, Cameroon, China, Colombia, Costa Rica, Cuba, Ecuador, Indonesia, Kenya, Libyan Arab Jamahiriya, Madagascar, Malaysia, Mauritius, Mexico, Niger, Pakistan, Peru, Qatar, Russia, Saudi Arabia, Senegal, Syrian Arab Republic, Thailand, Uruguay, Venezuela, Vietnam.

Against: Belgium, Canada, Czech Republic, France, Germany, Italy, Japan, Latvia, Norway, Poland, Portugal, Romania, Spain, United Kingdom, United States of America.

Abstaining: Burundi, Guatemala, India, Liberia, Nigeria, Republic of Korea, South Africa, Swaziland, Zambia.

2010 Resolution

In favor: Bahrain, Bangladesh, Bolivia, Burkina Faso, China, Cuba, Djibouti, Egypt, Indonesia, Jordan, Kyrgyzstan, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russia, Saudi Arabia, Senegal, South Africa

Against: Argentina, Belgium, Chile, France, Hungary, Italy, Mexico, Netherlands, Norway, South Korea, Slovakia, Slovenia, Ukraine, United Kingdom, United States of America, Uruguay, Zambia.

Abstaining: Bosnia and Herzegovina, Brazil, Cameroon, Ghana, India, Japan, Madagascar, Mauritius.

A glance confirms that predominantly Western democracies voted against the defamation of religion resolutions, while the rest of the world tended to support the resolutions.

The OIC and its supporters argued that criticism of Islam (and other religions) violated several provisions of the human rights treaties. Article 18 of the Universal Declaration provides that "everyone has the right to freedom of thought, conscience and religion." Article 19 of the ICCPR provides that freedom of expression may "be subject to certain restrictions [including] for the respect of the rights or reputations of others." Article 20 of the same treaty provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The OIC argued that anti-Islamic advocacy, including disregard of the Muslim taboo against depictions of the prophet, amounts to interference with the practice of the faith and incitement to discrimination.

Critics of defamation of religion argue that treaty provisions give pride of place to freedom of expression and permit censorship under only the narrowest of conditions, but the fact is that many Western countries other than the United States practice censorship—for example, of Nazi-related advocacy and various types of hostile speech directed at religious and sexual minorities. To the extent that the UN human rights bodies are delegated the power to interpret and develop human rights norms, it would seem that by now Western countries would be bound by the defamation of religion theory.

Except that they are not. Western countries reject defamation of religion, and thus they reject the authority of the human rights bodies to impose this norm on them. And taking the Western perspective (which most readers of this book will share), it is easy to understand why the United States, Netherlands, and France would refuse to delegate legal authority to an international body that operates by majority rule. Why should we in the West accept norms governing speech based on theological and political imperatives that we do not agree with? And so it should also be easy to understand why Saudi Arabia, China, and Indonesia would not want to delegate legal authority to an international body where they, too, could be outvoted on issues that matter to them. Just as Westerners refuse to bow to non-Western norms they disagree with, non-Westerners refuse to bow to Western norms they disagree with. And why shouldn't they? Why should countries that recognize norms that most or nearly all countries refuse to recognize be forced to abandon their own norms and recognize those that more widely prevail? The margin of appreciation, if applied consistently, would block the emergence of new, more liberal norms that shock the orthodoxy, as well as non-liberal norms that seem retrogressive.

Another example is also instructive. In the 1990s various international bodies (including the British Privy Council and the Human Rights Committee) held that certain procedures relating to capital punishment in several Caribbean nations violated the ICCPR. The decisions were unpopular, and the governments responded by withdrawing from treaties and other instruments that subjected them to the jurisdiction of international courts.[8] They did not withdraw from the ICCPR itself, which illustrates that governments can live with treaties that contain norms they can explain away or ignore. They cannot live with judicial bodies that issue orders that they do not want to obey, and so they keep international bodies weak, do not set them up, or, as in this example, withdraw from them. The

events in the Caribbean also illustrate the weakness of the ICCPR, and by extension all human rights treaties, in constraining states when they are not implemented by independent judicial bodies. Governments appear to incur political costs from defying the orders of international judicial bodies whose jurisdiction they agree to, but not (or less so) from defying their treaty obligations when there is no judicial body to interpret and apply them.

An international human rights body is an agent of the nations that establish it. The nations want their agent to serve certain purposes. Ideally, the agent would encourage or even compel the parties of the treaty to comply with the treaty and end their human rights violations. The nations thus should instruct the agent to monitor the states, and use whatever means seem appropriate to bring them in line. But this has not happened with the human rights bodies. The human rights treaties papered over significant differences by using vague language and by piling on rights. When it comes time for implementation, the human rights agencies are put in the position of giving content to those provisions. Only then does it become clear that the level of agreement is shallow. Agencies must then take a position and risk disagreement and repudiation from states whose views they reject.

Countries must have understood these problems from the beginning—for only that explains why they gave the human rights bodies so little power compared to the power they give to their domestic courts. In particular, the human rights violating states have worked again and again to ensure that the human rights bodies cannot condemn specific countries for specific practices, or at least can do so only in limited circumstances, and in such a way as to have no legal or political effect. And when they find themselves subject to legally binding orders from international courts, they can always withdraw from jurisdiction, as the Caribbean countries did.

Thus, while countries recognized from the beginning of the modern era of human rights that international organizations were necessary for implementing human rights treaties—for giving vague terms content, resolving conflicts, monitoring countries, and pressuring them to comply with the treaties—countries also realized that agencies that possessed enough power to serve these functions would pose a threat to their interests. The compromise has been a system of agencies that are given no formal legal powers, and are too weak, underfunded, and dependent on avoiding offense to provide an effective system of enforcement. Indeed, while the inadequate resources of the committees are well known, the response of states has been not to strengthen the institutional system but to keep adding human rights treaties with new substantive obligations, which further overwhelm the infrastructure.

5.5. A FAILURE OF WILL

I have argued that the reason human rights law has failed to improve respect for human rights is that the law is weak—the treaties are vague and inconsistent, and the institutions are balkanized, starved of resources, and unequipped with legal authority. Why have states failed to create stronger law and more robust institutions? Below I consider two possible answers.

People don't care (much) about the human rights of foreigners. Many states have authoritarian governments or traditions that lack human rights norms; in these states, governments are under little pressure domestically to improve their enforcement of human rights. These states have no incentive to exert pressure on foreign countries to improve their human rights, and rarely do. Consider, for example, China, Russia, and Saudi Arabia. China and Russia do not take much interest in the well-being of foreigners. Saudi Arabia does, but by

financing madrassas in foreign countries that teach fundamentalist Islamic doctrine, not human rights. Many other states—much of the vast developing world—have more democratic governments and more open societies, and respect some human rights internally. But their populations are focused inward, on the difficult process of state-building and development, and so do not exert much pressure on their governments to improve human rights elsewhere in the world.

That leaves the West—the United States, the European countries, Canada, Australia, and a few others. The populations of these countries are wealthy and mostly liberal. Their governments provide foreign aid, and many private citizens devote time and money to help foreigners in foreign countries. But these efforts are minimal. One study suggests that if the amount of foreign aid represents how much Americans care about foreigners, then Americans think of a foreign life in a poor country as 1/2,000 as valuable as an American life.[9] This doesn't mean that people lack altruism; it means that their altruism is mostly confined to co-nationals.

Thus, populations in democracies put little pressure on their governments to give aid to foreigners, either in the form of development projects or human rights enforcement, and governments in democracies must respect the wishes of voters. Indeed, most Western efforts to provide aid and promote human rights are driven by instrumental concerns about global stability, or efforts to advance geopolitical interests. But supporting human rights does not always achieve these goals. They are better achieved by cooperating with authoritarian countries like China, Russia, and Saudi Arabia.

The EU has been effective at encouraging countries at the European periphery to improve human rights by dangling the carrot of EU membership, but it is not potent enough to exert pressure on Russia, China, and other countries that are powerful or far away from the European continent. The current resurgence of

authoritarianism in Hungary provides an important test case of the ability of the European liberal democracies to compel foreign countries to abide by human rights norms. If Europeans cannot even compel a small, financially dependent country in their midst to comply with human rights, then one must infer that they do not care enough about human rights to devote substantial resources to them. The point is not that Western states discount human rights; it is that they balance their interest in promoting human rights with their interest in political stability and economic growth, and casual as well as rigorous empiricism suggests that the interest in promoting human rights receives minimal weight in the balance. Trade provides a useful counterpoint. States care enough about their economic interests that they put a great deal of pressure on other countries to abide by trade treaties.

Thus, while states are willing to enter into human rights treaties and hope that they will exert positive pressure on human rights violators, they are not willing to put significant resources into enforcing those treaties. More to the point, they tolerate the treaty regime because the ambiguities and conflicts in and among the treaties provide countries with plenty of freedom of action—permitting Western countries both to restrict human rights domestically when necessary, and to refrain, without appearing to repudiate their treaty obligations, from putting too much pressure on foreign rights violators. The key move was to enter into these treaties without providing for strong international organizations to enforce them, so that—unlike in domestic law—countries can work around the treaties without defying specific legal orders.

Enforcement is too hard. Coercing a foreign state is not easy. Consider an enforcing state that seeks to cause a target state to stop torturing people. The enforcing state could threaten to cut off trade, terminate diplomatic relations, refuse to grant visas to visitors from the target state, freeze the funds of the target state, issue arrest

warrants for the leaders of the target state, launch a military invasion, and so on. All of these activities are highly costly. If the enforcing state cuts off trade, then it no longer benefits from trade, and if the target increases trade with other countries, it is the enforcer rather than the target that ends up isolated. If it cuts off diplomatic relations, then it will become harder to cooperate with the state on issues of mutual interest. The target state may have no funds in the enforcing state; and if it does, then the enforcing state that freezes funds too often may cause other states to withdraw funds, making it harder to do business.

Worse for the enforcing state, its enforcement efforts may drive the target state into the arms of rivals and enemies, who provide the diplomatic support and cooperative benefits that the enforcing state tries to deprive it of. Indeed, even friendly countries may free ride on the enforcing states' efforts, maintaining their own cooperative relationships with the target state while the enforcing state bears all the burdens. The prospect of free riding will discourage any state from taking the role of enforcer in the first place. And as we saw earlier, efforts to overcome collective action problems through the construction of international institutions have foundered because the collective action problem reemerges within the operation of those institutions.

The people-don't-care and enforcement-is-too-hard problems are connected. If people cared more, then they would bear the costs of enforcement; and if enforcement were cheap and easy, then people would bear the cost of enforcement even if they cared only a little. But they don't care much and enforcement is hard, which is why serious efforts to enforce human rights are extremely rare, and take place only in response to the worst atrocities such as genocide, and, as we saw in Rwanda, not always then.

Still, these two explanations are not entirely satisfactory. For one thing, they assume that people do not care very much about

foreigners, but then another question arises—why not? People are willing to make sacrifices for co-nationals even though they never meet them; why shouldn't this altruism extend beyond borders? The same two explanations could be used to show why domestic constitutional enforcement is not possible; but in fact, it is possible. We must continue to look for explanations.

5.6. THE PROBLEM OF EPISTEMIC UNCERTAINTY

I now turn to a deeper problem with international human rights law—the problem of epistemic uncertainty—which I will try to explain by drawing on a domestic analogy: the problems with judicial enforcement of constitutional rights. This might seem to be an odd approach. Judicial enforcement of constitutional rights, represented most fully by the U.S. system, is for some people the inspiration for international human rights law. However, I am going to argue the other way around: that when one thinks carefully about judicial enforcement of constitutional rights, it becomes easier to see what is wrong with international human rights law.

A simplified picture of U.S. constitutional law begins with the idea that Americans enjoy certain "rights." These rights are recognized by the Constitution, either directly in the text, or indirectly in judicial interpretations, or both. The rights protect important human interests. When the government makes policy, it must take those interests into account. It may be that in some cases, the rights are "absolute," in the sense that the government may never disregard those interests. For example, perhaps the government is never permitted to impose a cruel and unusual punishment on someone. In most cases, however, we think that rights are not "absolute." The interest in freedom of expression is very strong, so the government may limit that freedom only for good reasons (for example, to protect

someone from fraud or defamation). Courts do not normally say that the government may violate the right if there are strong interests on the other side; instead, the right is defined as protected unless overridden by compelling factors on the other side.

A crucial feature of U.S. constitutional law is that the judiciary is charged with the task of ensuring that the government respect the rights in the Constitution. The idea that (unelected) judges may strike down laws that violate the Constitution sits uneasily with democratic commitments, and theorists have labored to reconcile these two ideals. One view is that democracy works only as long as certain rules are respected, and the judge's task is to enforce those rules. For example, judges should prevent elected officials from entrenching their authority by abolishing elections, restricting who can vote, or prohibiting criticism of their actions. Another view is that democracy sometimes works too well, and the majority oppresses the minority. The task of the judges is to protect the rights of the minority to enjoy freedom, property, and other basic human goods even if they are repeatedly outvoted on issues of public policy. A third view is that constitutional norms reflect strong political commitments that should prevail over normal politics, because people take constitutional deliberation and constitution-making more seriously than ordinary politics.

It is easy to see how this thinking could influence the international human rights movement. In some ways, the argument for international human rights is even more compelling than the argument for domestically enforced constitutional rights. The reason is that the international human rights regime applies to non-democratic states as well as democratic states and it may seem more compelling to insist that a dictator not violate people's rights than to say that a democracy may not violate people's rights. But in other ways, the analogy breaks down. In the United States, courts are regarded (rightly or wrongly) as neutral arbiters, and so can be

trusted to enforce rights fairly (on this, I will say more below). The international human rights regime depends mainly on enforcement by states, which are the same entities subject to the rights regime and for that reason may not be trusted with a task that requires neutrality and fairness.

Rather than press this point, however, I want to suggest why it is that even if the constitutional analogy is taken seriously, it provides weak support for the human rights system, and indeed does the opposite—points out flaws in the premises of the human rights system.

The first problem with constitutional adjudication is epistemic. Policy is complicated, and judicial review requires courts to evaluate the policy rationales for statutes. To take a recent case, in District of Columbia v. Heller,[10] the Supreme Court was required to decide whether a gun control law violated the Second Amendment right to bear arms. The Court faced two closely connected questions: how to define the right (for example, does it extend to machine guns?) and how to evaluate statutes that appear in tension with the right (for example, does a registration statute put too much of a burden on the gun owner?). To answer these questions, the Court must make a judgment about how dangerous certain weapons are, and how burdensome the various legal obligations are. These are not questions one can answer by interpreting legal materials. They are empirical questions that must be answered (ideally) by analyzing data, or (more usually) by consulting anecdotes, common experience, intuition, and the like.

Are courts in a good position to answer these questions? They can certainly demand that litigants provide the best evidence available. But ultimately judges are in no better position to evaluate the data than legislators are, and probably worse—as legislators equip themselves with expert staffs who specialize in different policy domains. An even greater problem is that most judges lack any political sense.

Federal judges are appointed and serve for life, and so are not subject to electoral pressure. Most have little or no political experience. This ensures that they are not buffeted by the political winds, but also that they lack a strong sense of what people really care about. Constitutional doctrine typically turns on, among other things, the strength of a government's interest in some outcome, and the government's interest is generally derived from the public interest. If people care deeply about crime, then gun control laws may well serve their interests even if they have only marginal effects on the level of crime. If people care deeply about self-defense and hunting, then gun control laws that have marginal effects on crime will not serve their interests. The license to carry a concealed weapon might seem justified in one place where traditions ensure that people use guns responsibly, but not in another place where too many guns already flood the streets. Judges are in a weak position to make these determinations.

Indeed, it is rarely appreciated in legal scholarship just how serious this problem is. Judges must contend with the fact that people's political interests and preferences are private information, which they have no incentive to disclose truthfully in court, where advocates exaggerate in order to advance their clients' claims. Faced with noise from both directions, judges have little choice but to fall back on their own experience, supplemented with whatever data might exist. By contrast, elections compel people to reveal some private information by punishing them with an adverse outcome if they fail to do so. Politicians seek reelection and so have a strong incentive to learn from their constituents what they care about and how much, and to embody those views into policy. And while many factors—including financial donations to campaigns—may distort their incentives, politicians' fates are still tied more closely to the interests of the people than are those of judges.

This argument carries over to human rights. Even if governments tried to comply in good faith with human rights treaties, it does not follow that human rights outcomes would improve. Governance is a highly complex activity that is vulnerable to the law of unintended consequences. A government that stops using harsh methods of repression may be unable to stop an insurgency, which develops into a civil war, during which people suffer significantly more than they did when the government used harsh methods of repression. Many people will suffer at the hands of insurgents, and although the harm inflicted on them will not be classified as a violation of the human rights treaties because the government did not inflict the harm, the net outcome for people is just as bad, or worse. Some civil wars last decades and kill millions.

But even when such extreme outcomes do not result, efforts to comply with human rights norms can have perverse effects. Governments that abolish the death penalty may end up spurring the police to engage in extrajudicial killings so that they can keep order. A government that woodenly attempts to comply with the right to work may end up causing inflation or other disruptions to the economy that produce long-term harms worse than the joblessness that provoked the intervention.

Governments do not need human rights treaties to tell them to build medical clinics and schools. One might argue that they do not build enough clinics and schools, or insufficiently good clinics or schools, but how is one to know? Perhaps mortality is high and literacy is low, but high or low compared to what? Many countries are too poor to build many clinics and schools, and other countries have other legitimate priorities. To finance more buildings, one needs more money, which means raising taxes, taking on debt, or cutting spending in some other area. The public may be unwilling to pay higher taxes, or it may be impossible to collect more taxes given the existing enforcement system. It may be

difficult or impossible or unwise to take on more debt. Even if the government collects more money, it may be more wisely spent on police, military protection, environmental cleanups, development projects, and so on.

The analogy to judicial review of domestic constitutions is even weaker because no international institution plays the role of the domestic courts. States enforce human rights treaties against states, which means that one state or a small group of states (typically, the United States and some European states) must decide how to interpret human rights treaties in the course of condemning (or not) the practices of another state. Take the issue of female genital cutting. It may be possible to apply human rights provisions "neutrally" to this practice, but it is difficult for Western countries to evaluate this practice in a dispassionate way because it violates deeply rooted Western norms. It would be even harder for these countries to predict how a prohibition on this practice would play out over time—whether it would, for example, lead to political turmoil that causes more harm than good. Finally, unlike courts, enforcing states will take into account domestic and international political pressures, and so will likely enforce the norms in a way that responds to those pressures rather than in a way that respects the law. It is, after all, distrust of the motives of governments that provides the basis for judicial review in the first place. And so if we distrust governments in the context of domestic constitutional litigation, we should distrust governments of enforcing states that claim to be enforcing human rights treaties as much as the governments of target states that are said to violate them.

If all this is true, then how is it possible for domestic courts to function effectively? After all, as I noted earlier, domestic courts are called on to make policy tradeoffs of a highly complex nature. If (domestic) constitutional law can work in this way, why can't international human rights law as well?

There are several reasons. First, courts (at least in Western countries) are reasonably independent institutions, and there are strong norms and expectations that judges decide cases neutrally. Even if they make errors, the errors will not systematically favor one political faction over another. By contrast, human rights are enforced by states (or international organizations controlled by states), and they have strong incentives to interpret human rights so as to advance their own interests, rather than in such a way that takes account of the complexity of policy tradeoffs in specific countries.

Second, American courts are staffed by Americans, who live in the United States and have a reasonably good understanding of American norms and institutions, even if they may lack a politician's sensitivity to public opinion. When they interpret the Constitution, they do so with an eye toward what is reasonable under prevailing conditions. But when states and international organizations try to enforce human rights in a particular state, the enforcers are usually foreigners, who have little experience with the target state. Foreign practices may seem hideous or inexplicable because the enforcers lack familiarity with them.

Third, most Western countries incorporate political checks on judges. In this respect, the United States is an outlier, as it is difficult to correct constitutional interpretations issued by the Supreme Court. Most countries allow their governments to override constitutional interpretations that seriously offend the public. But even in the United States (as well as in other countries), political officials can influence the course of constitutional law by appointing judges with the "appropriate" ideology, choosing which cases to bring and which to defend, and controlling the jurisdiction of the courts. There is always a back-and-forth between the political system and the judicial system, which allows the political system to correct some of the judiciary's errors. And all of this takes place within the context of democracy, where popular sovereignty is taken for granted.

But human rights laws lack this sophisticated institutional organization. The major states that enforce human rights laws cannot be forced to abandon or modify their interpretations, and they rarely do. It is true that target states can resist interpretations they dislike, but this reflects the weakness of human rights law, not its capacity for self-correction. If states can simply ignore interpretations they dislike, how could the treaties influence them? Most people in the world pay little attention to international human rights law, and do not try to make their voices heard about it. The world lacks authoritative institutions through which people or governments can impose a political check on the powerful states that enforce human rights law.

In sum, human rights law can be seen as a way to settle significant controversies about the human good, based on the notion that human beings possess enough knowledge about the undesirability of certain types of government behavior that they can rule them out. But conceptions of the human good change, and ideas about how best to trade off human values and how to implement them through government policy are constantly evolving as people gain information, test and discard proposals, observe experiments in other places, and so on. Because of the peculiar requirements of international cooperation, the international human rights institutions lack authoritative agencies that can modify rights in response to changing mores and the growth of empirical knowledge. The result is a system that is both rigid and vague, unresponsive to the needs of governments and populations, and thus ultimately plagued by circumvention on the part of the states it is supposed to bind.

5.7. THE IMPORTANCE OF POLITICAL PARTICIPATION

In much of the U.S. literature on constitutional law, the accepted view is that courts interpret rights that are embodied in the

Constitution and then enforce them by striking down legislation that conflicts with them. Thus, the process of recognizing rights involves the ordinary tools of legal interpretation, and the rights possess legal authority because they were ratified by the founding generation and the subsequent generations that ratified constitutional amendments. Some scholars believe that constitutional rights are only those that can be found in the original text and the amendments, while others believe that rights have been added to the Constitution through a process of judicial and political development, but both sides agree that constitutional democracy requires judicial review of laws and executive actions to ensure that they do not violate individual rights or any of the "structural" elements of the Constitution.

This is a highly simplified view of constitutional interpretation.[11] Because of the ambiguity of the rights in constitutional documents, courts must necessarily act as more than passive interpreters, and in practice have expanded and invented rights in response to the needs of their times. For example, until the New Deal the Supreme Court recognized rights to private property that put limits on federal and state regulation of working conditions and wages. In response in part to political pressure, the Court later abandoned this view so that legislation that was considered socially desirable could be put into effect. Since the 1950s and 1960s, the Court has created numerous rights for religious, racial, and ethnic minorities; political dissenters; criminal defendants; women; and gun owners—rights that had not previously been recognized.

But there is often just as much political dispute about the foundational rights that limit governmental activity as there is about ordinary policy. In the United States, large coalitions disagree profoundly and in good faith about whether there is or is not a constitutional right to undergo an abortion, to possess guns, and to marry a same-sex partner. And there is even more disagreement along the margins—for example, if there is a constitutional right to possess

guns, is that right violated by a ban on machine guns or a law that requires registration of handguns?

Sometimes, the constitutional text anchors these debates, sometimes it does not. Many constitutional rights—for example, the rights to travel and to marry—are nowhere mentioned in the text of the Constitution. It is clear that the text does not determine the rights that are recognized by courts. Supreme Court justices recognize new rights and discard old rights based on legally constrained but ultimately moral-political determinations stemming from their own ideologies. Presidents nominate ideologically compatible lawyers to the Court for just this reason. Once one recognizes that rights emerge from democratic deliberation, and that the public asks Congress to embody them in legislation, then judicial review of that legislation begins to seem like usurpation of the public's right to political participation.

This argument is not reducible to the epistemic problem, although it is related to it. Epistemically imperfect judges make mistakes and may end up striking down statutes that do not violate people's rights and that advance the public good. But even epistemically perfect judges violate the public's right to political participation by striking down their (by hypothesis) ill-considered choices. Political participation, on this view, is an intrinsically valuable feature of life. Judicial interference with it harms people and violates their rights.

Consider various historical controversies—whether people have a right not to be enslaved; whether women have (or should have) the right to vote; whether women should have a right to obtain an abortion; whether gay people have or should have the right to marry people of the same sex. Judges were not the first people to argue for these rights and insist that the government should respect them. The idea that the people in question had rights that were being violated emerged from the general population—often led by intellectuals, or religious leaders, or politicians, or activists. Once the

idea caught on, attempts were made to vindicate the rights—both in court and in the political arena. Thus, the picture of judges protecting rights antecedently determined in an early constitutional agreement is misleading. The correct picture is one in which judges play an ambiguous role in speeding up, slowing down, or modifying rights as they emerge in public discussion and political action.

Let us turn now to international human rights. The setting differs from that of domestic constitutional enforcement in many ways, but there are also some essential similarities. International human rights treaties identify rights that, in principle, supersede domestic political action. Thus, a domestic legislature is prohibited from passing laws that violate human rights. The public accordingly loses any meaningful opportunity to demand, debate about, and cause their representatives to pass legislation that infringes on any of the human rights. The damage to the right to political participation is, in this sense, similar to the damage done to the right to political participation at the domestic level through judicial enforcement of constitutional rights.

But international human rights, if enforced, can do more harm to the right to political participation than judicial enforcement of constitutional rights does. Within the United States, people can reassert their right to political participation as against judicial enforcement by agitating for a constitutional amendment, by exerting pressure on the judicial appointments process, and by pressuring the executive and legislature to challenge constitutional interpretations. In other countries, citizens can lobby the legislature to reverse judicial interpretations of the constitution. By contrast, there is no practical way to amend human rights treaties. As a matter of international law, a treaty can be amended only with the consent of all states—an unattainable threshold. In practice, states can, in effect, amend treaties by advancing their own interpretations and seeking consensus, but because this does not occur through any institutional process,

it occurs haphazardly if at all. Therefore, if human rights treaties really did bind, they would deprive people of their right to political participation.

There are several responses to this argument. A first response is that a democratic judgment is made whether to enter into human rights treaties in the first place, and the right to political participation is vindicated in this way. This is a standard argument in constitutionalism, but it has few adherents today. The dead hand of the past will always constrain the present because of inertia and the costs of revisiting settled norms and procedures. But constitutions are especially problematic because they require supermajorities to amend, and so outdated constitutional norms can become deeply entrenched. The argument is still weaker for human rights treaties. While the U.S. Constitution was debated at great length at the time of the founding, I am unaware of any evidence that the human rights treaties were topics of meaningful public deliberation in the United States or any other democracy. They never had the political salience of a constitution, and were handled by governments in the course of other foreign policy duties.[12]

A second response by defenders of human rights treaties is that human rights treaties address only the worst types of rights violations, and the right to democratic participation does not encompass the right to debate whether people should be tortured or deprived of trials. This is an appealing argument but it is surely wrong. The rights not to be tortured and deprived of trials developed out of democratic deliberation; judicial intervention came later. In the United States, torture and denial of trials turned out to be topics of democratic deliberation in the first decade of the twenty-first century, when both of these instruments were used against Al Qaeda. Moreover, human rights treaties do not address only the worst type of rights violations. As we have seen, they encompass nearly all aspects of governance—health and pension policy, the rights of

workers, schooling, welfare, the treatment of disabled people, race discrimination, and on and on. If all these topics are removed from democratic deliberation, then there will be little left for the people to discuss.[13]

The third response is that human rights treaties do not infringe on the right to political participation because governments can either denounce the treaties or (when the treaties lack a denunciation clause) refuse to recognize them as legally binding. Human rights treaties in this way differ from domestic constitutional law, which (at least in advanced countries) is enforced by powerful courts. But this response gives away the game. If states can evade human rights treaties, then they cannot have any positive value. Perhaps there is a subtle thread-the-needle argument that human rights treaties exert just enough force to cause states to improve governance but not so much as to interfere with democratic deliberation. But even if this argument were logically coherent, there is no evidence that human rights treaties play much role in political deliberation in Western countries.

But what of authoritarian countries? The fourth response is that human rights treaties do not interfere with political participation in democratic countries, where voters support the human rights embodied in the treaties or rights close enough to the rights in the treaties that any infringement on democratic deliberation is marginal. By contrast, the human rights treaties promote democratic participation in authoritarian countries, where democracy movements draw strength and inspiration from the treaties. Any modest harm to political participation in democratic countries is outweighed by the benefit in authoritarian countries, both from a global standpoint and from the standpoint of people living in democracies, who benefit from the spread of democracy around the world.

This is a powerful argument, but on inspection it fails as well. To begin, it is impossible to divide the world into (good) democratic states and (bad) authoritarian states. States fall along a continuum,

and many states with authoritarian governments are responsive to the needs and interests of their populations. Consider China, which has greatly improved the standard of living of its population over the last 30 years—thus advancing their economic rights. A human rights treaty that required China to grant political rights might make it more difficult for the government to manage the economy. Political rights might lead to turmoil or civil war, or they might not—but the claim that this extremely difficult question can be settled by a human rights treaty containing some vague and mainly aspirational clauses drafted decades ago without the specific needs and conditions of China or any other particular country in mind is unpersuasive.

In sum, in countries on the democratic side of the spectrum, human rights treaties (to the extent they are enforceable) interfere with the right to political participation by taking numerous policy questions off the political agenda. This might be an acceptable price to pay if those treaties promoted democratic participation and other public goods in authoritarian states. As I have argued throughout this book, however, in practice the rights are too vague and too conflicting to bind authoritarian states; but even if they were not, then—and this is the dilemma I have repeatedly emphasized—there would be little reason to believe that the specific rights would promote the well-being of people in a diverse array of very different authoritarian countries, where the interests, values, and needs of the populations cannot be captured in a simple list of rights.

5.8. REPRISE

This chapter began with a discussion of why states lack incentives to comply with human rights treaties that do not merely ratify their existing policies, but concluded with normative arguments that explain why human rights treaties, even if complied with, would not advance

the public good, while interfering with important political rights. The two ideas are connected. One reason governments do not pay much attention to human rights treaties is that they are responsible for advancing the public good, and the treaties themselves do not provide reliable guidance as to what promotes the public good. Moreover, governments that see themselves as obligated to respect the rights of citizens to engage in political participation cannot credibly shut down debate by citing treaty obligations that were agreed to decades earlier, usually without public debate, and that are in any event too vague and contestable to contradict positions advanced in the debate. Thus, even states with democratic traditions approach human rights treaties with caution—they are, and should be, reluctant about allowing human rights treaties to constrain domestic politics.

This logic also may explain why such states do not devote much effort to trying to compel foreign countries to comply with human rights treaties. The point is not (or not just) that voters care little about the well-being of foreigners. The danger is in the opposite direction: if voters care a great deal about the well-being of foreigners, but do not understand the interests of those foreigners and the conditions under which they live, then well-meaning attempts to enforce human rights treaties in those countries may, because of epistemic limits, lead to bad outcomes as well as interfere with the domestic right to political participation. The wisdom of the Westphalian system lay in the recognition that an excessive concern with the lives of foreigners, not too little concern, can be a major source of conflict in international relations.