

# NONCONSENSUAL INTERNATIONAL LAWMAKING<sup>†</sup>

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*This article documents the rise of nonconsensual international lawmaking and analyzes its consequences for the treaty design, treaty participation, and treaty adherence decisions of nation states. Grounding treaties upon the formal consent of states has numerous advantages for a decentralized and largely anarchic international legal system that suffers from a pervasive “compliance deficit.” But consent also has real costs, including the inability to ensure that all nations affected by transborder problems join treaties that seek to resolve those problems. This “participation deficit” helps explain why some international rules bind countries without their acceptance or approval. Such rules have wide applicability. But they can also increase sovereignty costs, exacerbating the compliance deficit.*

*Nonconsensual international lawmaking thus appears to create an insoluble tradeoff between increasing participation and decreasing compliance. This article explains that such a tradeoff is not inevitable. Drawing on recent examples from multilateral efforts to prevent transnational terrorism, preserve the global environment, and protect human rights, the article demonstrates that the game-theoretic structure of certain cooperation problems, together with their institutional and political context, create self-enforcing equilibria in which compliance is a dominant strategy. In these situations, nonconsensual lawmaking reduces both the participation and the compliance deficits. In other issue areas, by contrast, problem structure and context do not affect the tradeoff between the two deficits, and the incentive to defect remains unaltered. Analyzing the differences among these issue areas helps to identify the conditions under which nonconsensual lawmaking increases the welfare of all states.*

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## I. INTRODUCTION

For centuries, the international legal system has been premised on the bedrock understanding that states must consent to the creation of international law. This meta norm of consent is especially well ingrained for treaties. The Vienna Convention on the Law of Treaties,<sup>1</sup> the writings of august commentators,<sup>2</sup> and the frequent reassertions of state control over the creation of new legal obligations<sup>3</sup> all demonstrate the enduring force of consent as a fundamental principle of international agreements.

1. Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 321 [hereinafter Vienna Convention] (“A treaty does not create either obligations or rights for a third State without its consent.”).

2. *E.g.*, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 28 (1995) (“For treaties, consent is essential. No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it.”); Bruno Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 485, 494 (R. McDonald & D. Johnston eds., 1986) (analyzing consent as the core concept of the law of treaties).

3. *See* REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, UN Doc. ST/LEG/SER.B/21, U.N. Sales No. E/F.83.V.8, at 148–58 (1985) (reviewing the vociferous objections by states to a suggestion by the UN Secretariat that certain treaties “provide for their automatic entry into force except in respect of States that voted against adoption or that submit an opting out notice”).

Grounding treaties on state consent has many advantages for a decentralized and largely anarchic international legal system. It ensures that states manifest expressly their approval of new international obligations. It enables government leaders to signal their solemn commitment to other nations, pledging their reputations as collateral. And it reconciles treaties with domestic legal authority by enabling domestic political institutions to review and endorse the provisions they contain. Taken together, these benefits provide international agreements with an imprimatur of legitimacy that promotes rule-conforming behavior by states. This is vitally important in a legal system that suffers from a pervasive “compliance deficit”—a paucity of centralized enforcement mechanisms that limit opportunities to sanction or penalize rule violators.<sup>4</sup>

The consensual underpinning of international agreements has significant costs, however. Multilateral treaty making is a slow and cumbersome process, especially when it requires the approval of the world’s nearly two hundred nations.<sup>5</sup> And the results are often not worth the time and effort. One of international law’s paradoxes is that “the higher the participation in a given multilateral treaty regime,” the greater the likelihood that the resulting agreement will contain “fairly ineffective provisions, which are the product of mutual concessions and package-deal negotiations.”<sup>6</sup>

A particular difficulty that the consensual treaty making process faces is how to ensure that all nations affected by transborder cooperation problems become parties to international agreements that seek to resolve those problems.<sup>7</sup> This difficulty might be labeled as treaty law’s

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4. See Daniel Bodansky, John R. Crook & David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 818 (2002) (“There is no world policeman to command or coerce obedience to international law rules; instead, states and other actors rely on a combination of other mechanisms . . . to win respect and compliance for these duties.”); Duncan Snidal, *Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 926 (1985) (noting the “problematique of international anarchy, where the absence of a centralized capacity to enforce agreements is fundamental”). For explanations on why states comply with international law in the absence of strong enforcement mechanisms or sanctions, see Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1847–49 (2002); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 539–45 (Walter Carlsnaes et al. eds., 2002).

5. See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 259 (1992) (characterizing existing methods of international environmental lawmaking as “slow, cumbersome, expensive, uncoordinated and uncertain”).

6. Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT’L L. 881, 888 (2006) [hereinafter Bianchi, *Assessing Effectiveness of Anti-terrorism Measures*]; see also Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT’L L.J. 542, 575–76 (2005) [hereinafter Rosand, *Security Council as Global Legislator*] (“The prevailing practice of seeking consensus or near-unanimity to adopt a convention has not only led to drawn-out negotiations, but also to highly ambiguous or empty provisions, undermining what is needed to ensure the establishment of an effective international legal regime.”).

7. See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195–220 (2003) [hereinafter BARRETT, ENVIRONMENT AND STATECRAFT] (analyzing the importance of membership rules in promoting international cooperation); George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 INT’L ORG. 397, 398

“participation deficit.” Ratification of a treaty is a voluntary act, even for a state that negotiated the agreement and voted in favor of its adoption.<sup>8</sup> The discretion states possess to decide whether or not to ratify creates free rider and hold-out problems, behaviors that can reduce or even undermine a treaty’s efficacy.<sup>9</sup> To take just one high-profile example, the Kyoto Protocol has little hope of slowing the pace of global climate change unless all major greenhouse-gas-producing nations join the agreement.

The last quarter century, however, has witnessed an erosion of this consensual approach to treaty making.<sup>10</sup> Scholars have noted this trend, but they have mainly focused on discrete doctrinal aspects of what is in reality an increasingly widespread phenomenon that pervades a broad range of issue areas.<sup>11</sup> More importantly, scholars have given inadequate attention to the consequences of this trend for the design of international agreements and for compliance with the obligations they contain.

This article begins to remedy these omissions. I review several types of nonconsensual lawmaking in different treaty systems and international organizations and analyze their consequences for treaty design, treaty participation, and treaty compliance. For purposes of this analysis, I define nonconsensual international lawmaking as the creation of a legal obligation that binds a member state of a treaty or an international organization (IO) even where that country has not ratified, acceded to, or otherwise affirmatively accepted that obligation.<sup>12</sup>

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(1998) (same); see also Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 50, 52 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (“Depending on the nature of the problem, agreements require different levels of participation in order to be effective.”).

8. See BARRETT, *ENVIRONMENT AND STATECRAFT*, *supra* note 7, at 93 (“states are free to participate in a treaty or not as they please”); BOWETT’S *LAW OF INTERNATIONAL INSTITUTIONS* 277 (Philippe Sands & Pierre Klein eds., 5th ed. 2001) (indicating that states that “take part in the process of adopting a convention within the framework of” an international organization retain “complete freedom of choice on the question of whether to become a party to that instrument later on”).

9. See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *AM. J. INT’L L.* 782, 795 (2003) (noting that the one-state, one-vote procedures for treaty making “accentuate[s] the possibilities of ‘hold-out’ bargaining”).

10. For the most comprehensive analysis of this trend, see Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241-IV *REC. DES COURS* 195–374 (1993); see also T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 *TEX. L. REV.* 1989, 1992 (2004) (“International law is moving away from a foundation of state consent and towards majoritarianism.”); Anne Peters, *Global Constitutionalism Revisited*, 11 *INT’L LEGAL THEORY* 39, 51 (2005) (describing the “the erosion of the consent requirement” as a “change of paradigm” that is “manifesting itself in the weakening of the persistent-objector rule, third-party effects of treaties, and majority voting within treaty bodies and international organizations” (citation omitted)).

11. See, e.g., Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, in 6 *MAX PLANCK Y.B. U.N.L.* 37 (2002); Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 *CHI. J. INT’L L.* 495 (2005).

12. This definition is consistent with the approach of scholars who analyze international delegations. See, e.g., Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems With Old Solutions*, 85 *MINN. L. REV.* 71, 86 (2000) (describing the international legal system as “increasingly centered around newly powerful international organizations that are sometimes em-

So defined, nonconsensual international lawmaking encompasses a wide variety of jurisgenerative phenomena, three of which I highlight in this article. The first and most obvious example is the delegation of legislative authority to an IO or to a group of states to adopt new rules that automatically bind other nations. Resolutions of the United Nations Security Council relating to international peace and security and directives of the European Union (EU) are two prominent examples.<sup>13</sup> A second type of nonconsensual lawmaking involves the power of a majority of member states to amend or augment an international agreement with binding effect for all treaty parties or IO members. Such changes are sometimes tacit, allowing an objecting state to opt-out of the revision. But others take effect even over the objecting state's protest, a case in point being the International Monetary Fund, where certain amendments bind all members, including dissenters, provided that three-fifths of the states having eighty-five percent of the total voting power approve the change.<sup>14</sup> The third example involves the decisions of international tribunals and review bodies.<sup>15</sup> Rulings that clarify ambiguities and fill in gaps in treaty texts are usually consistent with states' expectations. At the margins, however, expansive interpretations can fundamentally change treaty bargains<sup>16</sup>—as when international jurists find a treaty reservation to be invalid, sever the reservation, and apply the challenged treaty provision to the reserving state.<sup>17</sup>

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powered to impose binding international obligations on sovereign states"); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 n.3 (2004) [hereinafter Swaine, *International Delegations*] (defining delegation to international institutions as "vesting them with the authority to develop binding rules," and noting that "the authority so vested must be capable of some kind of legal effects on the international or domestic plane"). The definition excludes international delegations of nonbinding authority as well as the legal and political effects of treaties for nonparties. For a discussion of those issues, see Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. (forthcoming Winter 2008), available at <http://ssrn.com/abstract=943044>; Jon Kyl, *Unratified and Unsigned Treaties Still Constrain U.S. Action 2* (May 16, 2006) (policy paper), available at [http://rpc.senate.gov/\\_files/May1605UnsignedTreatiesMS.pdf](http://rpc.senate.gov/_files/May1605UnsignedTreatiesMS.pdf).

13. Bradley & Kelley, *supra* note 12, at 9.

14. Swaine, *International Delegations*, *supra* note 12, at 1508 n.50. Such majoritarian amending powers appear in a large number of treaties and IO charters. See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 336–37 (2005); C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 406–09 (1st ed. 1996); Swaine, *supra* note 12, at 1506–15.

15. See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 647–49 (2005) (analyzing "nonconsensual lawmaking" by international tribunals).

16. See Simma, *supra* note 2, at 495 (noting the need to distinguish between "evolutionary interpretation[s]" of treaties that are "appropriate" and those that create "impermissible strains to the element of consent"); Anne van Aaken, *The Perils of Success: The Case of International Investment Protection 15* (Univ. of St. Gallen Law School, Law & Econ. Research Paper Series, Working Paper No. 2007-29, 2007), available at <http://ssrn.com/abstract=1020959> (describing the "problem [that] arises through delegation and progressive interpretation" where "states thought of giving a promise  $P_A$  in time 1 and find out in time 2 that they promised  $P_B$  (with  $P_B > P_A$ )").

17. See *infra* text accompanying notes 81–82 (analyzing examples of this practice in the context of reservations to human rights treaties).

Several preliminary observations about this article's definition of nonconsensual international lawmaking help to clarify the arguments that follow. First, the definition emphasizes the formal, sovereignty-oriented dimension of state consent and excludes behavior that, to some observers, may appear less than voluntary. The European Union, for example, required Eastern European countries to ratify certain treaties and denounce others as a precondition to joining the regional organization.<sup>18</sup> These actions could be labeled as involuntary if, absent EU accession, the states' leaders would not have joined the first group of treaties or withdrawn from the second. However, so long as these changes follow established domestic processes for approval or disapproval of treaty obligations, they are not nonconsensual in the sense described in this article. The same is true of unanticipated exogenous shocks that compel treaty parties to negotiate modifications to their preexisting commitments, which are then ratified or approved by each member state. Also excluded from the above definition is the interpretive gloss on treaty rules that emerges over time through judicial interpretations or bureaucratic practices. These understandings decrease textual ambiguity. But ordinarily they do not impose new obligations upon states involuntarily.

Second, one might object to labeling as "nonconsensual" rules generated by the lawmaking processes described above, inasmuch as a state bound by such rules previously agreed to their creation when it voluntarily joined a treaty or IO and delegated to an international body the authority to make future decisions. Although "the state might not anticipate . . . every individual decision that the international body to which authority is delegated might make," such an argument continues, it has "intentionally accede[d] to a process that it must realize will lead to an evolution in its legal obligations over time."<sup>19</sup>

In addition to ignoring the fact that most treaties and IOs are not so overtly teleological, this claim fails to account for important structural differences between international and national legal systems and the incentives of sovereign states that those differences engender.<sup>20</sup> International law does not share the coercive enforcement authority of its domestic counterparts. As a result, even after joining a treaty or an IO,

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18. Chris Brummer, *The Ties that Bind?: Regionalism, Commercial Treaties and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1354–80 (2007).

19. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. (forthcoming Winter 2008), available at <http://ssrn.com/abstract=1009600> (explaining but not necessarily endorsing this argument).

20. See Tomuschat, *supra* note 10, at 266 (stating that "it would amount to a distortion of the true picture to contend that, in accepting an amendment procedure providing for majority vote, States have accepted *ex ante* the substance of any future amendments" and concluding that "[a]nticipatory consent to amendments adopted by majority is . . . a pure legal fiction"); Cesare P.R. Romano, *The Shift From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NYU J. INT'L L. & POL. 791, 795 (2007) (asserting that "consent has become so removed in time and substance from the exercise of jurisdiction [by international tribunals] that one may question whether consent continues to serve a significant function in the international order").

states often retain the possibility of refusing to comply with their prior commitments.<sup>21</sup> The probability of such defections rises when the sovereignty costs of rule-conforming behavior increase relative to its material and reputational benefits. New legal obligations that bind a state without its acceptance or approval can significantly increase those sovereignty costs, even if the state previously endorsed the processes by which those obligations were later adopted.<sup>22</sup>

Nonconsensual international rules thus appear to create an insoluble tradeoff between the participation and compliance deficits associated with traditional approaches to treaty making. On the one hand, nonconsensual rules seek to ensure that all nations affected by transborder cooperation problems are legally obligated to remedy them. But this attempt to ameliorate treaty law's participation deficit comes at a price. It increases the sovereignty costs of international rules and, as a result, the compliance deficit associated with those rules.

Sacrificing greater compliance to obtain greater participation is a problematic strategy for a relatively anarchic legal system with weak enforcement mechanisms. As this article explains, however, such a sacrifice is not always required. To the contrary, the game-theoretic problem structure<sup>23</sup> a treaty or IO confronts, together with the institutional and political context in which it is embedded, sometimes create a self-enforcing equilibrium in which compliance by all states is a dominant strategy. When this occurs, nonconsensual international rules reduce *both* the participation deficit *and* the compliance deficit, increasing the welfare of each state and of member states collectively. In other instances, by contrast, problem structure and context do not modify and may even exacerbate preexisting incentives for states to defect. Nonconsensual international lawmaking thus raises important and understudied theoretical and practical issues of treaty participation, treaty design, and treaty compliance that I analyze in greater detail below.

Before proceeding, however, a word about relationship between nonconsensual rules and international law's democracy deficit is in order. Commentators who criticize the delegation of authority to international institutions cite a litany of concerns, including the institutions' antidemocratic qualities, their lack of accountability and transparency, and their

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21. For a discussion of postratification noncompliance from a game-theoretic perspective, see David M. McEvoy & John K. Stranlund, *Enforcing 'Self-Enforcing' International Environmental Agreements* (Univ. of Mass. Amherst, Dep't of Res. Econ., Working Paper No. 2006-6, 2006), available at <http://courses.umass.edu/resec/workingpapers/documents/resecworkingpaper2006-6.pdf>.

22. Similarly, one might argue that rules adopted in the manner analyzed in this article are not nonconsensual because states retain the option of withdrawing from the IO or treaty that generated those rules. As I explain below, however, such withdrawals are often highly difficult as a practical matter. See *infra* notes 109–11 and text accompanying. In addition, under established treaty law, withdrawing states are not released from obligations that existed, nor excused from violations that occurred, prior to the date that their withdrawals take effect. See Vienna Convention, *supra* note 1, art. 70.1.

23. For a definition of "problem structure," see *infra* Part IV.A.

susceptibility to capture by special interests.<sup>24</sup> Putting to one side the merits of these complaints when leveled at traditional international lawmaking processes,<sup>25</sup> the concerns are surely more salient when applied to rules that bind states without their formal consent.

This article does not address these democracy and legitimacy challenges directly. It focuses instead on a cost-benefit analysis of nonconsensual lawmaking and argues that nonconsensual rules may be welfare enhancing for all countries in some contexts but not in others. Underlying this argument, however, is a recognition that nonconsensual rules may increase sovereignty costs and the propensity for noncompliance. The article also considers institutional and political constraints that circumscribe the scope of nonconsensual international lawmaking and function as partial substitutes for state consent. The framework proposed here thus implicitly engages with the democracy and legitimacy concerns expressed by international law's critics, albeit from a different perspective.

The remainder of this article proceeds as follows. Part II begins with a comparative analysis. Drawing upon examples from three issue areas—transnational terrorism, protection of the global environment, and human rights—it documents the wide variations in the erosion of the consensual approach to creating new international legal obligations.<sup>26</sup> In the area of transnational terrorism, the United Nations Security Council has enacted global legislation that requires all UN member states to prevent the financing of terrorism and to deter specific terrorist acts whether or not they have ratified multilateral treaties containing those same obligations. For environmental protection agreements, states are the principal architects of revisions to the consent principle. Numerous “green” treaties authorize a majority of states parties to adopt revisions that bind the entire treaty membership or amendments that enter into force without the need for ratification. Finally, with respect to human rights conventions, international tribunals and review bodies have, in certain instances, eroded state consent by interpreting treaties in a highly sovereignty-limiting fashion.

Part III provides a theoretical framework for assessing the costs and benefits of nonconsensual international lawmaking. It first reviews recent interdisciplinary scholarship that links the issues of treaty participa-

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24. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600 & n. 27 (1999) (citing numerous authorities); Swaine, *International Delegations*, *supra* note 12, at 1496–97 & n.12 (same).

25. For thoughtful responses to commentators who criticize international delegations, see, e.g., Anne-Marie Slaughter, *A Dangerous Myth*, PROSPECT, Jan. 22, 2004, at 11; Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 844–57 (2003); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 410–17 (2000).

26. The erosion of the consent principle is not limited to these subjects. For another prominent example with a long historical pedigree, see Laurence R. Helfer, *Monitoring Compliance with Un-Ratified Treaties: The ILO Experience*, 71 LAW & CONTEMP. PROBS. (forthcoming Winter 2008), available at <http://ssrn.com/abstract=1002947>.



tion, treaty design, and treaty compliance. These studies describe the relationships among these three variables and illustrate how changing any one variable necessarily affects the other two. The interdependencies among these variables helps to predict how states respond if we relax the assumption that all treaty obligations are voluntary. As explained below, a state that objects to a nonconsensual rule can attempt to renegotiate the rule, escape from it, or exit from the treaty to which it belongs. As a practical matter, however, the most plausible option for the objecting state is likely to be noncompliance. The benefit-cost ratio of nonconsensual lawmaking can thus be expressed as the tradeoff between reducing treaty law's participation deficit and exacerbating its compliance deficit.

Part IV analyzes how two additional variables—problem structure, and institutional and political context—influence nonconsensual lawmaking in each of the three issue areas discussed in Part II. For transnational terrorism, whose problem structure is characterized by assurance games known as Stag Hunt, Weakest Link and Weaker Link, mandatory legislation by the Security Council enhances multilateral efforts to deter future terrorist attacks. The problem structure of global environmental protection—a summation Prisoners' Dilemma game—is less conducive to interstate cooperation. As a result, the efficacy of nonconsensual rules depends heavily on institutional and political context, including linking public goods to club goods, pressure from powerful nations, and changes in state preferences and identities. Nonconsensual lawmaking is most problematic in the area of human rights. Scholars have advanced different interest-based theories to explain why states join human rights agreements. These theories predict that states will only rarely comply with nonconsensual rulings by international tribunals and review bodies. Institutional and political factors that favor compliance with such rulings will thus face significant obstacles. Part V briefly concludes.

## II. NONCONSENSUAL INTERNATIONAL LAWMAKING IN THREE ISSUE AREAS

This Part documents the erosion of consensual international lawmaking in three issue areas—transnational terrorism, protection of the global environment, and human rights. The shift away from consent has evolved very differently in each area. These dissimilarities are reflected in differences in the actors that create international rules, the speed and extent of change, the relationship of new legal obligations to preexisting ones, and the existence of proxies that function as alternative safeguards to state consent.

### A. *Transnational Terrorism*

Since the first airline hijackings in the 1960s, the member states of the United Nations have negotiated more than a dozen multilateral

agreements to deter specific acts of transnational terrorism.<sup>27</sup> Yet on the eve of the terrorist attacks of September 11, 2001, these agreements suffered from two major problems.

First, many of the treaties were sparsely ratified. Only two UN members were parties to all twelve conventions then open for signature, and the two most recent agreements—the Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention) and the Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention)—had been ratified by just twenty-eight and four states, respectively.<sup>28</sup> Even for treaties with large memberships, states “in the regions where the terrorist threat is probably greatest were slow to take the necessary domestic steps to become parties to . . . them, thus limiting their practical relevance.”<sup>29</sup>

Second, the conventions’ substantive rules were quite weak. The treaties required member states to implement antiterrorism provisions in their national legal systems through domestic legislation and judicial action. Yet, the conventions did not establish any international mechanism to monitor whether states in fact carried out these requirements.<sup>30</sup> In addition, several states had filed reservations further restricting their obligations under the treaties.<sup>31</sup> Given these weaknesses, it is perhaps unsurprising that an empirical study of UN antiterrorism conventions negotiated prior to 1990 found no statistically significant reduction in the average number of terrorist attacks before and after the treaties entered into force.<sup>32</sup>

Immediately following the September 11th attacks, the UN Security Council acted to remedy these two deficiencies. In Resolution 1373, the Council imposed a series of mandates on the UN membership to combat the threat of terrorism by nonstate actors.<sup>33</sup> These included the obligation to criminalize the financing of terrorism, freeze terrorist assets, re-

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27. Antiterrorism treaties adopted under the auspices of the United Nations include thirteen conventions and three protocols or amendments. See International Instruments to Counter Terrorism, <http://www.un.org/terrorism/instruments.html> (last visited Oct. 17, 2007). Thus far, UN members have been unable to agree on a general definition of terrorism. See Laurence R. Helfer, *Transforming International Law After the September 11th Attacks? Three Evolving Paradigms for Regulating International Terrorism*, in *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 180, 182 (Mary L. Dudziak ed., 2003).

28. Andrea Bianchi, *Security Council's Anti-Terror Resolutions and their Implementation by Member States*, 4 J. INT'L CRIM. JUST. 1044, 1056 (2006) [hereinafter Bianchi, *Security Council's Anti-Terror Resolutions*]; Rosand, *Security Council as Global Legislator*, *supra* note 6, at 577.

29. Rosand, *Security Council as Global Legislator*, *supra* note 6, at 577.

30. Todd Sandler, *Collective Action and Transnational Terrorism*, 26 WORLD ECON. 779, 797 (2003).

31. See Bianchi, *Security Council's Anti-Terror Resolutions*, *supra* note 28, at 1055; Rosand, *Security Council as Global Legislator*, *supra* note 6, at 577.

32. See Walter Enders et al., *UN Conventions, Technology and Retaliation in the Fight Against Terrorism: An Econometric Evaluation*, 2 TERRORISM & POL. VIOLENCE 83, 98–102 (1990).

33. See Bianchi, *Security Council's Anti-Terror Resolutions*, *supra* note 28, at 1046–47.

frain from providing active or passive support to terrorists, and deny safe haven to terrorists and their supporters.<sup>34</sup>

From the perspective of nonconsensual international lawmaking, several features of Resolution 1373 stand out. First, the Security Council adopted the resolution by a unanimous vote less than three weeks after the attacks in the United States. As a body with only fifteen members and a history of responding to rapidly unfolding crises, the Council acted far more expeditiously than would have been possible using the multilateral treaty making process.

Second, the Council invoked its authority under Chapter VII of the UN Charter to impose legally binding obligations on all 191 UN member nations. The Council had exercised its Chapter VII powers on many prior occasions. But the legal obligations it created were always linked to a specific controversy with clear geographic boundaries.<sup>35</sup> In Resolution 1373, by contrast, the Council assumed a new institutional role—that of a “global legislator”<sup>36</sup> empowered to adopt universal international law for the entire community of nations.<sup>37</sup>

Third, the Council both circumvented and bolstered the decades-old effort to use multilateral treaties to combat transnational terrorism. The core provisions of Resolution 1373 were taken directly from the Terrorism Financing Convention, a treaty that at the time had been ratified by only four countries and was not yet in force.<sup>38</sup> In a single stroke, the Security Council bypassed the ratification process and made the major provisions of this convention binding on the entire UN membership. Resolution 1373 did not, however, wholly supplant the consensual approach to treaty making. To the contrary, the resolution urged all states to “[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism,” including the Terrorism Financing Convention.<sup>39</sup> Later resolutions have made clear that the Council considers the adoption and ratification of multilateral terrorism agreements to be “an absolute priority.”<sup>40</sup>

Fourth and finally, the Security Council established a new monitoring mechanism, the Counter-Terrorism Committee (CTC), to oversee the implementation of Resolution 1373. The creation of the CTC is es-

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34. S.C. Res. 1373, ¶¶1–2, U.N. Doc. S/RES/1373 (Sept. 28, 2001) [hereinafter Resolution 1373].

35. Bianchi, *Security Council's Anti-Terror Resolutions*, *supra* note 28, at 1046–47.

36. Rosand, *Security Council as Global Legislator*, *supra* note 6, at 546–47.

37. *See also* Bianchi, *Security Council's Anti-Terror Resolutions*, *supra* note 28, at 1045 (“In many ways, the SC [Security Council] has acted, arguably for the first time, as a world government, rather than as peace enforcer.”). *See generally* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529 (1993).

38. *See* Paul C. Szasz, Note, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 903 (2002).

39. Resolution 1373, *supra* note 34, ¶ 3(d).

40. Bianchi, *Security Council's Anti-Terror Resolutions*, *supra* note 28, at 1055; *see also id.* at 1056 (“The SC [Security Council] continues calling on states to participate in such conventions, including the recently adopted ones.”).

pecially significant given that none of the antiterrorism conventions contains a procedure to monitor state compliance.<sup>41</sup> In 2004, the Council expanded the CTC's authority, creating the Counter-Terrorism Committee Executive Directorate to develop "a more systematic, consistent and comprehensive" approach to monitoring the implementation of Resolution 1373.<sup>42</sup> Among its many functions, the Executive Directorate is authorized to conduct site visits to member states to facilitate their compliance with the resolution.<sup>43</sup> In the same year, the Council created another counter-terrorism-related body to monitor adherence to Resolution 1540,<sup>44</sup> which obligates all members to prevent nonstate terrorist groups from acquiring weapons of mass destruction.<sup>45</sup>

In sum, the Security Council exercised a unique global legislative function to impose legally binding obligations on all UN member states. In so doing, it swiftly surmounted the participation deficit associated with multilateral treaties. The Council did not, however, entirely eschew consent-based approaches to international lawmaking. Rather, it established an overlapping and complementary legal regime that functioned in tandem with existing multilateral conventions regulating transnational terrorism.

### B. *Protection of the Global Environment*

Whereas nonconsensual international lawmaking in the antiterrorism area involves the exercise of delegated legislative authority by the UN Security Council, nonconsensual lawmaking relating to the global environment occurs when states revise or supplement multilateral environmental protection agreements. Transborder environmental harm possesses several distinctive characteristics that have influenced the nature of the participation deficit in this area and the mechanisms used to overcome the limitations of the consent principle.

First, states frequently face mounting evidence of environmental harm without the scientific or technical knowledge required to identify the causes or seriousness of that harm or the measures needed to remedy it.<sup>46</sup> This knowledge gap creates several impediments to international cooperation. Consider first the timing of treaty negotiations. If states refrain from negotiating until sufficient information is available, it may

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41. Rosand, *Security Council as Global Legislator*, *supra* note 6, at 550.

42. U.N. Security Council, Counter-Terrorism Comm., *Report of the Counter-Terrorism Committee to the Security Council for its Consideration as Part of its Comprehensive Review of the Counter-Terrorism Committee Executive Directorate*, ¶29, delivered to the Security Council, U.N. Doc. S/2005/800 (Dec. 16, 2005).

43. See Bianchi, *Assessing Effectiveness of Anti-terrorism Measures*, *supra* note 6, at 901.

44. S.C. Res. 1540, ¶4, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

45. *Id.* ¶¶8 (a), 8(c), 9, 10.

46. See JØRGEN WETTESTAD, *DESIGNING EFFECTIVE ENVIRONMENTAL REGIMES: THE KEY CONDITIONS* (1999) (describing the high degree of "scientific, technological and political uncertainty" concerning environmental harms).

be too late to take effective action. Conversely, a treaty adopted without such information may misidentify the problem or prescribe an inefficacious solution. In addition, states may see little reason to join a treaty “when there is still lack of agreement on both the severity of the environmental problem and on appropriate responses.”<sup>47</sup> Yet, taking effective action against transborder environmental harm requires “bringing as many of the relevant players as possible” into a multilateral treaty adopted to remedy that harm.<sup>48</sup>

Second, scientific and technical knowledge relating to environmental problems and their potential solutions often evolves rapidly. When faced with sudden shifts in the informational landscape, states need to adopt quick responses, for example, by revising their agreement to capitalize on the most recent research. The traditional approach to international lawmaking, which requires each member state to consent to treaty amendments or revisions, is ill suited to such responses.<sup>49</sup>

Third, transborder environmental harms suffer from collective action problems that create incentives for free riding, even after knowledge gaps have closed.<sup>50</sup> Treaties that seek to close the hole in the ozone layer or reduce the adverse effects of global warming are apt examples. All countries would benefit from phasing out ozone-destroying chemicals and greenhouse gases. In the short term, however, each nation has an incentive to continue to use those substances while allowing other states to switch to more environmentally friendly but costly alternatives.<sup>51</sup>

To help surmount these hurdles to treaty negotiation, participation, and revision, multilateral environmental agreements have developed a distinctive “framework-protocol” approach. The two most prominent examples of this approach are, on the one hand, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol, and, on the other, the Framework Convention on Climate Change and the Kyoto Protocol.<sup>52</sup>

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47. Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 7 (2002) [hereinafter Brunnée, *COPing with Consent*].

48. *Id.*

49. See Vienna Convention, *supra* note 1, art. 40.4 (stating that an “amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement”); Brunnée, *COPing with Consent*, *supra* note 47, at 15 (stating that “conventional [law-making] processes are too sluggish to produce timely responses to global environmental decline”).

50. See LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 23 (1994) (asserting that many nations will refuse to participate in multilateral environmental agreements because they “assume that other [] [countries] will make enough of an effort so that they will benefit from an environmentally safer world without shouldering any of the costs”). Free-riding incentives are especially acute for developing countries, which often have not contributed to environmental harm to the same extent as industrialized nations and which have limited resources to devote to combating it.

51. See TODD SANDLER, GLOBAL CHALLENGES: AN APPROACH TO ENVIRONMENTAL, POLITICAL, AND ECONOMIC PROBLEMS 30–32 (1997).

52. See generally Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795 (2003).

In the first phase of the framework-protocol model, states convene a diplomatic conference to discuss the extent of environmental damage, the relevant scientific and technical knowledge, and possible responses. But rather than agreeing to specific targets or regulations, the conference concludes with the adoption of a “shallow” treaty that contains relatively modest commitments and allows ratifying countries to “retain much of their sovereign elbowroom.”<sup>53</sup> In particular, such “framework conventions” (1) express the parties’ shared concern about a particular environmental threat, (2) articulate their commitment to find an appropriate response to that threat, (3) create mechanisms for the parties to gather and share information, and (4) adopt decision-making procedures to structure future negotiations.<sup>54</sup> The limited nature of these commitments increases the likelihood that the conventions will be widely ratified.

The next stages of the framework-protocol approach involve the “expansion, tightening, speeding-up or other adjustment of the parties’ commitments.”<sup>55</sup> The degree to which these revisions require hard bargaining often depends upon advances in science and technology. In the case of multilateral efforts to close the hole in the ozone layer, for example, multinational firms that produced the bulk of the world ozone-depleting chemicals developed commercially affordable substitutes, providing a clear roadmap for revising the Vienna Convention for the Protection of the Ozone Layer. The result was the adoption of the Montreal Protocol, widely considered to be among the most effective environmental protection treaties.<sup>56</sup> One reason for the Protocol’s success has been the speed and frequency with which member states have expanded its reach by adopting annexes (which identify new chemicals to be restricted and eventually phased out) and adjustments (which revise the ozone-depleting effects of chemicals or the timetables for their elimination).<sup>57</sup>

It is with respect to these fine-grained amendment procedures that environmental treaties such as the Montreal Protocol frequently deviate from a consensual approach to international lawmaking. The deviations fall into two broad categories: (1) the adoption of amendments, annexes, and other supplementary texts by a simple or qualified majority vote; and (2) the entry into force of those instruments without the need for state-by-state ratification.<sup>58</sup> Deviations in the first category relax the consen-

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53. Brunnée, *COPing with Consent*, *supra* note 47, at 7; see also Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 392–93 (2000) (noting the shallow nature of many environmental agreements).

54. See generally SUSSKIND, *supra* note 50, at 30–37 (describing and critiquing the framework-protocol approach).

55. Brunnée, *COPing with Consent*, *supra* note 47, at 8.

56. See Thoms, *supra* note 52, at 805 n.53 (collecting authorities supporting this conclusion).

57. See, e.g., John K. Setear, *Ozone, Iteration, and International Law*, 40 VA. J. INT’L L. 193, 220–23 (1999).

58. See Bernhard Boockmann & Paul Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, 6 INT’L ENVTL. AGREEMENTS 113, 116–20 (2006) (analyzing the revision and entry-

sus rule for approving treaty revisions; those in the second category enable revisions to bind all treaty parties unless a specified percentage of states rejects the revisions within a designated time period. These so-called “tacit acceptance procedures” sometimes also permit individual countries to object to revisions, thus preventing their entry into force for the dissenting nation or nations alone.<sup>59</sup> “By establishing a presumptively binding norm, tacit acceptance procedures alter[] the status quo and thereby shift[] the burden of justifying noncompliance from the institution to the nonconforming state.”<sup>60</sup>

Both majority-adoption rules and tacit-acceptance procedures facilitate the adjustment of treaty commitments to changed circumstances. They do so by granting de facto lawmaking powers to the “conference of the parties” for each agreement, transforming those treaty-based collective bodies “into issue-specific equivalents of global legislatures.”<sup>61</sup> But the deviations from the consent principle reflected in these two procedures are often linked in ways that preserve at least a modicum of state sovereignty.

For example, treaty amendments adopted by majority vote are “typically used together with a ratification requirement” to avoid “a large loss of control for national actors.”<sup>62</sup> Conversely, revisions subject to a tacit-acceptance procedure are usually adopted by consensus for similar reasons.<sup>63</sup> Only rarely do treaties “permit a supermajority to adopt changes that are subject neither to ratification nor to objection by an individual party.”<sup>64</sup> Adjustments to the Montreal Protocol are the most widely cited example. However, the majoritarian revisions that the Protocol authorizes contain safeguards that reduce the risk that dissenting states will be bound by adjustments against their will.<sup>65</sup> Equally telling, “all adjustments to the Montreal Protocol to date have proceeded on

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into-force provisions for 400 international environmental treaties, protocols, and other supplementary texts).

59. See Brunnée, *COPing with Consent*, *supra* note 47, at 17–23; Lei Shi, *Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law*, 11 U.S.F. MAR. L.J. 299, 305–07 (1999).

60. *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1608 (1991).

61. Brunnée, *COPing with Consent*, *supra* note 47, at 4 (internal quotations omitted).

62. Boockmann & Thurner, *supra* note 58, at 116.

63. See Brunnée, *COPing with Consent*, *supra* note 47, at 22 n.109 (listing examples).

64. Swaine, *International Delegations*, *supra* note 12, at 1513; see also Brunnée, *COPing with Consent*, *supra* note 47, at 22 (discussing the Montreal Protocol and the Biosafety Protocol and stating that “[o]nly a handful of other examples exist where [multilateral environmental agreements] allow [conferences of the parties] to adopt ‘adjustments’ to similarly substantive annexes without providing parties with an ‘opt-out’ possibility,” but noting that in those instances “the relevant decisions require adoption by consensus”).

65. Adjustments are adopted by consensus whenever possible and may only be adopted by a two-thirds majority “as a last resort.” Brunnée, *COPing with Consent*, *supra* note 47, at 21. In addition, the majority “is ‘double-weighted’ and must include a majority of both industrialized and developing countries present and voting.” *Id.*

a consensus basis rather than the supermajority vote provided for in the Protocol.”<sup>66</sup>

The foregoing discussion illustrates that multilateral environmental agreements use the framework-protocol approach in two distinct ways: first, to overcome international law’s participation deficit under conditions of informational uncertainty; and second, to reduce the costs of consent-based approaches to treaty making by enabling revisions to be approved quickly and with widespread effect. In practice, however, non-consensual lawmaking to protect the global environment has been confined to situations in which treaty parties largely concur on the need for collective action. Whether such procedures will function effectively when states are fundamentally divided has yet to be tested.

### C. *Human Rights*

Nonconsensual international lawmaking has evolved quite differently in the area of human rights. In the six decades since the Second World War, global and regional human rights treaties have, for the most part, overcome international law’s participation deficit. Many of these treaties now have large numbers of states parties, with a few agreements approaching universal membership.<sup>67</sup>

The substantive provisions of these treaties create sovereignty costs for their member states by restricting how they treat individuals and groups located in territories subject to their jurisdiction.<sup>68</sup> The treaties also establish a network of international courts, commissions, and expert bodies. These judicial and quasi-judicial monitoring institutions review reports from states parties, publish conclusions and recommendations concerning those reports, interpret the treaties in general comments and advisory opinions, and, for some countries in some treaty systems, issue legally binding judgments or nonbinding decisions in response to complaints filed by private parties or by other states.<sup>69</sup>

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66. Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT’L L. 137, 171 (2005).

67. See Office of the U.N. High Comm’r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last visited Aug. 25, 2007).

68. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1852–53 (2002) [hereinafter Helfer, *Overlegalizing Human Rights*] (“Altering domestic policies to conform to international human rights standards is not costless. Such alterations impose external constraints on a government’s ability to respond to legitimate social problems by regulating the behavior of individuals within its borders or by allocating resources to other areas of social policy—both traditional aspects of state sovereignty.” (citation omitted)); JoonBeom Pae, *Sovereignty, Power, and Human Rights Treaties: An Economic Analysis*, 5 NW. J. INT’L HUM. RTS. 71, 82 (2006) (providing an economic analysis of sovereignty costs associated with adhering to international human rights agreements).

69. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 296–301 (1999) [hereinafter Helfer, *Forum Shopping for Human Rights*] (discussing evolution of UN human rights system and its monitoring mechanisms).



Compliance with human rights treaties varies widely, however.<sup>70</sup> The European Convention on Human Rights is the globe's compliance bright spot. Its forty-seven member states regularly carry out the judgments of the European Court of Human Rights (ECHR), albeit with occasional acts of recalcitrance and more frequent instances of delay.<sup>71</sup> Compliance rates in other regional systems are more modest,<sup>72</sup> and adherence to UN human rights treaties is lower still.<sup>73</sup>

In contrast to transnational terrorism, the divergence from consent-based international lawmaking in the human rights area has not involved the creation of extratreaty legal obligations by an intergovernmental organization. Rather, it has occurred as a result of rulings and decisions by international courts, commissions, and expert committees. As I explain below, these rulings and decisions have expanded the scope of existing human rights treaties and transformed nonbinding norms into legally binding obligations.<sup>74</sup>

The mandate of international human rights tribunals and review bodies—to monitor compliance with the treaties and review complaints alleging that states have violated them—necessarily includes an interpretive function. In exercising this function, the tribunals and review bodies

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70. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) [hereinafter Hathaway, *Do Human Rights Treaties Make a Difference?*]; Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005).

71. See Tom Barkhuysen & Michiel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 1, 15–17 (Theodora Christou & Juan Pablo Raymond eds., 2005); Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359, 367 (2005).

72. See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 924 (2005) [hereinafter Helfer & Slaughter, *International Tribunals*] (reviewing 2003 report of the Inter-American Commission on Human Rights indicating that “full compliance” and “partial compliance” occurred in eight percent and forty-seven percent of disputes, respectively). The Inter-American Court has become much more active in recent years monitoring compliance with its judgments. INTER-AM. COURT OF HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 84 (2006), available at <http://www.corteidh.or.cr/docs/informes/20063.pdf> (chart showing dramatic increase in monitoring compliance with judgments in contentious cases); *id.* at 77–78 (stating that “States have acquiesced or acknowledged completely or in part, their international responsibility” in 35.3% of all contentious cases heard by the Inter-American Court of Human Rights).

73. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 344–45 (1997) [hereinafter Helfer & Slaughter, *Effective Supranational Adjudication*] (reviewing 1995 report that indicated in approximately thirty percent of cases did states parties to the International Covenant on Civil and Political Rights implement or express their intention to implement the nonbinding decisions of the UN Human Rights Committee).

74. A similar phenomenon is underway in some national courts. See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 652–56 (2007) (examining how courts in the United States, Australia, Canada, New Zealand, and the Commonwealth Caribbean use international human rights standards—including unratified treaties and nonbinding norms—to interpret of individual liberties clauses in their respective domestic constitutions); see also Richard Frimpong Oppong, *Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa*, 30 FORDHAM INT'L L.J. 296, 313–15 (2007) (noting similar trends in domestic courts in African countries).

have identified the objectives that human rights instruments seek to achieve. The International Court of Justice (ICJ) first articulated these goals in its early and influential advisory opinion on reservations to the Genocide Convention.<sup>75</sup> The ICJ reasoned that states parties to human rights treaties “do not have any interests of their own; they merely have . . . a common interest, namely, the accomplishment of those high purposes which are the [treaties’] *raison d’être*.”<sup>76</sup>

Other international tribunals have echoed and amplified the ICJ’s articulation of these objectives, with the result that a distinctive method of interpreting human rights agreements has now emerged. This approach deemphasizes the intent of the treaties’ drafters and the preservation of state sovereignty in cases of doubt. It stresses instead the treaties’ objectives, their evolutionary character, and the need for rights to be practical, effective, and relevant to present-day conditions.<sup>77</sup> Application of these principles “often lead[s] to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other.”<sup>78</sup> A few judges and commentators have even gone so far as to assert that the “the voluntary nature of state obligations is not appropriate in international human rights law.”<sup>79</sup>

Human rights tribunals have applied this sovereignty-limiting approach to treaty interpretation in a variety of contexts. Perhaps the most well-known context concerns reservations. In most treaties, reservations are permissible only if they are consistent with the object and purpose of the agreement. Many states have filed reservations to human rights agreements, some of them very broad. The common practice of reserving has created a difficult question for the tribunals: how does severing

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75. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23, 26 (May 28); see also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90 (1978) (“Unlike international treaties of the classic kind, the [European] Convention [on Human Rights] comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which . . . benefit from a collective enforcement.” (internal quotations omitted)).

76. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 75, at 23.

77. See, e.g., SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 23–29 (1997); Helfer & Slaughter, *Effective Supranational Adjudication*, *supra* note 73, at 343–45; Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 *HUM. RTS. L. REV.* 57, 60–78 (2005).

78. Rudolph Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention of Human Rights*, 42 *GERMAN Y.B. INT’L L.* 11, 14 (1999).

79. Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 *STAN. J. INT’L L.* 241, 245 (2002); see *Blake v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, at ¶33 (Jan. 22, 1999) (reparations & costs) (separate opinion of Judge Cançado Trindade) (advocating an approach to interpreting human rights treaties that “establish[es] limits to State voluntarism” and that creates “a new vision of the relations between public power and the human being” in which “the State exists for the human being, and not vice-versa”); Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 *INT’L & COMP. L.Q.* 217, 229 (2007) (statement by the former President of the ECHR that the Court’s interpretation of the Convention “go[es] beyond the consent- and sovereignty-oriented rules of general international law”).

an invalid reservation effect a state's obligations and its status as a treaty party?<sup>80</sup>

Three alternatives are possible. First, if a reservation is viewed as a condition of the state's consent to be bound by the treaty, severing the reservation nullifies its ratification and terminates its treaty membership. Second, the state may be considered bound by the treaty except for those provisions to which its invalid reservation applied. And third, the state may be deemed a party to the entire treaty, including the provisions to which its now stricken reservation attached.<sup>81</sup> Many human rights tribunals and review bodies have opted for the third approach, with the result that states are legally bound to provisions to which they have not formally consented.<sup>82</sup>

Another way in which tribunals have eroded the consent principle is by altering the location of particular rules in the hierarchy of international legal norms. For example, the Inter-American Court of Human Rights has held, over the objections of the United States, that the non-binding American Declaration on the Rights and Duties of Man has become binding by virtue of its indirect incorporation into the Charter of the Organization of American States (OAS).<sup>83</sup> The Inter-American Commission on Human Rights has extended the American Declaration's reach in a different way. In reviewing a complaint by a criminal defendant who challenged the United States' failure to comply with the Declaration, the Commission concluded that "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime" and that "this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*."<sup>84</sup> Recognizing this prohibition as a peremptory norm allowed the Commission to "avoid the usual consent-based restrictions associated with claims based on treaties and customary international law" and disregard the United States' persistent objections to a customary rule banning the execution of juveniles.<sup>85</sup>

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80. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

81. *Id.*; Laurence R. Helfer, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367, 379–81 (2006) [hereinafter Helfer, *Not Fully Committed?*].

82. See Tomuschat, *supra* note 10, at 262–64; see also Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 309 (2006) [hereinafter Swaine, *Reserving*] (noting the diversity of approaches to whether an invalid treaty reservation may be severed from a state's ratification).

83. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989); see also DAVIDSON, *supra* note 77, at 12–15 (stating that the indirect incorporation of the nonbinding American Declaration into the legally binding OAS Charter "is clearly contrary to the original intentions of the OAS Member States" but nevertheless reflects "a decisive shift in their attitude towards the supervision and enforceability of the rights listed in the Declaration").

84. *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/ser.L/V/II.116, doc.5rev. ¶¶ 84–85 (Oct. 22, 2002).

85. Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 536 (2002).

The erosion of the consent principle reflected in these sovereignty-restrictive interpretations of human rights treaties has engendered considerable controversy. Commentators who defend the tribunals' approach argue that states ratified the treaties with the understanding that tribunals and review bodies would interpret their obligations in unforeseeable ways.<sup>86</sup> But other scholars have criticized the practice and several countries have openly challenged it.<sup>87</sup> I consider the reasons for this resistance in Part IV. Before doing so, however, I undertake a more general analysis of the costs and benefits of nonconsensual international lawmaking and their relationship to recent scholarship linking the issues of treaty participation, treaty design, and treaty compliance.

### III. LINKING TREATY PARTICIPATION, TREATY DESIGN, AND TREATY COMPLIANCE

The benefits of the nonconsensual international lawmaking mechanisms analyzed in the previous sections of this article should by now be clear. These mechanisms expedite the creation of new legal rules and the revision of old ones. They facilitate the adoption of deeper commitments that require more extensive changes in member states' behavior. And they reduce international law's participation deficit by automatically applying those commitments to a larger number of nations.

For some observers, these advantages provide a sufficient basis for endorsing the erosion of consensual international lawmaking. As one scholar states at the conclusion of a study of specialized lawmaking processes, UN agencies

do find ways to channel members' conduct in discrete areas, and they often do it without the express consent of each member to each norm they promulgate. This ability to promulgate norms that are reasonably effective even as to passive participants in the system is a major contribution to the international legal process . . . . [I]t also has great practical importance[] in a world where political, economic, technological and cultural diversities tend to impede effective norm promulgation if no government has any degree of obligation without its explicit consent to the obligating norm.<sup>88</sup>

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86. See Lau, *supra* note 11, at 503–05.

87. See Swaine, *Reserving*, *supra* note 82, at 323–24, 363–64 (reviewing recent state practice and arguing that giving international tribunals and review bodies the power to sever incompatible reservations “risk[s] weakening treaty terms, driving reservations underground without increasing compliance, and diminishing the willingness of states to ratify”).

88. Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in *THE UNITED NATIONS LEGAL ORDER* 109, 161 (Oscar Schachter & Christopher C. Joyner eds., 1995); see also Szasz, *supra* note 38, at 905 (“If used prudently, this new tool [the Security Council’s use of global legislation to combat transnational terrorism] will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.”).

Such salutary appraisals usefully identify the disadvantages of consensual international lawmaking and how nonconsensual alternatives help to overcome them. What these assessments fail to grapple with, however, are the costs of these alternatives, in particular their consequences for treaty design and treaty compliance. Specifically, any analysis of these issues must consider whether nonconsensual lawmaking merely reduces international law's participation deficit only to increase its compliance deficit.

A. *Designing Treaties Under an Assumption of Voluntary State Participation*

Recent interdisciplinary scholarship on treaty design provides a framework for analyzing this important and understudied issue. The authors of these studies explain how states structure their treaty-based relationships to take account of the interconnections among several variables—the form of international agreements, their substance, and the behavior of the countries who join those agreements. In particular, these scholars argue, countries negotiating treaties prospectively evaluate how different design features (such as tribunals or monitoring mechanisms) and different legal obligations (for example, the depth or precision of treaty commitments) will affect treaty compliance.<sup>89</sup>

A key implication of linking treaty form and substance to the treaty participation and compliance decisions of states is that changing any one of these variables necessarily affects the others. For example, agreements that include strong enforcement mechanisms are less likely to receive a large number of ratifications,<sup>90</sup> but more likely to increase compliance by those nations that do participate.<sup>91</sup> Conversely, agreements that contain substantive provisions that are “too deep,” i.e. that require overly ambitious modifications of state behavior, are more likely to result in “numerous violations” by a smaller number of ratifying countries.<sup>92</sup> By strategically manipulating these variables, treaty negotiators

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89. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 606–09 (2005) (arguing that three design elements—hard law, dispute settlement mechanisms, and monitoring—increase the costs associated with treaty violations and therefore increase the probability of compliance, and offering an explanation for why states infrequently include some of these elements in treaties); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 493 (2005) [hereinafter Hathaway, *Between Power and Principle*] (analyzing the reciprocal relationship between treaty commitment and treaty compliance); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1834 (2003) (“When deciding whether to ratify a treaty, a country will take into account the expected compliance costs—that is, how much the country will change its behavior as a result of the ratification.”); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 581, 610 (2005) (analyzing the relationships between legality, substance, and structure of treaties and the consequences for treaty compliance).

90. Hathaway, *Between Power and Principle*, *supra* note 89, at 530.

91. Guzman, *supra* note 89, at 599.

92. Raustiala, *supra* note 89, at 613; see also *id.* at 613–14 (stating that “[t]he International Monetary Fund’s structural adjustment accords, the European system of human rights, and perhaps the . . . International Criminal Court represent other examples of agreements whose depth may exceed the

can structure the form and content of agreements to maximize joint gains.

Although these studies of treaty design view the form and content of international agreements as variables, they regard the voluntariness of treaty participation decisions as a constant.<sup>93</sup> The assumption that states are free to enter into treaties or not as they see fit has two consequences for the models of state behavior developed in these studies—it influences compliance with treaty obligations, and it shapes treaty-design choices.

The effect of voluntariness on compliance is easily identified. States only negotiate and join treaties with respect to which they have at least a reasonable prospect of compliance.<sup>94</sup> It follows that “[t]he more likely a state is to change its behavior to comply with a treaty, the more reluctant it will likely be to commit to it in the first place, all else being equal.”<sup>95</sup> The paradoxical result is that governments often negotiate shallow agreements that elicit broad participation and high compliance rates but produce little meaningful changes in behavior. Deeper agreements are possible, but only by limiting participation to a smaller number of countries that are able to comply with the more onerous rules that such agreements contain.<sup>96</sup>

Voluntariness also influences treaty-design choices. Government negotiators know that they cannot compel states to join a treaty. Given this constraint, negotiators who want to deviate from the two default designs described above—shallow treaties with broad participation or deep treaties with narrow participation—while maintaining a reasonable prospect of high compliance rates, must modify the treaties’ design elements (such as its review and enforcement mechanisms) and/or utilize other

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optimal level”). Deeper obligations also limit the number of ratifications. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights*, 54 DUKE L.J. 621, 659 (2004) (“It is well understood that higher standards in a human rights treaty tend to reduce levels of state participation.”).

93. See, e.g., Hathaway, *Between Power and Principle*, *supra* note 89, at 488 (asserting that the “defining characteristic of international treaty law is the voluntary nature of the legal obligation it imposes”). This assumption is in some tension with the dominance of powerful nations in the treaty negotiations. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002). I explore the issue of coercion by powerful nations in Part IV.

94. George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 383 (1996) (“Just as orchestras will usually avoid music that they cannot play fairly well, states will rarely spend a great deal of time and effort negotiating agreements that will continually be violated.”); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT’L ORG. 573, 599 (2000) (“[G]overnments are hesitant to make international legal commitments if there is a significant risk that they will not be able to honor them in the future . . . . [C]ommitment is associated with conditions that one can reasonably anticipate will make compliance possible.”).

95. Hathaway, *Between Power and Principle*, *supra* note 89, at 494.

96. See BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 292–306 (discussing the tradeoff between breadth and depth and its effect on treaty membership size); George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT’L L. 465, 500 & n.123 (2000) (arguing that more stringent legal obligations reduce membership in environment, trade and arms control treaties); Raustiala, *supra* note 89, at 611 (explaining why states negotiate “numerous shallow, ineffective international agreements”).

mechanisms to change states' incentives to ratify (such as side payments, technical assistance, or other treaty membership benefits). But such modifications and incentives are costly. And where the costs exceed the benefits of cooperation, agreement may never be reached or may produce fewer joint gains.<sup>97</sup>

### B. *Relaxing the Voluntariness Assumption*

Now consider the consequences of relaxing the assumption that all treaty obligations are voluntary. Assume instead that a country can be bound to new obligations without its consent after it joins a treaty or an IO. This revised assumption affects both treaty participation and design choices *ex ante* and treaty compliance decisions *ex post*.<sup>98</sup> I consider each of these consequences in turn.

The prospect that an IO, a tribunal, or a group of states may adopt or extend treaty obligations nonconsensually acts as an additional deterrent to ratification. To overcome this impediment, negotiators must offer inducements (over and above those outlined above) to encourage states to participate. Such inducements include increasing the benefits of treaty or IO membership, reducing substantive standards, weakening monitoring and enforcement provisions, adopting procedural protections to limit the scope of nonconsensual rules, or some combination of these elements.

Evidence of these inducements appears in each of the three issue areas analyzed above.<sup>99</sup> First, at the UN Charter drafting conference in San Francisco, smaller states expressed concern about delegating law-making powers to the Security Council and its five permanent members.<sup>100</sup> Yet the overwhelming benefits of UN membership, and the greater burden to preserve peace and security that five great powers assumed, were such that smaller countries could exact only minor concessions as the price of securing their participation in the organization.<sup>101</sup> Second, with respect to the protection of the global environment, the

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97. See BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 357 (arguing that constraints of international legal system mean that “[t]reaties are often able to sustain only a second-best outcome”); Raustiala, *supra* note 89, at 599 (arguing that where hold-out states can credibly threaten to remain outside a treaty, the countries that desire an agreement must provide side payments or change “the legality, substance and structure” of the treaty or risk “scuttling the pact altogether”).

98. Nonconsensual lawmaking also effects the negotiation of future treaties, increasing the likelihood that states will decline to enter into such agreements or will draft overly precise, rule-bound agreements when the adoption of flexible standards would be more efficient. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 338–55 (1999) (discussing the relationship among treaty negotiation, dispute settlement, and the efficiency of standards versus rules).

99. See *supra* Parts II.A–C.

100. See RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 713–49 (The Brookings Ins. 1958); see also Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2077 (2003) (stating that “the San Francisco conference was characterized by debates between the Big Three (or Five, if France and China are included) and other states over their relative power in the UN”).

101. See RUSSELL & MUTHER, *supra* note 100.

prospect of adopting nonconsensual amendments correlates with both the shallowness of framework conventions and of the initial iterations of the protocols that succeed them. It also helps to explain why majoritarian treaty-revision rules are inversely correlated with nonconsensual entry-into-force provisions.<sup>102</sup> Third and lastly, the possibility that international tribunals would expansively interpret human rights treaties is reflected in the design features of those agreements. These include the ability of states parties to ratify most treaties without also recognizing the jurisdiction of tribunals and review bodies to receive complaints from other nations or private parties; the fact that a majority of tribunals and review bodies issue only nonbinding decisions and recommendations rather than legally binding judgments; and the fact that states control the election, reappointment, and funding of decision makers.<sup>103</sup>

To be sure, states' concerns about nonconsensual international lawmaking were not the sole determinants of these treaty design features. But the above evidence is consistent with the claim that relaxing the voluntariness assumption influences treaty-participation and treaty-design decisions in ways that scholars have not previously considered.

In addition to influencing treaty-design choices and participation decisions *ex ante*, relaxing the voluntariness assumption also affects states' postratification behavior. As I explain below, a country that objects to a nonconsensual rule has several potential options available to it. Practically and politically, however, the most common response is likely to be noncompliance.<sup>104</sup>

Renegotiation of a treaty provides one potential response to nonconsensual lawmaking. In practice, however, this option is often illusory. Revision of treaties is a time-consuming and cumbersome process, especially when it follows the traditional route of requiring individual ratification by all states parties. Even where a treaty provides for expedited amendment procedures (such as the majority voting or tacit acceptance rules discussed above),<sup>105</sup> it may be impossible for countries adversely affected by nonconsensual lawmaking to use the procedures successfully. This is particularly true where only one nation or a small number of countries objects to the nonconsensual rule.

The prospect of a multilateral response is only slightly brighter in the case of nonconsensual obligations imposed by international tribunals.

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102. See Boockmann & Paul Thurner, *supra* note 58, at 120.

103. See Helfer, *Forum Shopping for Human Rights*, *supra* note 69, at 299–301; Helfer & Slaughter, *International Tribunals*, *supra* note 72, at 945–48.

104. To be clear, I do not claim that states always choose to violate nonconsensual legal obligations. Whether noncompliance in fact occurs depends on factors unrelated to the obligation's nonconsensual pedigree, including the underlying problem structure and the cost-benefit ratio of treaty membership—issues that I address in Part IV of this article. Here I simply argue that, where a state decides to find a way to avoid a nonconsensual obligation, it is more likely to choose noncompliance over the other theoretically available alternatives discussed below.

105. See *supra* Part II.B (discussing such amendment procedures).



Because all treaty parties have an interest in the tribunal's rulings, a consensus in favor of overturning an expansive decision or restricting the tribunal's jurisdiction may seem easier to achieve. But "[e]ither option requires building a political coalition of states that want to clip the court's wings."<sup>106</sup> Such coalition building is difficult, however, because "[c]ountries committed to the norm of judicial independence resist efforts to punish" the tribunal.<sup>107</sup> The empirical record is replete with mostly unsuccessful attempts to amend treaties in response to expansive or unpopular rulings by international tribunals.<sup>108</sup>

Third, if the treaty contains unilateral exit or escape mechanisms (such as withdrawal, derogation, and suspension clauses),<sup>109</sup> the state may invoke those mechanisms to modify the nonconsensual obligation or terminate its membership in the treaty altogether. The utility of these mechanisms is likely to be limited, however. Many treaties do not contain escape clauses or, if they do, they may not be applicable to the nonconsensual obligation at issue. (In human rights treaties, for example, derogations are restricted to national emergencies and apply only to certain rights.)<sup>110</sup> Even in treaties where exit or escape is authorized, it is often difficult as a practical matter. The benefits of membership in a treaty or an IO, pressure from more powerful nations, or the reputational costs of publicly abrogating prior treaty commitments can make the use of such clauses politically implausible. It is hard to imagine, for example, a state withdrawing from the WTO in response to an unfavorable ruling by the WTO Appellate Body.<sup>111</sup>

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106. Karen J. Alter, *International Courts Are Not Agents! The Perils of the Principal-Agent Approach to Thinking About the Independence of International Courts*, 99 AM. SOC'Y INT'L L. PROC. 138, 140 (2005) (internal quotations omitted).

107. *Id.*

108. Compare Karen J. Alter, *Delegation to International Courts and the Limits of Recontracting Political Power*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 312, 324–36 (Darren Hawkins et al. eds., 2006) (comprehensively reviewing examples, including proposals to amend EU law in response to decisions of the European Court of Justice, and concluding that states are reluctant to use “re-contracting tools” to reverse the rulings of international tribunals), with Official Statement, NAFTA Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> (official statement from three NAFTA parties adopted “to clarify and reaffirm the meaning of” a provision of NAFTA Chapter 11).

109. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582 (2005) [hereinafter Helfer, *Exiting Treaties*] (defining “exit clauses” as provisions that “create a lawful, public mechanism for a state to terminate its treaty obligations or withdraw from membership in an intergovernmental organization”); B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 830 (2001) (defining “escape clauses” as “provision[s] of an international agreement that allow[ ] a country to suspend the concessions it previously negotiated without violating or abrogating the terms of the agreement”).

110. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

111. See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 267 (2004) (characterizing a threat by the United States to leave the WTO in reaction to judicial lawmaking as having “limited credibility”); see also Jared Wesel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing*

To summarize, the responses to nonconsensual international lawmaking reviewed above are often costly, time consuming, restricted in scope, and likely to be opposed by other treaty parties. When weighed against these alternatives, noncompliance will often be a more attractive option.<sup>112</sup> Several structural features of the international legal system support this conclusion.

First, the system's relatively anarchic environment makes it "difficult for a state to monitor the conduct of its treaty partners and to evaluate whether that conduct violates the treaty."<sup>113</sup> Surreptitious shirking of treaty obligations, if undiscovered, creates few costs to the noncomplying country, at least in the short term. Even if a state's behavior is readily detectable, it may prefer to incur the (relatively low) risk of sanctions and (likely higher) probability of harm to its reputation if the sovereignty costs of compliance are sufficiently high.

Second, several scholars have argued that noncompliance may be normatively defensible in response to imperfections in international lawmaking processes. Where, for example, there are "inadequacies in how the international community creates, internalizes, and manages the rules," or "substantive and procedural flaws in the creation of legal norms that impinge on the rules' fairness and legitimacy,"<sup>114</sup> noncompliance can function "as a sort of necessary safety valve . . . rather than an inherent flaw in the system."<sup>115</sup> Scholars have applied these arguments in favor of noncompliance to traditional lawmaking and dispute settlement processes. Such claims have even greater salience, however, when raised by states in response to instances of nonconsensual international lawmaking.

#### IV. USING NONCONSENSUAL INTERNATIONAL LAWMAKING TO PROMOTE TREATY PARTICIPATION AND TREATY COMPLIANCE

This article has thus far reviewed different varieties of nonconsensual international lawmaking in treaties and IOs and has provided a

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*International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 425 (2006) (asserting that "exit from the Rome Statute is unlikely for political reasons").

112. Scott Barrett provides a succinct example when discussing the options facing the countries of the former Soviet Union, which, in the early 1990s, were unable to reduce ozone-depleting chemicals as required by the Montreal Protocol. He concludes that "withdrawing from the agreement would have made [these countries] even more worse off. Being deterred from withdrawing, and with the other parties refusing to renegotiate, *non-compliance may have seemed an alluring outlet*, especially as the penalty for non-compliance was unspecified." BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 287 (emphasis added).

113. Helfer & Slaughter, *International Tribunals*, *supra* note 72, at 934; *see also* BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 37 ("Non-participation [in a treaty] is easy to observe, but non-compliance need not be.").

114. Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 194-95 (2006) (proposing and assessing "operational noncompliance" that maintains the efficacy of the international legal system).

115. Alter, *supra* note 106, at 141.

comprehensive analysis of their costs and benefits. In particular, I have argued that the benefits of nonconsensual lawmaking—reducing international law’s participation deficit, expediting the creation and revision of new legal rules, and facilitating the adoption of deeper commitments—must be balanced against its costs, which include changes in the form and substance of treaties, and, most importantly, a higher probability of non-compliance. If the benefits of nonconsensual international lawmaking were always less than its costs, it would be appropriate to abandon the practice. Stated differently, sacrificing greater compliance to obtain greater participation is a problematic strategy for a legal system characterized by weak enforcement mechanisms and ample opportunities for shirking treaty commitments.

Accurately assessing the costs and benefits of such a strategy, however, requires consideration of two additional variables: (1) the problem structure that a treaty or IO confronts, and (2) how nonconsensual rules are nested within broader institutional and political environments. For certain collective action dilemmas and in certain contexts, nonconsensual lawmaking creates a self-enforcing equilibrium in which compliance by all member states is a dominant strategy. In such cases, nonconsensual rules reduce *both* international law’s participation deficit *and* its compliance deficit. As a result, the benefits of such lawmaking do indeed exceed its costs, increasing the welfare of each individual state as well as the welfare of member states as a group. In other instances, by contrast, strategic incentives and institutional contexts will exacerbate compliance problems, making nonconsensual lawmaking a disfavored strategy.

In this Part, I first provide an overview of these two variables and their effects on international cooperation. I then use the variables to analyze nonconsensual lawmaking in each of the three issue areas discussed above. I demonstrate that nonconsensual lawmaking helps states overcome collective action problems related to deterring transnational terrorism and, to a lesser degree, protecting the global environment. By contrast, I explain why the incentives and institutional and political context of human rights regimes are more likely to engender opposition to nonconsensual lawmaking.

Before proceeding with these arguments, however, two important cautionary notes are in order. First, the analysis of collective action problems and institutional and political settings that follows can only skim the surface of what is a highly complex set of issues. For example, several noncooperative game types can be used to analyze multilateral efforts to combat transnational terrorism.<sup>116</sup> Conversely, global environmental problems with identical public-goods characteristics can have

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116. See WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* 84–159 (2006) (using multiple game types to analyze specific transnational terrorism issues).

“vastly different collective action prognoses.”<sup>117</sup> This diversity of problem structures and the rules and institutions developed to address them suggest that the positive or negative consequences of nonconsensual lawmaking may vary significantly even within a single issue area.

Second, the discussion below assumes that states are unitary actors that seek to maximize the welfare of their citizens. This simplifying assumption usefully highlights the strategic interactions engendered by global collective action problems and how nonconsensual lawmaking ameliorates or exacerbates them.<sup>118</sup> A more in-depth treatment of these subjects, however, would disaggregate states into their governmental and private components and examine the interactions between domestic and international political actors. These more fine-grained studies, which are beyond the scope of this article, would consider issues such as public choice, the strategies of domestic interest groups, and the ability of non-governmental organizations to influence compliance with nonconsensual international obligations.<sup>119</sup>

#### A. Problem Structure

Underlying every international cooperation endeavor is a “problem structure,” a set of externally determined features of the substantive issue or concern that states have joined together to address.<sup>120</sup> Social scientists have yet to settle on a single definition of problem structure. But its most common elements include the number of states involved, their incentives, the strategic interactions they generate, the level of uncertainty, and asymmetries of information and power. These factors help to predict the difficulty of establishing and sustaining collective action that improves states’ individual and group welfare in comparison to the alternatives of unilateral action or no action at all.<sup>121</sup>

As an example, consider the problem structure associated with curbing greenhouse gas emissions. Reducing global warming is a pure public good that provides nonrival and nonexcludable benefits to every country on the planet.<sup>122</sup> Although all nations would gain by reducing carbon dioxide levels in the atmosphere, each has an incentive to let other countries shoulder the costs of doing so. This is the classic Prison-

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117. TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 212 (2004) [hereinafter SANDLER, *GLOBAL COLLECTIVE ACTION*].

118. *Id.* at 77 (making a similar assumption for purposes of analyzing strategic responses by states to global collective action problems).

119. For one example of such an analysis, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1 (2004).

120. For an insightful recent analysis of problem structure and the different approaches scholars have used to define it, see Ronald B. Mitchell, *Problem Structure, Institutional Design, and the Relative Effectiveness of International Environmental Agreements*, 6 *GLOBAL ENVTL. POL.* 72 (2006).

121. ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* 59–68 (1997); Mitchell, *supra* note 120, at 78–81.

122. SANDLER, *GLOBAL COLLECTIVE ACTION*, *supra* note 117, at 47, 213.

ers' Dilemma, a game theoretic model of collective action in which individually rational behavior yields socially suboptimal outcomes.<sup>123</sup> These perverse incentives are exacerbated by uncertainties about the causes of global warming and the high costs of averting it, which have led even well-resourced industrialized nations to delay taking remedial measures. The combination of these factors reveals that global warming's problem structure is strongly resistant to multilateral cooperative solutions.

Problem structure also determines whether attempts to cooperate will be plagued by participation deficits. All else equal, the wider the geographic reach of a transborder problem, the larger the number of countries that must participate in resolving it. For some problem structures, such broad-based cooperation is easy to achieve. The allocation of radio frequencies, satellite communication rules, air traffic control procedures, and harmonized transportation standards are all well-known examples of coordination games with very high rates of state participation and compliance.<sup>124</sup> These salutary outcomes can be sustained because no country can benefit by unilaterally deviating from an existing focal point once it has been established.<sup>125</sup>

Not all collective action dilemmas are so easily remedied. In the case of global public goods whose problem structure is characterized by collaboration,<sup>126</sup> "success . . . requires that treaty participation be encouraged."<sup>127</sup> Yet "whether a particular country participates often depends on the number of *other* countries that participate."<sup>128</sup> When these interdependent preferences are present, the voluntary nature of treaty commitments may prevent states from entering into mutually beneficial cooperative relationships.

A critical question, therefore, is whether treaty negotiators can manipulate state incentives to "make it more attractive for other countries to join [an agreement] when your country joins."<sup>129</sup> Recent work in game theory has analyzed how minimum treaty participation clauses can create "treaty bandwagons" that "kick-start the process" of cooperation.<sup>130</sup> As I

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123. *Id.* at 23–24. Social scientists often use game theory to analyze state incentives and the cooperative or noncooperative outcomes they generate. See HASENCLEVER ET AL., *supra* note 121, at 44–59 (reviewing game theoretic models of collective action); SANDLER, *GLOBAL COLLECTIVE ACTION*, *supra* note 117, at 17–44 (same).

124. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 314–16 (1982).

125. See BARRETT, *ENVIRONMENT AND STATECRAFT*, *supra* note 7, at 94–100; Helfer, *Exiting Treaties*, *supra* note 109, at 1634.

126. In collaboration games, the rational pursuit of individual self-interest leads to socially inferior outcomes. To remedy this result, the parties must collaborate, creating rules and institutions that "specify strict patterns of behavior and insure that no one cheats." Stein, *supra* note 124, at 312.

127. BARRETT, *ENVIRONMENT AND STATECRAFT*, *supra* note 7, at 39.

128. *Id.* at 91.

129. *Id.* at 18.

130. *Id.* at 260; Ulrich J. Wagner, *The Design of Stable International Environmental Agreements: Economic Theory and Political Economy*, 15 J. ECON. SURVEYS 377, 392–93 (2001); see also Carlo Carraro et al., *Endogenous Minimum Participation in International Environmental Treaties* (Ctr. for Econ. Policy Research, Working Paper No. 4281, 2006), available at <http://ssrn.com/abstract=527545>.

explain below, nonconsensual international lawmaking may provide an alternative way to reach this same cooperative outcome for certain problem structures. Before addressing this issue, however, I first consider how the broader institutional and political settings in which treaties are embedded affects states' participation and compliance decisions.

### B. *Institutional and Political Context*

Recent international law and international relations scholarship has emphasized the importance of situating individual treaties and IOs in a wider institutional and political setting. Studies of nested and overlapping international regimes,<sup>131</sup> regime complexes,<sup>132</sup> and IOs that link discrete issue areas together<sup>133</sup> all attest to the importance of "the legal and political environments in which [a] treaty is embedded" in evaluating the success or failure of international cooperation.<sup>134</sup> Whether and how agreements are situated within these broader environments can radically alter states' decisions about treaty participation and treaty compliance.

Institutional and political context can be disaggregated into at least three distinct components: (1) whether the benefits of cooperation can be restricted to member nations, (2) the ability of powerful states to sanction or reward target nations to induce them to join a treaty or IO and adhere to its terms, and (3) the extent to which membership socializes states and changes their incentive to comply. These three contextual factors—which I analyze in greater detail below—can operate either independently or in tandem. More importantly, treaty negotiators can manipulate the factors to enhance the probability that international cooperation will succeed.

Consider first whether the benefits that a treaty or IO generates can be enjoyed by nonmembers or are limited to member states alone. The basic distinction is easy to grasp. International agreements that create public goods—such as treaties restricting the use of military force, disease-eradication pacts, and agreements to protect the global environment—generate positive externalities for countries that do not ratify the treaty and do not share in the burden of providing those goods. (For example, if medical research funded by an IO finds a cure for an infectious disease, the entire planet benefits.) Public goods agreements thus exacerbate international law's participation deficit by creating an incentive for every state to remain outside of the treaty or IO and free ride on the cooperation of other nations.

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131. See generally Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006).

132. See generally Kal Raustiala & David Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

133. See generally David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002).

134. Helfer, *Exiting Treaties*, *supra* note 109, at 1619.

By contrast, treaties whose benefits can be excluded from nonmembers generate very different participation incentives. Because “[o]nly members of the ‘club’ can enjoy the good[,] . . . others face an incentive to join the club to gain access to that good.”<sup>135</sup> Trade agreements and regional economic integration pacts are prominent examples of club goods treaties.<sup>136</sup> As the growing numbers of member states in the WTO and EU attest, countries are eager to join these clubs (and unlikely to leave them) to partake in the privileges that membership confers.<sup>137</sup> Where these privileges are sufficiently large, treaty participation gaps can be reduced or even eliminated.

Savvy negotiators can manipulate the design of treaties and IOs to make public-goods treaties more club like, enhancing the prospects for ratification and compliance. For example, they can craft package deals that combine club and public goods in a single agreement.<sup>138</sup> Requiring ratifying countries to accept the entire package of treaty commitments ensures that states receive the benefits of club membership only if they also agree to the treaty’s public-goods provisions. A second strategy involves offering privileges to member nations that join and comply with public-goods treaties while withholding those same privileges from non-complying nations and nonmembers.<sup>139</sup>

A second important dimension of institutional and political context involves coercion by powerful countries. Power can be exercised both within treaties and outside of them. With respect to intratreaty coercion, powerful states often take the lead in punishing treaty violators or withholding benefits from them.<sup>140</sup> In theory, any party to a multilateral treaty can sanction another party that violates the agreement. In practice, however, “[r]eciprocity is most effective when employed by powerful actors against weaker ones, rather than vice versa.”<sup>141</sup> The imposition of sanctions by hegemons also resolves second-order collective action

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135. Raustiala, *supra* note 89, at 599.

136. See Chris Brummer, *Regional Integration and Complete Club Goods: A Trade Perspective*, 8 CHI. J. INT’L L. (forthcoming Winter 2008) (arguing that regional integration arrangements exhibit some club good features but are incomplete forms of such cooperation).

137. See Helfer, *Exiting Treaties*, *supra* note 109, at 1636–37; Raustiala, *supra* note 89, at 599.

138. See Leebron, *supra* note 133, at 6–18 (describing different types of linkages in international agreements).

139. See BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 309 (explaining how excluding nonparties from treaty-based research and development enhances the incentives for states to ratify treaties to acquire such knowledge). For a more detailed discussion of this issue relating to environmental protection treaties, see *infra* Part IV.E.

140. See LISA L. MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS 40–43 (1992) (discussing strong leadership and bandwagoning effects relating to multilateral sanctions).

141. Robert O. Keohane, *Compliance with International Commitments: Politics Within a Framework of Law*, 86 AM. SOC’Y INT’L L. PROC. 176, 177 (1992).

problems that may otherwise prevent the members of multilateral agreements from sanctioning noncomplying nations.<sup>142</sup>

Powerful nations also exercise coercive authority outside of IOs and treaties. Among the most common forms of pressure are laws that link military aid, financial assistance, or preferential trading rules to a target state's ratification of and compliance with designated international agreements.<sup>143</sup> Perhaps the most striking example is the European Union's Generalized System of Preferences, which provides reduced tariffs for goods and services imported from poor developing countries. To receive these preferences, however, participating nations must ratify twenty-seven governance, human rights, and environmental agreements.<sup>144</sup> The result is increased pressure to join these treaties and, where powerful states continue to monitor target nations' behavior after ratification, to comply with the obligations they impose.<sup>145</sup>

The third component of the institutional and political setting in which a treaty or IO is embedded relates to the processes for changing state preferences and identities. Persuasion and acculturation feature prominently in this analysis,<sup>146</sup> as do monitoring mechanisms that emphasize "managing" compliance through technical assistance combined with the sunshine of public scrutiny and the shame of public censure.<sup>147</sup>

The political and expert bodies that operate within IOs and treaty systems are key venues within which persuasion and acculturation occurs. These bodies promote repeated exchanges of information and dialogue among state representatives, IO officials, and (in some regimes) private parties. These structured interactions use ritualized behaviors to

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142. Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1155–57 & n.136 (2006).

143. See Goodman & Jinks, *supra* note 92, at 690 (describing the coercion approach to human rights compliance in which "traditional notions of power—military and economic—provide the principal machinery for changing state practices").

144. Hathaway, *Between Power and Principle*, *supra* note 89, at 505 & n.86 (citing Memorandum, European Union, Developing Countries: Facts and Figures on the New EU Scheme of Trade Preferences for 2006–2008 (Oct. 20, 2004), available at <http://europa.eu/rapid/searchAction.do> (search complete database for reference "MEMO/04/243")).

145. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005); Hathaway, *Between Power and Principle*, *supra* note 89, at 509.

146. See Goodman & Jinks, *supra* note 92, at 635 (defining "persuasion" as "the active, often strategic, inculcation of norms . . . [in which] actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice"); *id.* at 638 (defining "acculturation" as "the general process of adopting the beliefs and behavioral patterns of the surrounding culture," that induces behavioral changes by "changing the actor's social environment").

147. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22–28 (1995) (advocating a "management" approach to treaty compliance that emphasizes noncoercive mechanisms to monitor behavior, build capacity, and persuade states to adhere to their treaty commitments). See generally Edward Weisband, *Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime*, 44 INT'L STUD. Q. 643 (2000) (assessing naming and shaming strategies used to promote compliance with labor conventions).



“elicit expectations of adherence to group goals and [to] encourage or reward . . . conforming behavior.”<sup>148</sup> By participating in these interactions, state representatives are “exposed to . . . normative processes that can shape their identities as participants in the regime and may promote the formation of collective identities.”<sup>149</sup> Where these same normative processes are reiterated in other venues—such as national legislatures, domestic or international courts, and other IOs or treaty bodies—they reinforce states’ commitment to the international obligations they have undertaken.

In addition to changing prospects for treaty compliance, persuasion and acculturation also influence the creation of new legal obligations. As their preferences and identities are shaped through the processes described above, states may become amenable to accepting more stringent commitments to achieve group goals. This shift is manifested in the drafting of protocols or amendments to existing treaties or the adoption of new treaties. At the extremes, socialization and peer pressure can trigger “norm cascades” that result in rapid adoption and widespread ratification of new treaties.<sup>150</sup> Prominent examples include the ILO Convention on the Worst Forms of Child Labor (150 ratifications in six years) and treaties to combat bribery and corruption (adopted by several global and regional IOs in the late 1990s and quickly and ratified by most of their member states).<sup>151</sup>

### C. *The Interactive Effects of Problem Structure and Context*

Before analyzing how these factors influence nonconsensual lawmaking relating to transnational terrorism, global environmental protection, and human rights, I pause briefly to highlight the interactive effects of problem structure and institutional and political context. Consider as an example a developing country that has not joined a treaty or IO that creates a global public good. The country calculates that the costs of membership are greater than the benefits because positive externalities permit it to free ride on the efforts of other nations.

What could induce this country to join this treaty? Bundling club goods and public goods provisions in a single treaty is one possibility. Such bundling compels countries to “take the bitter with the sweet,” ac-

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148. ALVAREZ, *supra* note 14, at 348 (citation omitted).

149. Brunnée, *COPing with Consent*, *supra* note 47, at 36–37.

150. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895 (1998) (describing the life cycle of international norms and explaining how norm cascades occur once a critical mass of states have accepted the relevant norm).

151. Int’l Labour Office [ILO], Comm. on Legal Issues and Int’l Labour Standards, *Improvements in the Standards-Related Activities of the ILO: A Progress Report*, at 6, ILO Doc. GB.292/LILS/7 (Mar. 2005), available at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb292/pdf/lils-7.pdf>; Transparency International, Anti-Corruption Conventions and Other International Instruments, [http://www.transparency.org/global\\_priorities/international\\_conventions](http://www.transparency.org/global_priorities/international_conventions).

cepting public goods obligations as the price of obtaining club goods that are available exclusively to treaty members.

Pressure to ratify by a powerful country is another option. Such pressure links the target state's participation decision to nontreaty benefits, such as aid, trade, and technology transfers. Once this hypothetical developing country joins the regime, however, its subsequent interactions with IO officials and other treaty parties may change its preferences and identity in favor of compliance and a further tightening of member states' legal obligations.

Numerous alternative scenarios could be constructed. The key theoretical point, however, is that the interaction of problem structure and institutional and political context is a dynamic process that can be strategically manipulated to influence states' treaty participation and treaty compliance decisions. Nonconsensual international lawmaking is an underexplored part of this dynamic process, as the discussion below explains.

#### D. *Transnational Terrorism*

As described in Part II, the Security Council has adopted several resolutions requiring all UN member states to suppress transnational terrorism regardless of whether those nations have ratified multilateral treaties that make such suppression mandatory. The first and most novel of these resolutions, Resolution 1373, requires states to, *inter alia*, criminalize the financing of terrorism and freeze terrorist assets. These obligations are taken directly from the recently negotiated Terrorism Financing Convention, a multilateral treaty that, at the time of the resolution's adoption, had been ratified by only a handful of countries and had yet to enter into force.<sup>152</sup>

Evaluating the efficacy of the Security Council's exercise in non-consensual lawmaking depends upon accurately identifying the problem structure associated with international efforts to combat transnational terrorism. Scholars have used different games to analyze these efforts, focusing on three assurance games—Stag Hunt, Weakest Link, and Weaker Link.<sup>153</sup> In the discussion that follows, I review the application of these three games to terrorism-prevention measures. I first consider how nonconsensual international lawmaking promotes socially beneficial outcomes in ways that traditional multilateral treaty making processes cannot. I then assess institutional and political factors that influence states'

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152. See *supra* Part II.A.

153. The term "assurance game" refers to the fact that "pledged (assured) action [by one state] will elicit a like response by the other" state. ENDERS & SANDLER, *supra* note 116, at 96. The incentives of assurance games are thus very different from the Prisoners' Dilemma game, in which the largest payoffs are awarded to states that refuse to abide by a prior agreement to cooperate.

propensity to comply with the Security Council's global antiterrorism legislation.

Leading game theorists have analyzed the prevention of terrorist financing using an assurance game known as Stag Hunt. The payoffs of Stag Hunt are such that players receive the most benefit by cooperating (i.e. hunting stag), but only if all other players do likewise. If even one player refuses to cooperate (and instead hunts hare on his or her own), the remaining players are also better off hunting hare individually.<sup>154</sup>

The incentive structure of the Stag Hunt dictates that all countries "must act in unison" (for example, by freezing terrorist assets) "for the best payoffs to be achieved. . . . Even a sole defector can spoil the policy's effectiveness for all nations abiding by the policy."<sup>155</sup> However, once all states have agreed to restrict terrorist financing, no state will deviate from this socially optimal position since, by definition, none can achieve a higher payoff by unilaterally altering its behavior.<sup>156</sup> The challenge countries face, therefore, is not promoting compliance. Rather, it is how to assure each other that all states in fact agree to ban the financing of terrorism.

The traditional consensual approach to multilateral treaty adherence does little to resolve this assurance problem. If even one state refrains from ratifying these agreements (and thus allows terrorists to finance their global operations within its borders), the remaining nations will have little incentive to freeze terrorist assets or undertake similar measures.<sup>157</sup> Such an outcome "greatly limits the usefulness of [terrorism] conventions," since "universal ratification and implementation are necessary but are never attained."<sup>158</sup>

Nonconsensual lawmaking by the Security Council neatly resolves this collective action dilemma. By requiring every UN member nation to

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154. The Stag Hunt takes its name from a description of the game in the writings of the philosopher Jean-Jacques Rousseau. As one scholar recently explained this now rather antiquated account of hunting incentives:

The point is that stag makes a much better dinner than hare but can only be hunted in a group in which everyone cooperates, while hare may be hunted individually. If you think that everyone will cooperate, you are better off hunting stag. But if you expect that even one person will go off to hunt hare, then you had better hunt hare yourself.

Alan Hyde, *A game-theory account and defence of transnational labour standards—a preliminary look at the problem*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 143, 147 (John D.R. Craig & S. Michael Lynk eds., 2006).

155. ENDERS & SANDLER, *supra* note 116, at 147.

156. *Id.* at 148.

157. *Id.* at 149 (stating that this noncooperative outcome "is of particular concern in the case of freezing assets, because even one nonadherent nation can be the spoiler when one realizes that the 1993 World Trade Center bomb cost only \$400 but caused over \$500 million in damages").

158. *Id.* at 154. Game theorists have reached similar conclusions when studying so-called "mixed strategies" involving multiple nations, each of which freezes terrorists' assets some fixed percentage of the time. According to these studies, "[e]ven for a relatively small number of nations, near-certain adherence is required." *Id.* at 149. Such a result is extremely unlikely to occur when states' treaty ratification decisions are voluntary. See Todd Sandler & Keith Sargent, *Management of Transnational Commons: Coordination, Publicness, and Treaty Formation*, 71 LAND ECON. 145, 148 (1995).

freeze terrorist assets and prevent terrorist financing, the Security Council achieves in a single step what might have taken decades to accomplish (if ever) under the voluntary approach to multilateral treaty adherence. Stated differently, if the Stag Hunt accurately models international measures to suppress terrorist financing, then Resolution 1373 provides the assurance necessary to jumpstart interstate cooperation and leads to full compliance by all UN member states.<sup>159</sup>

There is some empirical evidence to support this conclusion. As of early 2005, states “were reported to have seized or frozen \$147 million in assets belonging to 435 individuals and groups linked to al-Qaeda or the Taliban.”<sup>160</sup> In addition, more than 150 nations have become parties to the Terrorism Financing Convention,<sup>161</sup> and a campaign by the Security Council’s Counter-Terrorism Committee (CTC) to promote ratification of all UN antiterrorism treaties has been highly successful.<sup>162</sup> Most recently, in September 2006, the UN General Assembly adopted a Global Counter-Terrorism Strategy that endorsed the Security Council’s antiterrorism efforts.<sup>163</sup>

Yet there is no denying that terrorist attacks have continued since 2001. This raises doubts as to whether the Stag Hunt is an accurate problem structure for analyzing the Security Council’s antiterrorism resolutions. And it suggests that a different game, one with a somewhat less sanguine outcome, may more accurately model efforts to combat transnational terrorism.

Consider attempts to deter specific terrorist acts (such as bombings or hijackings) or to shore up potential targets against attacks (for exam-

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159. Cf. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1263–76 (2004) (arguing that the decisions of international tribunals create “focal points” around which state practices converge).

160. Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, 11 J. CONFLICT & SECURITY L. 399, 413 n.30 (2006) [hereinafter Rosand, *Response to Jihadist Terrorism*]. But see *id.* (explaining why these figures may be inflated).

161. Bianchi, *Security Council’s Anti-Terror Resolutions*, *supra* note 28, at 1056. As of April 10, 2007, 156 states had ratified this Convention. See U.N. Sec. Council, Counter-Terrorism Committee, International Law and Terrorism, <http://www.un.org/sc/ctc/law.shtml> (last visited Oct. 9, 2007).

162. Joël Sollier, Presentation, The Increase in the Number of Ratifications of United Nations Anti-Terrorism Conventions Since the Adoption of UNSC Resolution 1373, in Vienna 2004 Follow-Up Meeting to the United Nations Counter-Terrorism Committee Special Meeting of 6 March 2003 on Strengthening Practical Cooperation against International Terrorism between Regional and International Organizations, Vienna, Austria, Mar. 11–12, 2004, *Strengthening Cooperation Against International Terrorism*, 74, 75 (2005) (proceedings report), available at [http://www.unodc.org/pdf/crime/terrorism/UNCTC\\_Conference\\_Report.pdf](http://www.unodc.org/pdf/crime/terrorism/UNCTC_Conference_Report.pdf) (documenting the increase in ratifications of antiterrorism conventions and asserting that “the Security Council and the [CTC] ha[ve] succeeded in mobilizing the international community around the common theme of combating terrorism, and in disseminating international legal norms in order to institutionalize cooperation among States”).

163. The United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 8, 2006). The strategy builds upon a May 2006 report of the UN Secretary General, which contained an extensive and favorable discussion of Resolution 1373 and its progeny. The Secretary-General, *Uniting against terrorism: recommendations for a Global Counter-Terrorism Strategy, delivered to the General Assembly*, U.N. Doc. A/60/825 (April 27, 2006), available at <http://www.un.org/unitingagainstterrorism/contents.htm>.

ple, requiring airline passengers to pass through a metal detector). Scholars have modeled these antiterrorism measures using a game known as Weakest Link. The payoff structure of Weakest Link is such that the smallest contribution to a public good (here, global terrorism security) by any one nation sets the level of security for the entire world community. Countries have an incentive to match (but not exceed) the behavior of the weakest-link security provider, since, according to the game's assumptions, "there is no return from providing beyond the smallest contribution level."<sup>164</sup>

Two examples illustrate the incentives of the Weakest Link game. The first is skyjacking prevention. "When airport security against skyjackings is provided, the least-secure airport determines the level of safety, especially in a globalized world where a nation's citizens can be targeted at home or abroad. Terrorists will probe airport security to locate the least-fortified point" and direct attacks there.<sup>165</sup> Installing decoy devices on airplanes to thwart attacks by portable anti-aircraft missiles provides another example:

If US planes are protected [with such devices] and other countries do not follow suit, then terrorists bent on using [portable anti-aircraft missiles] will merely travel to a country where planes are not so equipped and try to shoot down a foreign plane full of Americans. The additional safety derived from [the missile decoy devices] depends on the least effort taken. The need for international cooperation, so that all air carriers equip their planes with similar security methods, is evident.<sup>166</sup>

Following this reasoning, no state will unilaterally adopt antiterrorism measures in excess of those provided by the least secure country. Were any nation to adopt such measures, it would merely be "us[ing] up scarce resources without adding to the amount of the public good consumed."<sup>167</sup>

A modified version of Weakest Link, known as Weaker Link, changes these assumptions in a way that may more accurately reflect reality. In a Weaker Link game, a state that exceeds the protection level provided by the least secure country *does* increase global security. However, because the antiterrorism effort of the least protected country creates the greatest marginal risk of a future terrorist attack, such additional measures make the world only modestly safer.<sup>168</sup> If, for example, certain airports are more likely to be targeted by skyjackers, concentrating terrorism-prevention resources in those high-risk locations reduces (but

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164. SANDLER, GLOBAL COLLECTIVE ACTION, *supra* note 117, at 62.

165. *Id.* The claim that "[n]ations must guard everywhere, while terrorists can identify and attack the softest targets" is borne out by numerous informational and other asymmetries between governments and terrorist networks that "provide tactical advantages to terrorists who target assets from powerful nations." Todd Sandler, *Collective Versus Unilateral Responses to Terrorism*, 124 PUB. CHOICE 75, 78 (2005).

166. ENDERS & SANDLER, *supra* note 116, at 149-50.

167. SANDLER, GLOBAL COLLECTIVE ACTION, *supra* note 117, at 62.

168. *Id.* at 81.

does not eliminate) the overall probability of an attack. The screening of airline passengers' baggage is also a Weaker Link game. If the goal is to prevent a bomb from exploding anywhere in the world, such screening is only as good as the least secure airport. However, if "more luggage is transferred at airport A, then extra measures there may compensate somewhat for lower [screening] standards elsewhere."<sup>169</sup>

The payoffs of the Weakest Link and Weaker Link games create incentives for wealthy countries (especially nations, such as the United States, whose citizens and property are prime terrorist targets) to shore up the security efforts of poorer nations. Such bolstering can be carried out through multilateral cooperation.<sup>170</sup> However, UN antiterrorism conventions cannot achieve this goal.<sup>171</sup> As explained above, the conventions require ratifying countries to deter and punish specific terrorist acts in their domestic laws. But they do not create international mechanisms to monitor compliance, nor do they provide technical assistance to countries in need. Moreover, many nations with low levels of security were, at the time of the September 11th attacks, not parties to the conventions or had ratified them with reservations, severely limiting multilateral efforts to increase global security.<sup>172</sup>

The Security Council's mandatory antiterrorism resolutions help to address the collective action problems associated with Weakest and Weaker Link games in ways that the conventions cannot. The resolutions establish a monitoring mechanism that requires all UN member states—not only ratifying countries—to provide the CTC with reports on their antiterrorism activities. These reports assist the CTC in identifying at risk nations where terrorists can gain a foothold. The CTC also provides technical assistance to these states, improving their capacity to combat terrorism and, as a result, enhancing the safety of all countries. Strikingly, Resolution 1373 did not include these capacity-building functions; rather, the functions evolved organically as the CTC identified obstacles to implementing the resolution.<sup>173</sup> This suggests that a Weakest or Weaker Link game accurately models United Nations efforts to thwart transnational terrorism.

Unlike the Stag Hunt game, however, adopting nonconsensual international obligations in a Weakest or Weaker Link game setting does not eliminate noncompliance. First, states may have different preferences for deterring terrorism based on the variable security threats they

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169. ENDERS & SANDLER, *supra* note 116, at 106.

170. A wealthy state can also bolster other countries' antiterrorism measures unilaterally, albeit with greater difficulty and higher cost. *Id.* at 150.

171. See SCOTT BARRETT, WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS 61 (2007) (analyzing "the inadequacy of the treaty instrument as a means for supplying weakest link global public goods" relating to the prevention of transnational terrorism).

172. See *supra* Part II.A.

173. See Rosand, *Security Council as Global Legislator*, *supra* note 6, at 583 ("While the Council wanted all States to do more domestically to combat terrorism, it did not envisage the CTC becoming the extraordinary capacity-building instrument that it has become.").

face. Countries at lower risk of future attacks will prefer to devote few resources to antiterrorism measures than states at greater risk. These low-risk countries also have an incentive “to free ride on any nation that is inclined to shore up weakest links, because this action provides purely public benefits for all countries.”<sup>174</sup> Seen from this perspective, the monitoring procedures created by Security Council antiterrorism resolutions have a preference-revealing function. They differentiate states whose noncompliance is attributable to insufficient capacity (and thus are worthy candidates for technical and financial assistance) from states whose noncompliance reflects a lack of political will (and against whom additional enforcement measures may be required).<sup>175</sup>

It is here that problem structure interacts with institutional and political context to induce both types of states toward compliance. It is worth reemphasizing that the UN Security Council is the progenitor of nonconsensual lawmaking to suppress transnational terrorism. The Council is unique among international bodies. “[N]o other existing international mechanism pairs global legislative power capable of departing from preexisting treaty obligations with the possibility of enforcement via binding economic sanctions or military force.”<sup>176</sup> Precisely because these powers are so capacious, some commentators have questioned the legitimacy of the Security Council’s antiterrorism resolutions.<sup>177</sup> As a practical matter, however, UN member states are unlikely to oppose the Council’s lawmaking authority.

Several facts support this conclusion. First, other UN bodies, such as the ICJ and the General Assembly, can do little to challenge the legality of Security Council legislation.<sup>178</sup> The material and reputational benefits of UN membership are a second important factor. These benefits, many of which are unavailable to nonmembers,<sup>179</sup> make it highly implau-

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174. ENDERS & SANDLER, *supra* note 116, at 150.

175. See Bianchi, *Security Council’s Anti-Terror Resolutions*, *supra* note 28, at 1070–71 & n.118 (citing reports of the CTC indicating that most difficulties encountered by states in implementing the Security Council’s antiterrorism resolutions result from a “lack of capacity” rather than “a lack of will”).

176. José E. Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 874 n.9 (2003) [hereinafter Alvarez, *Hegemonic International Law Revisited*]; see also Beharani v. France, App. No. 71412/01, at ¶ 148, (Eur. Ct. H.R. Grand Chamber May 2, 2007) (admissibility decision) (characterizing the UN Security Council’s responsibility to maintain international peace and security “through the use of coercive measures” as “unique”).

177. See, e.g., Bianchi, *Security Council’s Anti-Terror Resolutions*, *supra* note 28, at 1072–73; Rosand, *Security Council as Global Legislator*, *supra* note 6, at 578–79. See generally ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

178. See Rosand, *Security Council as Global Legislator*, *supra* note 6, at 559 & n.74 (stating that “there appears to be no legal limitation in the Charter that prohibits the Council from using its Chapter VII authority in a legislative capacity” and citing numerous supporting authorities). Recent proposals to alter the Council’s membership and voting rules could effectively limit its authority. For the foreseeable future, however, these proposals are politically nonviable.

179. These benefits include financial and technical assistance restricted to members and, more generally, the imprimatur of sovereign legitimacy that UN membership confers. These club benefits do not, of course, negate the fact the UN also creates important public goods that can be enjoyed by all countries. See John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT’L L. 641, 656

sible that any country would attempt to withdraw from the organization.<sup>180</sup> Stated differently, membership in the UN is a club whose benefits continue to exceed its costs, even after an increase in dues required all members to fight transnational terrorism.

Even if formal challenges to the Security Council and withdrawal from the UN are impossible as a practical matter, one might nevertheless argue that states opposed to nonconsensual lawmaking could simply not comply with the resolutions. There are several reasons to doubt this claim, however. First, as noted above, transnational terrorism's problem structure may be such that every nation gains from taking action against terrorist networks, provided that all countries agree to do likewise. Even in weakest or weaker link countries whose governments have limited appetites for terrorism prevention, compliance is likely when receipt of material or financial assistance is conditioned upon rule-conforming behavior.

Second, potent regulatory networks reinforce the Security Council's efforts to prevent terrorist financing. Notable among these is the Financial Action Task Force (FATF), an international body established by the G7 industrialized nations in 1989 to combat money laundering and other illicit financial transactions. The FATF compares the financial control laws of target states against a template of detailed recommendations. Countries that fail to comply with these guidelines are placed on a "black list" that results in heightened scrutiny of their financial transactions.<sup>181</sup> After September 2001, the FATF adopted recommendations to combat terrorist financing that "overlap and expand upon the 1999 Terrorist Financing Convention and Resolution 1373."<sup>182</sup> Private financial markets and rating agencies have reacted swiftly and negatively to AFTF black listing orders, leading target countries to overhaul their financing laws to remain in FATF's good graces.<sup>183</sup>

A third explanation favoring compliance relates to the influence of powerful nations. The United States is the most ardent proponent of the Security Council's antiterrorism legislation. At the time of Resolution 1373's adoption, American officials touted it as a way to "globally ex-

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(2006) ("Peace and stability are international public goods because they are non-exclusive, non-rivalrous, and benefit all nations by reducing the need for defense expenditures and allowing trade to occur.").

180. This assumes that withdrawal is legally permissible, an issue that remains unsettled. See Egon Schweb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 AM. J. INT'L L. 661, 661 (1967).

181. See WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM* 89-111 (3d ed. 2004).

182. Jason B. Conn, *When Democracy Gives the Purple Finger: An Examination of the Proper International Legal Response When a Citizenry Elects a Terrorist Organization to Lead its Government and Seeks International Aid*, 23 J.L. & POL. 89, 104 (2007).

183. See Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 31-32 (2004); *Global Agenda: The Dirt on Money Laundering*, ECONOMIST, Jun. 21, 2001.



port[] U.S. counterterrorism legislation, particularly the U.S. Patriot Act.”<sup>184</sup> Even if this assertion is exaggerated, the United States derives substantial benefits—in enhanced legitimacy, legality, and cost-sharing—from filtering its global antiterrorism agenda through the Security Council.<sup>185</sup> These benefits provide strong incentives for the United States to pressure UN members to comply with Resolution 1373 and its progeny. American hegemonic power operates both within the UN and outside the organization. Internally, the United States’ influence on the Council means that, as a last resort, “the CTC can count on the threat of economic sanctions or military action to buttress its [monitoring] efforts.”<sup>186</sup> Externally, the United States can induce countries to comply with the Security Council’s mandates by using (or threatening to use) the carrots and sticks of granting or withholding financial, military, and technical aid.<sup>187</sup>

Fourth and lastly, the state reporting process enables the CTC to engage in an iterated dialogue with member states to change their preference for compliance.<sup>188</sup> The CTC has yet to request that the Security Council impose sanctions on any UN member. Instead, it has managed noncompliance using the tools of persuasion and acculturation and social rewards and punishments. Pressure for conformity occurs when the CTC gives “a high degree of exposure” and publicity to state reports and when it “name[s] and shame[s]” countries that fail to comply with Resolution 1373.<sup>189</sup>

As the above discussion illustrates, persuasion, acculturation, and threats of coercion go hand in hand with a favorable problem structure and a distinctive institutional setting to induce high levels of participation and compliance with the Security Council’s antiterrorism resolutions, notwithstanding their nonconsensual pedigree.

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184. Alvarez, *Hegemonic International Law Revisited*, *supra* note 176, at 875; see also Serge Schmemmann, *United Nations to Get a U.S. Antiterror Guide*, N.Y. TIMES, Dec. 19, 2001, at B4 (reporting statements by government officials that CTC would enable the United States to export its antiterrorism legislation around the world).

185. See Eric Rosand, *The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT’L L. 745, 760 (2004) (“Whereas countries may be reluctant to freeze the assets of an entity simply because powerful countries such as the United States suspect it of having ties to Al Qaeda, they are legally obligated to do so once that entity is included on the list” created by the Security Council’s terrorism sanctions resolutions.); U.S. Dep’t of State, International Organizations, <http://www.state.gov/s/ct/intl/io/> (last visited Aug. 25, 2007) (stating that working through IOs “lend[s] broader legitimacy to U.S. Government counterterrorism efforts and can shoulder the counterterrorism capacity-building burden”).

186. Alvarez, *Hegemonic International Law Revisited*, *supra* note 176, at 875. But see J. Craig Barker, *The Politics of International Law-Making: Constructing Security in Response to Global Terrorism*, 3 J. INT’L L. & INT’L REL. 5, 16 (2007) (claiming “it is unlikely that the United Nations Security Council would use sanctions against non-cooperating states in the context of Resolution 1373”).

187. Cf. Rosand, *Response to Jihadist Terrorism*, *supra* note 160, at 425 (stating that the United States strategically focuses its technical assistance relating to terrorist financing on certain countries).

188. See *supra* notes 146–49 and accompanying text (discussing the socialization processes that exists in IOs and treaty bodies to change state interests and identities in favor of compliance).

189. Barker, *supra* note 186, at 19.

*E. Protection of the Global Environment*

Nonconsensual international lawmaking to protect the global environment occurs in the context of revisions to multilateral environmental agreements. As described above, many of these agreements follow a “framework-protocol” approach, according to which states first negotiate a foundational agreement that identifies a particular environmental problem and adopts procedures for future negotiations. Later, as additional information concerning the problem becomes available, the parties add to that agreement by adopting protocols, amendments, annexes, and appendices that deepen cooperation to include targets and timetables and other more precisely defined activities.<sup>190</sup>

As noted at various points in this article, the game-theoretic problem structure underlying many (although by no means all) efforts to reduce global environmental harms is the multiple-player Prisoners’ Dilemma.<sup>191</sup> In addition, efforts to mitigate such harms are summation public goods. The “summation” label denotes the fact that each state’s contribution to protecting the environment is added together, such that the collectively desired outcome (better global environmental quality) “depends on the aggregate effort of a large number of countries.”<sup>192</sup> The two most prominent examples of the summation Prisoners’ Dilemma problem structure are multilateral efforts to slow global warming and close the hole in the ozone layer.

The payoffs of this game create incentives for states to engage in two different types of free-riding behavior: first, choosing to remain outside an environmental protection treaty that other nations have joined; and second, deciding not to comply with the obligations of a treaty that a state has joined while benefiting from the cooperative efforts of other nations that do comply.<sup>193</sup> These dual incentives to free ride make it exceptionally difficult to negotiate multilateral environmental protection treaties that are “both effective and widely accepted.”<sup>194</sup> Stated differently, efforts to protect the global environment often face intractable participation and compliance deficits.

One way to overcome these twin deficits is to impose legally binding obligations on all nations to protect the global environment. Such an exercise in nonconsensual lawmaking could theoretically be accomplished,

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190. See *supra* Part II.B.

191. See *supra* note 122–23 and accompanying text. For an analysis of environmental harms with asymmetric externalities using games other than the Prisoners’ Dilemma, see Ronald B. Mitchell & Patricia M. Keilbach, *Situation Structure and Institutional Design: Reciprocity, Coercion, and Exchange*, 55 INT’L ORG. 891 (2001).

192. Scott Barrett, *The Problem of Averting Global Catastrophe*, 6 CHI. J. INT’L L. 527, 536 (2006); see also SANDLER, GLOBAL COLLECTIVE ACTION, *supra* note 117, at 61–62 (describing the characteristics of summation public goods).

193. See McEvoy & Stranlund, *supra* note 21, at 1.

194. Carlo Carraro & Domenico Siniscalco, *International Environmental Agreements: Incentives and Political Economy*, 42 EUR. ECON. REV. 561, 562 (1998).

as in the counterterrorism area, by a Security Council resolution requiring UN members to ratify and comply with environmental protection treaties.<sup>195</sup> Alternatively, mandatory rules could be adopted by a new “international environmental protection agency” with autonomous enforcement powers. To be sure, such an agency would require “a significant surrender of sovereign powers on the part of the nations of the world—which is probably why there is no such agency.”<sup>196</sup> But commentators have lamented that “there may be no feasible alternative means of curbing highly destructive global negative externalities” such as global warming.<sup>197</sup>

In the absence of these nonconsensual rules and institutions, government negotiators and game theorists and have attempted to “manipulate the incentive structure” of treaties to “make it more attractive for other countries to join when your country joins, and for others to reduce their pollution more when your country pollutes less.”<sup>198</sup> So far, however, their efforts have yielded only mixed results. Differences in cost-benefit ratios, time horizons, uncertainties about environmental harms, and the leadership (or lack thereof) of key polluting nations have exacerbated the free-riding incentives of the summation Prisoners’ Dilemma problem structure in some instances while mitigating them in others.<sup>199</sup>

Nonconsensual lawmaking has thus far played only a limited role in assisting international efforts to improve the global environment. Unlike transnational terrorism, where foundational legal obligations—such as preventing financing or criminalizing particular conduct—were dictated by the Security Council, foundational environmental protection rules only take effect *after* a state voluntarily joins a treaty or protocol that contains those obligations. Stated differently, major increases in treaty commitment levels—such as the ratification of a framework convention or a protocol that supplements it—require the affirmative consent of every state. Only more fine-grained revisions and adjustments of preexisting obligations can be imposed nonconsensually (in some treaties) by means of majority-adoption provisions and automatic or tacit entry-into-force rules.

What functions, if any, do these more modest instances of nonconsensual lawmaking serve in aiding international cooperation to protect the global environment? In answering this question, consider first that all states upon which nonconsensual rules may be imposed have already

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195. Of course, this approach would also require the creation of a credible enforcement mechanism or an institutional and political environment which altered states’ incentives in favor of compliance.

196. RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 216 (2004).

197. *Id.*

198. BARRETT, *ENVIRONMENT AND STATECRAFT*, *supra* note 7, at 18.

199. See SANDLER, *GLOBAL COLLECTIVE ACTION*, *supra* note 117, at 212–34 (comparing the success of protecting the ozone layer versus the failure to reduce greenhouse gas emissions, and the success of reducing sulfur-based acid rain versus the failure to reduce acid rain caused by nitrogen oxide).

agreed, through their voluntary participation decisions, to the treaty's basic objectives. When the parties later consider tightening their obligations (for example by adopting additional limits on the type or level of pollutants), prior uncertainties about the costs and benefits of such restrictions may have dissipated, revealing that the gains from cooperation exceed the costs for all member states.<sup>200</sup> In this setting, nonconsensual lawmaking does very little work. It merely enhances the speed at which new rules are adopted and enter into force for all treaty parties, many of which have already voluntarily complied with those rules.<sup>201</sup> In short, where economic incentives favoring more stringent protection of the environment outpace formal treaty revisions, nonconsensual lawmaking does nothing more than make it a bit simpler for states to reach an equilibrium that they would have reached in any event.

If, however, an environmental treaty regime evolves in a slightly different manner, nonconsensual lawmaking can play a more consequential role. For example, new scientific information may reveal that the costs of environmental degradation or the benefits from mitigating it vary from country to country. Recent studies of global warming illustrate this possibility, asserting that, in the short term, a rise in the earth's temperature will produce winner and loser countries.<sup>202</sup> Where the costs and benefits of action or inaction are not uniformly distributed, countries that gain from more stringent environmental controls may use nonconsensual revision rules to impose obligations upon other nations.

Some scholars have argued that the tightening of the ozone regime functioned in this fashion, with key polluting countries "increas[ing] mandated cutbacks through amendments [of the Montreal Protocol] that forced others to comply with these higher standards."<sup>203</sup> In fact, although the Protocol includes procedures authorizing nonconsensual revisions, the parties have not made use of them.<sup>204</sup> This suggests that the benefits of protecting the ozone layer outweighed the costs for *all* countries. In other environmental agreements, by contrast, the adoption of treaty revisions nonconsensually may be a rational strategy for a coalition of member states.

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200. *Id.* at 96 ("Once [treaty] formation takes place, the net benefits from cooperation can be re-evaluated and this can lead to greater tightness if cooperative gains become viewed more favorably over time.").

201. *Id.* at 231 (asserting that regional treaties limiting emissions of acid rain-producing sulfur "largely encoded cutbacks that most ratifiers would have achieved in the absence of the treaty").

202. Karen L. O'Brien & Robin M. Leichenko, *Winners and Losers in the Context of Global Change*, 93 ANN. ASSOC. AM. GEOGRAPHERS 89 (2003), available at [http://geography.rutgers.edu/people/faculty/leichenko/publications/obrien\\_leichenko2003.pdf](http://geography.rutgers.edu/people/faculty/leichenko/publications/obrien_leichenko2003.pdf).

203. SANDLER, GLOBAL COLLECTIVE ACTION, *supra* note 117, at 220 (emphasis added); see also *id.* at 231 (stating that the Helsinki Protocol on sulfuric acid rain "serve[d] to bring along some stragglers and this achieved some cooperative gains").

204. Adjustments may be adopted nonconsensually, but this has never occurred in practice. Hollis, *supra* note 66, at 171.

Such nonconsensual revisions eliminate international law's participation deficit. Whether they also reduce the compliance deficit is a very different question. Recall that the summation Prisoners' Dilemma that underlies most global environmental protection treaties creates incentives for two types of free riders—states that remain outside a treaty and states that join but fail to comply. Nonconsensual revisions eliminate the first type of free riding. But such revisions exacerbate the second type of free riding by imposing legal obligations on states for whom the costs of deeper cooperation exceed the gains.

Interactions between problem structure and institutional and political context help to determine whether this compliance deficit can be overcome. Revisions to environmental protection treaties create public goods. But these revisions can also be tied to benefits that are made available exclusively to treaty members who comply with the revisions. Bundling club goods with public goods can also help to enforce treaty commitments.

The Montreal Protocol, and its associated amendments and supplementary texts, incorporate both of these design features. In addition to requiring member states to phase out ozone-depleting chemicals (a public good), the Protocol prohibits exports or imports of those chemicals to or from nonmembers (a club-good obligation). These restrictions create strong incentives for nonmember nations to avoid the trade ban by joining the treaty.<sup>205</sup> The Protocol uses club goods in another way—by providing financial assistance and technology transfers to developing country members. These benefits may be suspended if a developing nation violates the treaty.<sup>206</sup> Precisely this result occurred when Mauritania failed to comply with the Protocol. The remaining member states stripped Mauritania of its developing country status, denying it important treaty benefits and, in effect, partially expelling it from the treaty.<sup>207</sup> The key insight of these two illustrations is that by strategically combining club and public goods provisions in a single agreement, nonconsensual treaty revisions can “increase[] the benefit-cost ratio” and improve both participation and compliance.<sup>208</sup>

Coercion by powerful states can also help to close the compliance gap with respect to nonconsensual treaty revisions. Hegemonic pressure

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205. BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 313–14 (quoting RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 54, 91 (1998)).

206. *Id.* at 288.

207. See Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 605–06 (2004); O. Yoshida, *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 95, 129–30 (1999).

208. BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 309.

can serve

as a driving force in both setting the agenda and pushing through binding agreements on emissions reductions. [In the case of the ozone treaty negotiations,] [t]his was accomplished partly through norm-building efforts by the U.S. scientific, diplomatic, and political communities, and partly through threats of unilateral [U.S.] action prior to the Montreal negotiations, backed by Senate proposals to freeze the production of CFCs and bar the import of products made with or containing CFCs.<sup>209</sup>

This quote describes the negotiation of the Montreal Protocol, which followed the consensual approach to treaty making and treaty ratification. But the insight applies with equal force to treaty revisions adopted non-consensually with the backing of powerful countries. Moreover, coercion need not end after negotiations do. The same mechanisms that make unilateral hegemonic threats credible—such as trade restrictions and withholding of technology transfers—can be incorporated into the design of the treaty itself, transforming those mechanisms into multilateral inducements for compliance.

Finally, the repeated interactions engendered by the framework-protocol approach can alter states' preferences and identities in favor of compliance, even for nonconsensual treaty revisions. The opportunities for socializing states and managing compliance are especially well developed in international environmental law.<sup>210</sup> The meetings of each treaty's conference of the parties and its scientific and political subsidiary bodies provide numerous opportunities for "information gathering, negotiation and consensus-building processes," activities that make it "more difficult for individual [states] to determine agendas, to resist regime development, and to extricate themselves from regime dynamics."<sup>211</sup> Over time, these interactions "generate patterns of expectations and normative understandings that guide and constrain subsequent policy choices and legal development within the regime."<sup>212</sup> The result, in short, is that states are socialized toward greater levels of compliance with international environmental rules, even those adopted nonconsensually.

This section has analyzed problem structure and institutional and political context to illustrate the overall cost-benefit calculus of using nonconsensual lawmaking to protect the global environment. Initially, the summation Prisoners' Dilemma game produces strong incentives for free riding and creates conditions unfavorable for the adoption of non-

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209. Thoms, *supra* note 52, at 825–26 (footnote omitted).

210. See José E. Alvarez, Colloquy, *Do States Socialize?*, 54 DUKE L.J. 961, 969 n.16 (2005); Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT'L L. & INT'L REL. 139, 152–62 (2005); Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 637 (2004) [hereinafter Brunnée, *Living with an Elephant*]; Thoms, *supra* note 52, at 807–10.

211. Brunnée, *Living with an Elephant*, *supra* note 210, at 637.

212. *Id.*

consensual rules. Over time, however, new scientific or technical information may reveal that the benefits of adhering to more stringent treaty commitments outweigh the costs. In such a scenario, the nonconsensual revision of a treaty provides a simple and efficient mechanism to move all states parties to a new equilibrium. Where, by contrast, the costs and benefits of more stringent regulations are asymmetrically distributed, nonconsensual treaty revisions impose real constraints on some countries. These constraints increase the likelihood of noncompliance and heighten the influence of institutional and political factors in shaping state behavior. Unlike in the terrorism area, however, these factors are highly variable. Some environmental public goods treaties do not contain club-goods features, and hegemonic pressure fluctuates widely—as the recent practice of the United States demonstrates.<sup>213</sup> Only the framework-protocol structure of many environmental treaty systems consistently socializes states toward greater compliance with nonconsensual treaty revisions.

#### F. Human Rights

The problem structure of human rights differs markedly from the problem structures of transnational terrorism and global environmental protection. Unlike agreements in the latter two issue areas, the principal goal of human rights treaties is not to regulate the external interactions of states or the transborder effects of their domestic activities. Rather, such treaties seek to hold countries accountable for domestic conduct that occurs within their own borders.<sup>214</sup>

To be sure, human rights advocates have endorsed the adoption of multilateral conventions to remedy specific human rights problems and have aspired to their universal ratification.<sup>215</sup> But these agreements “do not depend on universal adherence to be effective in any state.”<sup>216</sup> To the contrary, as the history of domestic constitutional protection of civil liberties attests, there is no necessary correlation between international cooperation and the protection of individual rights and freedoms. Stated more pointedly, the key distinction between human rights and other international issue areas is that the protection of most human rights is not easily conceptualized as a collective action dilemma. Scholars have identified three factors to explain this result.

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213. See *id.* at 637–40; Thoms, *supra* note 52, at 825–29.

214. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 217 (2000).

215. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Effective Function of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, ¶¶ 14–36, U.N. Doc. E/CN.4/1997/74 (Mar. 27, 1997) (prepared by Philip Alston) (discussing efforts made to achieve “universal ratification” of UN human rights treaties).

216. Raustiala, *supra* note 89, at 604.

First, states have substantial capacity to promote and protect human rights within their territory without coordinating their efforts with other states. . . . Second, many states have little clear interest in promoting and protecting human rights abroad. Although “bad actors” impose externalities on other states in extreme cases (for example, when poor human rights conditions trigger massive refugee flows), these externalities arise only sporadically and typically affect only a few (bordering) states. Third, many states have no interest in promoting and protecting human rights domestically . . . [or] in accepting structural commitments that may alter their current decision processes.<sup>217</sup>

Rather than explaining human rights cooperation using the logic of collective action, studies of why states join human rights treaties have advanced several competing theories, including: realism, liberalism, and the expressive effects of ratification.<sup>218</sup> Realism argues that weaker states ratify human rights agreements because they are compelled to do so by great powers. Hegemons coerce weaker states to join these treaties as a way to project their ideological beliefs extraterritorially. Although powerful nations also join these treaties, they limit their commitments by ratifying with reservations or by refraining from joining more demanding optional provisions.<sup>219</sup>

Liberal theory focuses on the domestic politics of a different group of countries. It asserts that new and often unstable democracies voluntarily bind themselves to human rights treaties to prevent future governments from backsliding away from democratic rule.<sup>220</sup> This same desire for self-binding also explains why these states delegate authority to international tribunals and quasi-judicial bodies to review complaints by individuals challenging their human rights records. International obligations and international review mechanisms together provide a way to “lock[] in” democratic rule through the enforcement of human rights.”<sup>221</sup>

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217. Goodman & Jinks, *supra* note 92, at 628–29; see also Pae, *supra* note 68, at 76–77 (analyzing externalities associated with massive human rights abuses that threaten regional stability). For a recent attempt to integrate human rights and collective action scholarship, see TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS (Erik André Andersen & Birgit Lindsnaes eds., 2007).

218. Scholars have used a fourth theory, constructivism, to explain why states join human rights treaties. Unlike the rationalist and interest-based theories analyzed in the text, constructivism asserts that the international rules shape—or “construct”—understandings of appropriate conduct to promote favorable human rights practices. See Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHL J. INT’L L. 1, 5–7 (2001); see also MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 5 (1996) (asserting that “[t]he international system can change what states want”). Constructivism’s emphasis on changing preferences and identities concerning the protection of human rights make it a more appropriate subject for analysis under this article’s discussion of institutional and political contexts. See *supra* Part IV.B.

219. See generally JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 107–34 (2005) (describing the inconsistent enforcement of human rights treaties).

220. Moravcsik, *supra* note 214, at 220–21.

221. *Id.* at 228.



The expressive theory of adherence to human rights treaties proceeds from yet another premise. It argues that countries, especially those with poor records of protecting individual liberties, ratify these agreements to obtain benefits from the external signal that the act of ratification sends to other states, IOs, and NGOs. According to this theory, joining a human rights treaty is “not necessarily intended to have any real effect on outcomes.”<sup>222</sup> Rather, states ratify to obtain various material and nonmaterial benefits (such as foreign aid or lower trade barriers) that follow from the act of ratification. Yet because of the limited opportunities for enforcement, states anticipate that they can enjoy these benefits (at least in the short to medium term) without actually complying with their treaty commitments.<sup>223</sup>

What does the distinctive problem structure of human rights—as elaborated by these three theories—portend for nonconsensual lawmaking? As described above, international tribunals, commissions, and expert committees have expanded the reach of human rights agreements (for example, by severing reservations) and transformed nonbinding norms into legally binding commitments.<sup>224</sup> These tribunals and review bodies have achieved these results by applying treaty interpretation methods that go “beyond the consent- and sovereignty-oriented rules of general international law.”<sup>225</sup>

These sovereignty-restrictive interpretations, which emphasize states’ common interests in promoting and protecting human rights,<sup>226</sup> are in tension with the absence of a collective action dilemma for most human rights agreements. Moreover, the inherently teleological nature of these interpretive methods results, over time, in more expansive protections of individual rights and greater restrictions on state activities. Yet without a better understanding of why states join human rights agreements, international tribunals and quasi-judicial bodies that engage in nonconsensual lawmaking risk substantially exacerbating the compliance deficit that already plagues many human rights treaties.<sup>227</sup>

Consider the consequences of nonconsensual lawmaking for each of the three theories of human rights adherence reviewed above. Under the realist approach, powerful nations compel weaker countries to join human rights treaties but accept few constraints on their own behavior.

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222. Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 70, at 2005.

223. *See id.* at 1940–41; *see also* Hathaway, *Between Power and Principle*, *supra* note 89, at 507–12 (explaining signaling theory of ratification which argues that states “join treaties with which they will not comply because they may receive collateral benefits from committing to treaties even without complying”).

224. *See supra* Part II.C.

225. Wildhaber, *supra* note 79, at 229 (statement by the former President of the ECHR).

226. *See, e.g.,* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 90 (1978); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

227. *See supra* notes 70–73 and accompanying text (reviewing mixed record of state compliance with human rights agreements).

This coercion itself creates incentives for surreptitious noncompliance by target countries.<sup>228</sup> Expansive rulings by tribunals and review bodies exacerbates the coercive effects of ratification, magnifying these incentives.

By contrast, where nonconsensual obligations increase the sovereignty costs of powerful nations, for example by restricting their ability to shield domestic practices from international scrutiny, those nations can be expected to express vociferous disagreement. Thus, for example, when the UN Human Rights Committee adopted a general comment on reservations that arrogated to itself the power to determine the validity of reservations and their associated legal consequences, the United States, the United Kingdom, and France filed formal objections challenging the Committee's analysis.<sup>229</sup>

Nonconsensual lawmaking fares little better under liberal theory. As noted above, this theory posits that governments, especially those in nascent or transitional democracies, ratify human rights agreements to lock in democratic rule and tie the hands of future governments with autocratic impulses. In effect, treaty commitments establish an international baseline of rights protections below which, ratifying governments hope, their countries will never fall.

These objectives shape how states respond to nonconsensual lawmaking by tribunals and review bodies.<sup>230</sup> Countries that remain committed to democratic governance may welcome some gap filling and expansions of rights—such as freedom of expression and association—that bolster core democratic values.<sup>231</sup> For other human rights issues, by contrast, such as those that constrain states' responses to legitimate domestic social problems, nonconsensual lawmaking may generate domestic opposition to compliance or, more rarely, pressure to withdraw from the treaty.<sup>232</sup> The United Kingdom's decision to derogate from the European Convention on Human Rights to continue preventive detention of suspected terrorists provides a stark illustration.<sup>233</sup>

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228. See Andrew Moravcsik, *Explaining International Human Right Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L REL. 157, 182 (1995) (stating that "pressuring countries to accept binding jurisdiction and the individual right of petition [to human rights tribunals] before they are ready to accept it voluntarily is to invite open non-compliance").

229. Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations, 15 HUM. RTS. L.J. 464 (1994); U.N. Human Rights Comm., Observation by the Government of France, Annual Report of the Human Rights Committee, A/51/40 vol. I, at 104-06 (1997).

230. Such lawmaking must be distinguished from new legal obligations undertaken consensually through the adoption of protocols and other supplementary—and optional—treaty texts.

231. See, e.g., *United Communist Party of Turk. v. Turkey*, 1998-I Eur. Ct. H.R. 1, 25 (holding that democracy requires tolerance for political debate and rejecting restrictions on political parties that seek to "resolv[e] a country's problems through dialogue, without recourse to violence").

232. Helfer, *Overlegalizing Human Rights*, *supra* note 68, at 1854.

233. The Prevention of Terrorism (Temporary Provisions) Act, 1984, authorized preventive detention of certain criminal suspects. The European Court of Human Rights later held that the statute violated a provision of the European Convention on Human Rights requiring all arrestees to be brought promptly before a judge and to be tried within a reasonable time. In response, the British Parliament invoked a clause in the Convention authorizing states to derogate from their obligation to

Finally, consider how the expressive theory of human rights treaty adherence predicts that states will respond to nonconsensual lawmaking by international tribunals and review bodies. According to this theory, countries (in particular countries with poor human rights records) join human rights treaties to obtain the benefits that other states and nonstate actors confer upon ratifying nations. Yet these nations do not intend to comply with their treaty obligations and, according to some empirical studies, in fact, comply less frequently than other countries.<sup>234</sup>

States that ratify with these intentions are likely to react in one of two ways. Where a tribunal or review body expands a treaty's substantive rules, these countries have no reason to react. So long as monitoring mechanisms remain weak, these nations can continue their nonconforming behavior and allow the gap between treaty commitment and treaty compliance to widen. Their response is likely to be very different, however, where nonconsensual lawmaking enhances the authority of tribunals and review bodies to monitor state behavior. Capacious interpretations of standing rules to provide greater access to nonstate actors and expansions of remedial powers are two plausible examples.<sup>235</sup> This type of lawmaking makes it more difficult for countries to rely on weak monitoring mechanisms to obscure their noncompliance and thus diminishes their ability to reap the benefits of treaty membership without also incurring its burdens. Such nonconsensual expansions of monitoring authority, "might thus be normatively unassailable, but still capable of producing a backlash"<sup>236</sup> in the form of "domestic opposition to compliance or pressure to revise or exit from the treaty."<sup>237</sup>

The above discussion reveals that, under all three theories of human rights treaty adherence, nonconsensual international lawmaking by tribunals and review bodies increases the probability of noncompliance with and resistance to human rights treaties. However, as with transnational terrorism and global environmental protection, political and institutional context can mitigate or exacerbate the influence of problem structure in shaping states' responses to nonconsensual rules.

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protect certain human rights during a "public emergency threatening the life of the nation." European Convention, *supra* note 110, art. 15. The ECHR later upheld the United Kingdom's derogation from the Convention as necessary and proportionate. See Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2198 (2006).

234. See Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 70, at 1999.

235. See, e.g., Alastair Mowbray, *A New Strasbourg Approach to the Legal Consequences of Interim Measures*, 5 *HUM. RTS. L. REV.* 377 (2005) (analyzing judgment holding that the ECHR is authorized to award interim measures, notwithstanding governments' express exclusion of such measures from the European Convention); Anne van Aaken, *Making International Human Rights More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions*, (preprints of the Max Planck Institute for Research on Collective Goods Paper No. 16, 2005), available at [http://www.call.mpg.de/pdf.dat/2005\\_16online.pdf](http://www.call.mpg.de/pdf.dat/2005_16online.pdf) (proposing a broadening of standing rules for human rights treaty complaints mechanisms).

236. Helfer, *Overlegalizing Human Rights*, *supra* note 68, at 1857.

237. *Id.* at 1854.

Incentives for noncompliance could be reduced if human rights agreements were paired with club goods treaties, such as those enshrining free trade rules. However, most countries have resisted linking trade and human rights in a meaningful way. For example, WTO member states have rejected proposals to incorporate human rights and labor rights into that organization.<sup>238</sup> Some regional and bilateral trade treaties (such as NAFTA and the U.S.-Jordan Free Trade Agreement) include provisions protecting core labor rights. But the mechanisms for monitoring compliance with those rights are generally weak—often weaker than those already in place in other labor and human rights treaties and IOs.<sup>239</sup>

Powerful club effects also exist where ratification of a human rights treaty is made a condition for membership in, or the receipt of benefits from, an economic organization. Thus far, only the EU has conditioned membership on human rights, requiring accession candidates to ratify the European Convention on Human Rights before applying for EU membership.<sup>240</sup> Other global economic institutions, such as the World Bank and the IMF, “traditionally . . . have claimed that they are not allowed to take human rights into account due to the limitations in their mandates,”<sup>241</sup> although this position has eroded somewhat in recent years.<sup>242</sup> Expanding club-goods linkages may improve prospects for compliance, including compliance with nonconsensual rules promulgated by human rights tribunals and review bodies.<sup>243</sup>

A second contextual factor is the use of coercion by powerful countries to induce compliance with human rights treaties.<sup>244</sup> The EU’s Generalized System of Preferences, described above, provides a salient example.<sup>245</sup> The preferences offer reduced tariffs for developing countries

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238. Compare Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT’L L. & POL’Y 1, 40–45 (1996) (proposing incorporation), with Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 466, 471, 480 (2004) (describing rejection by WTO members of proposals to incorporate labor rights into the WTO).

239. See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 217–24 (2007) (identifying numerous weaknesses in labor rights provisions of regional and bilateral trade agreements negotiated by the U.S.).

240. See Hathaway, *Between Power and Principle*, *supra* note 89, at 504.

241. Anja Lindroos, Book Review, 17 EUR. J. INT’L L. 1038, 1039–40 (2006) (reviewing MACDARROW, *BETWEEN LIGHT AND SHADOW, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003), and BAHRAM GHAZI, *THE IMF, THE WORLD BANK GROUP AND THE QUESTION OF HUMAN RIGHTS* (2005)).

242. *Id.* at 1040 (stating that World Bank and IMF “have effectively begun to take into account . . . human rights considerations” but that the human rights policies of both IOs “remain incoherent and the institutions are reluctant to accept solid, legally binding human rights obligations”).

243. Regime design will be a critical issue. State-to-state compliance mechanisms are likely to remain underenforced. By contrast, granting private parties direct access to international tribunals and review bodies has a greater propensity to improve compliance. Helfer & Slaughter, *International Tribunals*, *supra* note 72, at 903.

244. This factor is different than the realist theory described above, which seeks to explain why powerful and weaker states ratify human rights treaties.

245. See Hathaway, *Between Power and Principle*, *supra* note 89, at 505.

that join a long list of human and labor rights treaties. The EU's policy is not, however, limited to ratification. Rather, the organization grants preferences to countries that have "ratified and effectively implemented" the specified agreements.<sup>246</sup> Beneficiary nations "must apply for special incentives, and the European Council, after a review of the application, determines if the country complies with" these requirements.<sup>247</sup>

In practice, however, the EU has failed to scrutinize closely the conduct of beneficiary countries.<sup>248</sup> This is unsurprising, since it is far more difficult—even for powerful nations—to monitor a target state's behavior than it is to verify its treaty ratifications.<sup>249</sup> Moreover, even where noncompliance is overt, a hegemonic response cannot be presumed. In the late 1990s, for example, three Caribbean nations denounced human rights treaties and withdrew from the jurisdiction of human rights tribunals whose rulings had resulted in a de facto abolition of capital punishment in the region.<sup>250</sup> The EU, implementing its campaign for global abolition of the death penalty, pressured Caribbean nations to refrain from carrying out executions. The United States, by contrast, viewed the countries' withdrawals more sympathetically. As a result of this divided response, Caribbean governments "actively and successfully resisted any external pressures" to revise their human rights practices.<sup>251</sup> The essential point of this illustration is that both the ability and the incentive of powerful nations to deter human rights treaty violations by weaker states varies from issue to issue and from country to country.<sup>252</sup>

Persuading states to comply with nonconsensual human rights obligations is the third institutional and political factor. A large body of constructivist scholarship argues that human rights regimes promote desirable state behavior in two principal ways:<sup>253</sup> first, by repeatedly engaging government officials in a dialogue about treaty-incompatible practices before international monitoring bodies, and second, by providing oppor-

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246. Council Regulation 980/2005, art. 9(1)(a), Applying a Scheme of Generalized Tariff Preferences, 2005 O.J. (L 169) (EC).

247. Kolben, *supra* note 239, at 214.

248. *See id.* at 216 ("The EU's GSP regime also does not seem to be particularly discriminating in its implementation. Colombia, a country cited by human rights organizations and the ILO as being one of the countries in which basic labor and human rights are most violated, is one of the current beneficiaries." (footnotes omitted)).

249. *See, e.g.*, Hathaway, *Between Power and Principle*, *supra* note 89, at 507.

250. *See* Helfer, *Overlegalizing Human Rights*, *supra* note 68, at 1859–85.

251. *Id.* at 1895.

252. *Cf.* BARRETT, ENVIRONMENT AND STATECRAFT, *supra* note 7, at 73 ("[A] theory of international cooperation should be capable of incorporating a hegemon. But the theory should not assume that a hegemon has both the wherewithal and the incentive to sustain co-operative outcomes under any and all circumstances.").

253. *See, e.g.*, MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 1 (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 17–35 (Thomas Risse et al. eds., 1999); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411, 415–16 (1993).

tunities for domestic and transnational advocacy networks to influence states “from above and from below.”<sup>254</sup> According to this view, officials respond to these internal and external pressures with minor tactical concessions they believe to be cosmetic or inconsequential. Over time, however, the discursive practices of international monitors and advocacy groups ensnare governments in their own rhetoric, forcing them to justify their behavior by reference to existing rules and exceptions. The steady accretion of norm-affirming events eventually reaches a tipping point<sup>255</sup> beyond which a preference for rule-compliant behavior predominates and states find it increasingly difficult to dispute the validity of international rules or engage in rights violations.<sup>256</sup>

The empirical validity of these claims remains contested. Moreover, scholars have studied the effects of persuasion and acculturation on compliance with *existing* treaty obligations. They have devoted far less attention to assessing the efficacy of persuasive techniques for human rights obligations that have evolved significantly from their origins. Where national political actors support such an evolution—for example by enlarging a treaty system with consensually adopted amendments and protocols—these actors are also likely to accept a moderate level of non-consensual lawmaking by international tribunals and review bodies.<sup>257</sup> The incremental evolution of the European and Inter-American human rights systems are two examples of this favorable dynamic. By contrast, where tribunals expand obligations into areas that states have identified as falling within their exclusive domestic jurisdiction, backlashes in the form of rule violations and norm denials have occurred, even among states whose human rights practices are reasonably advanced.<sup>258</sup> This suggests a need for a context-specific approach to assessing when persuasion and socialization in fact promote compliance with nonconsensual human rights obligations.<sup>259</sup>

## V. CONCLUSION

For centuries, state consent has been a cornerstone of international law and of treaties in particular. Yet as globalization has expanded the need for legal rules to resolve collective action problems transcending national borders, it has become apparent that voluntary treaty making

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254. Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 COMP. POL. STUD. 259, 261 (1993).

255. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896, 901 (1998).

256. See KECK & SIKKINK, *supra* note 253, at 12–13; Finnemore & Sikkink, *supra* note 255, at 904–05; Risse & Sikkink, *supra* note 253, at 21–22.

257. See Helfer, *Overlegalizing Human Rights*, *supra* note 68, at 1858–59.

258. For examples, see *id.*, at 1881–82; Helfer, *Not Fully Committed?*, *supra* note 81, at 372.

259. See Helfer, *Overlegalizing Human Rights*, *supra* note 68, at 1897–1901 (explaining why constructivist theory failed to predict treaty withdrawals by Caribbean countries in response to expansive rulings by human rights tribunals and review bodies concerning defendants sentence to death).

and treaty adherence procedures often produce a problematic result—international agreements that have weak standards, attract less than full participation, or are not widely followed. In response to these shortcomings, IOs, tribunals, and groups of states have started to experiment with various forms of what this article terms nonconsensual international lawmaking—rules that bind a member state of a treaty or an IO even where that state has not ratified, acceded to, or otherwise affirmatively accepted those obligations.

In addition to documenting different types of nonconsensual lawmaking in three issue areas—transnational terrorism, protection of the global environment, and human rights—this article considers theoretical and practical questions of how nonconsensual rules affect treaty design, treaty participation, and treaty compliance. Because the international law lacks the coercive enforcement authority of its domestic counterparts, nonconsensual legal obligations may produce a perverse result. They may reduce international law's participation deficit, but only at the expense of increasing its compliance deficit.

The tradeoff between the benefits of greater participation and the costs of reduced compliance is a pervasive feature of the international legal system. But it is not inevitable. To the contrary, the structure of the problem that a treaty or IO seeks to resolve, together with the institutional and political context in which that problem is embedded, may create opportunities for nonconsensual rules that increase both treaty participation and treaty compliance. Drawing upon variety of theoretical perspectives, this article demonstrates that this happy state of affairs is most likely to occur with respect to Security Council resolutions requiring all UN member states to combat transnational terrorism. The ability for nonconsensual rules to improve interstate cooperation to protect the global environment is more uncertain, and depends upon a treaty-specific mix of institutional and political factors. By contrast, nonconsensual human rights obligations adopted by international tribunals and review bodies create the greatest risk of noncompliance. The problem- and context-specific analysis of these three issue areas highlights the need for government negotiators to explore different treaty design elements to improve the prospect of effective cooperation among the world's nations.

