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Does International Human Rights Law Make a Difference?

Douglass Cassel*

I. INTRODUCTION

Does international human rights law make a difference? Does it protect rights in practice?

The importance of these questions for rights protection is obvious: the institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to protection of rights, or at least promise eventually to do so.

Moreover, at the moment these questions have added urgency. They underlie an ongoing debate, fomented in part by this Journal, on the extent to which the United States should be prepared to cede degrees of its national sovereignty to international human rights institutions, in return for their presumed benefits for rights protection.¹ For example, should the US ratify the treaty to create an international criminal court for war crimes, at the risk, however slight, that Americans might be prosecuted before the Court?² Similarly, should the US ratify human rights treaties with only a minimum of reservations, rather than, as now, accepting the treaties (if at all) only to the extent they conform to our domestic norms?³ And should we be willing to make human rights treaties enforceable against our federal, state, and local governments? The extent to which we should accommodate ourselves to these international organizations and treaties depends in part on whether they are likely to do any good in protecting rights globally.⁴

In answering these questions, international human rights law must be understood and evaluated as part of a broader set of interrelated, rights-protecting processes. So understood, and taking into account its still early stage of historical

* Director of the Center for International Human Rights at Northwestern University School of Law.

1. See, for example, Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 Chi J Intl L 327 (2000).
2. See, for example, Council on Foreign Relations, *Toward an International Criminal Court* (CFR 1999).
3. Compare Goldsmith, 1 Chi J Intl L at 327 (cited in note 1), with Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 Chi J Intl L 347 (2000).
4. See Goldsmith, 1 Chi J Intl L at 335–38 (cited in note 1).

development, international human rights law has shown itself to be a useful tool for rights protection. Most important are its indirect effects. International articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce, stimulate, and monitor these domestic dialogues. While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits for rights protection.

In addition, international enforcement mechanisms have more limited, but nonetheless important, direct benefits for rights protection. They protect lives, free prisoners, rescue reputations, prompt legislative reform, and afford otherwise unattainable justice in the form of truth telling, reparations, and condemnation and punishment of rights violators. Still, direct international interventions are limited in impact. Over time, the extent to which international law serves as a useful tool for protection of human rights will depend mainly on its contribution to a broader set of transnational processes that affect the ways people think and institutions behave⁵—whether governments, state security forces, guerrilla groups, or corporations.

Granted, the instrumental value of international human rights law—direct or indirect—is not self-evident. Within the last decade alone, skeptics may cite such breaches as the genocide of nearly one million Rwandans, the ethnic cleansing of hundreds of thousands of former Yugoslavs, and the displacement of nearly two million Colombians. But continued atrocities do not disprove the case for international human rights law; the fact that it has not triumphed everywhere does not mean that it serves no useful purpose anywhere.

Where human rights have made remarkable advances—as in the ending of forced disappearances in Latin America and the freeing of political dissidents in central Europe—skeptics may plausibly credit factors other than international law. Moral outrage, we are told, sufficiently galvanizes world public opinion,⁶ while internal factors such as economic collapse, economic development, democratization, or domestic legal institutions deserve the credit for improvements in rights.

To individualize causation in this way, however, overlooks the multiple, reinforcing interactions among parallel processes that have fueled the post-World War II rights revolution. Articulation of norms in law, for example, is not irrelevant to their perceived moral content. International law may shape national law. Formally obligatory international norms can legitimize and fortify the organizing and consciousness-raising efforts of non-governmental organizations. Their work in turn often leads to further development of both international and national rights law.

5. Consider Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L J 2599 (1997).

6. Goldsmith, 1 Chi J Intl L at 338 (cited in note 1).

Where rights have been strengthened the cause is usually not so much individual factors acting independently—whether in law, politics, technology, economics, or consciousness—but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a “rope” of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.

Professor Goldsmith is thus beside the point in contending that “Nations that increase protection for their citizens’ human rights rarely do so because of the pull of international law.”⁷ As an example, he argues that European nations were predisposed to protect rights, and hence were not prompted to do so by the European human rights system. The European system, he explains, merely “provided the monitoring, information, and focal points that assisted domestic governments and groups already committed to human rights protections but unable to provide these rights through domestic institutions.”⁸ But this is precisely how international law is most useful in protecting rights—by interacting with other strands, in this case by “assist[ing] domestic governments and groups.”⁹

This hypothesis is amply supported by anecdotal evidence.¹⁰ It is also consistent with a number of leading schools of contemporary international relations and international law theory.¹¹ The fact that this hypothesis probably cannot be proven empirically, given the limitations of data on human rights and the complexities of

7. Id at 337.

8. Id.

9. Id.

10. Skeptics might still ask whether the hypothesis can be proved empirically. Professor Goldsmith rightly takes international law scholars to task for “[m]ethodological [u]nsophistication.” Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *Stan L Rev* 959, 934 (2000).

11. Space does not permit analysis of the “fit” of the approach outlined here with leading contemporary theories of international relations and international law. For a general discussion, see Kenneth Abbott, *International Relations Theory, International Law, and the Regimes Governing Atrocities in Internal Conflicts*, 93 *Am J Intl L* 361 (1999) (international relations theories); Steven R. Ratner and Anne-Marie Slaughter, eds, *Symposium on Method in International Law*, 93 *Am J Intl L* 291 (1999) (international law theories). In brief, the argument here that international human rights law is effective mainly insofar as it interacts with other, related processes, is consistent with elements of nearly all the major schools, especially the “transnational legal process” school, see Koh, 105 *Yale L J* 2599 (cited in note 5), the “compliance pull” theory, see Thomas M. Franck, *Legitimacy in the International System*, 82 *Am J Intl L* 705, 712, the “liberalism” school of international relations, see Abbott, 93 *Am J Intl L* at 366-67, and “constructivism,” see id at 367-68. While the approach here has little in common with the “realism” school, see id at 364-65, it shares the recognition that the most powerful states are least likely to be influenced by international human rights law and institutions. See part V below (discussing variable context).

causal analysis, is not fatal.¹² The utility of international human rights law is merely one of many international policy questions that must rely mainly on judgment informed by experience.

Before outlining the theory in more detail, a definition of "international human rights law" is required. In this essay the term is used in a broad sense, to include not only human rights treaties but also international humanitarian law, which in essence provides more specific human rights protections in time of war. It also includes not only formally binding treaties, but also customary international law, as evidenced in formal international declarations and diplomatic practice. This inclusion may be controversial. Skeptics argue that pronouncements by international bodies and diplomats in support of human rights do not demonstrate customary international law, in the face of widespread violations in domestic practice.¹³ For purposes of the argument here, however, this inclusion is inconsequential. If international pronouncements are not included as part of the "strand" of international human rights law, then they may be treated simply as another strand woven into the human rights "rope." Since what matters is the strength of the rope, and not of any individual strand, international rights declarations play similar roles in rights protection, regardless of how they are classified within the rope.

For purposes of this analysis, one major category of rights is excluded from the definition of human rights, namely economic, social, and cultural rights. The question of the efficacy of international law in protecting rights to housing, medical care, employment and social security, all of which depend even more than civil rights on the availability and allocation of material resources, raises separate and additional issues beyond the scope of this analysis.

II. THE "ROPE" THAT PULLS HUMAN RIGHTS FORWARD

As one strand in the rope that pulls rights forward, the value of international human rights law depends mainly on its interaction with the other strands. The central strand in the rope is the global growth in *human rights consciousness*. This in turn interweaves the concept of *rights*, as entitlements of individuals or groups on which claims or demands may be based, together with the notion that some rights are so

12. For an illustration of difficulties with human rights data and causality, see Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 393 (Oxford 2000).

13. For a broad critique, see Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 *U Chi L Rev* 1113 (1999). For a narrower one, see Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 *Ga J Intl & Comp L* 99 (1995-96).

fundamental they are inherent birthrights of all human beings, regardless of nationality or culture.

Other strands of the rope include *non-governmental human rights organizations*, whose numbers, activities, and sophistication in international human rights law norms and institutions have grown dramatically at both national and international levels¹⁴ and rapidly evolving *communications and transportation technology* that makes possible far more effective transnational organizing by these human rights groups than was possible only two decades ago. Both communications and faster and lower cost transportation technology, by making possible frequent, well attended international conferences, have contributed to the growth of another strand in the rights revolution, *transnational issue networks*,¹⁵ energized by “*epistemic communities*” of like-minded rights advocates in nongovernmental groups, sympathetic governments, academia, and the media, who work together across national and professional boundaries to promote shared values and agendas.¹⁶

Some remaining strands include domestic constitutions and laws, which increasingly incorporate international norms,¹⁷ national human rights institutions, established in dozens of countries in the last fifteen years, spreading democratization,¹⁸ and gradually extended rule of law. This list is not all-inclusive but merely points out

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14. See generally, William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (St Martin's 1998). John R. Bolton and others sharply criticize the role of human rights nongovernmental organizations. See, for example, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 *Chi J Intl L* 205, 215–18 (2000). This essay is not the place to join that debate. The point here is simply that NGOs are a vital strand in the rope that pulls human rights.
 15. See, for example, Kathryn Silkink, *Human Rights: principled issue-networks and sovereignty in Latin America*, 47 *Intl Org* 411 (1993); Margaret E. Keck and Kathryn Silkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell 1998).
 16. For a general discussion on epistemic communities, see Peter M. Haas, ed, *Knowledge, Power, and International Policy Coordination*, 46 *Intl Org* 1 (1992).
 17. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *Ga J Intl & Comp L* 287 (1995–96); Héctor Fix-Zamudio, *El Derecho Internacional de los Derechos Humanos en las Constituciones Latinoamericanas y en la Corte Interamericana de Derechos Humanos*, in Antonio A. Cancado Trindade, *The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal* 159 (Inter-American Institute on Human Rights 1996); Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *Chi J Intl L* 1, 14–15, n 27 (2000). Also consider, *id* at 14–15, n 28. One analysis of Argentina's less than fully successful experience with constitutional incorporation of human rights treaties argues perceptively “A successful internalization strategy must be a dynamic, multifaceted process that engages a myriad of transnational actors from social, political, as well as legal, spheres.” Janet Koven Levitt, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 *Colum J Transnatl L* 281 (1999). Her critique is consistent with the argument here that human rights advances are pulled forward not by any single strand, but by a rope of interrelated strands. No one strand by itself is generally sufficient.
 18. See, for example, Freedom House, *Democracy's Century: A Survey of Global Political Changes in the 20th Century*, available online at <<http://www.freedomhouse.org/reports/century.html>> (visited Mar 25, 2001).

some of the strands comprising this "rope." The purpose here is to recognize how international human rights law interweaves with these other strands, all growing both independently and in their relations with each other, to create an ever stronger rope that pulls international human rights forward. Other strands in the rope include the growing levels of affluence and education in most parts of the world,¹⁹ expansion in the number and reach of nonbinding international norms,²⁰ and, of course, the explosive growth of international human rights law itself.

III. INDIRECT EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON RIGHTS PROTECTION

Does the necessity to bring in other factors suggest that international law, by itself, counts for little? For that matter, with all these other rights-protecting processes, who needs international law?

What such questions overlook is that all the foregoing processes of rights protection—including international human rights law—are interrelated and, over time, growing stronger. All the others are strengthened by international human rights law, which in turn is strengthened by each of them. Human rights groups, for example, make constant use of international human rights law in their organizing. National human rights ombudsmen regularly appeal to international norms in opposing local efforts to legislate lower standards. Constitutional courts increasingly look to international treaties and the jurisprudence of international courts in interpreting national constitutional rights.

In this process of mutual reinforcement, international law plays several distinctive roles:

(A) *Provides a common language.* Rights groups in Thailand and Chile, New York and Johannesburg, can invoke the same set of rights expressed in the same language, interpreted by the same UN human rights bodies. In theory, this function could be played by nonlegal instruments. Indeed, at the outset of the modern rights revolution, it was played by the Universal Declaration, that instrument arguably evolved into

19. See, for example, UN Development Programme, *Human Development Report 1998* 19 (1998) (combined primary and secondary school enrollment in developing world more than doubled in last 30 years).

20. See generally Shelton, ed, *Commitment and Compliance* (cited in note 12), and especially the chapters on human rights by: Erika B. Schlager, *A Hard Look at Compliance with "Soft" Law: The Case of the OSCE* 346–72; Francis Maupain, *International Labor Organization: Recommendations and Similar Instruments* 372–93; Douglass Cassel, *Inter-American Human Rights Law* at 393–418; Christopher McCrudden, *Human Rights Codes for Transnational Corporations: The Sullivan and McBride Principles* 418–49; Dinah Shelton, *Commentary and Conclusions* 449–63. In accord with the initial protocol of the research project, my own contribution used the term "soft law"; I am now persuaded by Richard Bilder's critique that a better term is the one eventually adopted for its title, namely "non-binding norms." Richard B. Bilder, *Beyond Compliance: Helping Nations Cooperate*, in Shelton, ed, *Commitment and Compliance* at 65, 71–72 (cited in note 12).

customary international law. This function, then, is a by-product rather than a necessarily unique function of international human rights law. Nonetheless, in practice, the instruments of international law supply most of the vocabulary for transnational rights discourse.

(B) *Reinforces the universality of human rights.* Three quarters or more of all governments accept the main international human rights treaties: the International Covenant on Civil and Political Rights; UN treaties on rights of women and children and against racial discrimination; basic ILO treaties on labor rights; and the Geneva Conventions and Protocols on international humanitarian law. The numbers grow every year. Such broad participation in formally binding international instruments reinforces the claim that human rights are universal. This, in turn, strengthens their claim to being fundamental and hardens their currency in domestic and international political debate.

While most widely adopted instruments are legally binding, not all are. For example, the Universal Declaration not only asserts its universality, but has repeatedly been adopted without formal dissent, first by the UN General Assembly in 1948, and later by widely attended, UN-sponsored diplomatic conferences in 1968 and 1993. Thus, again, the contribution of international human rights law to universality, even if not unique, is an important by-product.

(C) *Legitimizes claims of rights.* Because international human rights treaties are adopted by governments, usually after prolonged and contested negotiations and followed in many countries by lengthy processes of ratification, they confer legitimacy on claims of rights, especially when those claims are asserted (as they usually are) against governments.²¹ Human rights groups can (and regularly do) say to governments, "It is not *we* who say that torture is illegal and must be investigated and punished; it is *you* who so declare, as parties to the Convention Against Torture."

(D) *Signals the perceived will of the international community.* Because of broad participation by governments, via formally serious processes of negotiations and ratifications, international human rights treaties are often perceived as expressing the will of the international community. While that perception may matter little in a powerful country such as the United States, it often carries considerable weight in smaller and weaker countries—which is to say, most of the world's nations.

During peace negotiations in Guatemala in the mid-1990s, for example, the military pressed for a blanket amnesty for its wartime violations of human rights. Human rights groups had few cards to play in opposition, other than the argument that under international law, amnesties could not be conferred for certain crimes against humanity. In need of international approval and financial support for post-war

21. See generally the works of Thomas M. Franck, including: Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon 1995); Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford 1990); Thomas M. Franck, *Legitimacy in the International System*, 82 Am J Int'l L 705 (1988).

recovery programs, the government ultimately agreed to leave such crimes out of the amnesty. The perception that violating international law would flout the will of the international community—or at least that it could be so characterized by opponents—was a major factor in this decision.²² Only crimes whose prosecution is arguably required by international law were exempted. Those for which amnesty would merely offend international sensibilities were not exempted.

Perceived international will also plays a role in the tendency of newly democratic regimes to ratify human rights treaties and accept international enforcement mechanisms, as a kind of insurance policy against the return of authoritarian rule.²³ Most recently, no sooner did Peru oust the regime of President Alberto Fujimori, who had purported to withdraw the country from the contentious jurisdiction of the Inter-American Court of Human Rights, than the new government promptly rejoined the Court.²⁴

(E) *Provides juridical precision.* Especially when international human rights law is put in treaty form, by which governments expect to be bound, negotiators strive to give it a degree of juridical precision generally lacking in political declarations and philosophical pronouncements. The room for debate as to its meaning—and hence pretense for evasion, or grounds for needless disagreement—is narrowed.

(F) *Creates increased expectations of compliance.* Because international human rights law is expressed as law, it generates increased expectations of compliance. This gives human rights claimants stronger ground to demand compliance, and narrows the defenses available to violators: they may deny that violations were committed, but they cannot easily deny their obligation to respect the relevant norm. A government may well have accepted an international obligation with no intention to comply, but this is a difficult thing to admit publicly. The government may find itself trapped by its own hypocrisy.

(G) *Encourages domestic judicial enforcement.* International human rights law, especially in treaty form, is susceptible to domestic judicial enforcement, whereas non-legal instruments generally are not. Many constitutions, for example, expressly

22. See Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L & Contemp Probs 197, 222–24 (Aut 1996).

23. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Intl Org 217 (2000).

24. Consider Douglass Cassel, *Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?*, 20 Hum Rts L J 167 (1999); BBC Summary of World Broadcasts, *Congress Approves Rejoining Inter-American Court of Human Rights* (Jan 15, 2001) (reporting congressional action on Jan 12, 2001), available on Lexis; James Morrison, *Embassy Row: Peru Rejoins Court*, Wash Times A12 (Feb 2, 2001).

incorporate treaties into domestic law,²⁵ and some accord special, higher domestic legal status to human rights treaties.²⁶

(H) *Encourages enforcement by international courts or agencies.* Because international human rights law is couched as law, it also lends itself to potential enforcement by international courts or agencies—a trend growing in practice. Outside Europe such enforcement is rare and even more rarely effective. Still, the mere threat or perception (even mistaken) of its potential gives human rights groups added leverage. Indeed, the very *uncertainty* of enforcement makes governments nervous. The uncertainty is aggravated by the trend toward increasing enforcement in new and unexpected ways—witness the surprise arrest of Chile's General Pinochet on a Spanish arrest warrant in London, or credit denials by the World Bank on human rights grounds, after decades of contending that the Bank could not consider human rights. Risk-averse diplomats and bureaucrats often treat slaps on the wrist, administered by toothless international human rights bodies, as if they were matters to be taken seriously, precisely because they never know when such seemingly empty words may come back to haunt them.

(I) *Creates additional stigma.* International human rights law, especially international criminal law norms such as those proscribing crimes against humanity, adds to the moral sting and shame of violation. Granted, atrocities generate broad condemnation on moral grounds alone. Even so, in many cultures—including the culture of international diplomacy—criminal conduct carries its own, additional stigma, undermining the capacity of violators to defend their conduct, while enhancing the force of condemnations.²⁷

(J) *Avoids moral relativism.* State violence does not always provoke moral outrage. Populations victimized by opposing ethnic or rebel groups may tolerate, if not applaud, brutal retaliation. Yet in such situations international law, written for universal application, can keep its bearing. Even while few Peruvians, for example,

25. See Hannum, 25 Ga J Intl & Comp L (cited in note 17); Fix-Zamudio, *Derechos Internacionales* at 159 (cited in note 17); Kahn, 1 Chi J Intl L at 14–15, n 27 (cited in note 17); Levitt, 37 Colum J Transnatl L (cited in note 17).

26. For example, Article 46 of the Constitution of Guatemala (1985) provides, "*Preeminence of International Law.* The general principle is established that in matters of human rights, treaties and conventions accepted and ratified by Guatemala, have preeminence over internal law." (Trans by author). For other examples, see Constitution of Argentina (1994) Art 75.22 (Treaties have "constitutional hierarchy" above laws); Constitution of Ecuador (1998) Art 163 (treaties prevail over laws); Constitution of El Salvador (1982) Art 144 (same).

27. It is an overstatement to argue that "it is the moral quality of the act, and not its legal validity, that provokes such criticisms. When shaming works, it is the perceived moral quality of the shamed practice, and not its illegality, that matters." Goldsmith, 1 Chi J Intl L at 338 (cited in note 1). It should also be recognized that "[t]he moral content of international relations is being absorbed by claims of legal rights, leaving less and less room for morally driven politics outside of law." Kahn, 1 Chi J Intl L at 15 (cited in note 17).

protested the prison massacre of rebellious Shining Path guerrillas, the Inter-American Court of Human Rights ruled against Peru's resort to excessive force.²⁸ Similarly, after the Knesset failed to stop torture of Palestinian security suspects, the Israeli Supreme Court finally ended the practice.²⁹ And while few Israelis today protest their government's selective assassinations of security suspects, Amnesty International rightly denounces these violations of international law.³⁰ Where moral clarity may be lost in the passions of the moment, international law can not only condemn, but also teach, helping morality to regain its compass.

To some degree, as noted, these attributes of international law are not necessarily unique. Precision might be demanded, for example, even in a political declaration. But in practice this unique combination of attributes—commonality of terms, near universality of formal acceptance, legitimacy of adoption, perceived reflection of international will, relative normative precision, increased expectations of compliance, susceptibility to domestic legal enforcement, potential and uncertainty of international enforcement, the additional stigma of violation, and moral clarity—enables international human rights law to make a distinctive contribution in support of growing human rights consciousness, organizing, and national legal and institutional development.

Each of the other strands, in turn, reinforces the reach and credibility of international human rights law. Public human rights consciousness gives international human rights law more teeth, by imposing a cost on most governments—again excepting the most powerful—of openly violating or being credibly accused of violating international human rights law. Nongovernmental organizations are often the main users of enforcement procedures and the main lobbyists for stronger treaties

28. See *Neira Algeria*, Sep 19, 1996 (Inter-Am Ct Hum Rts), in *Ann Report of the Inter-Am Ct of Hum Rts* 1996 179, 183 para 21, 186 paras 44–45 (OAS 1997).

29. See *Judgment on the Interrogation Methods Applied by the GSS*, Nos HC 5100/94, HC 4054/95, HC 6536/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep 6, 1999), available online at <<http://www.court.gov.il/mishpat/html/en/verdict/judgment.rtf>> (visited Mar 25, 2001). The Court noted that its prohibition of brutal or inhuman interrogation techniques "is in perfect accord with (various) international Law treaties—to which Israel is a signatory—which prohibit the use of torture . . . These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." Id para 23.

30. See Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings* (AI 2001) (citing both treaties and nonbinding UN codes of conduct), available online at <<http://www.web.amnesty.org/ai.nsf/index/MED150052001>> (visited Mar 25, 2001).

and enforcement procedures.³¹ National human rights ombudsmen and courts, too, give international law greater currency and credibility by invoking it.

Reinforced by these interactions, international human rights law is then even better positioned to contribute legitimizing force to these other institutions. In other words, the interactions among strands in the rope are mutually reinforcing. The full impact of international human rights law is not limited to its initial, indirect impact on rights protection, through its strengthening of other strands in the rope, but also includes a secondary impact, made possible by the reinforcement it receives from the other strands.

Quantifying the ultimate benefit for rights protection of all these interacting processes, or even demonstrating a clear qualitative impact, would require an enormously sophisticated methodology, coupled with a herculean effort to gather a range of data, much of which may not exist or may not be reliable. Perhaps some day such an ambitious research agenda will be attempted. In the meantime, judgment, based on experience, and tested for plausibility against the leading international relations-international law theories, is the best guide for policy.

One way to detect the distinctive, indirect role of international law is to assume its absence. Without international human rights law—with only national laws or international philosophical declarations—could we count on a comparable degree of universality, legitimacy and precision in human rights norms, and of stigma and risk of potential sanction for violations? One would be hard pressed to make that case.

IV. DIRECT IMPACT

Account should also be taken of the growing, non-negligible, direct impact of international human rights law. Unquestionably the direct impact has been greatest in Europe, where it has grown recently and rapidly in a hospitable climate of democratic values and regional unification.

In the Council of Europe, which has grown from the post-war democracies of Western Europe to its current embrace of some forty European states, the European Convention on Human Rights was adopted in 1950 and came into force in 1953. Not until the 1970s, however, did its enforcement institutions—the European Commission and Court of Human Rights—have much business. After gaining public and governmental trust, they expanded their dockets and effectiveness from the mid-1970s on.³² By 1990 the European Court had come to play for Europe approximately the same role in safeguarding approximately the same set of basic rights, as the US

31. "Over the course of a generation, human rights activists—inside and outside of governments—gained control of the agenda for the creation of substantive law." Kahn, 1 *Chi J Intl L* at 13 (cited in note 17).

32. Consider Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L J* 273 (1997).

Supreme Court plays in enforcing constitutional rights among the fifty states, with comparable substantive outcomes and degrees of compliance.³³

As a result of judgments of the European Court of Human Rights, not only have individual plaintiffs been awarded damages, but European governments have revised legislation on such sensitive matters as media criticism of judicial proceedings,³⁴ national security measures against terrorists,³⁵ gay rights,³⁶ family rights,³⁷ and criminal justice procedures.³⁸ The direct impact of international human rights law in Europe is not only comparable to that of domestic constitutional law in developed democracies, but greater than that of domestic law in nations where the rule of law has yet to take hold or is crippled by corruption.

While the European Court of Justice of the European Union mainly deals with economic and regulatory issues, it, too, has rendered important and effective rulings on such matters as gender discrimination and rights of immigrants.³⁹

Outside Europe, however, the direct impact of international human rights law has been sporadic. The UN human rights system—developed largely since the mid-1970s through state reporting requirements, special rapporteurs and experts who investigate and publish reports, and individual complaint procedures under several treaties—has been a useful strand in the rope of human rights protection. It indirectly protects rights by reinforcing public awareness, exposing violations, legitimizing efforts by nongovernmental organizations and keeping issues of human rights on diplomatic agendas.⁴⁰ Beyond a few exceptions—its contribution to the fall of apartheid in South Africa; human rights components of peacekeeping missions in countries ranging from El Salvador to East Timor; ad hoc international or partly international criminal tribunals for the former Yugoslavia, Rwanda and Sierra Leone; and occasionally successful interventions in individual cases by rapporteurs and treaty

33. Consider Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 Conn J Intl L 39, 39 (2000) (The European human rights system is “remarkably efficacious, but it is far from (anything but relatively) perfect.”).

34. See *Sunday Times v UK*, 30 Ser A: Judgments and Decs (Eur Ct of Hum Rts 1979).

35. See, for example, *Ireland v UK*, 25 Ser A: Judgments and Decs (Eur Ct of Hum Rts 1978).

36. See, for example, *Dudgeon v UK*, 45 Ser A: Judgments and Decs (Eur Ct of Hum Rts 1981).

37. See, for example, *Marckx v Belgium*, 31 Ser A: Judgments and Decs (Eur Ct of Hum Rts 1979).

38. See, for example, *De Cubber v Belgium*, 86 Ser A: Judgments and Decs (Eur Ct of Hum Rts 1984).

39. Consider Nanette A. Neuwahl and Allan Rosas, eds, *The European Union and Human Rights* (Martinus Nijhoff 1995).

40. Even while objecting to it as “fundamentally illegitimate,” John Bolton notes that “[t]he real agenda of the [UN death penalty] rapporteur and his allies . . . is to leverage the stature and legal authority of the United Nations (such as they are), into our domestic debate.” Bolton, 1 Chi J Intl L at 215 (cited in note 14). He thus illustrates how international law interacts with other strands in the human rights rope. While the UN may have little “pull” in the US, its “stature and legal authority”—and hence its pull—are higher in most other countries. Id.

committees—the UN's direct impact on rights protection has been exceedingly modest.

Two other regional systems merit mention. During the Cold War it could fairly be said that the Organization of American States had an ineffectual human rights declaration since 1948, a mostly ineffectual Inter-American Commission on Human Rights since 1959, and an Inter-American Court of Human Rights with no contentious caseload since 1979. Such successes as the system could claim—for example, documentation and exposure of Argentina's "dirty war" in 1980—were more diplomatic than legal in nature.

By the late 1980s, however, the Inter-American Human Rights legal system began to make claims of direct impact.⁴¹ In 1988, ruling under the American Convention on Human Rights, the Inter-American Court delivered the first of what are now a score of significant damage awards against states for violations of the right to life, and there are many more cases currently on its docket. Governments also began to accept substantial damage awards in settlement negotiations with the commission. In the 1990s the commission and court began regularly to issue requests and orders for "precautionary measures" by governments to protect the lives of dozens of human rights defenders and witnesses. In nearly all these cases, security measures were taken or offered, and in nearly all, the intended beneficiaries were not thereafter killed.⁴²

The court's orders also appear to have freed at least two wrongfully imprisoned persons.⁴³ They also led to the restoration to Peruvian media owner Baruch Ivcher Bronstein of a TV station wrongly taken from him by the Fujimori regime, after the station criticized the regime's involvement in corruption and torture.⁴⁴ In addition, in

41. Consider Thomas Buergenthal and Douglass Cassel, *The Future of the Inter-American Human Rights System*, in Juan E. Méndez and Francisco Cox, eds, *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* 539 (Inter-Am Inst on Hum Rts 1998).

42. One cannot know for certain whether each intended beneficiary would have survived in any event. But in view of the dangerous circumstances typically presented in such cases, and the high level attention that precautionary measures generally command from government officials, it is likely that these international interventions contributed to saving at least some lives, and perhaps many.

43. On September 17, 1997, the court ordered Peru to release the victim from prison "within a reasonable time." *Loayza Tamayo* Sep 17, 1997 in 2 *Inter-Am YB on Hum Rts* 2184, 2264 para 84, 2266 para 5 (Martinus Nijhoff 1997). On October 16, 1997, Peru did so. See *Loayza Tamayo* para 106(A)(k), 42 Ser C: Decs and Judgments (Inter-Am Ct Hum Rts 1998). See also *Suarez Rosero* Nov 12, 1997, in *Ann Report of the Inter-Am Ct on Hum Rts* 1997 283, 286 para 15 (OAS 1998).

44. See *Ivcher Bronstein Case* paras 51, 55, 76z, 76aa, 174, 179–80 (Inter-American Court on Human Rights Feb 6, 2001), available online at <http://www.nu.or.cr/ci/PUBLICAC/SERIE_C/C_74_ESP.HT> (visited Mar 25, 2001); Cassel, 20 *Hum Rts LJ* 167 (cited in note 24); Lucien Chauvin, *Peru Reinstates Ousted Station Owners*, *Variety* 58 (Dec 11–17, 2000).

the 1990s, national courts in Latin America have begun to follow the jurisprudence of the Inter-American Court in rights cases, resulting in modifications of national law.⁴⁵

In terms of real operation, the Inter-American human rights legal system is thus little more than a decade old. But it has become consolidated—all Spanish- and Portuguese-speaking nations in Latin America (except Cuba) now accept the binding, contentious jurisdiction of the Inter-American Court. Its output is growing, as is the degree of state compliance. Although its direct impact remains far short of that of the European Court, the Inter-American system can claim solid achievements and shows promise.

The African regional system remains at an earlier and less effective stage of development. The African Convention of Human and People's Rights came into force only in 1986. It created an African Commission which has limited powers and did not begin to function until the 1990s, when it began reporting cases with little or no impact on the real world. Under South African leadership, African states recently agreed to establish an African Court of Human Rights. As yet, the direct impact of the African system is negligible. The question is whether, like the Inter-American system, it may slowly evolve into a system capable of making meaningful contributions to rights protection.

V. THE CONTRIBUTIONS OF INTERNATIONAL HUMAN RIGHTS LAW IN PERSPECTIVE

In evaluating the direct and indirect impact of international human rights law on rights protection, at least three further perspectives should be borne in mind. One is that of *relative utility*: the issue is not whether international human rights law achieves its lofty objectives or even comes close. Rather, the question is whether it is a useful tool for human rights protection activities carried out by nongovernmental organizations, the press, government agencies, and courts. Plainly the users of the tool—human rights activists, advocacy journalists, ombudsmen, and human rights litigators—testify by their regular use that they find it to be of value in their efforts.

A second perspective is that of *history*. As historical movements go, international human rights laws and the international human rights movement are still in their relative infancy. Until 1945, human rights was generally considered to be a matter within the exclusive domestic sovereignty of states. The first significant conceptual breakthrough, a vague "internationalizing" of human rights, came only with the United Nations Charter of 1945. The first international bill of rights came only with

45. See, for example, *Case of Róger Ajún Blanco*, Motion of Unconstitutionality no 421-S-90, Sentence no 2313-95 (Sup Ct Costa Rica, Const Chamber May 9, 1995) (striking down compulsory licensing of journalists); *Ekmedjian v Sofovich*, case E 64 XXIII (Sup Ct Just Argentina, July 7, 1992) (right of reply), in 3 *Jurisprudencia Argentina* 199 (Jurisprudencia Argentina 1992). Also, consider Levitt, 37 *Colum J Transnatl L* 281 (cited in note 17).

the Universal Declaration in 1948. The principal human rights treaties, the International Covenants, were not adopted until 1966 and did not enter into effect, with only 35 ratifying states, until 1976. Enforcement mechanisms under both the UN Charter and the main human rights treaties did not begin to take generalized effect until the late 1970s and have grown steadily since then. Except for the post-World War II trials at Nuremberg and Tokyo (which fell well short of current human rights standards), international prosecutions of human rights violators have developed only within the last decade.

International human rights law and institutions, then, are still rapidly growing. It is far too soon to assess their effectiveness at maturity. What they have already achieved in their fledgling state is, arguably, remarkable.

A third perspective is that of *variable context*. That is, the effectiveness of the international human rights law strand—and indeed of the entire rope of the international human rights movement—varies tremendously with context. Where wars are underway or governments dictatorial, rights protection is usually ineffective in the short term. Where governments are powerful globally (the US, China, Russia) or regionally (India, Nigeria, Saudi Arabia, Brazil), they are relatively impervious to external human rights pressures, legal or otherwise. Even if international human rights law helps to nudge much of the world toward greater respect for rights, it cannot be expected to work in all times and all places.

VI. CONCLUSION

The direct impact of international human rights law on practice in most of the world remains weak and inconsistent. But both this incipient body of law, and to a lesser degree its direct and even more its indirect influence on conduct, have grown rapidly in historical terms, and appear to be spreading in ways that cannot be explained by a worldview based solely on state power and rational calculations of self-interest. To appreciate its effectiveness and potential, international human rights law must be understood as part of a broader set of interrelated, mutually reinforcing processes and institutions—interwoven strands in a rope—that together pull human rights forward, and to which international law makes distinctive contributions. Thus understood, international law can be seen as a useful tool for the protection of human rights, and one which promises to be more useful in the future.

By promoting international human rights law, the US can make this body of law more useful for rights victims worldwide. On the other hand, by opposing and denigrating it, the US weakens not only international law, but the full range (the entire rope) of interrelated cultural, organizational, institutional and political supports for expanded protection of human rights in the world. Considering the stakes in human lives and dignity, international human rights law deserves a place of respect in US domestic and foreign policy debates.

