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Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”

BETH SIMMONS*

ABSTRACT

International law has developed what many might consider a constitutional understanding of individual civil rights that individuals can claim vis-à-vis their own governments. This article discusses the development of aspects of international law relating to civil rights and argues that if this body of law is meaningful, we should see evidence of links between acceptance of international legal obligation and domestic practices. Recognizing that external forms of enforcement of civil rights is unlikely (because doing so is not generally in the interest of potential “enforcers”), I argue that international civil rights treaties will have their greatest effect where stakeholders—local citizens—have the motive and the means to demand treaty compliance. This is most likely to be the case not in stable autocracies, where such demands are likely to be crushed, nor in stable democracies, where the motive to mobilize is attenuated due to rights saturation, but in transitional countries where the expected value of mobilization is maximized. Thus, I test the hypothesis that the International Covenant on Civil and Political Rights is likely to have its greatest positive effects in transitional countries—those that have had some fleeting experience with democratic governance. This proposition is tested quantitatively with indicators for freedom of religious practice and fair trials. The proposition is weakly supported by extremely stringent statistical models that control for the endogeneity of the treaty commitments, country- and year-fixed effects, and other obvious influences on civil rights practices. I conclude that the “International Bill of Rights” has the power to influence the direction of rights practices in fluid political situations, but it cannot magi-

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cally transform autocracies into liberal guarantors of civil liberties. Still, these effects are important and are the most we can expect from scraps of paper that the international community has been reluctant to enforce.

INTRODUCTION

Scholars, international lawyers, and activists have grown accustomed to the claim that an identifiable set of international instruments constitute "The International Bill of Rights."¹ The Universal Declaration of Human Rights (UDHR)² along with two binding treaties, the International Covenant for Civil and Political Rights (ICCPR)³ and the International Covenant for Economic, Social and Cultural Rights (ICESCR)⁴ have come to be thought of as international society's clearest expression of a core set of human rights commitments with "constitutional" status in international law. The purpose of this article is not to contest the claim of these agreements' constitutionalism. Rather it is to ask whether the promulgation of the rights contained in these agreements over the past five decades has contributed to the realization of such rights. Empirically, what has the International Bill of Rights contributed to the realization of these rights around the world?

The emphasis of this article is empirical, but it is based on several theoretical claims. First, the ratification of human rights agreements can stimulate domestic demands for their realization that certain governments might find costly to recognize. Groups begin forming to demand their rights once human rights agreements are formally acknowledged by governments through ratification, though the incentives to mobilize will differ predictably across different kinds of political regimes. Furthermore, the greater the groups' abilities to monitor the government, the greater the pressures will be to comply with international legal obligations protecting civil rights. There is some evidence that the International Bill of

1. See, e.g., Louis Henkin, *Preface* to *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, at ix, ix (Louis Henkin ed., 1981).

2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR], available at <http://www.un.org/Overview/rights.html>.

3. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>.

4. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], available at http://www.unhcr.ch/html/menu3/b/a_ceschr.htm.

Rights has contributed to an improvement in certain civil rights practices around the world largely because of the public commitment ratification requires. Ratification stimulates a demand for compliance, making it harder than it would otherwise be for a government to ignore international civil rights norms.

The first part of this article provides background and discusses the place of civil rights in international law. The second part provides theoretical justification for expecting treaties to influence civil rights and potentially other human rights practices. The remaining parts test the proposition that treaty ratifications—focusing on the ICCPR and its optional protocol relating to the death penalty—have had a significant “commitment effect.” The pattern of empirical evidence supports the idea that this effect is conditional. Therefore, it is strongest where domestic groups have both the motive and the means to make civil rights demands of their government. The key finding is that international legal obligations make important and positive differences to practices in these two areas, but the greatest differences are to be found where citizens have the capacity and motivation to mobilize, and where government practices are most easily observed and monitored.

I. BACKGROUND: CIVIL RIGHTS AND INTERNATIONAL LAW

Civil and political rights were two of the first areas to be addressed by the international human rights treaty regime that was negotiated in the mid-1940s. Along with economic and social rights, civil and political rights were the central core—the first nineteen articles—of the UDHR, passed unanimously by the U.N. General Assembly in 1948. But for reasons that have been discussed elsewhere⁵—foot dragging, notably by the major powers—it took eighteen years to agree upon a binding treaty covering civil and political rights, and to then negotiate its contents (despite the fact that most of its provisions were already contained in the UDHR itself).⁶ At the insistence of the United States, a move was made to bifurcate the social and economic rights from the civil and political rights. The ICESCR contains the codification in treaty form of the former, while the latter are encoded in the ICCPR. The ICCPR, along with the ICESCR and the UDHR, are often referred to collectively (if loosely) as the “International Bill of Rights.”⁷

5. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

6. See UDHR, *supra* note 2, arts. 3–21. Many scholars also hold that at least some of the obligations found in the ICCPR reflect customary international law. See, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* (1995).

7. HENKIN, *supra* note 6, at 184–85.

The ICCPR is the primary global treaty devoted to what people have come to call “first generation” human rights.⁸ These are the complex of “Enlightenment rights” that in their day were crucial in overthrowing feudalism and shattering the uncontested divine right of kings.⁹ Infused with Enlightenment notions of individualism and laissez-faire, this first generation of rights, with their focus on the rights of the individual vis-à-vis political authority, has come largely to be thought of as a set of “negative rights,” or rights that require government to abstain from denigrating (rather than requiring governments to intervene on behalf of) human dignity.

In large part, the emphasis on “negative freedoms” can be seen in Part III of the ICCPR, which contains the treaty’s substantive obligations. Individuals have a right to their lives;¹⁰ to be free from torture or degrading treatment;¹¹ to be free from slavery or servitude;¹² to liberty and security of person;¹³ to free movement;¹⁴ to a fair trial;¹⁵ to freedom of religion and thought;¹⁶ and to peaceful assembly and free association.¹⁷ Rights of political participation are guaranteed.¹⁸ Equality before the law and minority rights are protected.¹⁹ But the treaty suggests positive rights of the individual as well. “Each state Party to the present convention,” according to Article 2(1), “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant without distinction of any kind . . .”²⁰ The treaty thus contains an affirmative obligation of states to organize civil and political life in ways that make the enjoyment of the rights contained in the treaty possible.

The drafters of the treaty did not, however, envisage that these rights would

8. The delineation of civil and political rights as “first generation human rights” has become standard terminology. See, e.g., MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 3–4 (2004); see also *Encyclopedia Britannica*, Human Rights, <http://www.britannica.com/EBchecked/topic/275840/human-rights> (last visited Jan. 9, 2009).

9. ISHAY, *supra* note 8, at 7–8.

10. ICCPR, *supra* note 3, art. 6.

11. *Id.* art. 7.

12. *Id.* art. 8.

13. *Id.* art. 9.

14. *Id.* art. 12.

15. *Id.* art. 14.

16. *Id.* arts. 18–19.

17. *Id.* arts. 21–22.

18. *Id.* art. 25.

19. *Id.* arts. 26–27.

20. *Id.* art. 2(1).

be absolute; both the ICCPR²¹ and the UDHR²² recognize that these rights may need to be limited when necessary to protect certain public interests.²³ Many states reinforce and specify their rights of derogation through the use of reservations.²⁴ Some—China, with respect to freedom of religion, is an outstanding example—provide for the civil freedoms contained in the ICCPR in their domestic law, but then take back the guarantee with domestic derogations that are much broader than the ICCPR itself allows.²⁵ Many civil rights (citizens' rights vis-à-vis the state) raise culturally sensitive controversies about the proper relationships between the individual, society, and the state.²⁶ Ideological differences drove East and West to spar over civil rights during the Cold War. Today, civil rights are among those most likely to be dismissed as "Western."

In order to facilitate enforcement of these obligations, the ICCPR established the Human Rights Committee,²⁷ whose main purpose is to enhance the mechanisms of accountability through its authority to monitor and receive state reports that are due on a regular basis. The Human Rights Committee is also empowered by the convention to consider complaints of one state against another,²⁸ although this process has never been used. The Committee is also empowered, through the first Optional Protocol, to consider individual complaints against one's own government.²⁹ Although the Human Rights Committee was estab-

21. *Id.* art. 4.

22. UDHR, *supra* note 2, art. 29, ¶ 2.

23. The Economic and Social Council negotiated a set of principles defining the conditions under which derogation from the ICCPR treaty obligations are in fact allowed. See U.N. Econ. & Soc. Council [ECOSOC], *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

24. The North African countries tend to make "states of emergency claims" for purposes of derogation. See Jean Allain & Andreas O'Shea, *African Disunity: Comparing Human Rights Law and Practice of North and South African States*, 24 HUM. RTS. Q. 86, 90 (2002).

25. Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 16 HUM. RTS. Q. 455, 484 (1994).

26. The "Asian values" debate is pertinent in this regard. See, e.g., Maznah Mohamad, *Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment*, 24 CONTEMP. SOUTHEAST ASIA 230 (2002) (proposing the idea that the global civil rights regime may not be compatible with Southeast Asian notions of statehood).

27. See ICCPR, *supra* note 3, art. 28; cf. David P. Forsythe, *The United Nations and Human Rights, 1945–1985*, 100 POL. SCI. Q. 249 (1985) (preferring to think of the activities of the Human Rights Committee as "socialization" rather than enforcement).

28. See ICCPR, *supra* note 3, art. 41.

29. For a legal analysis of the individual right of petition before the Human Rights Committee, see DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 132–246 (1991); Alfred De Zayas et al.,

lished expressly as a committee of experts rather than a court, analysis of its recent practice reveals that it is becoming increasingly court-like.³⁰

The ICCPR is not the only treaty to have addressed civil and political rights, but it is certainly the most central. Many of these rights have also been developed at the regional level, and in Europe with accompanying institutions with real enforcement power. The first eighteen Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms anticipate the civil and political rights covered by the ICCPR, and Section II establishes a regional court to assure enforcement.³¹ All of the first generation civil rights covered in the ICCPR are also detailed in the American Convention on Human Rights, book-ended by guarantees of juridical personhood and judicial protection of the rights contained in the treaty.³² The African Charter on Human and Peoples' Rights contains in a more limited and contingent form some of the civil rights found in the ICCPR, including liberty and security of person, the right to a trial, freedom of conscience, free practice of religion, the right to disseminate one's opinion, and free assembly and association.³³ Practically the entire panoply of civil rights has been exported from the ICCPR to other international conventions aimed at protecting specific groups, including the Convention on the Elimination of all Forms of Racial Discrimination³⁴ and the Convention on the Rights of the Child.³⁵

Application of the International Covenant on Civil and Political Rights Under the Optional Protocol by the Human Rights Committee, 1985 GERMAN Y.B. INT'L L. 9; P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication*, 1986 BRIT. Y.B. INT'L L. 201; Liz Heffernan, *A Comparative View of Individual Petition Procedures Under the European Convention on Human Rights and the International Covenant on Civil and Political Rights*, 19 HUM. RTS. Q. 78 (1997); Rein Myullerson, *Monitoring Compliance with International Human Rights Standards*, 1991-1992 CAN. HUM. RTS. Y.B. 105 (1992).

30. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 338 (1997). For a review of the literature on the effectiveness of the Human Rights Committee, see JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 79-114 (3d ed. 2007); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999).

31. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

32. Organization of American States, American Convention on Human Rights, arts. 3-25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

33. Organization of African Unity, African Charter on Human and Peoples' Rights arts. 6-14, June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter].

34. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5, U.N. Doc. A/6014 (Dec. 21, 1965).

35. Convention on the Rights of a Child, G.A. Res. 44/25, arts. 14, 15, 40, U.N. Doc. A/44/49 (Nov. 20, 1989) (guaranteeing children a right to religious freedom and free conscience, peaceable assembly, and civil rights when accused of crimes) [hereinafter Convention on the Rights of a Child].

II. THEORETICAL ARGUMENT: COMPLIANCE WITH THE ICCPR

Why should governments comply with the treaties they ratify? The current state of the literature suggests that, especially in the human rights area, they largely do not. Human rights treaties are not likely to be enforced, according to a dominant view, and for this reason states are likely to ratify so that they may enjoy the expressive benefits of doing so without concern that their legal commitment will be enforced.³⁶

This cynical view flows from an emphasis on international enforcement but neglect in domestic politics. While it may be true that international actors—and especially other states—have little incentive to enforce their peers' human rights commitments in any serious and systematic way, domestic actors have a clear stake in their enforcement. For the locals, their rights and freedoms are at stake. Thus we should expect that if international law with respect to human rights is to be enforced, the most consistent pressure to do so should emanate from domestic politics.³⁷

There are a number of ways in which international human and civil rights treaties might be expected to influence domestic politics. Most obviously, treaties are generally exogenous to the domestic legislative activities of most states. The question of their ratification and implementation places an issue on the national agenda that might not have been there in the absence of the treaty adoption itself. Even if they are not especially controversial, the existence of a treaty raises the question of ratification, putting an item on the national legislative agenda that might not have been there otherwise. Treaties can therefore have policy effects without raising much controversy, largely through elite consensus in favor of ratification.

The more interesting cases, however, are those in which governments ratify an international human rights agreement, yet make no move to implement or comply with it. Why should a ratified treaty make any difference in such cases? One reason is that treaties constitute law in many countries and could strengthen civil rights litigation. Of course, for this mechanism to work, it is necessary that the courts in the country in question are sufficiently independent of political powers that they can render an independent judgment with some probability of constraining political actors. Litigation in national courts is one of the best strategies available for creating home-grown, pro-rights jurisprudence.³⁸ Of course, the availability of treaty law

36. See generally Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

37. SIMMONS, *supra* note 5, ch. 3.

38. See Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191 (1997). For more information on transnational public law litigation, see generally Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

certainly does not assure litigation will take place. Potential litigants must be aware, or come to be made aware, of their rights under international law or under the implementing legislation it has inspired. A certain degree of legal literacy is required if individuals are to access the courts.³⁹ Litigation is limited for a number of reasons,⁴⁰ but cases involving international legal guarantees touching on civil rights seem to be on the rise in many places.⁴¹

Quite aside from litigation (or sometimes using it as part of a broader strategy), international legal agreements can be important aspects of domestic political mobilization to demand adherence from governments. Suppose the probability that citizens will mobilize to demand a civil right depends on two factors: the

39. See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 179–217 (2006).

40. Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 486–88 (2003). On the potential for human rights litigation in the United States, see Howard Tolley, *Interest Group Litigation to Enforce Human Rights*, 105 POL. SCI. Q. 617 (1991). The point being that the potential for human rights litigation exists, but it is relatively limited. Individual access to courts varies greatly. The Supreme Court of India, for example, has decided that cases can be taken up on behalf of those in poverty who are unable to file for themselves, and that such cases can be initiated simply by letter. Stephen Ellmann, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 349, 358 (Austin Sarat & Stuart Scheingold eds., 1998).

41. Examples of litigation involving rights guaranteed by ratified treaties can be found in every region of the globe. Human rights litigation is burgeoning in some parts of the developing world, notably in Latin American countries with fairly recent histories of severe rights abuses. See Hunjoon Kim & Kathryn Sikkink, *Do Human Rights Trials Make a Difference?* (2007) (unpublished manuscript), <http://www.law.uchicago.edu/files/intlaw-sikkink.pdf>. Several African countries have used international treaties to shape their own jurisprudence on civil and political rights. Namibian courts have referred to the ICCPR to provide guidance in the determination of national discrimination law. Botswanian courts have made reference to international instruments to determine reasonable criteria for a fair trial. ONKEMETSE TSHOSA, *NATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: CASES OF BOTSWANA, NAMIBIA AND ZIMBABWE* 108–10, 172 (2001). In Russia, the Constitutional Court has used international law to support its decisions in criminal justice cases, as well as instructing the rest of the judiciary to apply the ICCPR and ICESCR to domestic cases. See GENNADY DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 42–48 (1st ed. 1999). In Japan, women have used the courts to realize their right not to be discriminated against in employment, while in Israel, the Supreme Court has ruled that certain interrogation practices do, in fact, constitute torture as understood by the Committee Against Torture. These and other examples of successful litigation based on human rights treaties are collected by a variety of non-governmental organizations (NGOs). See, e.g., Madre: Demanding Rights, Resources, and Results for Women Worldwide, <http://madre.org/articles/int/hrconv.html> (last visited Jan. 8, 2009). Cases filed in the Indian Supreme Court in 1994 “asked the Court to order the government to show what steps were being taken to end discrimination in the personal laws consistent with the principles of CEDAW” thus effectively forcing the government to articulate the extent of its compliance with its 1993 ratification commitment. MERRY, *supra* note 39, at 167.

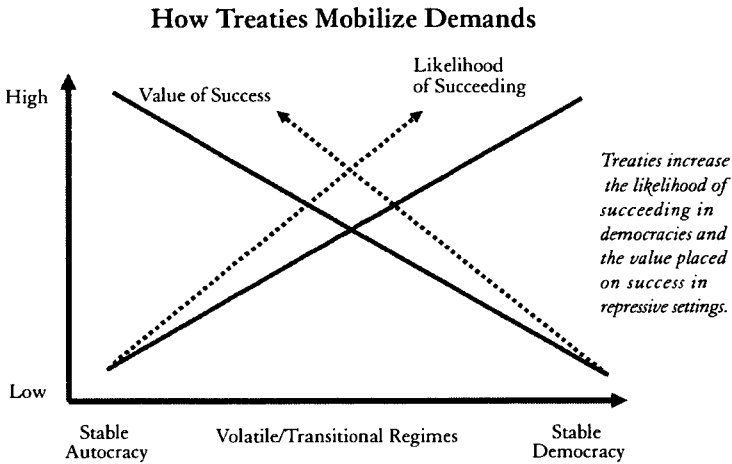
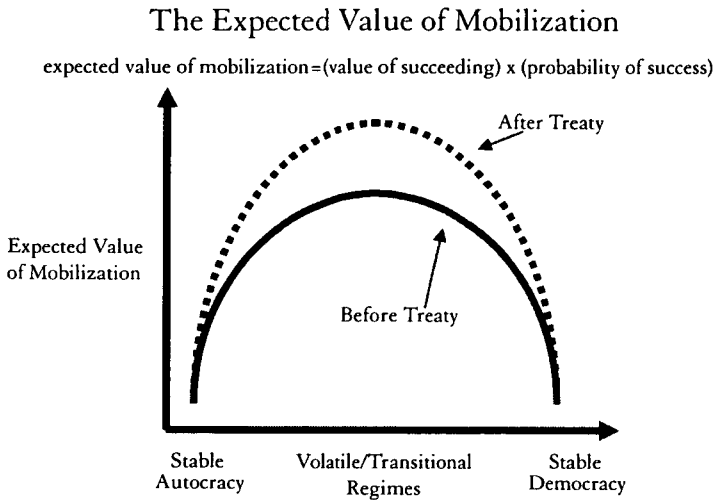


FIGURE 1

value they place on that right and the likelihood that mobilization will be effective. These two factors represent the “expected value” of mobilization. The expected value of mobilization varies across countries. In general, the value a citizen is likely to place on a treaty-protected civil right will be higher in non-democratic countries where the marginal value of an additional right is likely to be much higher than in a democracy, where access to a large number of rights is already secure. But at the same time, the likelihood that mobilization will succeed is higher in a democracy where more responsive government is the norm (Figure 1). When we combine these two factors, as illustrated in Figure 2, it becomes clear that the expected value of mobilization is rather small in both stable democracies and stable autocracies, but significant in countries in the middle that have some possibility of non-autocratic governance, yet do not have a broad and secure panoply of civil rights. In these countries, citizens have both the motive and the means to organize to demand respect for civil rights from their governments.

Ratification of the International Bill of Rights influences citizens’ mobilization calculations in two ways. On the one hand, in non-democracies, ratification injects a new model of rights into the domestic discourse, potentially altering expectations of domestic groups and encouraging them to imagine themselves as entitled to forms of official respect to which they may never have dreamt themselves entitled. The model has all the more power because the government has actively assented to the rights in question, imbuing them with legitimacy they would not have in the absence of ratification. As constructivist theory suggests, there are good reasons to at-



tribute an educative function to international legal instruments, especially once they have been formally accepted by government authorities. This educative function of international treaties ought to be weak or even absent in democracies, where many, if not most, of the civil rights in question are already part of political life.

On the other hand, international treaties are much more likely to enhance the probability of success in making civil rights demands in a democracy than in a non-democracy. Democratic governments are much more constrained by constitutional and statutory law; they are more likely to have independent courts, and to be composed of a citizenry that is quite legally literate. A ratified treaty will therefore have a strategic legal value in a democracy that it is likely to lack in an autocracy. Citizens that are armed with “new law” are more likely to be more empowered in a system based on the rule of law than one based on more arbitrary and unconstrained political authority.

Thinking of these factors in combination leads to the central expectation of this paper: where we are likely to see the most significant treaty effects—at least with respect to civil and political rights—is in the less stable, transitioning “middle ground” regimes. In these countries, individuals have both the motive and the means to realistically press their governments to take international human rights treaties seriously. Treaties can still play a legitimating function, reassuring a nascent coalition that their demands are legitimate and solidifying their identity as individuals with a moral and legal case to make vis-à-vis their government. Mobilizing is meaningful, even exciting, but not nearly as dangerous as in stable autocracies that

tolerate no opposition. Treaties create additional political resources for pro-rights coalitions under these circumstances. They resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the specific rights at stake, but also believe they must take a stand on rule-governed political behavior in general. The courts may be somewhat corrupt, inexperienced, or even incompetent, but they are not nearly as likely to execute the government's will as loyally as in a stable autocracy. International human rights treaties may be in their most fertile soil under such circumstances. As we shall see, the consequences of ratification for rights compliance in these cases can be profound.

Is the claim that treaty ratification contributes to compliance via enhanced political mobilization plausible? Table 1 addresses this issue. It shows that ratification gives rise to a significant increase in local membership in international non-governmental organizations within four years. Ratification appears to stimulate membership in civil society organizations even when we control for external aid, population growth, wealth, and a time-trend. It is therefore at least plausible that the treaty effects discussed above have much to do with the organization of civil society demands for compliance. This interpretation is consistent with a host of case studies that describe treaties as important tools in drawing attention to the civil rights violations of governments.⁴²

TABLE 1: Effect of ICCPR ratification on local memberships in international non-governmental organizations (INGOs)

Dependent Variable: logged INGO memberships

Ordinary Least Squares regression model

	Model 1: (no fixed effects)	Model 2: Country Fixed Effects
Logged INGO memberships, t-1	.776*** (p=.000)	—
ICCPR ratification, t-1	.054*** (p=.000)	-.044 (p=.155)
ICCPR ratification, t-2	—	.011 (p=.592)

42. For a discussion of how NGOs such as Human Rights Watch and the American Civil Liberties Union use the ICCPR to criticize countries, such as the United States, see HUMAN RIGHTS WATCH & ACLU, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1993).

ICCPR ratification, t-3	—	.033** (p=.030)
ICCPR ratification, t-4	—	.034*** (p=.010)
ICCPR ratification, t-5	—	-.027 (p=.175)
Overseas development assistance/GDP, t-1	-.027 (p=.488)	.488*** (p=.001)
Logged total population, t-1	.075*** (p=.000)	.528** (p=.022)
Logged GDP/capita, t-1	.072*** (p=.000)	.135 (p=.180)
Change in civil liberties, t-1	—	.007 (p=.408)
Civil liberties, t-1	.023*** (p=.000)	
Year trend	.005*** (p=.000)	.042*** (p=.000)
Constant	-10.07*** (p=.000)	
Number of countries	173	173
Number of Observations	3646	3757
R-squared	.975	.218

*=significant at .10 level

**=significant at .05 level

***=significant at .01 level

Note: Country-fixed effects are included in Model 2 but not reported here. Because of the fixed effect, the lagged dependent variable (which functions as a “baseline” for change) is omitted. Robust standard errors, clustering on country. While inclusion of a time trend does not disturb these results, year-fixed effects increase the standard errors on ICCPR ratification.

In the following parts, I test for the impact of ratification of the ICCPR on two clusters of civil rights: freedom of religion and fair trials. I have chosen these

areas because they provide a fairly reliable test for the impact of international legal obligations on practices. Specifically, I have decided to avoid those aspects of the ICCPR that are practically synonymous with democracy itself.⁴³ In this way, I am trying to separate treaty effects on civil rights from the more general waves of democratization that have swept most regions of the world over the course of the latter half of the twentieth century. The rights I choose to analyze are civil rights over which even democratic countries could plausibly have quite different practices and place quite different priorities. While rightly considered an Enlightenment right, the freedom to practice one's own religion is not quintessentially an aspect of democratization and, as we will see, does not vary directly with regime type. A similar point applies to the quality of criminal justice. Because most citizens will never brush up against the criminal justice system, this is an area that could easily lag behind the broader processes of "democratic development." And yet how a society deals with persons accused and convicted of serious crimes is a central civil rights issue.

III. THE ICCPR AND CIVIL LIBERTIES

The ICCPR is the world's premier civil liberties compact. It was intended—along with the ICESCR—to be the major legally binding expression of the UDHR. To what extent has a commitment to the ICCPR influenced the quality of civil rights among its signatories? How do these patterns compare with non-signatories? Would civil rights have improved regardless of their public commitment to this highly visible and legally binding document?

The first issue is how to capture civil liberties. There are of course a number of specific civil liberties, but they tend to be positively correlated with one another.⁴⁴ One approach is to begin with a broad index that captures a range of such liberties. Freedom House, a non-profit non-governmental organization, has compiled civil liberties scores based on a broad range of subcomponents⁴⁵ and parallels many of the basic requirements of the ICCPR. The measure considers freedom of

43. See, e.g., ICCPR, *supra* note 3, art. 25 (providing a right "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"). Such a right is so intimately connected—practically by definition—with regime type that it makes little sense to test as an empirical outcome the effect of a treaty commitment.

44. See MICHAEL HAAS, *IMPROVING HUMAN RIGHTS* 94 (1994).

45. See Freedom House, Methodology, <http://www.freedomhouse.org/template.cfm?page=35&year=2005> (last visited Jan. 8, 2009).

ICCPR Ratifications and Civil Liberties (Freedom House)

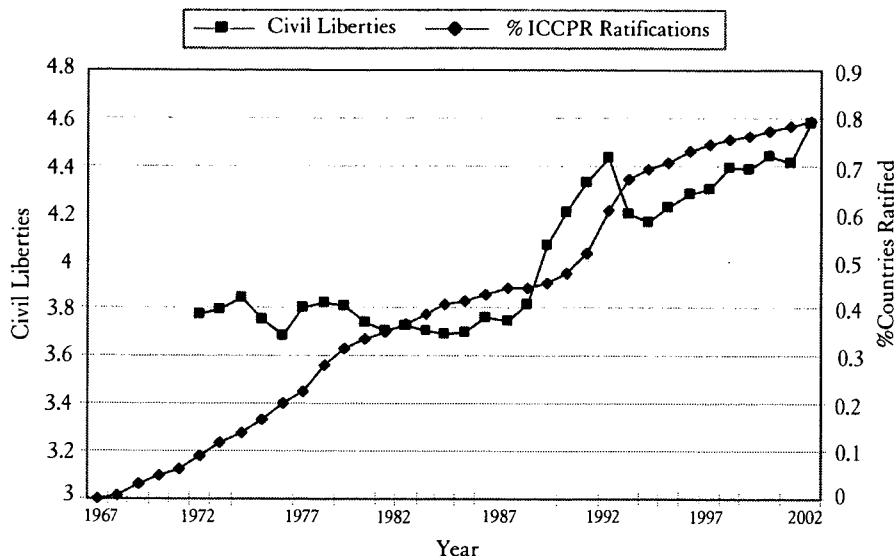


FIGURE 3

the media to express ideas,⁴⁶ free religious expression,⁴⁷ freedom of assembly,⁴⁸ independent judiciary,⁴⁹ equal protection of the laws,⁵⁰ protection from unjustified imprisonment and torture,⁵¹ freedom of movement,⁵² and equal rights in marriage.⁵³ Freedom House uses a broader set of rights in addition to those considerations with specific parallels in the treaty. For example, they consider trade unions and collective bargaining, freedom from war and insurgencies, freedom from extreme government indifference and corruption, and freedom from indoctrination by the state, none of which are explicitly addressed in the ICCPR. Nonetheless, there is a high degree of overlap.

As Figure 3 shows, the trend in civil liberties parallels quite closely the ratification of the ICCPR over time. There is a burst of improvement with the end of the

46. ICCPR, *supra* note 3, art. 19, ¶ 2.

47. *Id.* art. 18, ¶ 1; art. 27.

48. *Id.* art. 21.

49. *Id.* art. 14, ¶ 1.

50. *Id.* art. 14, ¶ 3; *see also id.* art. 26.

51. *Id.* art. 14, ¶ 3; *see also id.* art. 26.

52. *Id.* art. 12.

53. *Id.* art. 23.

Cold War and the simultaneous fall of a number of communist regimes (Freedom House is notoriously anti-Communist in its ideological orientation), and then a dip and a resumption in the global average thereafter. Ratification and civil liberties practices roughly appear to move together. But what, if anything, does the former contribute to the latter?

In order to answer this question, I have developed a model that is extraordinarily stringent. Ordinary least squares are used,⁵⁴ pooling observations both across cases and over time. In every case, the dependent variable is change in actual civil liberties since the previous year. Positive coefficients therefore indicate improvements in civil liberties from year to year. In order to control for the baseline from which change is measured, I include a lagged measure of the level of civil liberties in the previous period. Because there are a range of possible explanations for civil liberties that vary by country or region, but not across time, country-fixed effects are included in every specification. Thus, any differences reported in civil liberties correspond to changes within countries over time, and not to differences among countries themselves.

One of the central burdens of this research is to test the extent to which improved outcomes are the result of the treaty commitment itself or the result of other factors that give rise both to the commitment and to any behavioral improvements we might observe. Governments might have improved their practices, whether or not they have ratified a treaty obligating them to do so. I account for this possibility by using instrumental variables to model the decision to ratify the ICCPR in the first place. These models help to isolate treaty effects *per se*. I use a two-stage approach in which all of the variables that explain the behavioral outcome are used to estimate the ratification decision in the first place. But it is only possible to identify these models by including instrumental variables that help explain ratification, but which do not directly influence the human rights practice in question, except through the process of ratification. The instruments I use throughout this part build on the findings in earlier research⁵⁵ associated with false negatives and false positives: regional ratification density, domestic ratification, and legal institutions (the constitutional ratification hurdle and whether or not the legal system is based on common law). As we have seen, these variables influence ratification, but they bear

54. An instrumental variable ordered probit model would have been preferable given the categorical nature of the data (changes in the civil liberties index are typically, though not exclusively, 0s and 1s), but a two-staged ordered probit model would not converge when including country-fixed effects. I made the decision to retain the fixed effects and use ordinary least squares regression.

55. SIMMONS, *supra* note 5.

no significant relationship with the rights outcomes of interest here. This approach helps us to estimate the effects of ratification, once we have accounted for all of those factors that explain ratification in the first place.

Of course, many factors can make it more or less likely that a government will expand or contract the civil liberties offered to its citizens, and these are reflected in the control variables. One of the most important controls is the level of civil liberties in the previous period. Extremely liberal governments naturally have less room to improve than more restrictive ones. The better the existing practices, the less likely we are to see improvements. Another control is change in the quality of democracy itself. There are very good reasons to expect that as participation in governance increases, as institutional checks are put into place on the power of the executive, and as institutions of political competition become more highly developed, the government will respond to citizens' demands for greater freedom with civil liberty improvements. Inclusion of this variable makes for a very conservative test of our primary hypothesis about the role of the ICCPR. This specification refuses to credit treaty ratification with improved civil liberties protection when that credit should go to the broader processes of democratization that we have witnessed over the course of the past two decades. Similarly, I account for domestic efforts to bring governmental abuses out into the open and under control by including each country's experience with domestic truth commissions. It is very likely that a government willing to expose abuses of the past is itself more likely to respect its citizens' civil rights.

Two other variables also capture the broad processes of transition and democratization and their possibly contagious nature. I include the level of civil liberties in a country's region in the previous period as a potential influence. It is very plausible that liberties diffuse from country to country directly as citizens observe the practices of their near neighbors and come to expect similar freedoms from their own governments. I also include year dummies for the transition years from the Cold War to the Post-Cold War periods (1989, 1990, and 1991). These were years of commonly experienced shocks associated with civil rights liberalization. While the ideals of the ICCPR may have in fact inspired some of the changes of this period, the specifications below control for the widespread liberalizations associated with the end of the Cold War. In short, if there are any positive effects associated with ratification of the ICCPR, they are not being driven by these transition years alone.

Finally, I control for civil wars, which are notoriously associated with the degeneration in civil liberties when governments perceive their nations' security to be at stake. This is a simple dichotomous measure of whether a country was em-

broiled in a civil war during the year in question. I also control for a country's degree of social heterogeneity, since it is not unlikely that governments in more heterogeneous social settings use their power to favor some groups and to repress others. This is the log of the combined measure of religious, linguistic, and ethnic fractionalization. Each component of this measure captures the likelihood that any two individuals drawn randomly from the population will be from the same religious, linguistic, or ethnic group. They are totaled, and the log of the sum (plus one) is taken to reduce the influence of extreme outliers. This variable does not vary over time. The greater the total fractionalization in a given society, the more repressive we might expect the government to be. And finally, I consider the influence of external providers of development assistance. Because most of this aid comes from the more liberal democracies, there is a possibility that aid dependence is associated with improved civil liberties over time. Whether this is due to conditional aid or subtler processes of socialization and learning, aid dependence is expected to be positively associated with improvements in civil liberties.

**TABLE 2: Effect of ICCPR Ratification on Civil Liberties Improvements
(positive change)**

Instrumental Variable Regression

Regression coefficients (p-values)

	Model 1 1 year lag	Model 2 3 year lag	Model 3 5 year lag	Model 4 5 year lag, with controls
ICCPR obligation	.009 (p=.755)	.038 (p=.134)	.062** (p=.037)	.064** (p=.045)
Civil liberties level (t-1)	-.221*** (p=.000)	-.221*** (p=.000)	-.221*** (p=.000)	-.221*** (p=.000)
Civil liberties in region (t-1)	.149*** (p=.002)	.140*** (p=.000)	.131*** (p=.000)	.098*** (p=.009)
Democratic improvement (t-1)	.018*** (p=.001)	.018*** (p=.001)	.018*** (p=.001)	.018*** (p=.001)
Civil war	-.146*** (p=.000)	-.150*** (p=.000)	-.154*** (p=.000)	-.164*** (p=.000)
Fractionalization	-.113*** (p=.000)	-.115*** (p=.000)	-.116*** (p=.069)	-.052* (p=.098)

Overseas development assistance (t-1)	.622*** (p=.007).	.594** (p=.010)	.583** (p=.013)	.306 (p=.171)
Domestic truth commission	.239** (p=.027)	.238* (p=.029)	.233* (p=.034)	.240** (p=.028)
1989	.191*** (p=.002)	.188*** (p=.003)	.183*** (p=.003)	.196*** (p=.002)
1990	.127* (p=.084)	.125* (p=.087)	.123* (p=.094)	.154** (p=.026)
1991	.132** (p=.040)	.132** (p=.040)	.129** (p=.044)	.127** (p=.046)
Interstate war	—	—	—	.077 (p=.218)
Human Rights Commission member	—	—	—	.039 (p=.039)
Catholic	—	—	—	.673*** (p=.237)
Protestant	—	—	—	.113 (p=.663)
Islamic	—	—	—	-.354 (p=.206)
Logged GDP/capita	—	—	—	-.015 (p=.771)
Economic growth rate	—	—	—	.002 (p=.436)
Trade share in GDP	—	—	—	.0007 (p=.332)
Number of countries	143	143	143	143
Number of observations	3488	3448	3488	3380
R-squared	.145	.145	.146	.155

*=significant at .10 level

**=significant at .05 level

***=significant at .01 level

Note: Country-fixed effects are included but not reported here. Robust standard errors, clustering on country. Inclusion of a time trend disturbs the results for the ICCPR, but it is not statistically significant when estimating first difference models.

Ratification of the ICCPR may have some effect on civil liberties, but if so, it is hardly immediate. Indeed, if we look at the results only one year from ratification, there appears to be no detectable effect whatsoever (Model 1). By the third year, there is a stronger association between ratification and civil liberties (Model 2). By year five, it is quite likely that ratification of the ICCPR is associated with civil liberty improvements (Model 3), despite the broad range of controls included (Model 4). Ratification is associated with a .06 increase in the seven-point civil rights scale. Certainly this is not a huge effect, but it is detectably better than no effect at all. The scale of the effect can be compared to a domestic truth commission, which delivers (with somewhat high confidence) an improvement three to four times higher.⁵⁶

All of the control variables included in Models 3 and 4 behaved as expected, and were highly statistically significant. Certainly, the previous level of civil rights strongly predicts changes in the opposite direction. The better the practices in a country's region on average, the more likely a government itself is to improve its own civil liberties. A change in a country's level of democracy in the previous period is almost certain to result in improved civil liberties in the next, as is overseas development assistance as a proportion of gross domestic product. The transition years marking the end of the Cold War (1989–1991) were clearly associated with civil liberties improvements compared to all other years, as was also obvious in the graph of the scale over time. Civil wars and social heterogeneity—religious, linguistic, and ethnic—are conditions almost certainly associated with civil liberties deterioration.

We can conclude that there is *some* evidence that ratification of the ICCPR has made a bit—a small bit—of difference in the likelihood that civil liberties will improve in the ratifying country with a lag of about five years. But this conclusion is subject to some caveats. Aside from the modest size of the impact, it is still hard to tell whether we should assign causal significance to ICCPR ratification or to other processes we have not been able to model here. For example, when a time trend is included, it disturbs these results by increasing greatly the ICCPR standard errors (making it harder than ever to tell whether there is a relationship), although the time trend itself is not significant. Furthermore, the results are also weakened significantly when year fixed effects are included. Despite the inclusion of many variables that represent processes that unfold over time, it is hard to tell whether there still may be some time-dependent process that is associated with both ICCPR ratification and civil liberties improvements. While these results are

56. Note, however, that while treaty ratification is endogenous in this model, truth commissions are not. So it is not clear what advantage truth commissions would deliver above and beyond the conditions which were associated with setting them up in the first place.

suggestive of a relationship between ratification and improvements in a broad measure of civil liberties, they should be interpreted cautiously. It is also prudent to look for ICCPR effects with finer-grained measures of rights improvements, which is done in the following parts.

IV. RELIGIOUS FREEDOM

The freedom to believe in and to practice the religion of one's choice is a right with a long historical pedigree. Confessional differences were one of the earliest areas of social difference among groups—a signal distinction that was quite salient until well into the eighteenth century.⁵⁷ Protection for religious minorities was an important part of the Treaty of Westphalia,⁵⁸ which, however, was by no stretch of the imagination a human rights document. Still, it is probably correct to think of religious rights as among the first, if not the first, set of rights accorded initially to groups and later to individuals through international legal agreements.⁵⁹

Governments have been concerned about the practice and protection of religion over the centuries because it has implications for their political legitimacy and authority. As John Hall has written, “religions deal in ultimate meanings that bear a claim to exceed merely secular authority. Thus, they remain a potent basis for contesting political legitimacy both within and beyond nation-states . . .”⁶⁰ Governments have often feared that their authority could be undermined by spiritual claims that transcend their temporal and territorial domain. Sociologists have discovered that political movements with religious roots typically “originate in social strata that are negatively privileged politically and economically, or socially ascendant but blocked from power.”⁶¹ Religion can, and historically has, served to mobilize political opposition in ways that dominant social classes or regimes view as threatening. Religious fervor and religious intolerance have histori-

57. See Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1431 (1991).

58. *Id.*

59. See John P. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 171, 176 (Theodor Meron ed., 1984); Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 209 (Louis Henkin ed., 1981).

60. John R. Hall, *Religion and Violence: Social Processes in Comparative Perspective*, in HANDBOOK OF THE SOCIOLOGY OF RELIGION 359, 367 (Michele Dillon ed., 2003).

61. *Id.*

cally been prime ingredients in episodes and even eras of violent conflict.⁶² More mundanely, governments might choose to repress even relatively powerless religious movements or individuals in order to “reinforce general norms of cultural conformity.”⁶³ Often restrictions on religious organizations and practices involve calculated efforts to balance political control with personal freedom. The Communist Party of China’s effort to carefully control certain religious practices while accepting others can be viewed as an effort to grant limited personal autonomy while trying to guard the political legitimacy of the regime,⁶⁴ which is typically justified in the name of maintaining “social harmony.”⁶⁵

Religion has always been a social force with which governments have had to reckon. Recent surges in various indicators of religious fervor have made the issue more pertinent than ever. Throughout the former Soviet Union in the past thirty years, approximately 100 million people joined religious groups for the first time.⁶⁶ According to Ronald Inglehart, scholar and Chairman of the World Values Survey, “unequivocally . . . there are more people alive today with traditional religious beliefs than ever before in history, and they’re a larger percentage of the world’s population than they were 20 years ago.”⁶⁷

Modern states have come up with legal mechanisms for handling issues of religious freedom and its limits. Western perspectives typically assume that religious tolerance is the basis for peace;⁶⁸ the separation of church and state is an oft advocated formulation. “[T]oday, as many as one-third of the nations of the world include formal guarantees of church-state separation in their constitutions.”⁶⁹

62. Some studies suggest that religious nationalism has had an especially strong association with violent conflict since the 1980s. See, e.g., Jonathan Fox, *The Rise of Religious Nationalism and Conflict: Ethnic Conflict and Revolutionary Wars, 1945–2001*, 41 J. PEACE 715 (2004).

63. Hall, *supra* note 60, at 377.

64. See Pitman B. Potter, *Belief in Control: Regulation of Religion in China*, 174 CHINA Q. 317 (2003).

65. Kolodner, *supra* note 25, at 466.

66. Paul Froese, *After Atheism: An Analysis of Religious Monopolies in the Post-Communist World*, 65 SOC. RELIGION 57, 57 (2004) (also noting that this has led not to a proliferation of religious faiths, but to the unprecedented growth in religious monopolies associated with orthodox Christianity and Islam).

67. Ronald Inglehart, Chairman, World Values Survey, Speech at a Session of the Religion and U.S. Foreign Policy Working Group (May 8, 2006), <http://pewforum.org/events/?EventID=116>.

68. See David Little, *Studying “Religious Human Rights”: Methodological Foundations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 45, 75 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (discussing studies conducted by the United States Institute of Peace).

69. Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Dis-*

Even the constitutions of communist countries guaranteed freedom of religious belief and practice, as long as religions were not “misused” politically for opposing the (socialist) constitution.⁷⁰

A. Religious Freedom and International Law

International law has had several responses to the issue of religious freedom. During the interwar years, Article 22 of the League of Nations Covenant imposed upon Mandatory Powers the duty to guarantee freedom of conscience and religion.⁷¹ The UDHR, though not legally binding, stipulates in Article 18 that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”⁷²

The ICCPR contains a number of articles that obligate state parties to respect the right of individuals to believe and practice their own religion.⁷³ Article 2 prohibits discrimination of the rights enumerated in the Covenant on the basis of, among other things, religion, and Article 24 explicitly extends protection against discrimination to children.⁷⁴ Article 20(2) calls on state parties to prohibit “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to dis-

crimination Based on Religion or Belief, 2002 BYU L. REV. 217, 223; see also Paul E. Sigmund, *Religious Human Rights in Latin America*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 68, at 467, 467–81 (discussing Latin American constitutional provisions).

70. Ole Riis, *Modes of Religious Pluralism under Conditions of Globalisation*, 1 INT’L J. MULTICULTURAL SOCIETIES 20, 24 (1999). Frequently, of course, a state seeking to suppress religious freedoms characterizes the activities of religious groups and leaders as impermissible political action or subversion. See ECOSOC Comm’n on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶¶ 78–81, U.N. Doc. E/CN.4/1987/35 (Dec. 24, 1986) (prepared by Angelo Vidal d’Almeida Ribeiro).

71. Natan Lerner, *Religious Human Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 68, at 79, 84.

72. UDHR, *supra* note 2, art. 18.

73. For a discussion of ICCPR provisions, see NATAN LERNER, RELIGION, SECULAR BELIEFS, AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION 19–28 (2006) and BAHIIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 82 (1996). Religious tolerance was excluded from earlier binding accords, such as the Convention on the Elimination of Racial Discrimination, because of opposition from the socialist countries at the time. PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 9 (2005).

74. ICCPR, *supra* note 3, art. 2, ¶ 1; art. 24, ¶ 1; see also ICCPR, *supra* note 3, art. 26.

crimination, hostility or violence . . .”⁷⁵ The most important guarantee of religious freedom, however, is spelled out in Article 18, which provides that

[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁷⁶

According to Article 4(2), Article 18 is one of the provisions of the treaty that is non-derogable, even in a declared national emergency.⁷⁷ Interestingly, the IC-CPR’s Article 18 does not reiterate the UDHR’s language specifying a right to change religions—a provision that was opposed by Saudi Arabia and other conservative Muslim countries.⁷⁸

Several regional agreements also contain provisions about religious freedom.⁷⁹ Article 9 of the 1950 European Convention almost replicates Article 18, paragraph 3 of the ICCPR. The Organization on Security and Cooperation in Europe’s Principle VII of the Helsinki Final Act refers to freedom of thought, conscience, religion, and belief for all without distinction as to race, sex, language, or religion.⁸⁰ Article 12 of the 1960 American Convention on Human Rights provides for freedom of conscience and religion, and proclaims the right to maintain

75. *Id.* art. 20, ¶ 2.

76. *Id.* art. 18, ¶ 1. The right to practice one’s own religion is also guaranteed in Article 27. *Id.* art. 27. There are permissible limitations on the right to “manifest” one’s religious beliefs. TAYLOR, *supra* note 73, at 292–338.

77. ICCPR, *supra* note 3, art. 4, ¶ 2.

78. ТАХЗИБ, *supra* note 73, at 85. “The Saudi Arabian representative argued that explicit recognition of freedom to change one’s religion or belief would foster discrimination in favour of religions possessing highly organized proselytizing institutions, particularly in the case of a state with a proselytizing state religion.” *Id.* To quote the Saudi delegate, “[m]en could in fact be induced to change their religion not only for perfectly legitimate intellectual or moral reasons, but also through weakness or credulity.” U.N. GAOR 15th Sess., 1021st mtg., ¶ 27, U.N. Doc. A/C.3/SR.1022 (Nov. 14, 1960); *see also* TAYLOR, *supra* note 73, at 29–34.

79. *See* NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS 40–50 (2000).

80. Organization for Security and Cooperation in Europe (OSCE), Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292, *available at* <http://www1.umn.edu/humanrts/osce/basics/finact75.htm> [hereinafter Helsinki Declaration]. Furthermore, the monitoring of human rights by the Council of Europe, the OSCE, and the EU has produced significant case law with respect to religious rights. For a comparison of international and European law on religious freedoms, *see generally* TAYLOR, *supra* note 73.

and to change one's religious beliefs.⁸¹ Article 8 of the African Charter guarantees free conscience and the free practice of religion.⁸²

Islamic agreements referring to religious freedom are much more circumspect. While agreeing to the principle of freely chosen religious commitments, they evince a real concern with conversion from Islam to other belief systems. The 1990 Cairo Declaration on Human Rights prohibits "any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism."⁸³ Article 22 allows freedom of expression as long as it is exercised in a manner that is not contrary to the principles of Shari'a.⁸⁴ Religious freedom is sharply curtailed in certain Islamic theologies, according to some scholars, by the view that conversion from Islam to another religion is tantamount to treason, and potentially punishable by death.⁸⁵

More than a decade after the ICCPR opened for signature, the U.N. General Assembly passed a non-binding resolution that filled out some of the details of the religious clauses of the ICCPR. In 1981, the General Assembly adopted by consensus the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Its main purpose is to give more concrete content to the general norms of the UDHR and the ICCPR.⁸⁶ U.N.-based law on religious freedom is also reiterated in the Convention on the Rights of the Child, which acknowledges children's "freedom to manifest [their] religion or religious beliefs,"⁸⁷ although this is the most reserved-against provision of that convention.⁸⁸

81. American Convention on Human Rights, *supra* note 32, art. 12.

82. Banjul Charter, *supra* note 33, art. 8.

83. Cairo Declaration on Human Rights in Islam, art. 10, U.N. GAOR, 4th Sess., U.N. Doc. A/CONF.157/PC/62/Add.18, (June 9, 1993), available at <http://www.oicun.org/articles/54/1/Cairo-Declaration-on-Human-Rights-in-Islam/1.html>.

84. *Id.* art. 22

85. Mohamed Talbi, *Religious Liberty: A Muslim Perspective*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS 175, 182 (Leonard J Swidler ed., 1986).

86. Article 1 affirms the right to freedom of thought, conscience and belief, and the right to manifest one's religion or belief. ICCPR, *supra* note 3, art. 1. Article 2 prohibits discrimination on the basis of religion or belief. ICCPR, *supra* note 3, art. 2. Neither provision defines "religion" or "belief," nor are these terms defined elsewhere in the UDHR. See LERNER, *supra* note 73, at 20–23; see also ELIZABETH ODIO-BENITO, ELIMINATION OF ALL FORMS OF INTOLERANCE AND DISCRIMINATION BASED ON RELIGION OR BELIEF 48–50 (1989). See generally Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988) (providing an overview and analysis of the declaration).

87. Convention on the Rights of the Child, *supra* note 35, art. 14.

88. For a discussion of religious rights of children, see EVA BREMS, ARTICLE 14: THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION (2006).

Despite these international legal obligations, it is not at all obvious that governments have taken practical measures to improve religious freedom within their jurisdictions. In 1986, a study of U.N. members' constitutions found that most had in fact provided for the protection of religious freedoms in their national constitutions and guarded against religious discrimination in their penal codes, though very few countries were judged to have implemented these measures into practice in a satisfactory way.⁸⁹ State control over religious groups in Communist China has long been notoriously tight and treatment of many religious groups especially harsh.⁹⁰ Some countries, such as Russia, have ratified the ICCPR but have also recently implemented domestic laws on religious freedom that are noticeably more restrictive.⁹¹ In fact, as Peter Beyer has noted, "maintenance of some kind of religious hegemony is the rule all across global society . . . unfettered freedom of religion or genuine religious pluralization is correspondingly rare, if it exists anywhere."⁹² Even liberal democracies such as Germany and France have taken actions that to some extent discriminate against or suppress religious groups and practices.⁹³ Richard Lillich has concluded that "one is forced to acknowledge that the right of religious freedom is one of the weakest—from the point of view of its recognition and its enforcement—of all the rights contained in articles 3–18 of the Universal Declaration."⁹⁴ Does it matter for the enjoyment of religious freedom that governments have committed themselves to the ICCPR?

B. Data and Methods

While no society can be characterized by the perfectly free practice of religious beliefs—even the hyperliberal United States curtails religious practices con-

89. ODIO-BENITO, *supra* note 86, at 22–30.

90. See Carolyn M. Evans, *Chinese Law and the International Protection of Religious Freedom*, 44 J. CHURCH & ST. 749, 756–74 (2002).

91. W. Cole Durham, Jr. & Lauren B. Homer, *Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal*, 12 EMORY INT'L L. REV. 101, 123–61 (1998). Some scholars compare the restrictive 1997 law as a return to religious restrictions during the Stalin era. See Froese, *supra* note 66, at 69.

92. Peter Beyer, *Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context*, 42 J. SCI. STUDY RELIG. 333, 333 (2003).

93. See generally Editorial, *Religious Persecution in Today's Germany: Old Habits Renewed*, 40 J. CHURCH & ST. 741 (1998); Willy Fautre, *France's Anti-Sect Bill Could Hinder Religious Freedom*, CTR. FOR STUD. ON NEW RELIGIONS, July 20, 2000, available at http://www.cesnur.org/testi/fr2K_july4.htm.

94. Richard B. Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 160 (Theodor Meron ed., 1984).

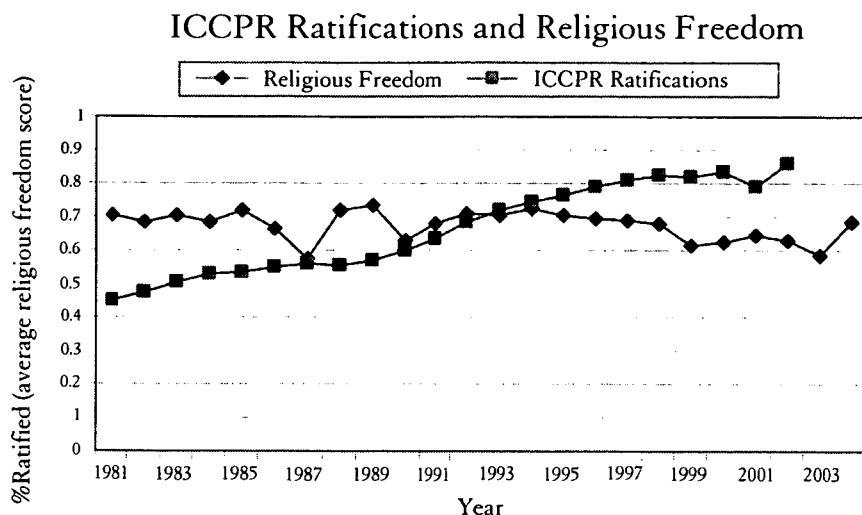


FIGURE 4

sidered immoral or a public danger—it is reasonable to expect that governments who have committed themselves to the ICCPR to move in the direction of a relatively more liberal approach to religious belief and practice. In order to test this proposition, it is necessary to measure the relative liberality of official practices. Data collected by Cingranelli and Richards provides one such measure. Their religious freedom indicator measures

the extent to which the freedom of citizens to exercise and practice their religious beliefs is subject to actual government restrictions. Citizens should be able to freely practice their religion and proselytize (attempt to convert) other citizens to their religion as long as such attempts are done in a non-coercive, peaceful manner.⁹⁵

This variable is dichotomous; that is, countries are coded as either restrictive or free. Governmental practices that count as restrictions include prohibitions on proselytizing, prohibitions on clergy's political participation, the arrest, detention or violence

95. CIRI Hum. Rts. Data Project, Short Variable Descriptions for Indicators in the Cingranelli-Richards CIRI Human Rights Dataset (2008), http://ciri.binghamton.edu/documentation/ciri_variables_short_descriptions.pdf.

toward religious officials, citizen conversions forced by government officials, citizen arrests, and harassment and intimidation for religious beliefs and practices.

The worldwide average relationship between this measure and ratification of the ICCPR is depicted in Figure 4. There appears to be no clear relationship between ICCPR ratification, which has trended upward over time, and this average measure of religious freedom worldwide. Religious freedom worldwide seemed to take a dive between 1985 and 1987, and then improved slightly in the earliest post-Cold War years, only to drift downward over the course of the 1990s and early 2000s. Obviously more than international legal developments are at play here. But the question is, given the broad range of pressures on governments to accommodate or to repress free religious practices, how, if at all, has ratification of the main binding global instrument—the ICCPR—influenced actual practices?

In order to address this question, I use a two-stage regression model in which ratification in the region, common law legal system, and ratification procedures are used as instruments for ratification.⁹⁶ Country-fixed effects are included as controls but are not reported. A lagged dependent variable is also included so that we are in effect modeling improvements in religious freedom from year to year.

A number of control variables are included so as to reduce the risk of drawing inappropriate inferences about ICCPR commitment. An indicator is included to capture the extent to which the state has a constitutionally established relationship with an official religious organization. I distinguish those states that established an official religion between 1970 and 2000 from those that disestablished an official religion in the same time period. My expectation would be that establishment would be associated with more governmental interference in free religious practices, while disestablishment would be associated with a liberalizing trend. I also distinguish states that were stable with respect to the establishment of state religion between 1970 and 2000, although I have no clear expectation for trends in their repression. After all, there is no reason to expect religious freedom in a country to change much where relations between church and state are fairly stable.⁹⁷

One of the most important conditions to control for is the extent of societal homogeneity with respect to religious culture. In societies characterized by a high de-

96. For a justification of these as good instruments, despite the fact that they explain ratification but do not directly explain the rights outcomes in question, see SIMMONS, *supra* note 5, ch. 3.

97. "Ironically, the motive behind establishment of a particular state religion usually is to strengthen that religion, but the effects are ultimately to undermine the vitality of the established religion." Charles M. North & Carl R. Gwin, *Religious Freedom and the Unintended Consequences of State Religion*, 71 S. ECON. J. 103, 103 (2004). Furthermore, establishing a state religion tends to reduce actual religious attendance. *Id.* at 104.

gree of homogeneity, state repression will hardly be necessary to achieve a consensus on basic value and social issues. But where many religious groups vie for social or cultural space, politicians may decide to use repression to advantage their religious supporters and quash culturally-based opposition. The greater the degree of religious fractionalization, the greater we might expect religious repression to be.

I also control for the dominant religion within each country. Certainly, no particular religious orientation has a monopoly on repressive tactics, whether for political or spiritual reasons. Yet it remains true that certain of the world's major religions are "universalistic" in orientation; in Ole Riis's words, they "claim to contain the whole spiritual truth, [while] particularistic religions have more specific aims and only claim partial access to that truth."⁹⁸ Riis goes on to contend that

[w]hile the former confront the individual with a fundamental choice and demand total commitment from their members, the latter are less demanding and may even be combined in functional mixtures, which, for the universal religions, would be perceived as eclecticism, syncretism and heresy. As a consequence, religious pluralism seems to be less problematic when particularistic religions are involved.⁹⁹

For these reasons, I include indicators for predominantly Protestant, Catholic, and Islamic countries. If Riis's observation can be generalized, we might expect countries dominated by these faiths to be relatively intolerant of, and possibly even repressive toward, religious minorities.

External pressures could also account for some episodes of liberalization toward religious belief and practice. Some of the wealthiest countries in the world are the most democratic and among the staunchest supporters of rights worldwide. Some of these governments are likely to use their aid strategically to oppose minority repression of all kinds; religious freedom would be only one among many of these governments' goals. In addition, foreign aid from some countries—the United States in particular—may have been influenced by religious Christians intent on punishing governments that take a harsh stance against Christian churches and missionaries.¹⁰⁰ Aid given by external actors could easily be conditioned—whether implicitly or explicitly—by demands that recipients honor the religious rights of

98. Riis, *supra* note 70, at 22.

99. *Id.*

100. William Martin, *The Christian Right and American Foreign Policy*, FOREIGN POL'Y, Spring 1999, at 66, 75–77.

their locals and of foreign missionaries. The more important such aid is as a proportion of GDP, the more we might expect an improvement in religious freedom, quite independent of the demands associated with treaty ratification.

C. Findings: ICCPR Ratification and Religious Freedom

The results of these analyses are displayed in Table 3. One thing is clear: there are many factors that impact government policies with respect to religious freedom other than the ratification of the ICCPR. Models 1–3 indicate that ratification is positively associated with minimal governmental restrictions on religious freedoms, although the result is statistically significant on average only five years after ratification. Models 3–5 run a similar model on subsets of countries: transitioning countries, stable democracies since World War II, and stable autocracies. These tests show that the transitioning group—countries that have at some point since World War II experienced a modicum of democratic governance—account for the most convincing share of the effects of ICCPR ratification. According to Model 4, we can be fairly sure that among transitioning countries, ratification of the ICCPR is associated with an 11 percent increase in the average religious freedom score. If anything, ICCPR ratification is associated with a slight deterioration in freedom in stable democracies ($p=.165$, below standard levels of statistical significance), while in stable autocracies, the standard error is far too high to draw any inferences at all. Ratification of the ICCPR is most convincingly associated with improvements in religious freedoms in countries in transition. These results are robust to the inclusion of country- and year-fixed effects, a year trend, the actual degree of democracy in each year, and average religious freedom in the region.¹⁰¹

Table 3: The ICCPR and Freedom of Religion

(Dependent Variable: Religious Freedom)

Two-staged instrumental regression (endogenous: ICCPR ratification)

	Model 1:	Model 2:	Model 3: transition countries only:	Model 4: stable democracies only:	Model 5: stable autocracies only:
ICCPR obligation (lagged 5 years)	.080* ($p=.055$)	.073* ($p=.089$)	.111** ($p=.018$)	-.023 ($p=.165$)	.081 ($p=.402$)

101. For brevity, these results are not shown here.

State religion, 1970–2000	.600*** (p=.052)	.749*** (p=.000)	—	—	-.614 (p=.179)
Establishing states, 1970–2000	-.033* (p=.092)	-.305*** (p=.009)	-.709*** (p=.000)	-.091 (p=.329)	.787** (p=.012)
Disestablishing states, 1970–2000	-.518*** (p=.001)	-.416** (p=.016)	.056*** (p=.000)	.321 (p=.304)	.930* (p=.074)
Religious freedom, t-1	.466*** (p=.000)	.464*** (p=.000)	.471*** (p=.000)	.426*** (p=.000)	.456*** (p=.000)
Religious fractionalization	-.0002*** (p=.000)	-.0002*** (p=.000)	.597*** (p=.010)	—	-.00006*** (p=.000)
Overseas development aid, t-1	.476*** (p=.004)	.480*** (p=.006)	.311* (p=.091)	.669 (p=.351)	.541** (p=.018)
Logged GDP/capita	-.097* (p=.052)	-.093* (p=.090)	-.126* (p=.106)	-.027 (p=.666)	-.155* (p=.092)
Islamic	-.032*** (p=.015)	-.18 (p=.306)	.149 (p=.122)	—	-.055** (p=.030)
Catholic	.454*** (p=.000)	.463*** (p=.000)	-.382* (p=.985)	-.073 (p=.405)	.856*** (p=.008)
Protestant	.108*** (p=.000)	.241* (p=.055)	-.061 (p=.274)	.165 (p=.483)	1.27** (p=.013)
Democracy	—	.002 (p=.336)		—	—
GDP growth	—	.0004 (p=.760)	—	—	—
Trade openness	—	-.0005 (p=.336)	—	—	—
Civil war	—	.023 (p=.527)	—	—	—
Interstate war	—	.019 (p=.620)	—	—	—
Country-fixed effects?	yes	yes	yes	yes	yes
Year-fixed effects?	yes	.yes	yes	yes	yes
# of countries			55	32	59
# of observations	2691	2556	1022	661	1038
R-squared	.700	.702	.701	.343	.644

Instruments: All explanatory variables, plus ratification procedures, common law tradition, regional ICCPR density, a counting vector of years without ICCPR ratification, three cubic splines, and a year trend.

Of course, many other factors also explain governments' efforts to control religious beliefs and practices in their jurisdictions. The changing relationship between church and state over time appears to be quite important, but it varies significantly across subgroups by regime type. Establishment and disestablishment were associated with greater governmental restrictions on religion in general, but not within stable democracies, where these changes seem to make no systematic difference to religious freedoms. Generally, in countries with a high degree of religious fractionalization, there tends to be much more official state oppression than in more religiously homogenous societies, but the stable autocracies account for most of the repression in this case. For an autocrat, religious opposition might well represent a perceived political threat, "justifying" a crackdown on the religious followers of political rivals.

As expected, foreign aid also seems to work. As aid increases as a proportion of the recipient's GDP, governments tend to remove restrictions and take a more liberal approach to religious freedoms. This result is especially strong for autocracies, though weak to non-existent within stable democracies. A strong possibility is that aid is given selectively, that is, to countries that already have fairly strong respect for religious freedoms. It could also indicate a form of soft conditionality if aid providers extend assistance on the understanding that rights practices with respect to religious freedoms are expected to improve. Surprisingly, a country's level of development seems to be negatively associated with religious freedoms, controlling for differences between countries, and focusing only on effects within them, greater wealth per capita is associated with more governmental interference with religious freedom.

Finally, a word about religious freedoms across the major religious cultures. Because they span many nations, I have tested for differences in practices with respect to religious freedom for predominantly Protestant, Catholic, and Islamic nations. No predominantly Islamic countries were among the stable democracies, but neither branch of Christianity had any significant impact on religious freedoms in stable democracies. Predominant religious culture in the transitioning countries and stable autocracies display contrasting results, with Islam associated with greater religious freedoms among transitioning countries and Christianity associated with greater religious freedom among stable tyrants.

For our purposes, the major result is the weak but noticeable influence of the ICCPR within five years of ratification for all regime types, with a clear concentration of these positive effects within countries that have had at least some post-war experience with a moderate level of democratic governance. This is consistent

with a theory that predicts the strongest treaty effects in countries in which individuals and groups have both the motive and the means to demand treaty adherence. It is also consistent with anecdotal evidence of the weight that at least some religious groups attach to ratification of the ICCPR as a way to enhance their ability to operate freely in many locations throughout the world.¹⁰² Indeed, the ability to organize and to draw from the strength of faith-based communities with dense social networks may be one of the key reasons the ICCPR's religious guarantees are more difficult for governments to ignore than other aspects of the treaty. A fairly sharp comparison can be drawn with civil rights touching on criminal justice, which is explored in the following part.

V. FAIR TRIALS

The right to a fair trial has deep historical roots that extend back as far as the Magna Carta.¹⁰³ The idea of that document—and many to follow with successively greater elaboration and expansion—was to prevent the arbitrary exercise of sovereign power to arrest, detain, and convict individuals for various infractions and misdeeds without basic provisions for the due processes of law.

So why do some states fail to provide their populace access to a fair trial? One cluster of explanations can be found in the generally repressive nature of governance on which some regimes rely. Denying access to justice for political opponents and common criminals is one way for an oppressive state to maintain its arbitrary control over social and political developments. Demands for fair treatment before the law have historically been associated with arbitrary or authoritarian rule. Fair trials were central among rights that distinguished the colonial

102. Among U.S. religious and church organizations, the more liberal—often those whose organizational provenance can be traced to the antiwar movement of the Vietnam era—tend to support the ratification of the ICCPR and other covenants, while more conservative religious organizations, such as the National Association of Evangelicals, are distinctly cool to the U.N. approach to rights. See generally Lowell W. Livezey, *US Religious Organizations and the International Human Rights Movement*, 11 HUM. RTS. Q. 14 (1989) (discussing the status of human rights among different religious organizations). For more on the follow-up of religious as well as secular NGOs, see TAHZIB, *supra* note 73, at 223–45; Michael Roan, *The Role of Secular Non-Governmental Organizations in the Cultivation and Understanding of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 68, at 135, 135–59.

103. “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” Magna Carta, art. 39 (1215), available at <http://www.fordham.edu/halsall/source/magnacarta.html>.

rights of Englishmen in the New World on the eve of the American Revolution.¹⁰⁴ Fair trials were also a centerpiece of the democratic transition in former Communist countries such as the Czech Republic, Hungary, Poland, Lithuania, and Romania, and made their way prominently into the new post-Communist constitutions in these states.¹⁰⁵ A right to a fair trial was not included in the South African constitution until apartheid was brought down in 1994; such a right as existed in common law in that country could be legislatively overridden according to principles of parliamentary sovereignty.¹⁰⁶ The concept of popular sovereignty historically has fueled demands for legal reforms that reflect the basic civil right to due process of law for individuals accused of crimes.¹⁰⁷

There may be other reasons for weak due process in practice. Some observers associate a breakdown in the fair delivery of criminal justice with a broad incapacity of judicial systems more generally. In parts of Asia, the lack of fair trials is seen as a symptom of the widespread demise of judicial independence more generally.¹⁰⁸ In particular, some countries are plagued with judicial incompetence and poor police training.¹⁰⁹ The provision of a fair trial may be limited not only for political purposes of despotic states but can also flow from bureaucratic incapacities that stem from broader resource deficiencies.

104. See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 19 (1992).

105. See generally Pavel Hollander, *Justice of the Czech Constitutional Court*, in *THE RIGHT TO A FAIR TRIAL* 24 (European Commission for Democracy through Law ed. 2000); Jerzy Oniszczyk, *The Right to a Fair Trial in the Decisions of the Polish Constitutional Tribunal*, in *THE RIGHT TO A FAIR TRIAL*, *supra*, at 141; Stasys Staciokas, *The Right to a Fair Trial in Lithuanian Law*, in *THE RIGHT TO A FAIR TRIAL*, *supra*, at 130; Laszlo Trocsanyi & Alexandra Horvath, *The Right to a Fair Trial in Hungary*, in *THE RIGHT TO A FAIR TRIAL*, *supra*, at 36; Florin Bucur Vasilescu, *The Right to a Fair Trial in Romania*, in *THE RIGHT TO A FAIR TRIAL*, *supra*, at 43.

106. Andrew Skeen, *The Right to a Fair Trial in South African Law*, in *THE RIGHT TO A FAIR TRIAL*, *supra* note 105, at 110, 110.

107. See Hung-En Sung, *Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process*, 605 *ANNALS AM. ACAD. POL. & SOC. SCI.* 311, 313–16 (2006).

108. See generally the rambling and disorganized discussion in *DECLINE OF FAIR TRIAL IN ASIA: PAPERS FROM AN ASIAN SEMINAR ON FAIR TRIAL, 7–12 NOVEMBER 1999*, KWOLLOON, HONG KONG (Asian Human Rights Commission ed., 2000) [hereinafter *DECLINE OF FAIR TRIAL IN ASIA*].

109. As an example, see the statistics regarding Nepal cited in Yubaraj Sangroula, *Fair Trial: Still a Long Way to Achieve in Nepal*, in *DECLINE OF FAIR TRIAL IN ASIA*, *supra* note 108, at 195, 195–215.

A. Fair Trials in International Law

The UDHR was the first modern multilateral document to articulate a right to a fair trial. Fair trials were somewhat less controversial than the provision of religious freedom, though debates did ensue about the exact parameters of this guarantee. The United States was eager to articulate post-war principles of civil and political rights, and provided the first proposal containing some of the substantive fair trial provisions for the UDHR.¹¹⁰ The United Kingdom drafted provisions for protections from arbitrary arrest.¹¹¹ Delegations from Cuba, Chile, and Mexico were also especially active in the drafting of fair trial provisions and were insistent on their inclusion. As a result of these efforts, fair trials are featured prominently in the UDHR. Article 8 provides for remedies for violations of the right to a fair trial; Article 9 deals with arbitrary arrest; Article 10 expresses the basic right of the individual to a fair trial in both civil and criminal proceedings; and Article 11 refers to a presumption of innocence and the prohibition of ex post facto laws and penalties.¹¹²

The ICCPR was negotiated concurrently with the UDHR, and the UDHR's Articles 8–11 were made legally binding in Articles 14 and 15 of the ICCPR.

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹¹³

Article 15 guarantees a presumption of innocence and prohibition of ex post facto laws and is one of the seven articles specified as non-derogable in Article 4.¹¹⁴ The ICCPR also addresses some events leading up to and following the trial

110. These provisions were developed specifically for the UDHR but were eventually adopted in the ICCPR's Article 14. DAVID S. WEISSBRODT, *THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 44 (2001).

111. *Id.*

112. UDHR, *supra* note 2, arts. 8–11.

113. ICCPR, *supra* note 3, art. 14. *See generally* David Weissbrodt & Matthias Hallendorff, *Travaux Préparatoires of the Fair Trial Provisions—Articles 8 to 11—of the Universal Declaration of Human Rights*, 21 HUM. RTS. Q. 1061 (1999) (discussing the origins and drafting history of Article 14).

114. *See* WEISSBRODT, *supra* note 110, at 93–110 (discussing the development of Article 4 as it pertains to the right to a fair trial).

proper, including arrest, detention, interrogation, and punishment.¹¹⁵ According to the Human Rights Committee, the object and purpose of these provisions, in particular Articles 14 and 15, is to ensure that no one is subject to arbitrary prosecution, conviction, or punishment.¹¹⁶

Fair trials are also mentioned in several regional human rights agreements. The Americas were among the earliest to institutionalize a right to a fair trial on a regional basis. The 1948 American Declaration of the Rights and Duties of Man mentions a fundamental right to access the courts "to ensure respect for his legal rights"¹¹⁷ while the American Convention on Human Rights provides for a liberal list of "minimal guarantees" for "[e]very person accused of a criminal offense . . ."¹¹⁸ Article 6 of the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms, which preceded the ICCPR, specifies a right to a fair trial and describes this right in much the same way as does the ICCPR.¹¹⁹ The League of

115. ICCPR, *supra* note 3, arts. 6–11, 17.

116. Accordingly, it has interpreted the provisions as applying both to general courts and to specialized courts (such as military tribunals) that try civilians and views fair trial provisions as pertaining to violations made at any stage of the proceedings. Human Rights Comm., *Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.2 (Apr. 13, 1984), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?OpenDocument). For a discussion of the various fair trial provisions of the ICCPR, see PIETER VAN DIJK, *THE RIGHT OF THE ACCUSED TO A FAIR TRIAL UNDER INTERNATIONAL LAW* (1983); Alfred de Zayas, *The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in *THE RIGHT TO A FAIR TRIAL* 669, 669–96 (David Weissbrodt & Rüdiger Wolfrum eds., 1997); Nihal Jayawickrama, *The Right to a Fair Trial Under the International Covenant on Civil and Political Rights*, in *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL & COMPARATIVE PERSPECTIVE* 37, 37–67 (Andrew Byrnes ed., 1997).

117. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. 18, 9th Int'l Conference of American States (Apr. 1948), available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

118. American Convention on Human Rights, *supra* note 32, art. 8, ¶¶ 1–2. For a discussion of cases heard by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, see Antonio Augusto Cancado, *The Right to a Fair Trial Under the American Convention on Human Rights*, in *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL & COMPARATIVE PERSPECTIVE*, *supra* note 116, at 4, 4–12; Juliane Kokott, *Fair Trial—the Inter-American System for the Protection of Human Rights*, in *THE RIGHT TO A FAIR TRIAL*, *supra* note 116, at 133, 133–62.

119. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 31, art. 6. See generally Leonard H. Leigh, *The Right to a Fair Trial and the European Convention on Human Rights*, in *THE RIGHT TO A FAIR TRIAL*, *supra* note 116, at 645, 645–68 (discussing the European Convention on Human Rights' influence on the concept of fair trial); Franz Matscher, *The Right to a Fair Trial in the Case-Law of the Organs of the European Convention on Human Rights*, in *THE RIGHT TO A FAIR TRIAL*, *supra* note 105, at 10, 10–23 (discussing the meaning of a right to a fair trial).

Arab States' Charter on Human Rights also contains guarantees with respect to fair trials.¹²⁰ Article 7 of the African Charter includes rights to be presumed innocent, to defense and counsel of accused's choice, the right to an impartial trial within a reasonable period of time and protection from ex post facto laws, but does not contain many of the other components of a fair trial specified in the UDHR and the ICCPR.¹²¹ The right to a fair trial is also addressed under international humanitarian law, in particular the Geneva Conventions and their 1977 Protocols.¹²²

The ICCPR remains the most important universal treaty to guarantee the right to a fair trial. What has the ratification of the ICCPR contributed to the actual provision of a fair approach to criminal justice? The strategy for answering this question is discussed in the following section.

B. Data and Methods

If the ICCPR has an influence on the civil rights of accused persons, then we should see actual practices guaranteeing fairness to improve among ratifiers. Oona Hathaway has developed a sophisticated measure of fair trials using international legal texts—primarily the ICCPR—as her guide and U.S. State Department reports for the raw material from which her index is coded.¹²³ The index considers the extent to which trials are carried out by independent and impartial tribunals; whether an accused person has a right to counsel (and if necessary, an interpreter) and to present a defense; whether there is a presumption of innocence; and whether the trial is held publicly, in a timely fashion, and with a right to appeal. In addition, she coded for prohibitions on ex post laws and the right to have charges presented with prior notice.¹²⁴ This index captures well the international norms embodied in the ICCPR.

Figure 5 illustrates the worldwide average of the Fair Trials scale each year

120. See League of Arab States, Arab Charter on Human Rights, art. 13, ¶¶ 1–2; art. 14, ¶ 5; arts. 16–17; art. 20, ¶ 2, May 22, 2004, available at <http://www1.umn.edu/humanrts/instree/loas2005.html>.

121. Banjul Charter, *supra* note 33, art. 7. See generally Ibrahim Ali Badawi El-Sheikh, *Preliminary Remarks on the Right to a Fair Trial under the African Charter on Human and People's Rights*, in *THE RIGHT TO A FAIR TRIAL*, *supra* note 116, at 327, 328–32 (discussing Article 7 of the Banjul Charter).

122. Christophe Swinarski, *On the Right to a Fair Trial under International Humanitarian Instruments*, in *THE RIGHT TO FAIR TRIAL IN INTERNATIONAL & COMPARATIVE PERSPECTIVE*, *supra* note 116, at 26, 26–36.

123. On the quality of U.S. State Department reports, see generally Judith Innes de Neufville, *Human-Rights Reporting as a Policy Tool: An Examination of the State Department Country Reports*, 8 HUM. RTS. Q. 681 (1986).

124. For the original coding justification, see Hathaway, *supra* note 36.

ICCPR Obligations and Fair Trials

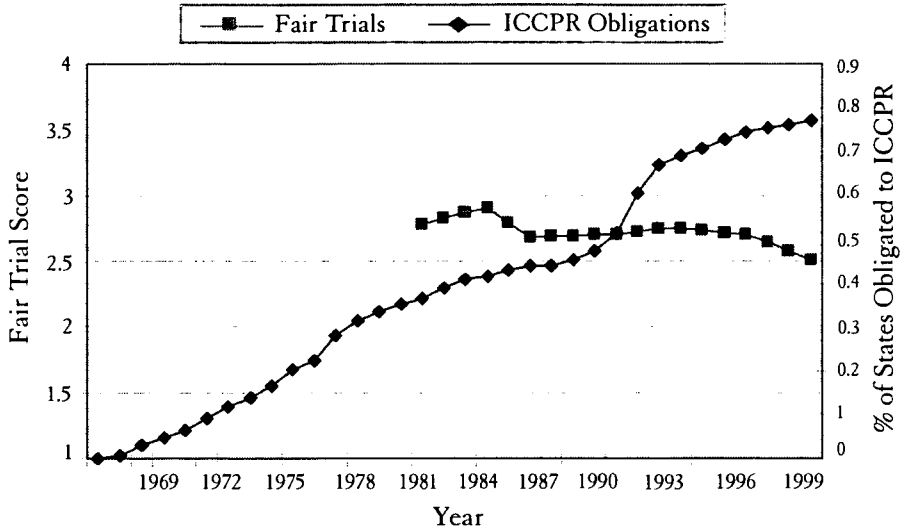


FIGURE 5

from 1982 to 2002. We only have data since 1982, but the trends are toward a slight deterioration in the mid-1980s and again in the late 1990s. On the face of it, it would appear there is very little relationship between average global ratification of the ICCPR and the average on this scale in contrast to the broader civil liberties measure examined above. Of course, many factors influence the will and capacity to provide individuals accused of a crime with a fair trial. What, if anything, does ratification contribute?¹²⁵

In order to answer this question, it is again important to construct a model that accounts for ratification endogeneity, constant characteristics of countries, shocks specific to particular years, and a host of alternative explanations. The models reported in Table 3 pool countries over time, employ two-stage least squares, and endogenizes the decision to ratify the ICCPR as described above.¹²⁶

125. *Id.* Fair trial scores are undated, interpolated, and inverted so that high values represent better practices.

126. Unfortunately, in this case, the common law variable is unlikely to make a good instrument. According to some legal scholars, the idea of a fair trial for those accused of crimes is a contribution of the common law tradition, with its emphasis on "fair play." See, e.g., Matscher, *supra* note 119, at 10. Thus, identification in this case depends almost exclusively on regional ratification density in the previous period.

They all contain country-fixed effects, so that constant characteristics of particular countries do not drive results, as well as year-fixed effects to control for the possibility that some common external shock jolts all countries to alter their policies at given points in time. To account for policy inertia, the dependent variable lagged three years is included, as are average regional trial practices to account for the possibility of socialization or mimicry toward regional norms. Because we do not want to confuse the effects of ICCPR ratification with the general processes associated with democratization, variables to capture both democratic levels and change are included. Because it is reasonable to assume that fair criminal justice is more likely to be suspended during national emergencies, civil and international wars are included. Fair trials could also be a function of development level (expressed as GDP per capita) or external influences, such as development assistance; both of these are controlled for in Table 3. In addition, I control for extraordinary efforts to improve government accountability with respect to human rights practices with controls for truth commissions and criminal trials aimed at prosecuting officials for criminal human rights violations. As above, robust standard errors with a correction for clustering on country are reported.

Oona Hathaway pioneered research in this area, and found that ratification of the ICCPR had little effect on state practices with respect to fair trials. Quite the contrary, some analyses of her evidence suggest that rights practices worsen once a treaty commitment has been made. However, I am interested not only in the aggregate effects of the ICCPR with respect to fair trials, but also in the conditions under which we might expect ratification to have its strongest impact. Theoretically, there are strong reasons to suspect that fair trials are already provided in stable democracies, and there is little reason for ratification of the ICCPR to stimulate new political demands in that regard. Nor should we expect the ICCPR to make much difference in stable autocracies, where potential demanders can anticipate costly state resistance. Ratification should matter most where local groups have both the motive and the means to demand compliance. This is the case in countries characterized by some degree of regime transition.

C. Findings: ICCPR Ratification and Fair Trials

TABLE 4: Effects of an ICCPR Commitment on Fair Trials
Dependent Variable: Fair Trial Practices two-staged instrumental regression
(endogenous: ICCPR ratification)

Explanatory Variables:	All countries	Trans. Only	Trans. Only, with controls	Never democratic only	Stable democracies only	Trans., ICCPR 5 year lag
ICCPR commitment	.168 (p=.175)	.314* (p=.086)	.348* (p=.087)	.094 (p=.674)	-.076 (p=.509)	.055 (p=.763)
Fair trials (t-3)	0.163*** (p=.002)	.152** (p=.024)	.148** (p=.047)	.110 (p=.125)	.206 (p=.220)	.174** (p=.027)
Regional fair trial average (t-2)	.163*** (p=.001)	.909*** (p=.00)	1.00*** (p=.000)	.647* (p=.054)	.362*** (p=.001)	1.01*** (p=.000)
Democracy (level)	-.004 (p=.635)	—	-.004 (p=.70)	-.008 (p=.570)	.278*** (p=.001)	.0003 (p=.978)
Democratic change	-0.019*** (p=.006)	-.017** (p=.019)	-.020** (p=.017)	-.014 (p=.211)	.134* (p=.05)	-.019** (p=.018)
Military government	-.144 (p=.148)	-.267** (p=.020)	-.243* (p=.052)	.054 (p=.650)	—	-.236* (p=.067)
Truth commission	.436** (p=.025)	—	.349* (p=.083)	.105 (p=.558)	.299 (p=.263)	.360 (p=.116)
Criminal trials	.023 (p=.814)	—	.038 (p=.717)	.079 (p=.649)	.223** (p=.018)	.037 (p=.734)
Logged Total fractionalization	.440* (p=.089)	—	.061 (p=.932)	-.097 (p=.837)	3.97*** (p=.001)	-.243 (p=.731)
Logged GDP/capita	-.235 (p=.354)	—	.111 (p=.811)	-.598* (p=.069)	-.386 (p=.217)	.169 (p=.731)
Logged population	-.845* (p=.055)	—	.019 (p=.983)	-.189 (p=.884)	-1.92*** (p=.001)	.413 (p=.648)
Overseas development assistance/ GDP	.372 (p=.600)	—	1.35* (p=.096)	-.045 (p=.962)	-10.32*** (p=.001)	1.37* (p=.085)
Civil war	-.207** (p=.044)	—	.006 (p=.960)	-.237* (p=.065)	-1.04*** (p=.000)	.038 (p=.757)
Interstate war	-.255** (p=.034)	—	-.021 (p=.809)	-.521*** (p=.000)	.090* (p=.097)	-.005 (p=.953)
Rule of Law	1.83** (p=.020)	—	-.631 (p=.643)	.340 (p=.557)	.497 (p=.158)	-.217 (p=.871)
Country fixed Effects	yes	Yes	yes	yes	yes	yes
Yr. fixed effects	yes	Yes	yes	yes	yes	yes

Observations	1890	746	684	756	434	684
# of countries	140	55	51	59	28	51
R-squared	0.767	0.724	.725	0.580	0.881	0.715

Results of Two-Stages Least Squares regression; Instrumented: ICCPR obligation. Instruments: All explanatory variables above, plus ratification procedures, common law legal tradition, regional ICCPR obligation density, a counting vector of years without ICCPR ratification, three cubic splines, and a year time trend. Robust p values in parentheses; * significant at 10%; ** significant at 5%; *** significant at 1%.

The results for the influence of ICCPR treaty commitments are reported in Table 4. In every version of the model, with one exception, ICCPR ratification is associated with improvements in fair trial practices. However, when all countries are included in the sample, the result does not meet traditional standards of statistical significance. Interesting variation emerges, however, when we look at subgroups of countries. Ratification of the ICCPR appears to have no discernable effects in countries that were never democratic during the post-World War II period, nor in stable democracies over those years. But if we run a similar test for countries that have had some experience with democratic politics—transitional countries in the sense that they had passed a moderately high democratic threshold at some point in the post-war years—ratification of the ICCPR is quite likely to be associated with fairer domestic trials from year to year, at least in the short run. When we look for impact five years out from ratification, the ICCPR effect becomes swamped by other factors. Nevertheless, there is some evidence that for the fifty-five countries coded as transitional, ratification has contributed to better practices—fairer trials for individuals than what would have been the case had the treaty not been ratified at all.

Ratification of the ICCPR is, of course, not the only influence on fair trials, and the control variables tested here reveal some important influences on legal practices. The usually strongly positive lagged dependent variable indicates that countries with poor ratings were likely to have poor ratings in the next period, indicating that the fairness of trials is marked by a high degree of institutional inertia. The most consistent external influence across all categories of countries is the nature of the practices in the region in which the country is situated. Across all subgroups and the sample as a whole, fair trial practices in the region were a strong predictor of fair trial practices in a specific country. This effect appears to be the strongest among transitional countries, though it is statistically significant in every model. This pattern could be explained by shared cultural patterns or even regional socialization or

mimicry. Another external influence that is strongest in transitional countries is the positive influence of overseas development assistance. But it is important to note that the effects of the ICCPR are noticeable among the transitional countries even when controlling for their regional context and foreign development aid.

One of the most important influences on fair trial practices is the nature of the domestic political regime, but the results hold some surprises in this regard. A country's extent of democracy at the time of observation does not have the positive effect on fair trials one might expect (except among those countries that have been stable democracies since World War II). Even more surprising, democratic change tends to lead to worse fair trial practices in the following year, and this result is especially robust for the fifty-five transitional countries. What these results suggest is that, in practice, fair trials do not improve in lock-step with democracy and democratic improvements. Protecting the legal rights of the accused requires something more than encouraging participatory democracy. More consistent with expectations, civilian governments are more likely to be associated with fair trials. Legal fairness appears to deteriorate significantly, especially in countries in transition and governed by military leaders. (Note that there were no military governments among the stable democracies, so the variable drops out of that model). There is also some evidence that governments especially committed to exposing the crimes and abuses of earlier regimes through the use of truth commissions improve their trials in the following year. Unsurprisingly, countries that score high on the rule of law scale also tend to provide fairer trials for accused persons. The inclusion of these variables helps to control for a domestically generated commitment to improve human rights practices, and increases confidence that the ICCPR ratification variable is not simply reflecting a set of domestic legal innovations.

There is little evidence that fair trial practices are driven by what might broadly be considered developmental or local social factors. While it undoubtedly takes resources to hold fair trials—providing the defense with qualified attorneys and educating independent judges is not an inexpensive option—it is not the case that wealthier countries conduct fairer trials, all else equal. In fact, there is some suggestion that the opposite is true, at least for the more authoritarian regimes. Countries that are more varied in terms of religion, language, and ethnic groups may tend to have somewhat better practices as well, but this result seems to be driven by the country being a stable democracy in the first place, such as Belgium. A burgeoning population may contribute to deteriorating practices if social and other problems worsen, though in this case the effects seem to be concentrated in

the stable autocracies. Overall, however, it is hard to say there is a clear social or developmental country profile associated with fair trials.

Far clearer is the role that violent conflict plays in the administration of justice for the accused. The expectation that violent periods of “national emergency” are often used as reasons to short-circuit normal rights protections in the name of national security is borne out in these tests. Both civil wars and interstate wars returned the expected negative coefficient for the sample of countries as a whole, but the most consistent deterioration in rights associated with war is concentrated in the countries that were never democratic during the postwar years. The effect is apparently contradictory for stable democracies, with civil wars associated with worse practices and international wars with fairer trials. In the transition countries, wars—whether civil or international—are not associated with clear trends in fair trials in either direction.

Overall, the influence of ICCPR ratification on fair trials is highly conditioned by the nature of the regime. There is a positive but statistically insignificant association across all countries, but the analysis of subgroups indicates that the positive effects are concentrated largely in neither the stable democracies nor the stable autocracies, but rather in those polities that have had some experience with democratic government, however fleeting. The statistical strength of the relationship is not very strong—we can only be 91–92 percent confident that the relationship is not due to chance alone—but it does offer some evidence that ratification is associated, under the right political circumstances, with actual improvements in fair trials.

CONCLUSION

The development of international human rights law has been one of the most significant projects of the last sixty years. Statesmen, activists, legal scholars, and organizations have committed a great deal of effort to fashioning a legal regime by which individuals might claim a broad array of civil rights vis-à-vis their own governments. Many have boldly labeled the central documents reflecting these efforts as “The International Bill of Rights” and have touted it as the closest thing the international community has to a global constitutional statement of the civil rights of humankind. There is little doubt that the UDHR and the ICCPR represent the normative aspirations of a good number of well-intentioned individuals, but it is also necessary to take stock of the effects of these documents, and ask, what have they contributed to the actual realization of the rights they proclaim?

This article has been a modest step toward exploring and trying to answer this

question. It has gone beyond claims that treaty ratification is largely symbolic and taken seriously the idea that domestic rights demanders have strong incentives to use whatever tools are available to them—including international treaty commitments—to claim the rights these treaties express. One surprise has been that ratification has mattered at all to civil rights practices, given the prevailing assumption that such commitments are close to meaningless and largely unenforced by external actors. It is also surprising given the stringency of the models developed here. It is not easy to claim, given these analyses, that in broadening religious freedom and making trials fairer that governments are simply mimicking others, that this is just a residual consequence of the process of democratization, or that the government would have changed its behavior even in the absence of the treaty commitment. These claims do not ring true because they are largely controlled for by the nature of the tests performed. The methods I use do not prove a causal relationship between treaty ratification and improved practices, but they do eliminate many alternative explanations that one might have initially thought would be more powerful explanations of official civil rights choices. Nor do I claim that the treaty commitment is the only or even the most important reason for the improvements we do observe. The claim is rather that such commitments have made an important contribution to rights practices, and that scholars and practitioners have not, to date, been able or willing to recognize this contribution.

Why should treaty ratification matter? The mechanisms are potentially myriad, but one is especially plausible: treaty ratification matters because it stimulates domestic organization and mobilizes locals to claim the rights the treaty contains. We have seen that ICCPR ratification is followed by a burst of civil society organization, consistent with the idea that citizens view the post-ratification period as a time to organize to demand the kinds of rights the treaty promises on paper. Of course, not all kinds of issues elicit identical kinds or degrees of domestic mobilization. This research shows that there is a real payoff to breaking out different kinds of “civil rights” and comparing the treaty impact across issue areas. This is important because the politics differ across these issue areas in ways relevant to the mechanisms of treaty compliance. Compare religious freedom with fair trials, for example. The domestic demands for compliance are likely to be much stronger for religious freedom than for fair trials. In many cases, religious freedom will be demanded by organized religious groups, who have the organizational capacity to press the government to allow them to worship and practice their religions freely. The primary demanders of fair trials may not only be political opponents of the government, but also an unsavory array of criminals. Not only is it difficult

for such groups to organize themselves, it is also often difficult to assemble a broad coalition for fair trials because such measures can be framed as being soft on crime. Unsurprisingly, ratification has a less convincing impact on fair trials. This does not mean, however, that a treaty commitment is meaningless where mobilization is weak. It may mean that other means must be found to enforce compliance. In Egypt, for example, the high court has used the ICCPR to craft rulings that improve the fairness of trials.¹²⁷

One of the most striking results is the evidence of stronger treaty effects in countries experiencing regime instability or transition. This was found to be the case with respect both to religious freedom and fair trials. The theoretical discussion provided good reason to suspect that treaty ratification would have the least impact in stable democracies (where rights are already very well protected) and in stable autocracies (where people anticipate harsh repression were they ever to demand treaty compliance). The evidence analyzed here is quite consistent with these expectations. With respect to religious freedom, the ICCPR has apparently had practically no impact in stable democracies or autocracies, but has had a positive impact in countries with some prospect of or experience with moderately responsive government. The evidence was weaker with respect to fair trials, but the basic pattern was similar: much more convincing positive ratification effects in the transition countries than in the stable extremes.

These results suggest a modest but important conclusion: international treaty commitments quite likely have made a positive contribution to civil rights practices in many countries around the world. Of course, ratification of the ICCPR does not guarantee good practices. It certainly cannot overcome the stresses of a conflict-ridden polity governed by a succession of despots. It may not even be as important as the examples (good and bad) provided by other governments in the region. But ratification does seem to support civil rights improvements on the margins. It does this most consistently where people have both the motive and the means to mobilize to demand compliance and where the practice in question can be monitored at a reasonable cost. This finding contrasts with those of previous scholars who have viewed treaty commitments as cheap opportunities to score public relations points with little risk that they will be expected

127. See, e.g., Adel Omar Sharif, *The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 1, 1–34 (Eugene Cotran & Mai Yamani eds., 2000).

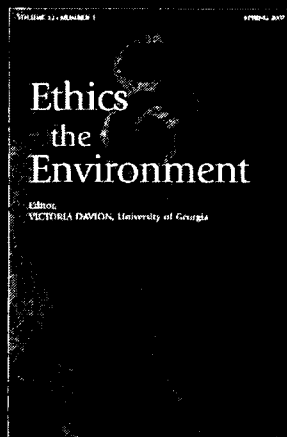
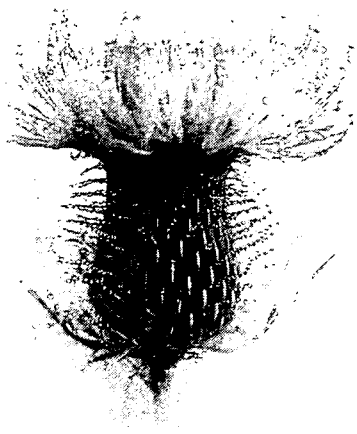
to improve the behaviors the treaty regulates.¹²⁸ The evidence reviewed here indicates the case for mere symbolic ratification is far from open and shut. Rather, it is consistent with a theory that views ratification as a political opportunity, depending on the anticipated costs, to mobilize and demand civil rights guarantees from one's own government.

128. See, e.g., Hathaway, *supra* note 36, at 1940 (finding that treaty ratification does not reliably result in better human rights practices); Keith, *supra* note 30, at 95 (suggesting "that it may be overly optimistic to expect that being a party to this international covenant will produce an observable direct impact.").

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