

Accès à l'Information et les Normes Internationales *Jorge Santistevan de Noriega**

Accès à l'information publique (AIP) dans les instruments internationaux

1. Le droit de demander et de recevoir de l'information est clairement établi comme un droit de l'homme. Ce droit a été reconnu dans les constitutions des états démocratiques modernes jusqu'à la Déclaration universelle des droits de l'homme (Article 19). Ce droit est inclus dans tous les traités conformes à la Loi internationale des droits de l'homme (Article 19 du Pacte international relatif aux droits civils et politiques ; Article 13 de la Convention américaine ; Article 9 de la Charte de l'Union africaine des droits de l'homme et des peuples ; et Article 10(d) de la Charte africaine de la jeunesse).

2. En plus des instruments internationaux, la législation s'est étendue pour promouvoir et protéger l'AIP dans les différentes régions du monde. Il est nécessaire de se référer au système Anglo-Saxon où il existe le Freedom of Information Act – FOIA – aux Etats-Unis, la Loi pour l'accès à l'information au Canada et des lois similaires en Afrique du Sud et en Nouvelle Zélande. Des mécanismes légaux et institutionnels ont été créés dans de divers pays de l'Amérique Latine ; ces mécanismes comprennent des organismes spécialisés (par exemple, l'Institut d'accès à l'information fédérale du Mexique) et une voie de droit constitutionnelle spécifique qui garantit l'AIP dans les cours (connu sous le nom de *habeas data*). Dans ce contexte, la première question à poser à cette conférence serait probablement :

- Semble-t-il recommandé de discuter des questions de la création de nouvelles normes internationales légales ou de l'avancement de lois nationales pour accroître l'AIP ?

3. Universellement, comme dans les régions, des mécanismes pour observer les avances et les reculs de l'AIP ont été mis en place. Les exemples incluent les Rapporteurs spéciaux pour la liberté d'expression à l'Organisation des Nations Unies et le Système interaméricain, ainsi que les déclarations universelles et régionales destinées à fournir des mécanismes efficaces de l'AIP utilisés comme piliers essentiels d'une société démocratique qui respecte les droits de l'homme. Les résolutions de l'Assemblée Générale de l'ONU ont traité de ce sujet depuis 1997. De la même façon, dans le Système interaméricain, la « Charte démocratique interaméricaine » (Articles 4 et 6), les résolutions de l'Assemblée Générale de l'Organisation des Etats Américains sur « l'Accès à l'information publique et la Démocratie : renforcer la démocratie » ont traité de ce sujet depuis 2004 (New León), 2005 (Fort Lauderdale) et 2006 (Santo

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Domingo). Ces résolutions démontrent la prise de conscience de la communauté internationale à ce sujet, mais ne garantissent pas *en soi* le respect des normes de l'AIP dans les différents pays qui forment la communauté internationale.

De la liberté d'expression, au droit du citoyen et à la garantie de la gouvernance démocratique

4. Toute analyse de l'AIP en tant que droit de l'homme et de son évolution dans le monde met en lumière un déplacement significatif de son centre d'intérêt. Prenant racine au départ dans le droit de « demander et de recevoir de l'information », dans le cadre de la liberté d'expression, pendant une grande partie du 20^{ème} siècle, il est resté à l'intérieur du cadre de la presse et des communications. A l'origine, il semblait que l'AIP s'adressait fondamentalement aux journalistes parce que c'étaient eux qui cherchaient des sources d'information et qui disséminaient ces informations dans les médias. Par exemple, nous pouvons citer la « Déclaration de Chapultepec » et la « Déclaration des principes de la liberté d'expression » adoptées par la Commission interaméricaine des droits de l'homme.

5. Cependant, le droit à l'AIP a été progressivement étendu à d'autres domaines qui dépassent la liberté d'expression. En augmentant sa pratique civique (le droit s'applique à tout le monde, même si la personne n'est pas journaliste) et en s'étendant au domaine des politiques publiques, l'AIP est considéré d'une manière moderne comme une garantie de gouvernance démocratique. Le plus récent instrument international pour la lutte contre la corruption (la Convention des Nations Unies sur le sujet), comme ses prédécesseurs : les Conventions interaméricaines et les Conventions de l'Union Africaine pour la répression et la prévention de la corruption, exigent que les pays signataires garantissent l'AIP à tous leurs citoyens y compris les médias. Pareillement, les « Principes de Johannesburg » et les « Principes de Lima », tous les deux portant sur l'AIP, renforcent le lien entre l'AIP et la transparence, la démocratie et le développement.

6. De plus, les dernières déclarations universelles et régionales font un lien entre les éléments irremplaçables d'un régime démocratique, le combat contre la corruption et pour la bonne gouvernance, sans oublier bien sûr, le droit légitime d'accès aux sources d'informations pour les journalistes. Ceci ne sépare pas nécessairement l'AIP pour les citoyens de la liberté d'expression. Au contraire, les avancées de la capacité d'organisation de la société civile, alliées à la liberté du champ d'exercice des technologies de l'information – spécialement sur le web – nous a amené à concevoir l'AIP comme étant associé plus étroitement aux tâches quotidiennes des citoyens qui complètent l'effet multiplicateur des activités des journalistes. Dans ce contexte, cette conférence devrait fournir les réponses aux questions suivantes :

- Pouvons-nous dire que nous sommes satisfaits de la consécration des droits dans les instruments internationaux ou dans les lois nationales sans suivre attentivement comment ils sont respectés ?
- Est-ce que l'AIP est devenu suffisamment indépendant dans la mesure où nous exigeons des normes internationales autonomes aujourd'hui ?

- Est-il nécessaire de créer un organisme supranational pour garantir la mise en œuvre du droit à l'AIP qui n'est garanti que d'une manière abstraite dans les instruments internationaux actuels ?
- Est-il possible de mettre en place des mécanismes de contrôle et de suivi pour garantir le respect de l'AIP ; un tel Plan d'Attaque devrait-il commencer au niveau régional ?

8. Voici les questions auxquelles nous devrions répondre au cours de cette conférence, suivies peut être des questions suivantes :

- Sommes-nous liés à de nouvelles normes qui traitent de l'AIP d'une manière autonome ?
- Sera-t-il nécessaire de créer des institutions spécialisées et de distinguer les institutions actuelles qui traitent du sujet en tant que thème subsidiaire de la liberté d'expression ?
- Est-ce que des *Rapporteurs* devraient être créés exclusivement pour l'AIP et est-ce que nous devrions promouvoir l'existence d'organismes nationaux qui surveillent de manière autonome le développement de ce droit, comme dans le cas du Mexique et de ce qui est proposé au Chili ?
- Comment la conférence peut-elle contribuer d'une manière créative en proposant un système de sanctions internationales contre les états qui ne respectent pas les normes de l'AIP ? Est-ce possible dans la situation réelle des relations étrangères dans nos pays ?

Les limites de l'AIP : dans quelle mesure l'information doit-elle être publiquement accessible ?

9. Un autre aspect dont nous devons débattre dans cette conférence est en rapport aux limites de l'AIP. D'un côté, nous devons préciser que les exceptions et les limites de ce droit devraient être interprétées d'une manière restrictive ; c'est-à-dire, s'il y a un doute que cette information devrait être connue globalement, on doit donner la priorité à l'intérêt public et à la contribution de l'information aux pratiques de la bonne gouvernance démocratique. Sans ce principe, tous les efforts qui sont accomplis à travers les normes internationales ou les lois nationales sembleront infructueux à cause de la capacité des législateurs, des administrateurs, des juges et des avocats de limiter l'AIP dans des cas spécifiques.

10. Mais nous voyons également l'autre extrême :

- A quel type « d'information publique » devons-nous pouvoir accéder ? Est-ce seulement le type d'information sous contrôle des institutions de l'état ? Ou est-ce également le type d'information « d'intérêt public », même sous contrôle privé ?
- Que se passe-t-il avec les organisations internationales, y compris celles à caractère financier qui pourraient ne pas avoir de politiques de l'accès à l'information et qui maintiennent des procédures sous le couvert de l'appréciation ou du secret ?
- Et qui est-ce qui – pour aller plus loin – s'occupe des institutions semi-privées ou privées, y compris les entreprises d'activité économique qui s'inscrivent dans la sphère de l'intérêt public à cause des services

qu'elles fournissent ou des activités qu'elles développent, et devraient-elles être assujetties aux politiques de transparence de l'information qui donne accès aux données et à la documentation qui est une propriété individuelle ?

11. Il n'y a pas de normes internationales qui traitent pleinement de ces sujets. Il est donc légitime que, dans cette conférence, nous proposons des débats et des conclusions sur les avantages d'étendre les limites de ce qui est public, et de prendre en considération les questions d'intérêt public même quand l'information est la propriété privée ou la possession de personnes. Est-ce que cela nécessite des changements normatifs ou est-ce que cela peut être accompli à travers une interprétation plus poussée des lois en existence ?

Le droit à la vie privée et les garanties de sa protection

12. Un débat sur l'AIP ne peut pas ignorer l'importance de la protection de la vie privée. Cette limite – qui n'est pas unique mais qui est dans la lignée des perspectives démocratiques et des droits de l'homme – est également présente à l'article 19 de la Déclaration universelle des droits de l'homme. Mais il est nécessaire de prendre des mesures pour s'assurer que le droit à la vie privée et le droit à l'information sont compatibles.

13. L'Europe a probablement fait le plus de progrès à travers des traités et des lois nationales qui ont pour objectif la protection des données et de l'information qui concernent l'intimité des personnes. Leur instrument est connu sous le nom de la « Convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel ». La loi interdit le transfert ou la commercialisation d'informations qui contiennent des données délicates qui concernent la vie privée des citoyens et de leurs familles. Elle essaye d'aller plus loin : elle pourrait interdire l'accumulation de données personnelles délicates par les institutions ou les entreprises qui les stockent et qui peuvent conjecturer une grande partie de nos vies privées. En négociant avec elles, la vie de milliers de personnes, qui ne sont pas conscientes de combien leur vie est enregistrée par les institutions ou les entreprises avec lesquelles elles ont des interactions, pourrait effectivement être transformé.

14. Un autre défi que cette conférence devra certainement prendre en compte, et auquel elle devra réfléchir et faire des propositions est de savoir s'il est indispensable de rendre compatible la portée importante du droit à l'information d'intérêt public avec la meilleure protection de toutes les informations qui concernent la vie privée des personnes, sans distinction, dans le monde moderne. Peut-être sera-t-il pertinent, dans ce domaine, de prendre en compte un instrument international, sur la vie privée et sur la gestion des données personnelles, qui n'existe toujours pas dans la majorité des régions du monde.

Les activistes de la société civile

15. L'écart entre les instruments internationaux, les lois nationales, et la reconnaissance concrète des droits de l'homme dans la vie quotidienne est évident dans le monde moderne. Cela crée des difficultés pour l'application du droit à l'AIP à des cas spécifiques (*exécution/respect*). C'est pourquoi – comme on le dit – la tâche de

renforcer l'AIP n'est pas limitée à la création de normes et d'institutions. Elle requière l'énergie des citoyens pour être capable de surveiller que le droit qui consacre les normes soit appliqué contre les autorités, les institutions ou les entreprises qui sont propriétaires d'informations d'intérêt public, et qu'il y ait une promotion de ce droit dans la société en général.

16. De ce point de vue, la conférence devrait reconnaître ce que la société civile a fait and peut continuer de faire pour l'AIP, sur la base de son dynamisme, de sa capacité de créer un réseau de contacts professionnels, de son influence dans les médias, et de son activisme sur l'internet. La conférence devra soutenir le renforcement de ces organisations puisqu'elles jouent un rôle primordial dans l'atténuation de la différence des droits exprimés dans les lois et des droits qui sont reconnus dans la vie réelle.

17. Cependant, la question de la responsabilité de la société civile *vis-à-vis* de la communauté avec laquelle elle a des interactions et du régime légal dans lequel elle est impliquée est toujours en suspens. C'est un sujet de débat qui ne peut être repoussé. Un forum de discussion comme celui organisé à Atlanta devrait contribuer à développer des dispositifs qui accroissent la responsabilité des réseaux de citoyens qui sont tellement importants dans la prévention et la répression de la corruption, dans la promotion des normes de bonne gouvernance, et la consécration de la transparence dans la vie publique.

Questions spécifiques pour faire des recommandations :

1. Y a-t-il une norme internationale reconnue pour la mise en œuvre du droit à l'AIP ? Où les questions de vie privée se classent-elles ? Est-ce que cela va assez loin ?
2. Y a-t-il un besoin de conventions ou de traités supranationaux pour créer de nouvelles normes ? Peut être faut-il promouvoir de nouvelles lois ? Si cela est le cas, comment seraient-elles mises en œuvre et contrôlées ?
3. Est-ce que ces lois serviraient à promouvoir un droit à l'information étendu ou est-ce qu'elles serviraient à avaliser le plus petit dénominateur commun ?
4. Quels sont les éléments nécessaires pour contrôler les mécanismes internationaux, régionaux et nationaux de l'AIP et pour progresser vers la transparence ?
5. Quels mécanismes peuvent être utilisés pour faire pression sur ces nations qui ne respectent pas les instruments internationaux ?
6. Quel est le rôle des institutions internationales pour favoriser/subordonner à des conditions l'avancement de lois nationales sur l'AIP, ou la signature de traités internationaux ?
7. Quel serait le rôle d'une communauté internationale de la transparence globale ? Qui serait membre ? Dans quelle mesure devrait-elle être tenu responsable ? Et comment pourrait-on la promouvoir ?

Atlanta, le 28 février 2008



Groupe de Travail 4

Création de normes internationales: considérer les normes universelles et une communauté globale

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International Studies Quarterly, Vol. 40, No. 3, Special Issue: Evolutionary Paradigms in the Social Sciences. (Sep., 1996), pp. 363-389.

Stable URL:

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The Evolution of International Norms

ANN FLORINI

This article puts forward a theoretical explanation for why norms of international behavior change over time. It argues that the mainstream neorealist and neoliberal arguments on the static nature of state interests are implausible, as the recent empirical work of the growing constructivist school has convincingly shown. But the constructivists have not yet provided a theoretical basis for understanding why one norm rather than another becomes institutionalized, nor has learning theory yet provided an adequate explanation. An evolutionary approach that draws its hypotheses from an analogy to population genetics offers a promising alternative. This article briefly outlines the constructivist critique of neorealism and neoliberalism. It develops the evolutionary analogy, illustrating the model with a case study on the emergence of a norm of transparency in international security and briefly discussing how the model might apply in several other issue areas.

The more than three centuries of the nation-state system have witnessed repeated sweeping changes in the broadly accepted standards of international behavior. Slavery, common for millennia, has virtually disappeared. Colonialism has given way to agreement on the right of self-determination. Aggression across recognized national borders, once a standard tool of state policy, now meets with international condemnation. To date, although the literature on norms is immense, the major traditions of international relations theory—neoliberalism and neorealism—have not adequately addressed these transformations of fundamental norms of interstate behavior. Instead, these theories assume that at most norms are unexplained sources of the exogenously given preferences of actors. Of late, the materialist assumptions of these theories have come under intense challenge from the rapidly growing constructivist literature, which draws on a diverse array of theoretical literature and empirical studies to argue that norms have explanatory power independent of structural and situational constraints (Finnemore, 1994, 1996; Tannenwald, 1995; Katzenstein, 1996).

But the constructivists, for all their compelling empirical case studies, have yet to develop a *theory* of norm change. Why, of the variety of norms available at any given time to govern behavior in particular choice situations, does one rather than another become a widely accepted standard of behavior? This article explores this question, making norms the dependent rather than the independent variable. Is the predominance of specific norms based merely on historically conjunctural idiosyncracies, or are there definite patterns that allow us to explain the changing role of any particular norm?

Author's note: The author is grateful to the participants in three conferences where earlier versions of the paper were discussed: the Washington International Theory Seminar, the 1995 International Studies Association Convention; and the workshop on evolution in international relations at the University of Seattle in May 1995. The author also wishes to thank Joshua Epstein, Martha Finnemore, and George Modelski for their helpful insights.

The evolutionary argument developed in this article draws an analogy between genes and norms to provide new insights into the development of norms. In short, it argues that norms, like genes, are instructional units. These units influence the behavior of their host organisms. And norms, like genes, are “contested”—that is, they are in competition with other norms or genes that carry incompatible instructions—and some are reproduced at much higher rates than their competitors.

This article constructs an evolutionary theory of the conditions under which a contested norm will spread or decline. It begins by defining what norms are and reviewing the debate over whether they matter. It then sets out the evolutionary hypotheses, contrasting them with the implicitly evolutionary basis of neorealism. The article argues that three simultaneous conditions must be met for a new mutant norm to replace an existing one. It illustrates the arguments with a description of several cases of norm evolution, focusing on the evolution of the norm of transparency in international security. Because the article is concerned only with explaining the rise and fall of individual norms, it does not consider broad historical patterns of normative change, nor does it make more than passing reference to the vast framework of existing norms embodied in international law.

What Are Norms?

Janice Thomson (1993:81) contends that the most useful definition of an international norm is “only that ‘as a rule’ states engage in such practices,” a definition that encompasses all observed patterns of behavior. Axelrod (1986) similarly defines norms as standard behaviors, although he adds the qualifier that actors are often punished when seen to be violating the norm. But used in this way, the term provides no particular analytical focus. It would include all behavior that is clearly driven by short-term material incentives. It thus conflates behavior that is determined by simple power relationships with that which is normatively driven. The whole point of the norms literature is to investigate what has too often been left out of theories of international relations—how it is that states determine their interests, and the role of social construction in shaping behavior. It is the sense of “oughtness” that is analytically distinct, and it is to refer to that sense of obligation that we need a term. The appropriate term for this purpose is “norm.”

By defining “norms” as standards of behavior and not just behavioral regularities, we stress two important points. First, norms are about *behavior*, not directly about ideas. This accords with the best-known definition of norms in the international relations theory literature, found in the regimes literature (Krasner, 1983) which considers norms to be one component of regimes. Regimes are “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area” that serve to “constrain immediate, short-term power maximization” (Krasner, 1983:1, 3). The norms that help to constitute regimes consist of “standards of behavior defined in terms of rights and obligations” (Krasner, 1983:3). However, there is no reason to restrict a norm to the confines of a given issue area, as regime theory does. A better definition describes norms as “a set of intersubjective understandings readily apparent to actors that makes behavioral claims on those actors” (Finnemore, 1994:2, fn. 2). Because they are intersubjective, or shared, they are not merely individual idiosyncracies. Instead, they “leave broad patterns of the sort that social science strives to explain” (Finnemore, 1994:3). These patterns matter to international relations theorists because, once embedded in social institutions, they act like structures, shaping states’ behavior (Thomson, 1993:72).

Second, this definition underlines the point that the essence of the distinctiveness of a norm is the sense of “ought.” This sense of ought, of how an actor *should* behave, can apply either to the individual actor or to others who witness and assess the actor’s behavior. The most important characteristic of a norm is that it is considered a

legitimate behavioral claim. No matter how a norm arises, it must take on an aura of legitimacy before it can be considered a norm. Norms are obeyed not because they are enforced, but because they are seen as legitimate.

Do Norms Matter?

The debate over whether such fuzzy and imprecise things as “norms” and “ideas” affect the behavior of states independent of structure and material factors is an old and recurrent one. The currently dominant schools of international relations theory have little room for norms. Game theory, which addresses the form rather than the content of strategic interaction, sees norms as exogenously determined coordinating mechanisms that enable actors to select among multiple equilibria or to overcome collective action problems (Ullmann-Margalit, 1977; Schelling, [1960] 1980; Stein, 1990, 1993; Binmore, 1994). But this is a functionalist argument without a mechanism to explain the functioning. Norms arise because they are “needed” to bring about cooperation in a mixed-motive setting or a game with multiple equilibria. This begs the question of what mechanism exists that causes this need to be met, providing no way to understand why norms do not always arise to solve all collaboration problems, or why actors settle on one equilibrium rather than another, or why the actors change the equilibrium selected.¹

Neorealism and neoliberalism, the main theories about the *content* of international relations, see norms as standards of behavior that can alter the calculations of costs and benefits and constrain the options available to policy makers, but again norms are exogenized. In neorealism, which focuses on security issues, norms reflect the distribution of power among states and have an only limited influence as intervening variables between power distribution and international outcomes. Because this distribution of power is the chief, if not the only, important determinant of actor behavior, change in international relations, including norm change, comes about when this distribution of power changes. In contrast, neoliberals, who have worked primarily on economic interactions and have a relatively optimistic view of the likelihood of sustained international cooperation, tend to accord those intervening variables a more enduring and significant influence than do the neorealists. Yet in both approaches norms are dismissed as being determined by factors exogenous to the theory.

All of these approaches ignore a crucial feature of international relations: what it is that states are trying to accomplish.² The vague assumptions of neorealism and neoliberalism, that states are trying to maximize either relative power or absolute wealth, are too general to provide much of a guide to states, even if they are accurate assumptions. Ruggie (1983: 198) points out that prevailing power-oriented conceptions of international authority either take interests, which he calls “social purpose,” for granted, or seek to deduce them from state power. “The problem with this formulation,” as he notes, “is that power may predict the *form* of the international order, but not its *content*.”

¹ Ullmann-Margalit (1977) is among those who assert that norms arise as solutions to problems posed by certain game situations. In passing, she notes that her approach implicitly assumes an evolutionary, “natural selection” process to explain why these solutions occur and persist, but she leaves the analogy unexplored.

² Keohane (1993: 285), who prefers to refer to neoliberalism as “institutionalism,” has recently written:

In the absence of a specification of interests (which will depend in part on domestic politics), institutional predictions about cooperation are indeterminate.

That is, institutional theory takes states’ conceptions of their interests as exogenous: unexplained within the terms of the theory. Unlike naive versions of commercial or republican liberalism, institutionalist theory does not infer a utility function for states simply from their material economic interests or the alleged values common to democracy. . . . Nor does realism predict interest. This weakness of systemic theory, of both types, denies us a clear test of their relative predictive power.

To rectify this significant omission, other scholars (Evans, Jacobson, and Putnam, 1993; Rosecrance and Stein, 1993) examine the domestic sources of state preferences and interests. They point out that neorealism's tendency to "black-box" states into undifferentiated units responsive only to systemic stimuli omits most of the significant sources of change in international relations. This is an important advance in understanding where states' preferences and policies come from. But the emphasis on domestic sources of state behavior does not explain the type of policy convergence among a large number of highly varied states that occurs with norm changes. Similarly, foreign policy analysis and comparative politics usually concentrate on cases involving a single country or, at most, a very small number of states (Finnemore, 1996:ch. 1). These nonsystemic approaches do not lend themselves readily to analysis of policy convergence among large numbers of states, inherently a systemic phenomenon.

In response to these shortcomings, a growing "constructivist" branch of the theory literature has drawn on sociological concepts to seek insights into the formation of and sources of change of national interests and the perceived meaning of behavior (Wendt, 1987; Katzenstein, 1996).³ The constructivist theorists see norms as crucial. In this view, what states aim to do is an endogenous variable, not an exogenous given, and norms shape both the goals of states—their perceptions of their interests—and the means they use to achieve those goals. While rational choice sees norms as reflections of the fixed preferences of the most powerful states, the constructivist approach believes that one of the roles norms play is to help determine those preferences. Because the ability of states to make correct choices of strategy is constrained both by limited rationality and by great uncertainty, the behavioral guidance provided by norms is crucial as a cognitive energy-saver and as a clue to successful strategies. The realm of *conceivable* behavior in a given social structure is normatively determined and it is not as wide as the realm of behavior that is physically possible. At the same time, which behaviors are conceivable, that is, which norms are accepted, varies over time.

The burgeoning constructivist literature is providing impressive empirical evidence that norms do alter the behavior of states in ways not explainable solely by short-term power maximization. Schelling (1994) and Tannenwald (1995) have independently shown that a norm prohibiting the use of nuclear weapons has significantly constrained at least U.S. policy makers. Nadelmann (1990) has argued that norms about the slave trade, colonialism, and a wide range of economic, military, and environmental matters have varied substantially over time, in ways that do not seem to reflect the prevailing distribution of power. These studies make it clear that something more is at work than the mere exercise of material power. While there is no shortage of behavior driven by short-term interests, states conceptualize those interests in the context of prevailing international norms, and the instruments used to pursue those interests are chosen within a normative framework.

Such is the state of the art on the debate over norms. Mainstream theory does not address the issues of preference formation and communication where norms play their most significant roles and does not address how norms spread or why one norm rather than another may be chosen. It is assumed that states know what they want, and their interests and preferences are postulated. Other theorists who look into the domestic sources of state behavior investigate rather than postulate preferences, but

³ A number of terms have been used to refer to the literature that applies sociological concepts to international relations theory. "Reflectivist" enjoyed a surge of popularity following its coinage by Robert Keohane (1988). Of late, most of the scholars in this field have adopted the term "constructivist," referring to the concept that actors in international relations, such as states, are socially constructed entities whose characteristics can be analyzed as variables, in contrast to the rational choice theories that treat those characteristics as exogenous givens.

they still assume that states know what they want. The constructivists, on the other hand, argue that interests and preferences emerge from social construction and that states must learn what they want. This approach is both closer to reality and more useful in investigating the roles of norms, which often teach states what they want, but it is very hard to tease a theory out of the rich descriptions in the constructivist literature that can explain norms as dependent variables. A new and different approach is needed to provide insight into the processes by which norms rise, spread, and decline over time.

The Evolutionary Model

This study starts from the constructivist perspective that norms and ideas do matter and that the norms that are accepted do not merely reflect the interests of the materially powerful. But if power is not the explanation for norm change, what is? Why do norms wax and wane over time? Given that many norms are contested—that is, that there are two or more norms competing to set the standard of behavior in a given area—what determines which one prevails?

The evolutionary argument made here draws an analogy between genes and norms. The analogy works on three levels. First, genes and norms have similar functions as the instructional units directing the behavior of their respective organisms. It is well known that genes strongly condition the behavior of most individual animals, if not humans.⁴ In international relations, norms govern much state behavior.

Second, genes and norms are both transmitted from one individual to another through similar processes of *inheritance*. This neo-Darwinian perspective looks at norms as part of the set of beliefs, attitudes, and values that are culturally transmitted. This cultural transmission is a type of inheritance, an inheritance of items of information passed from one mind or social organism to another, just as genes are units of genetic information passed through reproduction from one biological organism to another.

Third, norms, like genes, are “contested”—that is, they are in competition with other norms that carry incompatible instructions. Because contested norms must compete for time and attention, just as genes compete for slots on chromosomes, both are subject to the forces of natural selection, and their prevalence in a population waxes and wanes over time. These changes in the relative frequencies of genes or norms constitute evolution: as the relative frequencies change, so do the corresponding characteristics of the population. In both cases, the competition can have two kinds of outcomes: one of the contestants prevails absolutely and the other disappears; or the competitors can coexist within the population for long periods.

Genetic Inheritance

To draw the analogy between norms and genes as entities that provide instructions to their host organisms on what to do in response to given environmental stimuli, we begin with a very simplified description of genetic inheritance.⁵ Variations in traits among members of a population occur at the level of the gene, and are expressed in the phenotype (the physical form, functioning, and behavior of an organism). Genes are pieces of chromosomes, DNA strands, that convey informa-

⁴ Although the idea remains controversial when applied to humans, the contention that most animal behavior is genetically based is well documented. See, for example, Wilson, 1975. For an overview of the argument that there is a genetically based “human nature” that affects much of human behavior, see Wright, 1994.

⁵ The following account draws from several biology textbooks, including Mettler et al. (1988), Starr (1991), Wilson (1975), and *Biological Science* (1990). Dawkins (1987) provides a highly readable popular account.

tion about how to construct all the bits and pieces that make up an organism. They are instructions about what to do with available resources under given environmental conditions.⁶ These genes, these coded bits of information, are passed from an organism to its offspring, in the sense that the information contained in the offspring's gene is exactly the same as the information contained in the parent's gene.⁷ The survival time of an individual physical gene is at best the same as that of its host organism and usually much less, but the survival of a specific physical gene is not what interests us here. Rather, it is the replication of the coded information from the parent's genes to the offspring's genes that matters.

Those genes that create host organisms that survive and reproduce by definition have greater survival power than genes whose organisms do not reproduce. This is what is meant by the "survival of the fittest" imposed by natural selection. "Fitness" means the property of increasing the likelihood that the host organism will successfully reproduce—that is, create new hosts for the gene, hosts that will themselves successfully reproduce. A gene's fitness, or reproductive value, is not permanent. It may change over time as different environmental conditions affect the successive generations of host bodies through which the gene is passed or as other traits become established in the population.

Within a species, a given trait is controlled by a gene that occupies a specific, invariant slot on a given chromosome. If eye color is controlled by gene 7642 on chromosome 21 in one individual, the gene at slot 7642 on chromosome 21 in another individual will also control eye color, although the color may be different. The "address" is fixed, but the content may vary (Dawkins, 1987:117). These variants are competitors for that slot, and are known as alleles. Alleles do not directly compete: they do not slug it out to determine who gets access to the chromosome being passed on to offspring. Instead, some members of a species will carry one set of alleles and some will carry other alleles. Over many generations, those members of the species carrying one allele may reproduce more successfully than those carrying the other; the former will increase in frequency in the population relative to the latter; we call the first the more "fit." That is all that is meant by "fitness."

Competition with alleles is only a part of the natural selection story. Single genes rarely determine the reproductive success of their host organisms. Rather, genes must interact with a wide range of other genes contained in the same host body. Thus, part of the gene's ability to survive and be reproduced depends on the quality of its interaction with other genes. It must compete with its alleles, but it must also cooperate with a far larger number of other genes contained in the same host organism.

Finally, survival depends on the interaction of the organism—the phenotype in which the genetic instructions are expressed—with its environment, that is, with anything external to the population of organisms. Environmental factors for biological organisms include climate, predators, prey, the availability of water, and anything else that affects the organism's survival.

Population genetics explains changes in the characteristics of biological populations over time as the result of evolution through natural selection. The term "local population" (often called merely "population") refers more specifically to all the members of a species living in a defined geographical area at the same time (Wilson, 1975:9). *Evolution* is the process of cumulative changes over time in the characteristics of a population of organisms (Starr, 1991:8). The international system—the

⁶ In literal terms, they are instructions to the cell about what proteins to synthesize.

⁷ In asexual reproduction, this is literally true except for the rare random mutation. In sexual reproduction, as described above, the process is more complex, but on average the offspring's chromosomes will contain 50 percent of its mother's genetic information and 50 percent of its father's.

“population” of states—changes its characteristics, or evolves, over time. The underlying mechanism is the same in both biological and norm evolution: *natural selection*, causing some genes or norms to become more prevalent in a population and others to decline in frequency.

The theory of natural selection says that evolution occurs because of the selective survival and reproduction of certain traits within a population (Darwin, 1859). Those traits that confer some reproductive advantage will, by definition, be reproduced more often than others. Over time, those traits will come to dominate in a population. In more formal terms, selection is “the change in relative frequency in genotypes due to differences in the ability of their phenotypes to obtain representation in the next generation” (Wilson, 1975:67). If that population is isolated, the changes over time may be great enough that the isolated population will become a new species, unable to interbreed with its progenitor. Although it now seems self-evident if not tautological, the theory was a brilliant insight at a time when genetics was effectively unknown, the fossil record too incomplete to prove that populations change over time, and prevailing ideology insisted that all species had been separately created.

Evolution by natural selection is characterized by two traits: it is cumulative; and it is nonteleological. Cumulative change means that a long series of very small changes may lead to very substantial results. A series of very minor but cumulative improvements in the light-sensing capability of a single-celled organism can, given enough time, result in the complexity of an eagle’s eye. In biology, these cumulative changes result in the extraordinarily rich diversity and complexity of life in all its species. Evolution has created millions of types of organisms, each seemingly designed to fit into the niche it occupies. Nonetheless, the evolutionary process itself is entirely nonteleological. Evolution has no end product “in mind.” Rather, it consists of a series of adaptations to changing environmental conditions. An adaptation that is beneficial at one moment may quickly become useless, or even harmful, if conditions change. Those millions of “well-designed” species reflect only a small fraction of the species that have ever existed. The rest have become extinct because their “design” did not fit the prevailing or changing conditions of their time.

Natural selection causes evolution to occur if three conditions are met. First is the existence of some type of variation in the characteristics of the members of a population. There must be differences to choose among. Second, there must be some system of reproduction of these characteristics. Third is the presence of some type of competition among the variants such that not all are reproduced with equal frequency. In other words, some variants must have some reproductive advantage in the population, something that causes them to be reproduced more often than others.

The analogy here is to natural selection, not to evolution. That is, I am not just arguing that change occurs in the characteristics of the population of states, but that this change is the result of competition among norms that are reproduced at different rates and that thus come to have different frequencies in the population of states. Norms are subject to forces of natural selection because they meet all the criteria necessary for natural selection to occur. Variation is present in the form of competing norms. Norms are transmitted—reproduced—from one individual to another (in this case from one state to another). Different norms have different levels of reproductive advantage, different likelihoods of being transmitted. Given two contested norms, one may be more prominent in the norm pool, more compatible with other prevailing norms, and/or better suited to the existing environmental conditions than the other. If so, that one will become more frequent in the population relative to the other.

*Evolutionary Concepts in International Relations Theory*⁸

This population genetics approach differs strikingly from the usual ways in which evolutionary concepts have been applied—or misapplied—in international relations theory. Most notorious were the social Darwinists, who claimed that the dominance of Western states reflected their superior “fitness” and was thus not only inevitable but desirable (Spencer, 1876–97; Bagehot, 1891; Hofstadter, [1944] 1992). Such applications were based on a fundamental misunderstanding, if not a deliberate misuse, of the basic idea of evolution through natural selection—that “fitness” is a purely contingent phenomenon. If some individuals or groups prosper while others falter, this means nothing about their relative virtue. It means only that the former happened to have a combination of attributes, resources, and/or luck that better met the environmental demands of the moment than did the latter.

Neorealism discards the racism but, at least implicitly, retains the focus on natural selection. Yet it too suffers from a misapplication of basic evolutionary principles. Population biology, like international relations theory, has levels of analysis. Natural selection can be analyzed as working at the level of the gene (norm), the whole organism (state), or the entire population of organisms (system). For the analogy to provide useful insight, we must be careful to choose the appropriate level of analysis. Neorealism looks at states or firms as organisms and analyzes how natural selection operates on those organisms. But under the conditions prevailing in the late twentieth century, selection rarely works directly on the state. The usual analogy drawn between organisms and states is inappropriate.⁹

In organic evolution, the only way to change the relative frequencies of genes is to create new members of the population through reproduction, with different genotypes having different levels of success in reproducing themselves. Thus, selection works by killing off organisms (or more accurately, by preventing them from reproducing) at varying rates, depending on how well their phenotype meets the environmental conditions of the moment. Once conceived, individual members of the population cannot change their genetic endowment.

The neorealist selection argument maintains this focus on selection at the level of the organism, with the “organism” being defined as a state. Most accounts of the formation of states and the European state system are, at least implicitly, theories of evolution by natural selection (Anderson, 1979; Parker, 1988; Tilly, 1990). Politics that adopted a centralized authority with exclusive legitimate control of the means of violence in a given territory—that is, became states—survived. Other politics where authority remained fragmented, like Poland, were wiped out. Selec-

⁸ The natural and social sciences have long borrowed ideas from each other. Malthus attributed his ideas about the devastating consequences of human population growth to a biological observation by Benjamin Franklin that “there is no bound to the prolific nature of plants or animals but what is made by their crowding and interfering with each other’s means of subsistence” (cited in Hirshleifer, 1977: 4–5). Darwin in turn acknowledged that his theory of natural selection was inspired by his reading of Malthus: “In October 1838, that is, fifteen months after I had begun my systematic inquiry, I happened to read for amusement ‘Malthus on Population,’ and being well prepared to appreciate the struggle for existence which everywhere goes on from long-continued observation of the habits of animals and plants, it at once struck me that under these circumstances favorable variations would tend to be preserved and unfavorable ones to be destroyed. The result of this would be the formation of new species” (cited in Hofstadter, [1994] 1992: 39).

⁹ The gene is the ultimate source of biological evolution, because it is the unit of instruction for each individual trait, and it is mutations in genes that create variation in traits among members of a population. However, in sexually reproducing species, which are the vast majority of all species, the more immediate source of change is the mixing of the two parents’ genes. This extensive mixing leads to great variation among offspring. Most of these offspring in most species do not survive to reproduce. Thus selection can work strongly on each new generation. For this reason, many evolutionary biologists argue that natural selection works primarily at the level of the whole organism, because that is where the variation is primarily present (Mayr, 1991). Although genetic mutation is the ultimate source of genetic variation, mutations do not occur nearly as often as does the random recombination of genes in sexual reproduction. Indeed, it is likely that sexual reproduction evolved precisely because it enables favorable new combinations of genes to emerge much more rapidly than is possible in asexual species (Wilson, 1975: 316).

tion in this case strongly favored a particular allele over its competitor. For this era, when the nature of states was largely shaped by their ability to wage war and resist aggression, a selection model at the level of the state may well be appropriate. But the analogy no longer holds up. International norm change depends upon changes in the percentage of a population of states holding a given norm, not on the elimination of the state. Existing states *can* change the norms they hold. States, especially major powers, tend to persist in some recognizably continuous form over fairly long periods. In the state system, evolution primarily occurs not by wiping out some states and replacing them with others having different characteristics, but by supporting nonrandom changes in the behavior of existing states—that is, by rewarding the behaviors that express certain norms and penalizing other behaviors, but with penalties that fall short of the ultimate penalty of extinction. In the era of trading states and prohibitions against interstate aggression, when war among major powers is no longer the primary means of international change, this level of analysis is less useful (Rosecrance, 1986; Mueller, 1989).

Moreover, neorealism uses the selection principle to explain stasis, not change. It implicitly describes natural selection as a mechanism for limiting the amount and type of variation that can occur, rather than for bringing about change. In the competition in the marketplace, some firms do better than others, in Waltz's words, "whether through intelligence, skill, hard work, or dumb luck . . . [and] either their competitors emulate them or they fall by the wayside" (1979:77). What is being selected is behavior that helps the organism to survive over time—that is, to replicate itself temporally. Only a very small set of behaviors will permit the firm, or the state, to survive. In the neorealist framework, survival requires maximization of relative power, therefore only states that behave as though they are trying to maximize power will reproduce themselves over time. Selection pressures are fostered by the anarchic, and thus competitive, environment in which states find themselves, as a result of which states must behave "as if" they were rational if they are to survive. They "must" have preferences for wealth and power or they will cease to exist. Those that have certain characteristics (such as a concern for relative gains, relatively high shares of military and economic power, and the ability to choose strategies that maintain or increase those shares) will survive. Others will not.

If states were simply replaced by other states that were in no way different, no change in overall patterns of behavior would occur in the population of states. And most change that does occur in the international system takes place within the framework of existing states, not by eradicating states. No states disappeared (although many were created) when colonialism became unacceptable, nor did norm changes associated with the abolition of slavery or the nonuse of nuclear weapons depend on the death of states that did not share these norms. Evolution ultimately occurs at the level of the gene, and this is the appropriate parallel for considering the evolution of norms. By following the evolutionary journey from the perspective of the gene, or norm, rather than from the perspective of the organism, we get much better insight into factors accounting for norm change.

Cultural Evolution: The Genetic Analogy

It has long been noted that human society, like biological populations, undergoes a kind of evolution. Although we humans are biological organisms ourselves, and we exist in our current physical form purely as the result of the same genetic evolutionary forces that have shaped all other species on this planet, change among humans is no longer primarily the result of biological evolution. Far more dramatic and significant are the changes in human behavior governed by social and cultural forces.

A wide range of social scientists have applied the selection model to the evolution of human cultural traits, and it is this model that best applies to the evolution of international norms. Scholars such as Donald Campbell (1969, 1987) have tried to spell out the societal counterparts of variation, selection, and retention that would enable sociocultural evolution to occur. Anthropologists and sociologists have applied these basic principles to the transmission of human culture (Boyd and Richerson, 1985). They argue that human behavior, unlike the behavior of animals, is largely culturally rather than genetically determined. Since culture is transmitted from one generation to the next just as genes are, culture can evolve in a way broadly similar to genetic evolution. Because humans acquire norms socially from one another as well as through direct experience, humans can pass phenotypic traits of behavior directly from individual to individual far more readily than do other animals. These behavioral traits can spread throughout a human population just as genetic traits do, but far more quickly.

The most cogent argument for the evolution of human ideas independent of genetic evolution is the work of biologist Richard Dawkins (1989:ch. 11) on the concept of “memes”—a cultural equivalent of genes. He points out that genes matter because they are replicators. They are portions of chromosomal material that are copied with remarkable fidelity from one generation to the next.¹⁰ However, Dawkins says, there is no reason to assume that genes are the only possible types of replicators. Ideas that are transmitted culturally are a new type of replicator, one that is “achieving evolutionary change at a rate that leaves the old gene panting far behind” (Dawkins, 1989:192).

Dawkins calls these new replicators “memes.” A meme is a unit of information that is replicated through imitation or cultural transmission, just as a gene is a unit of chromosomal information that is replicated through sexual or asexual reproduction. A meme can be any kind of idea: a fashion fad, a musical jingle, the Ten Commandments. Norms, by my definition, are a subset of memes having to do with accepted standards of behavior, and international norms are a sub-subset having to do with the behavior of states.

For the process of natural selection to work on memes as it does on genes, certain conditions must be met (Boyd and Richerson, 1995:11). A gene or meme must be inherited—that is, passed on from one individual to another. There must be some way in which the coded information, the gene or the meme, is expressed in a phenotype. In the case of genes, the coded information is expressed in an organism. Sometimes this expression is the physical body, but it can also be behavioral. In the case of international norms, the memes of interest to this study, the expression is the behavior of states. As with genes, the extent to which a given meme is expressed in its organism’s phenotype depends in part on environmental conditions and in part on the meme’s interaction with other memes. There must be variation of beliefs or values in the population: different alleles among which selection can pick and choose. In biology, random mutation serves as the source of the requisite variation, that is, errors in the replication of DNA. The origin of specific ideas or norms, on the other hand, is often unknown. It is intuitively plausible that some variation comes from “copying errors,” misunderstandings of the information conveyed by a meme. This is particularly plausible with regard to norms of international behavior, which usually operate in a very noisy and confusing environment. However, the source of variation is not crucial to the selection argument. As long as variation exists, which

¹⁰ The DNA of a typical animal cell contains three billion nucleotide pairs, all of which are copied during replication. Initially, there is about one error in every 1,000 nucleotides. However, the cell has a proofreading system based on enzymes. Some enzymes detect and remove incorrect or damaged nucleotides, which are then replaced with a correct sequence synthesized by other enzymes. After repairs, the error rate is about one in a billion (*Biological Science*, 1990: 213).

it clearly does in cultures and in the international state system as well as in organisms, selection can occur.

The variation must affect actors' behavior in ways that alter the probability that they transmit those beliefs or values. Those memes "that cause people to behave in ways that make it more likely that their [memes] are transmitted will increase" (Boyd and Richerson, 1995:11). For example, a religious norm calling on its adherents to have large numbers of children and to proselytize actively is more likely to spread than is a norm that requires that followers neither procreate nor proselytize, as witness the respective fates of the Mormons and the Shakers.

Dawkins (1989:323-4) cites a simple example that makes it clear how the characteristics of a "mutant" meme may have survival value for that meme itself. The refrain to the song "Auld Lang Syne" is now almost always rendered "for the sake of auld lang syne," although Burns actually wrote, "For auld lang syne." Why should the interpolated phrase have survived and driven out the original wording? Dawkins speculates that the mutant form arose as a rare but insidiously penetrating variant. Anyone who has ever sung in a choir knows how obtrusive "s" sounds are when sung, and "k" is nearly as obtrusive. Most people learn the song from hearing it as a child, not seeing the words written. Once the error arises because one inaccurate participant chimes in (and the interpolated phrase does fit the song more easily than does the original wording), the "mutant" version will be heard more readily than the accurate one, and thus it will spread to more and more members of the population who are learning the song for the first time.

The point of this example is that there is no advantage to the members of the population one way or the other. The advantage is to the mutant meme itself. In short, we should look for the evolutionary advantage of a norm to the norm itself, not to its host organism. Obviously, a norm that is lethal to all potential hosts cannot last, but most behavioral decisions are not nearly so stark.

There must also be some limit on the number of memes that can exist in the given population, so that there is competition among the memes for existence. Memes do not have physical alleles as genes do. Memes do not literally compete for the same space in the human brain. Rather, as Dawkins (1989:197) notes, they "compete" for time and attention from their human hosts. This is true of memes generally, as an individual mind can contain a large but not infinite variety of memes. In organizations, the competition among memes may take the form of struggles between individuals or subunits of the organization, as well as within the mind of any given individual.

With regard to norms, which call for specific behaviors, the competition is relatively direct. An actor cannot follow two opposed norms at once. However, when norm variation is present, that is, when neither of the competing norms has driven the other to extinction, it is quite possible either for the population to be polymorphic (with some actors following one norm and some the other), or for an individual actor to pursue a mixed strategy, following one norm on some occasions and its competitor on others.¹¹

¹¹ The genetic parallel here is strong. There is far more genetic variation within populations than could exist if one allele always drove another to extinction. Several factors can account for the continued survival of competing alleles within a population. The one that is relevant to social evolution is the possibility of frequency-dependent selection. This can happen if one allele is more frequent than the other, and organisms with the rarer allele gain some advantage from its scarcity. For example, the more common type may be preferentially attacked by predators or parasites who adjust their attack strategy to the more common type. As the rarer allele becomes relatively more common, predators may start to shift their strategies to attack this formerly rare allele. The two alleles will remain at this intermediate frequency, the point at which the rarer allele begins to lose the advantage of scarcity (Wilson, 1975: 70-1).

The Evolutionary Approach to International Norms

To this point, the argument has attempted to show three things: (1) There is a gaping hole in the mainstream neorealist/neoliberal literature concerning how and why norms change over time; (2) concepts drawn from population genetics are appropriate to use in explaining norm change; and (3) theories of international relations that examine selection at the level of the state rather than at the level of the norm cannot provide insight into norm change. Now we are ready to develop the evolutionary model of norm change.

Norms, like genes, carry instructions. In organic evolution, the entity being instructed is a single biological organism. The evolutionary analogy is broadly appropriate for norms operating in any type of social grouping. In the norm analogy, the entity being instructed could be an individual, a state, or whatever other social grouping is most useful for purposes of analysis. To examine changes in state behavior, as we do here, obviously the appropriate entity to consider is the state as the “organism” that carries out the behavioral instructions of the norm.

This provides a framework within which changes over time in the substance of internationally held norms can be explained. Norms evolve because they are subject to selection. The genetic analogy suggests that, as with any instructional unit subject to selection, three factors account for the reproductive success or failure of a contested norm: (1) whether a norm becomes prominent enough in the norm pool to gain a foothold; (2) how well it interacts with other prevailing norms with which it is not in competition, that is, the “normative environment”; and (3) what external environmental conditions confront the norm pool. No one of these is sufficient to determine the path of a norm’s evolution. Each is a necessary but not sufficient condition.

Prominence. Norm “prominence” is a shorthand way of saying that a new mutation, no matter how favorable to fitness, is likely to need some help in getting established in the norm pool. This is an exact parallel to genetic evolution, where “even advantageous mutations are usually lost in the first few generations because of genetic segregation and random variation of offspring” (Lewontin, 1974:27–8). The intuition behind this is straightforward. Reproduction, whether of norms or of genes, takes place in a very noisy environment filled with confounding factors. If a new mutant is contained in a host organism that never has an opportunity to reproduce for reasons unrelated to the mutation, that mutation is gone unless it happens to arise again spontaneously elsewhere under more favorable circumstances. A bird born with far better eyesight than its siblings has a clear advantage, but one that will be wasted if the bird happens to be eaten by a predator while still a helpless infant. The same reasoning applies to cultural mutations as well. The most brilliant technological innovation will not diffuse if it is created by an inventor who dies without telling anyone of his invention. Individuals living in a police state may find it physically impossible to reproduce—that is, spread to others—norms about personal freedom.

Gene “prominence” usually occurs when a subpopulation becomes geographically isolated, essentially reducing the size of the gene pool in which new mutants must compete. Such may also be the case for norms below the level of the international state system. Societies had far more divergent norms when various regions of the world were isolated from one another. But since the subject of interest here is norms that are transmitted across state borders, not norms that are held exclusively within a given state, we must look for other explanations of how international norms gain that critical first toehold. International norm prominence generally occurs either because someone is actively promoting the norm, or because the state where the mutant norm first arose happens to be particularly conspicuous.

Norms are most likely to obtain their initial foothold through the efforts of a "norm entrepreneur," an individual or organization that sets out to change the behavior of others.¹² There is strong and growing evidence that norm entrepreneurs have been at work in the evolution of a wide range of norms. Nadelmann (1990) has referred to the importance of "moral entrepreneurs" in legitimizing or delegitimizing behavior and thus changing norms. Finnemore (1996) has traced several cases in which international or nongovernmental organizations acted as "teachers" to change states' conceptions of their interests. Mueller (1989) has documented the role of a handful of individuals in changing attitudes toward major war as an acceptable instrument of policy.

Although a norm entrepreneur need not be a powerful state (and in the cases cited above is often an individual or a small group), such states do have obvious advantages if they wish to try to create a new norm. The U.S., for example, interacts in a wide range of fora and situations with virtually all other states. Small states, on the other hand, may not be able to afford to have even sketchy diplomatic representation in many other states, much less participate regularly and substantially in whatever international organizations, conferences, or other fora may be relevant. In this way power, in the sense of communications resources, may be a significant part of the norm story. Norms held by powerful actors simply have many more opportunities to reproduce through the greater number of opportunities afforded to powerful states to persuade others of the rightness of their views.

An international norm may also begin to spread in the absence of a norm entrepreneur if some states simply emulate the behavior of some prestigious or otherwise well known actor, even if the emulated actor is not attempting to communicate its behavior. Because it is difficult to know how successful a particular strategy actually is compared to other possible behaviors, people look for clues as to which behavior they should adopt. Boyd and Richerson (1995:9) point out that such bias is evident in the transmission of innovations through personal contact. Although it is rational for people to adopt innovations when they observe that someone they know who has already adopted the innovation has succeeded, it is also common for an innovation to be emulated because the person who has already adopted it has prestige. No one believes that it is the shoes he wears that make Michael Jordan the greatest basketball player of all time, yet advertisers are willing to pay enormous sums to have his prestige associated with their product. Similarly, in the state system norms may become widespread simply because they are initially adopted by one or more very large states, even in the absence of direct efforts by those large states to induce similar behavior from others.

This issue of prominence raises a key question: How much is enough? Prominence is by definition a relative phenomenon, one that is not easily measured in the abstract. Discussions of prominence teeter perilously close to the tautology so often seen in discussions of power: that if one sees an outcome, it shows that an actor had been powerful "enough" to bring about that outcome. The difference is that power is usually taken to be a sole cause, whereas prominence is merely a necessary condition. Nonetheless, the theory here remains underspecified.

The international norms that have been studied generally did benefit either from the activities of a norm entrepreneur or from the good fortune of having originated with a prominent actor, and sometimes both. But, in international relations, as in biological evolution, contingency plays a major role as well. Deliberate efforts to promote particular norms may work—or they may not. Norm entrepreneurship is usually necessary, but it is never sufficient.

¹² The term "norm entrepreneur" was used by John Mueller at a conference on "The Emergence of New Norms in Personal and International Behavior" held at UCLA, May 1993.

Coherence. In the genetic analogy, environment is usually taken to be anything external to the organism. But by moving the focus to the level of the individual gene, or norm, we see that there is a crucial but often overlooked part of that environment: the other genes of the species. Since genes are reproduced down through generations, and may exist simultaneously in many members of a species, the relevant group of genes is the whole gene pool of the species, not just the genes contained in a single organism in which a given copy of a gene happens to find itself. A given gene's reproductive success depends heavily on how well it interacts with the rest of the gene pool. As Dawkins has put it:

Genes for making teeth suitable for chewing meat tend to be favoured in a "climate" dominated by genes making guts suitable for digesting meat. Conversely, genes for making plant-grinding teeth tend to be favoured in a climate dominated by genes that make guts suitable for digesting plants. And vice versa in both cases. Teams of "meat-eating genes" tend to evolve together, and teams of "plant-eating genes" tend to evolve together. (1987:172)

The normative analogy to such genetic coevolution has to do with the question of legitimacy. No norm exists in a vacuum. The social relationships in which states are enmeshed depend on a web of shared normative understandings about what behavior is acceptable. Any new norm must fit coherently with other existing norms—that is, with the rest of the "genotype." A norm's legitimacy depends crucially on such coherence, and coherence in turn engenders legitimacy.

Although legitimacy is widely acknowledged to play a crucial role in shaping international behavior, few scholars have successfully probed this particular minefield. They often simply assert that standard behaviors become standards of behavior over time, without attempting to explain the process by which practices become legitimized.¹³ How does "we've always done it this way" become "this is the way it should be"?

Thomas Franck (1990) has outlined several factors that tend to render a norm "legitimate" in the eyes of the affected actors. Franck (1990:24) defines legitimacy as:

a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.

This property is a matter of the degree to which a norm (or rule, in Franck's terminology) possesses certain characteristics. One is determinacy—that is, the extent to which the standard is clear to those who are expected to adhere to it and falls within the bounds of justice and reason. The more important is coherence: that is, the extent to which a norm is logically related to its own principled purpose, to "principles previously employed to solve similar problems," and to "a lattice of principles in use to resolve different problems" (Franck, 1990:147–8). The community of states is, in this view, a community bound by shared rules that are usually (but not always) codified in international law. The members of this community act according to recognized rules and interpret the meaning of each other's behavior according to those rules (Franck, 1990:203).

A new norm acquires legitimacy within the rule community when it is itself a reasonable behavioral response to the environmental conditions facing the members of the community and when it "fits" coherently with other prevailing norms

¹³ As Oran Young (1983: 95) has said, "The rise of conventionalized behavior is apt to engender widespread feelings of legitimacy or propriety in conjunction with specific institutional arrangements."

accepted by the members of the community. This is similar to the concept of institutionalization used by both mainstream and constructivist theorists. Because most existing norms are codified in international law, emerging norms must make the case that they are logical extensions of that law—or necessary changes to it. Indeed, a vast amount of international negotiation is in essence argument over whether specific potential new norms are acceptable extensions of the existing normative framework embodied in international law. Such negotiations constitute a key selection mechanism for norms. Norms that are highly coherent within the international legal framework will be far more resistant to change than those that are not so linked.¹⁴

Environment. The “population” of interest in the evolutionary approach is the population of norms, not the population of states. States are part of the environmental conditions facing norms. In other words, the environmental conditions that face a norm of international behavior are familiar from standard neorealist accounts of the factors that explain international relations: the distribution of power, which in turn encompasses the prevailing level of technology and the availability of natural and human resources. Unlike the neorealist approach, however, the evolutionary paradigm sees such environmental factors as merely a part of the story, not a sufficient explanation of fundamental behavioral change. Certain technological or other resources or certain distributions of power may be necessary for the reproduction of a mutant norm, but they are not sufficient.

The Reproductive Mechanism

The three factors of initial prominence, coherence, and environmental conditions explain which norms will be selected, but not how they will spread. To the extent that the existing literature on norms and ideas has considered how norms are transmitted if not simply by power, most scholars have focused on the need for a crisis to shake decision makers out of their bureaucratic lethargy and inspire them to uncover new ways of doing things (Weber, 1991). Even if this is true, it tells us nothing about which new ways will be chosen, nor what an individual actor will do. In population biology, it is assumed that strategies are linked to some genetic component on which natural selection can work. What is the mechanism that tells an individual state which strategy *it* should adopt?

This question of the reproductive mechanism inevitably leads us to the most complex issue in the evolutionary explanation of norm change: the role of thinking. Clearly, norms and genes are not perfect parallels. A biological organism does not have much choice about whether the instructions contained in its genes are expressed in the phenotype. Organisms have not—to date—been able either to choose which of their genes they wish to pass on or to deliberately modify those genes before passing them on. Natural selection has worked quite coldly by killing off organisms whose genes create less fit phenotypes, thus preventing them from passing on those genes to offspring. People, unlike nature, can reason. Their reasoning may be faulty, randomly or systematically biased, or based on woefully incomplete information, but it does occur and cannot be ignored. Human minds can, to some extent, modify memes and consciously select among competing alleles to decide which ones to accept as well as pass on. The “inherited effects of use and disuse” that Darwin (1891) wrongly thought to be part of natural selection clearly do play a role with memes. Human agents do have choice—in fact, they must choose to act if the instructions embedded in a norm are to be carried out.

¹⁴ I am grateful to George Modelski for pointing out the importance of international law in this context.

The evolutionary argument is based on a fundamental assumption that human “choices” about behavior are based far more on simple imitation, encoded in the form of a norm, than on deliberate weighing of well-considered and well-understood options. These processes are much less rational than rational choice theory would have us believe. Even norms that originate and begin to spread through rational processes are subject to selection pressures that are inherently nonrational.

Norm reproduction can take one of two forms, vertical or horizontal.¹⁵ Vertical reproduction refers to continuation of a norm or set of norms through new generations of leaders within a single state. Except for the occasional copying error, vertically reproduced norms rarely change. Successful norms are thus inherited vertically, passed down through the generations. It must be stressed that “success” here does not imply superiority. It simply means evolutionary “fitness.”

Horizontal reproduction refers to emulation: actors see others behaving in a certain way and copy those behaviors. Emulation, or the horizontal reproduction of a norm across actors within a single generation, is the mechanism by which norms change: a state following norm *x* sees another state behaving in accordance with norm *y* and replaces *x* with *y*. This horizontal mechanism allows for the rapidity with which new norms can spread, replacing well-entrenched standards seemingly in the blink of an eye. Rapid social change usually reflects horizontal emulation. Horizontal spread is a much faster means of copying than is vertical transmission down generations. Proselytization—persuading others to emulate one’s behavior—is likely to be far more successful in spreading a new religion than is having many children, even if all of the children could be persuaded to adopt the parents’ beliefs.

When do we expect to see horizontal rather than vertical reproduction—that is, change rather than perpetuation of the status quo? There are three conditions that would favor horizontal reproduction: (1) large-scale turnover of decision makers, as in revolutions; (2) clear failure of the behavioral norms of the previous “generation” to the extent that the previous way of doing things becomes virtually impossible; or (3) the emergence of a new issues area in which prevailing norms are not yet well established and thus there is little scope for vertical reproduction because most states do not have much in the way of relevant existing norms to be reproduced.

If emulation is the primary mechanism by which norms change, what accounts for which norms are emulated? A (boundedly) rational choice perspective would presume that “successful” norms would be imitated. In this view, rather than assessing all conceivable alternatives, states assess only the alternative behaviors (the phenotypes of norms) that are currently available in the norm pool, then adopt the one that has proved most successful for other actors. But the difficulties of determining which norms actually account for an actor’s success makes it unlikely that a purely rational selection of successful strategies can explain which behaviors are emulated. The net benefit of a behavior may be hard to distinguish from the effects of other behaviors or of factors that have nothing to do with human behavior. As Boyd and Richerson (1995:12) note, “Because the world is complicated and poorly understood and the effects of many decisions are experienced over the course of a lifetime, [estimates about the effects of alternative behaviors] will be imperfect.”

If there are contested norms applicable to a given situation, which one is selected will depend on the three factors that have been stressed throughout: the relative prominence of each of the contested norms, their relative compatibility or coherence with other prevailing norms, and the extent to which they fit the existing environmental conditions. In other words, horizontal transmission of norms re-

¹⁵ Axelrod (1986) suggests that trial and error by a single individual provides a third evolutionary mechanism for norm spread. But there is no “inheritance” in the trial and error approach. It is better considered a form of learning than a form of evolution.

quires that the same processes take place within as across states. A given state will usually contain some degree of normative heterogeneity, providing the variation necessary for selection to occur. Horizontal transmission is merely the changing of relative frequencies within a state until such point that the state's decision makers consistently adhere to the new norm. The complete story of norm evolution is thus a two-level game, with the three factors of prominence, coherence, and environmental conditions applying domestically as well as internationally. A complete account of international norm change would require empirical investigation of the domestic politics of all relevant states. But such completeness is unnecessary. The process by which variation initially arises may well be unique to each state, but as argued above, the *origin* of a mutant norm or new idea matters little to the evolutionary story. To explain why new norms spread throughout many states, the argument at the systemic level suffices.

The Advantages of Emulation. Why should emulation be a far more common, if unconscious, decision mechanism than is rational choice? Emulation has distinct advantages, especially in complex or novel situations. Trial and error is a slow, cumbersome, even dangerous process. It is much easier and safer to allow others to undergo the trials and make the errors. As Waltz (1954:220) cites Bismarck as saying, "Fools learn by experience; wise men learn by other people's experience." Yet this tells us nothing about the underlying mechanism by which actors are deciding what to emulate. Is there a complex and sophisticated cognitive process going on? Are "wise men" actually learning from other people's experience in the sense that they understand why the other people's behavior was successful or unsuccessful in achieving a certain goal, or even what the goal was and whether it was achieved? And how, if at all, does "learning" apply to changes of moral or social norms, where the question of success or failure in the instrumental sense does not arise?

Cohen and Axelrod (1984) have put forward a "surprise" model of the decision process incorporating a controlled form of preference change in which imitation proves to be more successful than rational choice as a means of achieving goals. The theory is both a normative "approach to the problem of improving your performance when you don't completely understand what you are doing" and a descriptive account of "some of the ways in which preferences do in fact change as a function of experience" (Cohen and Axelrod, 1984:31). They assume that actors have both very limited rationality and underlying models of the world that are fundamentally at variance with reality, both plausible assumptions to apply to nation-states. Thus, new information gets incorporated into a skewed view of the world. If such actors change their preferences to imitate those of a successful or prestigious actor, they may accomplish their original goals better than if they had pursued those goals directly.

In a chess game, for example, rational calculation of the outcome of each move is impossible (Cohen and Axelrod, 1984:31-2). Over time, players have developed a series of heuristic rules (a bishop is worth more than a rook, and a rook is worth more than a pawn) that provide intermediary goals—preferences—that help players to make decisions during the course of the game. Over time, those heuristic rules that most help players to win the game—that is, those that most closely correspond to the underlying reality of the relative value of different pieces—survive, and other rules are discarded. In other words, a preference for keeping a rook at the cost of losing a bishop will cause a player to lose more often than a preference for the bishop over the rook. This is true *whether or not* the player understands that the bishop is more useful than the rook in the ultimate goal of protecting one's king and capturing the opponent's. Novice chess players will win more often if they emulate these heuristics long before they have come to understand the logical bases for them.

In complex situations or when dealing with incomplete information, in other words, it may be better to do what others do than to try to decide one's own optimal strategy, even if you do not understand why the others are doing what they are doing, or even if they do not understand why they are doing what they are doing. Because complexity and uncertainty characterize so much of the human condition, it is certainly plausible that people would tend to use emulation rather than more cognitively difficult processes to decide behavior. This need not lead to nonrational or even suboptimal outcomes, but the process is certainly not rational in the usual sense.

This emulation is not "learning" in the sense of necessarily reflecting an improved understanding of the causal relationship between behavior and outcomes. Indeed, if states could "learn" one would not expect to see rapid policy convergence. In the learning model, argues Levy (1994:283), "People interpret historical experience through the lens of their own analytical assumptions and world views. . . . The different frames that people apply generally result in variations in learning across individuals in the same situation." Thus, there is no reason to expect policy convergence even in a world in which international interactions are becoming much more frequent. In the evolutionary model, since behavior is emulated, the sheer number of contacts increases the number of opportunities for horizontal reproduction. In an increasingly interdependent world, policy convergence should increase sharply in a wide range of issue areas.¹⁶ This is true both because the number of opportunities for horizontal reproduction has increased and because the environment is becoming more complex and uncertain, reducing the likelihood of effective learning and increasing the advantage of relying on emulation.

A learning model would single out changing understandings of the relative merits of the competing alleles. In this view, new norms are adopted due to a complex process of reevaluation of basic principles and causal theories. But this focuses only on the individual actor, in this case the state, and fails to explain why so many states change their policies in the same direction within a very short span of time in the absence of any compelling new information likely to motivate such a reevaluation. Learning models may provide the equivalent of the genetic mechanism explaining change at the individual level, but they do not explain change at the level of the population.

This framework sheds light on why norms so often vary from what would be expected from a rational choice perspective, for both good and ill. Behaviors that are merely seen as "appropriate" may actually help actors to meet goals in ways of which the actors are completely unaware. On the other hand, there can be huge lags in behavioral changes as response to structural changes, and norms may become maladaptive long before they are altered. The *homo behavioralis* posited here may expend far less cognitive energy than the *homo economicus* of rational choice theory and may find cooperation easier to achieve, but he often finds it difficult to adapt well to rapidly changing conditions.

¹⁶ Individual learning or cognitive psychological models may be the equivalent of a genetic mechanism. They are necessary to understand the mechanism by which information is transmitted, but they are not essential to the broader theory of evolution by emulation and natural selection. Many different transmission mechanisms could be compatible with the evolutionary model. One, posited by Farkas, would involve turnover of foreign policy decision makers as the mechanism for change.

Although learning may occur, adaptation is far more common. The mechanism may be turnover of decision makers or emulation that is then rationalized in ways that may resemble learning. Either turnover or emulation may explain policy convergence, but turnover would require a far more effective selection mechanism than I have considered here: one that ruthlessly displaces leaders who fail to adopt adaptive norms and replaces them with leaders who do.

Transparency: The Evolution of a New Norm

The necessity of considering the three factors of initial prominence, coherence, and environmental conditions simultaneously to explain norm change shows up clearly in the case of a new norm of transparency in military activities and capabilities. For more than fifty years, two fundamentally opposed ideas have struggled to shape the behavior of states in the security area. The long-dominant norm of the sovereign right of states to maintain secrecy about all security matters has gradually ceded ground to a new norm of transparency, under which states are obligated to provide vast quantities of information to other states. Treaty after treaty now requires states to report information about their capabilities and activities and often to host inspections by other states, allowing others to acquire information not available through national technical means or old-fashioned espionage. This represents a change of enormous significance, as secretive behavior that was once taken for granted has come to be seen as a signal of nefarious intentions.

The transparency norm illustrates how the three factors outlined above work in the evolution of a norm: (1) It became prominent primarily through the deliberate efforts of an entrepreneur, the United States; (2) it fits coherently with other relatively recent norms, particularly democratization, multilateralism, and the norm against the use of weapons of mass destruction; (3) several developments have provided a hospitable environment.

The Entrepreneur. After the onset of the Cold War, the United States faced a geostrategic imperative to gain information on the first adversary in many decades able to pose a threat to its homeland. The U.S. attitude toward transparency was influenced by the very different domestic structures of the two societies. The United States confronted the challenge of discovering the capabilities and intentions of a highly secretive adversary that, due to the nature of the respective societies, had substantially greater access to information about the United States than the U.S. could readily obtain about it. As any state would try to do when faced with a potential enemy, the United States set out to gather as much information as possible about Soviet behavior, capabilities, and intentions. As is well known, the U.S. spent billions of dollars on the development of national technical means of observation. But, although these technologies contributed vitally to crisis stability and made unintrusive arms control verification possible, they could not provide sufficient detail about capabilities and activities to ensure that the U.S. and its NATO allies would have warning of an attempted surprise attack, nor could they provide a guide to intentions. Thus, the U.S. consistently and systematically pursued policies aimed at inducing other states, particularly the USSR, to provide a wide range of otherwise inaccessible information. In other words, the U.S. found itself unable to rely on self-help to meet its goal of ensuring adequate warning of surprise attack. Instead, it had to attempt to change one of the most deeply rooted norms of state behavior: the right to secrecy on military matters.

To this end, the U.S. put forward a truly novel argument: that the Soviet Union was *obliged* to provide certain types of information about itself to other states, and that its only possible motive for failing to do so was that its intentions and activities were in fact hostile. From the 1946 Baruch plan for nuclear arms control, with its proposed on-site inspection, until the end of the Cold War, the U.S. repeatedly proposed intrusive inspections and confidence-building measures that would render the USSR nearly as transparent as the U.S. already was, and in some cases would greatly increase the military transparency of *both* countries. Soviet responses to these proposals were used in the domestic and international debates by their proponents as tests of Soviet intentions. Although these proposals centered on the East-West conflict, many were multilateral and some global in scope.

So far, this sounds like a standard neorealist explanation, which would argue that the emergence of transparency is a temporary phenomenon that simply reflects changing interests on the part of a state or group of states powerful enough to make most states accept transparency. But it rests on an unfounded empirical assumption: that U.S. coercion was responsible for the acceptance of transparency by other countries. U.S. power, whether defined as relative military capacity or as share of world GNP, was at its peak during the 1950s and 1960s, but U.S. proposals for increasing transparency usually fell on deaf ears during this period. Transparency blossomed in the 1980s and 1990s, not in the 1950s and 1960s.

And by that point, U.S. transparency proposals were being put forward largely for propaganda purposes, not out of any serious desire to see them implemented. This quickly became clear in 1987 when the Soviet Union took the startling step of accepting the U.S. proposals for extraordinarily intrusive verification provisions in the negotiations on Intermediate-range Nuclear Forces in Europe. The INF provisions were so profoundly intrusive that the U.S. found itself forced to backtrack substantially on its own proposals to avoid allowing Soviet inspectors to have the run of U.S. defense facilities (Garthoff, 1994:327). The Soviet Union could simply have called the U.S. bluff on the INF provisions and then retreated to its more familiar, secretive positions. Instead, it adopted the old U.S. language almost verbatim, challenging the United States to agree to the most intrusive transparency provisions yet considered, both in the INF negotiations and then throughout the remaining years of superpower negotiations.

Moreover, U.S. power has played little or no role in many of the more recent steps up the transparency ladder. Europe and Japan, for example, led the way on the negotiation of the United Nations Register on Conventional Arms, under which since 1992 states have reported annually on their conventional arms imports and exports. The United States stayed on the sidelines, expressing skepticism all the way. Similarly, in the mid-1980s the United States put forward sweeping demands for transparency measures in the chemical weapons negotiations, on which it abruptly reneged when it became clear that the proposals might actually be accepted. In short, the neorealist premise that powerful states use their material advantages to coerce others into behaving as the powerful dictate explains very little of the massive shift toward transparency that has occurred in the past few decades. That the norm entrepreneur in this case happened to be a powerful state was neither a necessary nor a sufficient condition. Nor, as this case makes clear, need the entrepreneur's motives be pure.

The Supporting Normative Structure. There have been three major norm shifts in the postwar era, each of which is at least hospitable to transparency: democratization; multilateralism; and restrictions on the use of force, particularly with regard to weapons of mass destruction. Democratization, surprisingly enough, has been relatively unimportant to the development of transparency, but it is clearly a permissive condition, even if it is neither necessary nor sufficient. Democracies are by definition more open, less able and less willing to restrict the flow of information. Moreover, because they rarely wage war against one another, a world filled with democracies is less vulnerable to the security dilemma that so strongly impedes increases in voluntary transparency (Doyle, 1986). Certainly there has been an extraordinary process of democratization of late, most notably in the former Warsaw Pact countries correlating with the explosion in agreements on transparency.

But states that are relatively open domestically are not necessarily open internationally as well. Historically, democracies have not necessarily been more willing to make themselves transparent to other states, nor have more authoritarian regimes always resisted the sharing of information. In the 1920s, for example, the U.S. was strongly opposed to any transparency measures on the grounds that they conflicted

with, or might have the potential for someday conflicting with, U.S. sovereignty. Conversely, the USSR's acceptance of high levels of voluntary transparency in such agreements as the 1986 Stockholm Document and the 1987 INF Treaty predates the establishment of anything that could reasonably be called a democracy in the Eastern bloc. Even during the height of the Cold War, the democratic European members of NATO on occasion proved to be bigger stumbling blocks to transparency than their Warsaw Pact counterparts, as in the negotiations over the Non-Proliferation Treaty.

Moreover, democratization is a process, not an end state, and most of the states referred to as democratizing have a long way to go before they can be considered full-fledged stable democracies. In the interim, many of them are having great trouble with the concept and implementation of the free flow of information (Mansfield and Snyder, 1995). The move to increased voluntary transparency has not been caused by democratization, nor will the future of transparency necessarily correlate with changes in regime types.

The other two norms have correlated more directly and importantly. "Multilateralism" describes a way of coordinating relations among three or more states (Ruggie, 1993:11). It is in essence a norm calling for the nondiscriminatory application of the agreed principles of conduct, meaning that all the relevant actors are expected to play by the same set of rules. In other words, as Anne-Marie Burley has pointed out, under multilateralist agreements the rule of law, rather than the rule of power, guides state actions (1993:144). Nor are relations between states differentiated according to the particulars of the situation at hand. This nondiscrimination is enforced by diffuse rather than specific reciprocity: that is, by the expectation that compliance now will generate long-term compliance by others, rather than by a specific tit-for-tat policy by each state with regard to every other. The essence of multilateralism as a norm of international relations is the "belief that activities ought to be organized on a universal basis at least for a 'relevant' group" (Caporaso, 1993:55). This nondiscriminatory multilateralism "now carr[ies] with it an international legitimacy not enjoyed by other means" of diplomacy (Ruggie, 1993:23).

Multilateralism is not new in the postwar era, but it has become markedly more prevalent. It now applies in a wide range of issue areas, most notably in trade under GATT and the application of most-favored-nation status, but it is becoming prevalent in security issues as well. Most notably, the United States instituted multilateralist norms in the creation and development of NATO (Weber, 1993).

The norm of transparency may have had its start in the atmosphere of specific reciprocity in the context of bilateral superpower agreements, but it has benefited enormously from, and often depended upon, the legitimation inherent in a multilateral nondiscriminatory process. Only when the U.S. agreed to open its civilian nuclear plants to IAEA inspection, thus applying the transparency norm to itself, was agreement possible on the inspection provisions of the Non-Proliferation Treaty. Since then, security accords have overwhelmingly relied on nondiscriminatory application of the rules to the parties. The Chemical Weapons Convention, for example, unlike the NPT, makes no allowances for states that already possess chemical weapons. All parties are subject to the same bans and limitations of their chemical facilities, and all are subject on the same terms to the convention's extremely intrusive inspection procedures. And there are no provisions for tit-for-tat specific reciprocity in the more recent security agreements. Instead, they depend upon the diffuse reciprocity and concern for reputation characteristic of multilateralism.

One effect of technological developments of the past century has been to create distinctions among categories of weapons. The use of so-called "conventional" weapons is accepted, no matter how devastating their effects. The use and increasingly even the

possession of “weapons of mass destruction”—that is, nuclear, chemical, and biological weapons—is not. The political and moral constraints surrounding the latter go much beyond rational deterrence. That is, states refrain from using them even when there is no reason to fear retaliation in kind. The U.S. did not use gas against Japan even in the later stages of World War II, “even though there was no threat of retaliation and [chemical weapons] would have been enormously effective against Japanese forces entrenched in the tunnels and caves of the Pacific Islands” (Price and Tannenwald, 1994:6). Similarly, the United States refrained from using nuclear weapons despite its monopoly in the early postwar years, nor did any of the nuclear weapons states use them in the many military actions they have undertaken since—even the ones they have lost against non-nuclear powers. These taboos are clearly normative, not purely “rational” calculations of costs and benefits. As Thomas Schelling has noted, much of the uniqueness of nuclear weapons “derives from their being perceived as unique. . . . It is simply an established convention that nuclear weapons are different” (Schelling, 1994:1).

This norm of nonuse is gradually broadening itself to include a prohibition on possession by most if not all countries. This is clearly the case with regard to chemical weapons, over which a convention has been negotiated that will seriously constrain any attempts by its parties to maintain or obtain a chemical weapons arsenal. A ban on possession is necessarily deeply intertwined with the norm of transparency. It is only because transparency became so broadly accepted that agreement on the Chemical Weapons Convention became possible. Chemical weapons are easily manufactured from precursor chemicals that are widely used throughout the world economy. Restricting production of these precursors is technologically and economically unfeasible, but monitoring their production is possible—as long as governments are willing to impose highly intrusive inspection procedures on their chemical industry. These inspections will be carried out by an international agency. Moreover, parties must allow substantial numbers of short-notice “challenge” inspections. Only because the norm of transparency had already become prevalent in the population of states was it possible to secure broad agreement on these terms for the CWC. In turn, the CWC further institutionalizes the norm of transparency, setting precedents for future multilateral arms control accords.

Transparency is also intertwined with a weaker but growing norm that would limit “excessive and destabilizing” concentrations of conventional weapons. Spurred by the Iraqi invasion of Kuwait and its aftermath, the U.N. General Assembly in December 1991 created a Register of Conventional Arms aimed at introducing greater transparency into the conventional arms trade and arms holdings. The Register provides a means for states to list their imports and exports in seven categories of weapons considered particularly useful for surprise attack or major offenses. In its first two years of operation, the Register has been surprisingly successful, with most major importers and exporters providing what appears to be reasonably complete, if sketchy, reports. Although in part the Register simply provides a centralized location for what was in any case a trend toward releasing more information on the arms trade, in at least some cases states have changed well-entrenched domestic legislation mandating secrecy in such matters to allow them to participate in the Register (Laurance and Wulf, 1994:46). Rather than attempting to control the conventional arms trade, the Register reflects the transparency norm: while no attempt to ban trade in (or production of) such items as tanks and conventional missiles is in prospect, states ought at least to provide information on their military capabilities that could pose a threat to others.

Environment. Two types of external conditions have provided a hospitable environment for the spread of the transparency norm: political shocks and technological developments. When Iraq’s near-success in developing an arsenal of weapons of

mass destruction was revealed after the Gulf War, states seized on the precedent of Great-Power transparency. This led to the successful conclusion of the negotiation of the Chemical Weapons Convention, with its extraordinarily intrusive verification provisions, and the establishment of the UN Register of Conventional Arms Transfers, under which most arms importers and exporters voluntarily list their arms trade every year.

Technology has also played a key role. Indeed, some would argue that national technical means, or more broadly the information revolution, have made it impossible for states to keep secrets from each other. In this view, the acceptance of intrusive verification measures represent nothing more than codification of the reality that others are capable of observing states regardless of whether those states want to be observed. For most countries, who do not have any ability to attack or interfere with spy satellites, "allowing" their territory to be observed by satellite reconnaissance does not constitute voluntary transparency. Given what has been publicly revealed about the capabilities of U.S. satellites, all major and middle powers are probably aware that satellites are providing the U.S. (and presumably Russia) with substantial information on matters ranging from civil disturbances to economic developments and nuclear and ballistic missile proliferation.

Although superficially plausible, this view is demonstrably wrong. As is clear from the surprise over the extent of Iraq's nuclear program and the uncertainty about whether North Korea yet has a nuclear weapon, it is quite possible for states to keep hidden very significant information about their military capabilities and activities if they choose to do so. National technical means have important limitations. Even the United States, with by far the heaviest investment in national technical means of verification of any state, has no more than half a dozen spy satellites in orbit at any given time, each of which is limited in its ability to observe at night or through clouds or in its resolution. Large parts of the planet go unobserved each day, and vast quantities of data that do come in are never analyzed.

These external shocks—the advent of nuclear weapons, the information revolution, and the Gulf War—undoubtedly spurred the evolution of the norm of transparency in crucial ways. But that is far from the whole story. Until quite recently, most major powers vigorously contested this "rational" solution to the advent of nuclear weapons. The norm remains contested in many parts of the world and by many countries that both possess and are threatened by nuclear weapons, such as China, India, and Pakistan. Although voluntary transparency may be a "rational" response to life in a dangerous world, it is not the only "rational" response available to states.

Each of the three factors is a necessary but not sufficient condition to explain the evolution of the norm. The initial U.S. promotion of the norm was essential, but on its own it was unsuccessful. The U.S. position was effectively resisted by most other countries for many decades even when U.S. power was at its peak. Cooperating norms such as democratization and nonuse of weapons of mass destruction were likewise relevant, but neither democracy nor abhorrence of particularly destructive weapons had in the past led to a norm of transparency. Environment conditions such as power relationships and changing technology, although essential, do not by themselves account for the evolution of the norm of transparency.

Although evolutionary theory, with its emphasis on the role of contingency, is inherently nonpredictive, attention to the factors described above provides insight into the trends that bear watching. Since the norm is already prominent, the U.S. role in promoting it should no longer be necessary. Indeed, as the debate over the Chemical Weapons Convention shows, the U.S. has found that transparency now often goes further than the U.S. would prefer. Interaction with other norms is likely to remain positive. For example, the norm opposing the use of weapons of mass destruction appears well entrenched. In addition, few governments are able to resist

the demands of their populations for greater levels of accountability and democracy. Environmental conditions may cut both ways. The information revolution will reduce the costs of gathering and transmitting information even further, but other technologies may make it easier to hide military capabilities and activities.

The true wild card in evolution is the emergence of new mutations, and there may be a new norm on the scene that would directly challenge the norm of transparency. To date, transparency in the security field has not encompassed economically significant information. As the degree of transparency called for grows, the information involved will increasingly have economic value, as illustrated by the transparency requirements of the Chemical Weapons Convention. The economic value of proprietary commercial information, rather than the military value of security information, may be the chief allele in the future competition with the norm of transparency.

Other Examples of Norm Evolution

Although the constructivist literature universally avoids explicit theorizing about why one norm rather than another comes to dominate, virtually every empirical study of the spread of a given norm focuses on the two variables of entrepreneurship and coherence, in addition to the environmental conditions already familiar from standard international relations theory. For example, the growing literature on the emergence of norms constraining the possession and use of weapons of mass destruction points both to the "self-conscious efforts on the part of some to foster a normative stigma," as one study put it, and to the logical connection with previously established norms of the illegitimacy of using "disproportionate" force or attacking noncombatants (Price and Tannenwald, 1994). Another study evaluating the new norm that allows and sometimes insists on military intervention for humanitarian purposes, even when no geopolitical "interests" are at stake, also concentrates on the importance of the larger normative environment, particularly multilateralism. This study argues that "mutually reinforcing and logically consistent norms appear to be harder to attack and to have an advantage in normative contestation that goes on in social life" (Finnemore, 1994). In Goldstein's innovative article on the role of ideas in U.S. trade policies, she argues that in times of crisis, new ideas are demanded. Two things will determine which new idea is ultimately accepted: which ones are supplied; and of these which "fit" well with existing structures (Goldstein, 1989:32). She does not expand theoretically on these claims.

Nadelmann's review of a whole host of norms that prohibit once-acceptable behavior provides a particularly useful comparison of two cases in which the same norm entrepreneur at the same time tried to promote two related norms, one of which succeeded and one of which failed, the only difference between the two cases being the presence or absence of an agreed larger normative framework. The U.S. role in delegitimizing the recreational use of drugs on a global scale is relatively well known and well documented. Opium and cocaine, for example, were widely legal and available a century ago, but they are not legal anywhere now. What is less well known is that for decades the United States took very similar steps to try to create an anti-alcohol norm, but failed miserably, even though the economic and social costs of alcohol abuse in most societies are demonstrably far greater than the costs of abuse of other drugs (Nadelmann, 1990).

One of the most ambitious efforts to address the role of ideas in international relations, the edited volume by Goldstein and Keohane, contains several contributions that indicate the importance of both norm entrepreneurship and the broader normative climate. In his discussion of the institutionalization of Keynesian ideas in the postwar economic order, for example, Ikenberry stresses two causal factors, "the political standing of the ideas' advocates (i.e., the strength of the individual norm

entrepreneurs), and a more diffuse shift in the norm web about the appropriate socioeconomic role of government" (1993). Similarly, in her discussion about the evolution of human rights norms, Sikkink stresses the role of entrepreneurs in the form of nongovernmental organizations forcing government to accept language in international agreements, along with broader changes in widely held beliefs about the scope of the authority governments should be allowed to exercise over their citizens (Sikkink, 1993).

Conclusion

Prevailing theoretical approaches to understanding changes in state behavior are based on an implicitly evolutionary framework that is seriously out of date. Neorealism draws its view of the system from a time when war was the primary agent of selection, and selection occurred at the level of the organism—that is, the state. Neorealism assumes that states are obsessed by relative power and made inherently and irremediably insecure by anarchy. But this is not a permanent condition. It is merely a once-dominant phenotype of an evolving population. Under current circumstances, war no longer shapes the behavior of major states to anything like the degree it once did, and new considerations are shaping state behavior. International change even in the security field is becoming far more a question of competing ideas, not competing military organizations.

Population genetics provides a valuable framework for considering the question of interest to this study: given that there are competing norms, what determines whether one will win out over the other or if both will be maintained in the population. Population genetics asks the same types of questions: in the end, will only one of a set of competing alleles survive (i.e., will the population become fixed for that allele), or will the population be polymorphic? The analogy is useful because of the extensive parallels between the two types of evolution. Both norms and genes are units of instruction. Both are transmitted from one individual to another through a system of inheritance. Both are contested, that is, there are variants of traits competing to be reproduced. Both are subject to selection forces that determine which of the competitors will come to dominate. And both require three simultaneously favorable conditions for the spread of new mutants: initial prominence, coherence with other genes/norms present in the same organism, and advantageous environmental conditions.

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International and Regional Mechanisms

Laura Neuman

United Nations

1. Article 19 of the UN Declaration of Human Rights
2. Convention Against Corruption includes call for access to information for all signatory states
3. UN Resolutions since 1997
4. UNDP supports adoption of ATI in member states
5. Special Rapporteur
6. Internal UN information policies

European Union

1. Mention of ATI included in Treaty on European Union and Fundamental Rights
2. Research on ATI legislation in member countries
3. European Transparency Initiative

OECD

1. Internal Disclosure Policy
2. Supporting member states through Department of Government-Citizen Relations

Council of Europe

1. Recommendation Rec (2002)2 “Access to Official Documents”
2. Ad hoc advisory group, “Group of Specialists on Access to Official Documents”
3. Working on Convention for Access to Information (legally binding for member states)
4. Internal rules on access to documents

OAS

1. Article 19, Universal Declaration of Human Rights
2. Article 19, International Covenant on Civil and Political Rights
3. Article 13, Inter-American Human Rights Convention
4. Articles 4 and 6, Inter-American Democratic Charter
5. Declaration at the Special Summit of the Americas, Nuevo Leon (2004)
6. General Assembly Res 2252 “Access to Public Information: Strengthening Democracy”, Santo Domingo (2006)
7. General Assembly Res 2121 “Access to Public Information: Strengthening Democracy”, Ft. Lauderdale (2005)
8. Office of the Special Rapporteur for Freedom of Expression

African Union

1. Included in Charter on Human and People’s Rights
2. Part of African Union Convention on Preventing and Combating Corruption
3. Part of African Youth Charter

Development Banks

1. Internal policies
2. Encourage states that receive funding
3. Provide funding specifically for ATI

Journal of Conflict Resolution

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Do International Human Rights Treaties Improve Respect for Human Rights?

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Journal of Conflict Resolution 2005; 49; 925

DOI: 10.1177/0022002705281667

The online version of this article can be found at:
<http://jcr.sagepub.com/cgi/content/abstract/49/6/925>

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Do International Human Rights Treaties Improve Respect for Human Rights?

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After the nonbinding Universal Declaration of Human Rights, many global and regional human rights treaties have been concluded. Critics argue that these are unlikely to have made any actual difference in reality. Others contend that international regimes can improve respect for human rights in state parties, particularly in more democratic countries or countries with a strong civil society devoted to human rights and with transnational links. The findings suggest that rarely does treaty ratification have unconditional effects on human rights. Instead, improvement in human rights is typically more likely the more democratic the country or the more international nongovernmental organizations its citizens participate in. Conversely, in very autocratic regimes with weak civil society, ratification can be expected to have no effect and is sometimes even associated with more rights violation.

Keywords: *human rights; ratification; democracy; civil society*

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

—Cassel (2001, 121)

Do international human rights treaties make a difference in reality? Does their ratification lead to improved respect for human rights in the country ratifying the treaty's provisions? This is the question examined in this article. It starts with a brief overview of what theory would lead us to expect regarding the effectiveness of international human rights treaties (or human rights regimes more generally). We start with theories that would lead us to expect little, moving on to theories that generate more optimistic predictions toward the potentially beneficial effects of international human rights regimes. Next, we review the existing empirical studies on this subject. The description of our research design is followed by a presentation and discussion of results and a

AUTHOR'S NOTE: An earlier version of this article was presented at the 23rd Annual Meeting on New Political Economy, "Analyzing International Conflict Resolution." Many thanks to participants for helpful comments. Special thanks to Lars Feld, Stefan Voigt, Eric Posner, Daniel Sutter, Anne van Aaken, Heike Jung, and Steven C. Poe. Financial assistance from the Leverhulme Trust is gratefully acknowledged. The data and a do-file replicating the reported results are available at <http://www.jcr.sagepub.com/cgi/content/full/49/6/925/DC1/>.

JOURNAL OF CONFLICT RESOLUTION, Vol. 49 No. 6, December 2005 925-953
DOI: 10.1177/0022002705281667
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conclusion. In short, we find that a beneficial effect of ratification of human rights treaties is typically conditional on the extent of democracy and the strength of civil society groups as measured by participation in nongovernmental organizations (NGOs) with international linkages. In the absence of democracy and a strong civil society, treaty ratification has no effect and is possibly even associated with more human rights violations.

THEORETICAL EXPECTATIONS

A (*neo*)realist international relations perspective regards countries as unitary actors with given preferences maximizing their own utility without regard to the welfare of other actors. Things happen if powerful countries want them to happen (Krasner 1993). In principle, this perspective should bode well for human rights. The United States, as arguably the most powerful country in the world, has a relatively good domestic human rights record despite emerging problems in the wake of 9/11, together with some commitment to pursue human rights improvements in its foreign policy. For example, its Foreign Assistance Act promises that no financial assistance will be given to states engaging “in a consistent pattern of gross violations of internationally recognized human rights” (U.S. Code Title 21, § 2151n). The same is true to a larger or smaller extent for practically all developed countries and for the European Community (European Commission 2001). However, powerful countries are rarely consistent in their application of human rights standards to their foreign policy, and they are rarely willing to grant human rights questions priority (Krasner 1993; Donnelly 1998; Goldsmith and Posner 2005). Powerful countries rarely employ sanctions—political, economic, military, or otherwise—to coerce other countries into improving their human rights record. Indeed, for the most part, countries take relatively little interest in the extent of human rights violations in other countries, unless one of their own citizens is affected. This is because contrary to, say, the extent of trade openness, a country and its citizens are hardly affected if the human rights of citizens from other countries are violated in other countries. Human rights violating countries often avoid subjecting foreign citizens, particularly from powerful Western countries, to the same extent of human rights violation as their own domestic citizens, exactly in order to keep the foreign country disinterested.

A further consequence is that the international human rights regimes are comparatively weak compared to, say, the regimes of finance or trade. No competitive market forces drive countries toward compliance, nor are there strong monitoring and enforcement mechanisms. Monitoring, compliance, and enforcement provisions are nonexistent, voluntary, or weak or deficient (Bayefsky 2001). Without powerful countries taking a strong interest in the effectiveness of international human rights regimes, there is little cost for parties with a poor human rights record to ratify the treaty as a symbolic gesture of good will, instead maintaining its poor record in actual reality (Goldsmith and Posner 2005). A (*neo*)realist perspective would therefore not expect that international human rights regimes make much difference in reality.

Hathaway (2002a, 2002-20) has provided an interesting new theory on the dual role of human rights treaties that would even suggest that treaty ratification can be associated with worse performance. She is no representative of (neo)realism, but her theory is most relevant if the fundamental assumptions of realism hold true, particularly the lack of interest by powerful countries in combination with the comparatively weak monitoring and enforcement mechanisms. Noting that treaty ratification plays an “expressive role” as well, communicating to the outside world that the country is committed to human rights, she argues that treaty ratification can deflect internal or external pressure for real change. In combination with the poor monitoring and enforcement mechanisms of international human rights treaties, countries with poor performance can not only get away with continued human rights violations but may at times even step up violations in the belief that the nominal gesture of treaty ratification will shield them somewhat from pressure. In this view, human rights treaty ratification can even lead to worse human rights records.

Compared to (neo)realism, an *institutionalist* perspective stresses more the beneficial effects of international regimes, helping countries to reap the mutual, often long-term benefits of cooperation. Regimes in this perspective offer a way out of the prisoner’s dilemma in order to achieve the Pareto optimum, which is unavailable if countries always seize their short-term selfish own interest. It is unclear, however, whether an institutionalist perspective would lead one to expect much more of international human rights regimes than a neorealist perspective. This is because, as mentioned already, it is somewhat questionable whether there are substantial *mutual* benefits from greater respect for human rights across countries (Krasner 1993). Given that a country’s citizens often reside in many foreign countries, a country with high human rights standards might be concerned about the fate of its own citizens abroad and therefore benefit from an effective international human rights regime. The same is true for people from the same ethnic or religious group residing in foreign countries (Goldsmith and Posner 2005). However, countries with low standards are not likely to share such benefits. Given they do not respect the human rights of their citizens living in their own country, why would they benefit from knowing that the human rights of their citizens are respected abroad? As Moravcsik (2000, 217) has put it, “Unlike international institutions governing trade, monetary, environmental or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.” Furthermore, even if international human rights treaties could be interpreted as cooperation mechanisms to overcome the prisoner’s dilemma to the mutual benefit of all parties, it is questionable whether deep cooperation is likely to be achieved. Economists have argued that enforcement mechanisms such as sanctions to deter noncompliance have to be self-enforcing in the sense that recourse to an external enforcement agency is not feasible and has to be renegotiation-proof. A sanction will only be credible if the threatening group of countries is better off actually executing the sanction than refraining from execution and renegotiating a new agreement with the free-riding country. Treaties that are not renegotiation-proof cannot deter free riding because potential free riders will anticipate that they could strike another deal after free riding and could therefore get away without being

punished. Applying game theory to analyze the consequences of the requirements of self-enforceability and renegotiation-proofness on multilateral cooperation, economists have come to pessimistic conclusions (see Neumayer 2001 for details): a self-enforcing and renegotiation-proof international treaty will *either* consist of only a small subset of countries *or*, if many countries are parties to the treaty, then the gains from cooperation relative to the noncooperative equilibrium are very small. In other words, cooperation is either narrow (instead of wide) or shallow (instead of deep). International relations theorists Downs, Rocke, and Barsoom (1996) provide very similar arguments. An institutionalist perspective would therefore not generate optimistic expectations regarding the effects of international human rights regimes.

From a *regime theory* perspective, which can be understood as a refinement of institutionalism, international treaties create binding obligations on the ratifying parties, which countries aspire to honor. Parties to international treaties generally aspire to comply in the spirit of *pacta sunt servanda* (agreements are to be kept and honored), where “compliance is the normal organizational presumption” (Chayes and Chayes 1993, 179). Otherwise, states would not engage in the often painstakingly long negotiations to hammer out all the details of such treaties. The regime’s norms are particularly likely to change regime parties’ behavior if they are widely regarded as the result of a fair and legitimate process and if they concur with widely shared substantive notions of justice since this bolsters peer pressure to comply with the norms—see Franck (1995), who suggests that international human rights treaties generally fare well on this account. However, treaty norms are often understood to represent long-term desirable goals. Not surprisingly, then, norms are set above a level that many participating countries can or want to comply with immediately or within the foreseeable future. Furthermore, Mitchell (1996, 25) and Chayes and Chayes (1993, 176) point out that full compliance is neither a necessary nor a sufficient condition for the effectiveness of an international regime. Instead, what matters is that overall compliance is at an acceptable level. These high standards often perform the function of setting targets to which parties are supposed to move toward over time, and compliance problems are not so much the consequence of deliberate noncompliance but are due to a lack of compliance capacity (Chayes and Chayes 1993, 1995). As Levy, Keohane, and Haas (1993, 404) observe, high regime standards serve many functions, such as generating political concern in low-standard countries and setting normative goals for them, communicating the intensity of preferences among regime members, and legitimating technical aid or outright transfer payments to improve the capacity to comply with the norms that might otherwise be denounced as bribes or blackmail. In this “managerial model” of international regimes, the fact that sanctions against human rights offenders are rarely used is not a problem since it is not sanctions but assistance for tackling insufficient compliance capacity that matters. Noncompliance is not an enforcement but a management problem.

Regime theory would lead to expectations concerning the effect of international human rights treaties that are optimistic, but only rather cautiously so. This is because such treaties do not fit as well into the theory as international treaties in other areas. As Chayes and Chayes (1993, 197) themselves point out, international human rights treaties are “an extreme case of time lag between undertaking and performance.” Fur-

thermore, contrary to the general presumption that noncompliance is not intentional, it is admitted that with respect to international human rights treaties, countries sometimes become state parties without any intention of compliance, perhaps “to appease a domestic or international constituency” (Chayes and Chayes 1993, 187). In such cases, pressure exerted by NGOs can be important (Chayes and Chayes 1995, chap. 11), which provides a link to the theory of transnational human rights advocacy networks discussed below. Last, international human rights treaties do not offer much in terms of assistance for tackling insufficient compliance capacity. One possible reason could be that state parties might not consider noncompliance with human rights treaty norms as caused by insufficient compliance capacity. After all, one could argue that no capacity problems hinder any state from refraining to engage in human rights violations. However, such a view does not take into account that human rights violations are often undertaken by lower tier governmental officials (police, military, and other security forces) whose behavior is not necessarily fully under the control of the central government. Educating and training these officials in human rights issues and changing their incentive structures as well as investigating and prosecuting continued rights violations might well be constrained by limited capacity.

Contrary to the theories looked at so far, which almost exclusively only deal with states as unitary actors and state-to-state behavior in the international arena, the next three theories place much emphasis on the interaction between states and domestic groups. The *transnational legal process model* addresses the process through which state actors internalize norms codified in international treaties (Koh 1996, 1998). Such internalization is regarded as the final phase of a three-step process of interaction, interpretation, and internalization. Some transnational actors such as diplomats, NGOs, and individual “transnational norm entrepreneurs” who form a kind of “epistemic human rights community” initiate an interaction (or series of interactions), which might lead to the negotiation of an international human rights treaty. The final treaty text to be concluded represents the common interpretation of norms, agreed on by state parties after a series of interactions at various drafting stages. Regular follow-on meetings provide opportunities for further interactions and interpretations, which gradually leads noncomplying state parties to be persuaded of the validity of the norms and therefore to accept and internalize them. The broader the group of actors involved at the various stages of interactions, the more likely internalization is to follow. This calls for the inclusion of intergovernmental organizations, NGOs, private individuals, and perhaps even business groups. Of course, as Koh (1998, 1399) admits, the process does not always work well and sometimes fails spectacularly in certain countries, but norm violation by a few does not prevent norm obedience by most states. A change in preferences is of course in conflict with (neo)realist theories built around the assumption of a given set of preferences, but constructivist approaches allow for preference change, noting that “the international system can change what states *want*” and can change “state action, not by constraining states with a given set of preferences from acting, but by changing their preferences” (Finnemore 1996, 5f.). Related is Goodman and Jinks’s (forthcoming) view on how actors become socialized and acculturated into following treaty norms. From their perspective, it is not so much persuasion—a form of rational acceptance—that matters but that regular interactions lead to cognitive and

social pressures for state actors to conform with treaty norms. Such often implicit pressures exist in the form of social-psychological benefits of conformity such as the “cognitive comfort” of satisfying social expectations and of being accepted and valued as an insider group member and in the form of the related costs of nonconformity such as dissonance and shunning. The result is conformity with treaty norms rather than their acceptance and internalization.

The transnational legal process model and related theories might be able to explain norm internalization or norm conformance if states do not incur great costs in complying with treaty norms. What if, however, there are strong incentives to maintain human rights violations? Will those who undertake human rights violations to maintain their grip on power be persuaded by the validity of human rights norms or be socially acculturated into human rights protection? This seems highly unlikely. The remaining two theories therefore address the issue of how domestic groups, perhaps in interaction with transnational actors, can use international human rights treaties to pressure state actors into compliance. The *liberal* international relations perspective abandons the realist concept of states as unitary actors, arguing instead that states are made up of a large number of actors with different interests, which is why domestic politics matters (Moravcsik 1997). International human rights regimes can be effective if domestic groups, be they nongovernmental organizations, protest movements, political parties, or any other group, can use the regime to pressure their domestic government into better respect for human rights (Helfer and Slaughter 1997). Obviously, there is more leeway for such pressure when the domestic political regime allows opposition and the exertion of peaceful political pressure on the government. Bringing lawsuits against human rights offenders to domestic courts can also be important (Hathaway 2002a). In consequence, a liberal perspective would lead us to expect that international human rights regimes are particularly effective in political democracies and where the rule of law prevails. Such countries will find it more difficult to exploit the “expressive role” of international human rights treaties without undertaking any actual change (Hathaway 2002a). Of course, in as much as the theory argues with recourse to rule of law rather than political democracy, there is the danger of tautology since human rights are partly about access to legal process and the right to lawful treatment.

The *theory of transnational human rights advocacy networks* predicts that international human rights regimes can improve actual performance where such networks are strong (Risse, Ropp, and Sikkink 1999; Schmitz and Sikkink 2002; Hafner-Burton and Tsutsui 2005). Networks consist of international human rights NGOs such as Amnesty International or Human Rights Watch, together with domestic NGOs and other civil society groups, parties, or the media committed to human rights. Improvement in human rights is regarded as a process going through a “spiral model” that takes five steps—namely, from unconstrained repression to rule-consistent behavior via a period of denial, tactical concessions, and prescriptive status. Movement through the stages is not inevitable and can take a very short or very long period of time, depending on the country in question and the pressure it is under at each stage. In the beginning, domestic political opposition is too weak to constrain human rights violations, and the country manages to escape the attention of transnational advocacy networks. However, after some time and often triggered by events of particularly gross human rights

violations, the network starts putting the regime under pressure via disseminating information, shaming the offending regime, and mobilizing international public opinion against it, as well as persuading strong states to target the country with open criticism as well as diplomatic, aid, trade, and other policy measures. The offending government reacts with denial, denouncing the universality of the human rights invoked and rejecting criticism as interference with its sovereignty. At this critical stage, it is important that the pressure on the offending country is maintained and international human rights regimes help in justifying the universal applicability of human rights. Few governments are willing to accept a positioning of their country as a rogue state. Under sustained pressure, they engage in tactical concessions in the hope of diffusing the criticism, often in the form of releasing some political prisoners, lifting some of the worst restrictions of civil liberties, and withdrawing some of the worst violations of human rights. A further possible concession could be the ratification of human rights treaties. The regime often underestimates that these concessions help mobilizing and strengthening domestic groups, which, under the protection and with the help of transnational networks, push for further improvements in human rights. The domestic groups ally with the transnational networks to exert pressure on the government "from below" and "from above." Pressure by powerful countries can be helpful if applied consistently and with a long-term commitment. Having undertaken tactical concessions, governments can no longer deny the validity of human rights in principle. They slowly lose control over the process they have initiated. Their leaders' rhetorical embrace of human rights is used by domestic and foreign groups against them in their call for the actual realization of human rights. A process of "controlled liberalization" takes place, during which the old regime is often split between a reformist and reactionary faction. Crushing the domestic opposition is often no longer an option unless the country is powerful enough to weather the adverse consequences for the government (e.g., the Tiananmen Square massacre in China). The reformist faction therefore often gains the upper hand, with the consequence that further reforms become more likely. If the mounting pressure is sufficiently strong, then human rights improvements stop being ad hoc and at the total discretion of the regime and start becoming institutionalized via legal or even constitutional changes. At this stage, human rights acquire prescriptive status, and governments stop dismissing human rights complaints as interference in internal affairs. In the final phase, governmental behavior becomes consistent with the human rights norms either because the government has sufficiently reformed or has stepped down and is being succeeded by a former opposition group, which is committed to human rights-consistent behavior. Human rights violations can still happen at this stage, but they are no longer officially pursued by governmental officials, and its perpetrators are likely to become the subject of state prosecution.

What are the implications of this theory for the likely effect of human rights treaty ratification on human rights performance? Risse, Ropp, and Sikkink (1999, 29) explicitly regard ratification as a manifestation of the phase of prescriptive status. If this is the case, then a positive association between ratification and improvements in human rights is likely, not least because the process of rights improvement is already well under way. It also means that ratification is more a manifestation of human rights improvement rather than a cause of it. However, as already mentioned, ratification can

TABLE 1
Summary of Theoretical Expectations on the Impact of
Human Rights Treaty Ratification

<i>Theory</i>	<i>Impact on Human Rights Performance</i>
(Neo)realism	Pessimism: No effect and potentially even negative effect
Institutionalism	Pessimism: No effect
Regime theory	Cautious optimism: Possibly long-term positive effects
Transnational legal process	Optimism: Positive effects
Liberalism	Contingent optimism: Positive effect dependent on degree of democracy
Transnational human rights advocacy networks	Contingent optimism: Positive effect dependent on strength of human rights civil society with international linkages

also form part of the tactical concessions. If so, then ratification can be more causally instrumental in bringing about human rights improvement if the increased attention, monitoring, and reporting, together with the formal acceptance of the validity of human rights by the government, allow the transnational networks in alliance with domestic groups to step up the pressure on human rights-violating countries. Risse (2002, 45) concludes from qualitative studies of human rights change in eleven countries that in all cases, ratification of international human rights treaties preceded respect for human rights.

Table 1 provides a summary of theoretical expectations on whether international human rights treaties improve respect for human rights. Neither (neo)realist nor institutionalist perspectives would lead one to expect much of international human rights treaties. Indeed, such treaties might even lead to a worsening of human rights performance. Regime theory leads to more optimistic conclusions, but only rather cautiously so, as explained above. The transnational legal process model provides an optimistic outlook, as do the remaining two theories. However, in the liberal theory, the effect of treaty ratification is likely to be contingent on the extent to which the domestic political regime is democratic, whereas in the theory of transnational human rights advocacy networks, the effect is contingent on the existence of a vibrant human rights civil society with strong international links.

REVIEW OF EXISTING STUDIES

To my knowledge, only three studies have tried to quantitatively assess whether ratification of human rights treaties makes a difference in reality. Keith (1999) analyzes whether ratification of the International Covenant on Civil and Political Rights (ICCPR) has had an effect on civil and political rights as measured by Freedom House and on personal integrity rights, using the same source as this article's analysis (see description below). In a first bivariate test of differences of means, she finds that state parties often have a better human rights record than nonstate parties. Second, applying tests of differences of means for each state party comparing the two years prior to rati-

fication with periods of various length after ratification, she finds no statistically significant differences. Third, in multivariate ordinary least squares (OLS) analysis with control variables, including the lagged dependent variable, she also fails to find any statistically significant influence of ICCPR ratification on either measure of human rights.

Hathaway's (2002a) study is much more comprehensive than that of Keith (1999), looking at a wide range of human rights treaties (see also Hathaway 2003). To start with, she uses a magnitude score of genocide/politicide as a measure of group integrity rights violation taken from the U.S. State Failure Task Force Project and the civil liberty index from Freedom House. In addition, she codes her own measures of torture and fair trial from data contained in the U.S. Department of State's Country Reports on Human Rights. She measures women's political rights by the percentage of men in each country's legislature. This is less convincing than the other measures since the relevant treaty only requires that women shall be eligible for election but does not prescribe a certain share of women in parliament. She looks at ratification of the Genocide Convention, the ICCPR, the Torture Convention, and the Convention on the Political Rights of Women, which are all open to universal membership, as well as a number of regional human rights treaties. As a first test, she compares the average human rights score of countries that have ratified the treaty with those that have not. Like Keith, she finds that ratifying countries typically have a better record than nonratifying ones, with the exception of some regional treaties. Second, she groups countries according to the interval of the human rights measure in which they fall and plots the average ratification rate for each interval. Third, she performs a multivariate ordered probit analysis with additional control variables, including the lagged dependent variable and a linear time trend. In this analysis, she takes the number of years passed since ratification rather than a ratification dummy as her variable of main interest. As justification, she argues that "the effect of treaties may be cumulative and long-term" and that "operationalizing the treaty variable this way has the effect of magnifying changes in country practices over time, whether positive or negative" (Hathaway 2002a, 1990f.). In the second and third type of tests, Hathaway finds no evidence that ratification of international human rights treaties is systematically associated with better human rights performance. Indeed, in some cases, she finds that ratification is associated with worse performance. She finds some evidence as well, however, that, depending on the definition of what constitutes a full democracy, human rights treaty ratification in fully democratic countries can be associated with a better human rights record.

Hafner-Burton and Tsutsui (forthcoming) do not address regional human rights treaties, but in addition to the ICCPR, the Torture Convention, and the Convention on the Elimination of Discrimination Against Women, they also look at three further universal treaties—namely, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of Racial Discrimination; and the Convention on the Rights of the Child. Given that personal integrity rights form their dependent variable, the selection of treaties appears inappropriate since only the Torture Convention and the ICCPR contain provisions that are directly related to such rights. Using ordered probit analysis with a lagged dependent variable and other control variables, they find that the number of years since ratification of the ICCPR and the Torture

Convention is associated with a worse human rights record.¹ The effect seems to lose statistical significance if year-specific time dummies are included that account for a global trend in human rights performance over time. One of the interesting findings of this study is that, besides democracy and per capita income, the number of international NGOs (INGOs) that citizens from a country participate in is associated with a better human rights record. This is interpreted to the effect that linkage to international civil society induces countries to improve their respect for human rights.

RESEARCH DESIGN

THE DEPENDENT VARIABLES

Human rights performance is not easily measurable. We will distinguish between civil rights and personal integrity rights (for various reasons, we do not include group integrity rights, i.e., freedom from the calculated physical destruction of a communal group in whole or in part).² Civil rights typically refer to such rights as the freedom of speech, the freedom of assembly and association, and the freedom of religious expression. Personal integrity rights typically refer to such rights as freedom from unlawful and political imprisonment, freedom from torture, freedom from unlawful physical or other harm, freedom from cruel and inhumane treatment, and the right to a fair trial. Personal integrity rights violations are more difficult to justify and are less subject to the relativist challenge. There is little justification for political imprisonment, torture, and murder, which amounts to political terrorism. Civil rights violations do not carry quite the same status.³

As our measure of personal integrity rights, we use data from the two Purdue Political Terror Scales (PTS). One of the two PTS is based on a codification of country information from Amnesty International's annual human rights reports to a scale from 1 (*best*) to 5 (*worst*). Analogously, the other scale is based on information from the U.S. Department of State's Country Reports on Human Rights Practices. Codification is as follows:

1. Countries . . . under a secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional. . . . Political murders are extraordinarily rare.

1. Footnote 17 of their article would suggest that the results uphold if dummy variables for ratification status rather than number of years since ratification are used.

2. To start with, Hathaway (2002a) uses a combined measure of genocide and politicide (calculated destruction of political opposition), whereas the relevant Convention on the Prevention and Punishment of the Crime of Genocide from 1948 refers to genocide only. In principle, the problem can be mended since Harff (2003) provides a detailed list that allows distinction. However, there are very few events of genocide, which means there is very little variation in the data, rendering statistical estimation problematic. Furthermore, genocide is the type of human rights violation for which a significant effect of treaty ratification on actual behavior is least theoretically plausible.

3. The argument that these rights are contingent on a particular form of Western culture and that a certain amount of civil rights violations is somehow "necessary" for the stability of certain countries and the welfare of their people cannot be as readily dismissed as the argument that political imprisonment, torture, and murder are "necessary" for the same purpose.

2. There is a limited amount of imprisonment for non-violent political activity. However, few are affected, torture and beatings are exceptional. . . . Political murder is rare.
3. There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without trial, for political views is accepted. . . .
4. The practices of Level 3 are expanded to larger numbers. Murders, disappearances, and torture are a common part of life. . . . In spite of its generality, on this level violence affects primarily those who interest themselves in politics or ideas.
5. The violence of Level 4 has been extended to the whole population. . . . The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals.

We use the measure based on Amnesty International reports below for our main estimations and the State Department measure in the sensitivity analysis. The State Department reports have been frequently charged with biased reporting in favor of allies of the United States, for which Poe, Vazquez, and Carey (2001) find some evidence, even though the bias is estimated to have only a small effect and there is convergence in the reports over time. Another advantage is that Amnesty International bases its reports on trial attendance, whereas State Department officials do not follow this practice (Poe, Vazquez, and Carey 2001). One apparent disadvantage of the Amnesty International reports is that they tend, particularly in the early years, to cover fewer countries, neglecting the ones with few, if any, human rights problems. Of course, these are also the countries for which international human rights treaty ratification almost by definition cannot have much impact. We will deal with the nonrandom sample selection with the help of a Heckman (1979) selection model in the sensitivity analysis. Data are taken from Gibney (2004), who provides data from 1980 onwards.⁴

To measure civil rights, we employ the civil liberties index published by Freedom House (2004), which is available from 1972 onwards. Contrary to Keith (1999) and in accordance with Hathaway (2002a), we do not add the political rights measure to the civil liberties index since these political rights are almost synonymous with political democracy, which is not directly required by any of the human rights treaties looked at. The civil liberties index is based on surveys among experts assessing the extent to which a country effectively respects civil liberties, subsumed under the headings of freedom of expression and belief, associational and organizational rights, rule of law, and personal autonomy and individual rights. The index is measured on a 1 (*best*) to 7 (*worst*) scale. Note that Freedom House's civil liberties index has some overlap with personal integrity rights as the following criterion forms part of the rule-of-law subcomponent of the index: "Is there protection from police terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system?" Unfortunately, Freedom House does not publish subcomponent data, so it is not possi-

4. Data can be extended back to 1976, using data provided by Poe, Tate, and Keith (1999), but we do not do so for a number of reasons. First, data from the late 1970s cover fewer countries, whereas from 1980 onwards, the coverage is higher. Second, the quality of the reports has improved over time and is weakest for the early years. Third, Mark Gibney coded the large majority of cases from 1980 onwards, whereas the 1976 to 1979 data have been exclusively coded by Steven C. Poe and Neal Tate, such that using data from 1980 onwards reduces the risk of intercoder inconsistency. This information is partly based on Poe, Tate, and Keith (1999) and partly on a personal communication with Steven C. Poe (2005).

ble to isolate the personal integrity rights from the civil liberties aspect. One should keep in mind, however, that there are fourteen other criteria closely related to civil liberties. The Freedom House measure is therefore predominantly a measure of civil rights, not of personal integrity rights.

METHOD

We estimate variants of the following model:

$$y_{it} = \alpha + \beta x'_{it} + \gamma_t + (a_i + u_{it}).$$

Time is indicated by t and countries by i , y is a measure of human rights violation, α is a constant, x' contains the explanatory variables, and β is the corresponding vector of coefficients to be estimated. The γ variables are year-specific dummy variables. Their inclusion lets each year have its own intercept to allow for aggregate changes in human rights that affect all countries equally. Its main function is to ensure that the explanatory variables and our measures of human rights treaty ratification in particular do not merely spuriously pick up global trends in human rights performance. Year dummies are more flexible than the linear time trend used by Hathaway (2002a). The end period of our analysis is generally 2001. We employ standard errors that are robust toward arbitrary heteroskedasticity and autocorrelation.

The a_i represent individual country effects, capturing cultural and other (approximately) time-invariant factors. Their inclusion ensures that unobserved country heterogeneity is accounted for. Again, the objective is to ensure that the explanatory variables do not pick up an effect that is spurious rather than substantive. For example, both Keith (1999) and Hathaway (2002a) find some evidence that the mean human rights performance of ratifying countries is above the mean performance of nonratifying countries. However, countries with a better human rights record might also be more likely to ratify international human rights treaties. What matters is whether there is any change in human rights performance in countries after ratification. The fixed-effects estimator is based on the time variation within each cross-sectional unit only and thus provides a test of change over time.

Given the fact that the dependent variables are not continuously cardinal but ordered ordinal variables, one would ideally want to use an ordered logit or probit model, notwithstanding the fact that the vast majority of existing studies on the determinants of human rights violation do not use an ordered probit or logit estimator (e.g., Poe, Tate, and Keith 1999; Cingranelli and Richards 1999; Zanger 2000; Keith 1999). Unfortunately, the price to be paid for using ordered probit or logit is that country fixed effects cannot be included. The reason is that the statistic for computing a fixed-effects ordered logit or probit model is extremely complex, and there does not currently exist a routine in Stata or, to my knowledge at least, any other standard econometrics package to estimate such a model. Hathaway (2002a) tried to approximate a fixed-effects model by adding "by hand" country fixed effects to the ordered probit estimator in Stata. Unfortunately, this leads to biased coefficients and standard errors (Stata 2003). To account for both statistical problems, I first use a linear fixed-effects estimator, in

effect OLS with country dummies, but second also a standard ordered probit estimator without fixed effects.

A potential statistical problem is measurement error in the dependent variable. If it is merely random, then the only consequence is to raise standard errors and lower the precision of estimations. More problematic is measurement error that is *systematically related* to the treaty ratification variables. Goodman and Jinks (2003) argue that countries that have ratified a human rights treaty might be under increased scrutiny, providing greater access to information than nonratifying countries. If this is the case, then the reported human rights record can deteriorate after ratification, even though the actual human rights performance has not changed. On the other hand, Hathaway (2002a, 2000) infers from her readings of U.S. State Department reports that countries seem to receive lighter treatment in the year of and immediately following ratification, which would point in the opposite direction. In either case, the coefficient of the ratification variable and, to some extent, the coefficients of other variables as well will be biased. We will deal with this problem in the sensitivity analysis by dropping observations in the year of and two years immediately following ratification.

Yet another statistical problem is that, as already pointed out above, there is sample selection bias in the sense that the human rights measures are not reported for all countries for all years and that the missing values are likely to be nonrandomly distributed. This is a problem mainly for the personal integrity rights measures, whereas the civil rights measure of Freedom House covers almost all countries. We deal with this problem in the sensitivity analysis by applying a Heckman (1979) sample selection model.

THE EXPLANATORY VARIABLES

Our main variables of interest are dummy variables of whether a country has ratified or acceded to a specific human rights treaty in a given year. Note that this is independent of whether the treaty has already been in force in that year. Formally, countries are only bound to a treaty once the treaty has been ratified by the minimum number of countries specified for the agreement to come into force. However, we expect rational forward-looking governments to anticipate that a treaty will enter into force and therefore to engage in any behavioral changes they might contemplate already from the time of their own country's ratification. The variable starts with the year the treaty became open for ratification. For regional treaties, the variable is set to missing for countries outside the region since they cannot become a state party. We prefer ratification dummy variables to a specification that measures the number of years after ratification since the latter imposes the assumption that any effect of ratification is linearly increasing over time, which appears restrictive and may not hold true. We look at the following universal treaties:

- International Covenant on Civil and Political Rights (ICCPR): opened for signature and ratification December 15, 1966, after almost two decades of negotiations; entry into force March 23, 1976; 154 state parties as of November 24, 2004. This "most ambitious human rights treaty" (Goldsmith 2000, 329) covers both personal integrity rights and civil rights.

- The First Optional Protocol to the ICCPR: opening date and entry into force as ICCPR; 104 state parties as of November 24, 2004. Ratification of this optional protocol implies that state parties succumb to additional monitoring provisions. In particular, state parties recognize the authority of the Human Rights Committee established by the ICCPR to receive and consider complaints from individuals of signatory states concerning human rights abuse. The Human Rights Committee does not have any enforcement power, however, and relies on state parties' willingness to comply with its recommendations.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): opened for signature and ratification December 10, 1984; entry into force June 26, 1987; 139 state parties as of November 24, 2004. Being more detailed and specified in its requirements than the ICCPR, it bans torture under all circumstances. State parties can prosecute foreign offenders even if the offence took place outside its jurisdiction if the victim is a national of the state or if it holds the offender under its jurisdiction and does not extradite the suspect (article 5), which Hawkins (2004) hails as a major breakthrough for universal jurisdiction in cases of gross human rights violations.
- Articles 21 and 22 of the Convention against Torture: while not representing an optional protocol, parties can opt in to provisions similar to the ones of the First Optional Protocol to the ICCPR by accepting obligations under these two articles. Article 21 allows other state parties, and article 22 allows individuals to communicate alleged human rights violations to the Committee against Torture. Similar to the Optional Protocol to the ICCPR, the committee does not have any enforcement power. Since the provisions are relatively similar, varying mainly in who can bring a matter to the attention of the committee, the relevant dummy variable is coded as 1 whenever a country has declared its willingness to accept *either* article 21 *or* article 22.

In addition, we also look at regional human rights treaties in Europe, the Western Hemisphere, and Africa (no comparable treaties exist in the Arab world or in Asia):⁵

- European Convention for the Protection of Human Rights and Fundamental Freedoms: opened for signature and ratification November 4, 1950; entry into force September 3, 1953; forty-five state parties as of March 23, 2005. Covers both personal integrity and civil rights. It contains mechanisms allowing individuals and state parties to bring complaints against (other) state parties to a human rights commission and establishes the European Court of Human Rights. Generally considered a role model and the most successful and influential international human rights regime (Forsythe 2000; Rehman 2003).
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: opened for signature and ratification November 26, 1987; entry into force February 1, 1989; forty-five state parties as of March 23, 2005. Establishes a committee that can visit state parties with minimal advance notification to examine compliance with the convention.
- American Convention on Human Rights: opened for signature and ratification November 22, 1969; entry into force July 18, 1978; twenty-five state parties as of end 2003. Covers both personal integrity and civil rights. Similar to the European Convention, it contains a mechanism allowing individuals (as well as state parties) to file a complaint against any state party (complaint by other state party presupposes general acceptance of the state party against whom the complaint is directed to accept such a mechanism). Also establishes the Inter-American Court of Human Rights. Compared to its European counter-

5. There exists an Arab Human Rights Charter, adopted by the Council of the Arab League in 1994. However, despite "serious weakness of its provisions," it has not been ratified by a single state (An-Na'im 2001, 714).

part, the American human rights regime is considered weaker (Forsythe 2000; Rehman 2003).

- Inter-American Convention to Prevent and Punish Torture: opened for signature and ratification December 9, 1986; entry into force February 28, 1987; sixteen state parties as of end 2003.
- African Charter on Human and People's Rights: opened for signature and ratification June 27, 1981; entry into force October 21, 1986; fifty-one state parties. Covers both personal integrity and civil rights. Many rights are subject to "claw-back" provisions giving state parties the possibility to restrict the enjoyment of rights by domestic law (Rehman 2003). Establishes an advisory African Human Rights Commission. An African Court on Human and People's Rights was enacted in 1998 and entered into force January 25, 2004. Generally considered to be the weakest of the three regional human rights regimes (Forsythe 2000; Rehman 2003).

Data are taken from <http://www.unhcr.ch> for the universal treaties and from <http://conventions.coe.int>, <http://www.oas.org>, and <http://africaninstitute.org> for the regional treaties. It is clear that the fit between the coverage of these treaties and our dependent variables is not perfect. For example, the Torture Convention refers to torture only, but our measure of personal integrity rights covers other aspects such as political murder and disappearances. On one hand, this misfit is a disadvantage as it amounts to a kind of measurement error in the dependent variable, which renders the estimated coefficients less precise. On the other hand, the broader coverage of our dependent variables can also be of advantage, considering strategic behavior on the part of governments that might substitute one form of human rights abuse with another one, such that the overall performance does not actually improve. Goodman and Jinks (2003, 174) provide the example of Latin America in the late 1970s and early 1980s, when torture, political imprisonment, and unfair trials receded but were replaced with making unwanted people "disappear" without a trace.

Our choice of other explanatory variables is inspired by major prior studies analyzing the determinants of human rights performance, which have not addressed human rights treaty ratification, however. In particular, we draw on Zanger (2000) and Poe, Tate, and Keith (1999). Variables include a measure of the extent of external and internal armed conflict (Gleditsch et al. 2002), the Polity measure of political democracy (Marshall, Jaggers, and Gurr 2003), per capita income as a measure of economic development, population size (both in logged form with data from World Bank 2003), and the number of international NGOs with domestic participation, which we will interpret as a measure of civil society strength (taken from Wiik 2002, who uses the *Yearbook of International Organizations* as the source⁶). These variables also overlap to a large extent with the ones used by Keith (1999), Hathaway (2002a), and Hafner-Burton and Tsutsui (2005), but note that we normalize the international NGO participation variable by domestic population size to account for size differences across countries. Ideally, one would like to include only NGOs that have a human rights mission. Unfortunately, no comprehensive data for a large number of countries and years are available. Fortunately, however, Tsutsui and Wotipka (2004, 612), in their analysis of data from 1978, 1988, and 1998 for seventy-seven countries, find that general inter-

6. Data for missing years were interpolated.

national NGO participation is associated with participation in international human rights NGOs and “is a key factor in drawing citizens into human rights activism.” We therefore feel justified in using general NGO participation as a proxy variable for participation in human rights NGOs, but note that our estimates are likely to suffer from measurement error. This is exacerbated by the fact that we can only measure the number of NGOs, having to ignore issues of size, membership, organization, staffing, funding, and so on for lack of data. Despite measurement error, this is an important variable as both the transnational legal process model and the theory of transnational human rights advocacy networks emphasize the important role of NGOs, as do Chayes and Chayes (1995, chap. 11). Originally, to test the theoretical expectations more directly, we also include an interaction effect between democracy and ratification and between civil society strength and ratification. This provides a direct test of liberal theory and the theory of transnational human rights advocacy networks, which argue that the effect of ratification is contingent on the type of political regime and the strength of transnational links of domestic civil society, respectively.

Another potential control variable, albeit a highly contestable one, is the lagged dependent variable. Some argue for its inclusion partly on statistical grounds as it typically mitigates to a very large extent any problems with autocorrelation in the data. Theoretically, the lagged dependent variable should be included if human rights performance in one year truly affects human rights performance in the next year. This could be justified if, for example, there is reason to presume that a history of applying torture makes governmental officials accustomed or habituated to the application of torture. In such cases, even if torture were to become formally prohibited by the ruling political authorities, this might not effect a change in actual behavior by lower tier governmental officials or might effect a change only with substantial delay. Against the inclusion of a lagged dependent variable speaks that it typically absorbs an enormous amount of variation in the dependent variable, leaving little for the remaining independent variables to explain as well as sometimes leaving coefficients with the wrong (i.e., theoretically unexpected) sign (Achen 2000). In line with the existing studies, we will include a lagged dependent variable in our models to be estimated. Note that this can lead to some so-called Nickell (1981) bias in the estimations, which for large N becomes smaller as T increases, however. Dropping the lagged dependent variable from the models leads to generally similar results on our other explanatory variables, which suggests that our main conclusions are not much affected by the Nickell bias. Also note that the fixed-effects results for the regional human rights treaties can be inconsistent since N , the number of countries in the sample, is sometimes small, whereas the fixed-effects estimator is consistent for fixed T under the assumption that N is very large.

RESULTS

In the following tables, we start with fixed-effects regression, followed by ordered probit regression without fixed effects, as explained above. We first look at universal human rights treaties, followed by regional ones. We start with the effect of Torture

Convention ratification on personal integrity rights, for which results are reported in Table 2. We find that the ratification variable, democracy, and its interaction term are statistically significant in fixed-effects estimation (column 1). The interaction term with civil society strength is also significant, but the individual civil society component is not. Where interaction terms are statistically significant, one cannot interpret the coefficients on the individual components in the conventional way. Instead, the coefficient on, for example, the ratification variable in a model with a significant interaction term between ratification and civil society strength, as well as ratification and democracy, measures the effect of ratification on human rights violations when the civil society and the democracy variables take on a value of 0. In other words, it measures the effect of ratification in countries that are pure autocracies and have no civil society (note that the democracy measure was recoded such that a score of 0 represents pure autocracy, while 20 represents perfect democracy). Keeping these rules of interpretation in mind, the results suggest that ratification in pure autocracies with no civil society is associated with a worsening of human rights. However, ratification has a more and more beneficial effect on human rights the more democratic the country is and the stronger is its civil society. This follows from the fact that both interaction terms are statistically significant with negative coefficient signs. Democracy is associated with less human rights violation, whether or not the country has ratified. This follows from the individual democracy component being statistically significant with a negative coefficient sign. Civil society strength only lowers human rights violations in countries that have ratified. This follows from the significant interaction term together with the insignificant individual civil society component. The control variables generally test in accordance with expectations. Internal and external armed conflict as well as the lagged dependent variable are positively associated with rights violation, whereas the opposite is the case for per capita income. Population size does not matter. Ordered probit results are generally consistent, but the external conflict variable and the interaction term between ratification and civil society become insignificant, whereas population size becomes significant with the expected positive sign (column 2). When we repeat the estimations, but looking at acceptance of either article 21 or 22 of the Torture Convention, we find that the results are very much consistent with those for the Torture Convention itself (columns 3 and 4).

For the ICCPR, we find in fixed-effects estimation that ratification of the treaty is associated with worse personal integrity rights in pure autocracies (column 5). Ratification becomes more beneficial the more democratic a country is. Civil society strength has no impact. Internal conflict is associated with greater rights violation, whereas the opposite is the case for higher income and, perhaps surprisingly, population size. The latter result is reversed in ordered probit analysis (column 6). Otherwise, results are consistent, and there is now also some weak evidence for an interaction effect between ratification and civil society, suggesting that ratification becomes more beneficial the stronger is civil society. A possible reason for the sign reversal of population size is that this variable changes only slowly over time in many countries, which means that it is highly correlated with country fixed effects. Such variables often switch signs depending on whether country fixed effects are included in the estimations.

TABLE 2
Torture Convention, ICCPR, and Personal Integrity Rights Violation

	Torture Convention			Article 21 or 22			ICCPR			ICCPR Optional Protocol		
	Fixed Effects (1)	Ordered Probit (2)	Fixed Effects (3)	Ordered Probit (4)	Fixed Effects (5)	Ordered Probit (6)	Fixed Effects (7)	Ordered Probit (8)				
Rights violation ($t-1$)	0.295 (11.35)***	1.071 (23.85)***	0.297 (11.46)***	1.066 (23.71)***	0.368 (15.58)***	1.127 (26.31)***	0.365 (15.56)***	1.133 (26.53)***				
Ratification	0.198 (2.18)**	0.247 (2.19)**	0.440 (2.36)**	0.537 (2.47)**	0.260 (3.26)***	0.287 (3.09)***	0.188 (1.88)*	0.189 (1.61)				
Ratification \times INGO p.c.	-0.001 (2.82)***	-0.001 (1.00)	-0.002 (3.68)***	-0.000 (0.13)	-0.001 (1.23)	-0.001 (1.71)*	0.000 (0.45)	-0.001 (1.70)*				
Ratification \times Democracy	-0.016 (2.74)***	-0.015 (1.84)*	-0.029 (2.84)***	-0.043 (3.12)***	-0.017 (2.69)***	-0.024 (3.15)***	-0.023 (3.37)***	-0.013 (1.54)				
INGO p.c.	0.001 (1.34)	-0.000 (0.39)	0.001 (1.44)	-0.000 (0.76)	-0.000 (0.07)	0.000 (0.23)	-0.001 (0.90)	-0.000 (0.00)				
Democracy	-0.010 (1.85)*	-0.009 (1.62)	-0.013 (2.60)***	-0.010 (2.18)**	-0.006 (1.02)	0.001 (0.10)	-0.008 (1.67)*	-0.011 (2.21)**				
External conflict	0.097 (1.65)*	0.064 (0.62)	0.092 (1.58)	0.056 (0.54)	0.025 (0.48)	0.003 (0.03)	0.031 (0.58)	-0.001 (0.01)				
Internal conflict	0.240 (8.60)***	0.369 (10.26)***	0.241 (8.56)***	0.367 (10.22)***	0.231 (9.72)***	0.337 (10.59)***	0.235 (9.86)***	0.330 (10.38)***				
GDP p.c. (ln)	-0.518 (5.74)***	-0.150 (6.02)***	-0.555 (6.06)***	-0.140 (5.46)***	-0.451 (5.67)***	-0.147 (6.22)***	-0.460 (5.76)***	-0.147 (6.17)***				
Population (ln)	-0.262 (0.94)	0.059 (2.14)**	-0.408 (1.45)	0.068 (2.39)**	-0.506 (2.42)**	0.055 (2.20)**	-0.459 (2.24)**	0.063 (2.43)**				
Observations	1,887	1,887	1,887	1,887	2,193	2,193	2,193	2,193				
(Pseudo) R^2	0.74	0.37	0.75	0.37	0.73	0.38	0.73	0.38				

NOTE: Fixed-effects and ordered probit estimation with robust standard errors. Absolute t - and z -statistics in parentheses. Year-specific time dummies included but coefficients not reported. ICCPR = International Covenant on Civil and Political Rights; GDP = gross domestic product; INGO = international nongovernmental organization. *Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.

Looking at the Optional Protocol to the ICCPR suggests that the results are very similar to the ones for the ICCPR itself. In fixed-effects analysis, the main difference is that democracies are associated with fewer human rights violations, whether or not they have ratified the Optional Protocol (column 7). In ordered probit analysis, the individual ratification component and its interaction with democracy marginally lose statistical significance (column 8).

In Table 3, we look at civil rights. In fixed-effects estimation, ratification of the ICCPR has no impact on civil rights, neither unconditionally nor conditionally. Democracy and per capita income are associated with less rights violation, whereas the opposite is the case for civil war (column 1). In ordered probit estimation, we find conditional ratification effects similar to the ones we found for personal integrity rights (column 2). Specifically, ratification in pure autocracies with no civil society is associated with more rights violation. Ratification becomes more beneficial the more democratic the country and the stronger its civil society, which has a beneficial effect on human rights also in nonratifying countries. Looking at the Optional Protocol to the ICCPR, we find in fixed-effects estimation major differences to the corresponding results for the ICCPR itself (column 3). To start with, ratification of the Optional Protocol has a beneficial effect on human rights. However, this effect tapers off the more democratic the country becomes. In other words, contrary to the pattern observed so far, this result would suggest that ratification is particularly beneficial in less democratic regimes! Note, however, that it is predominantly countries with a high democracy score that have ratified not only the ICCPR but also its Optional Protocol. Also, comparing the size of the coefficient of the individual democracy component with the one of the interaction term suggests that an increase in democracy always has a net beneficial effect on human rights. We also find that greater civil society strength is associated with fewer rights violation, whether or not the country has ratified the Optional Protocol. In ordered probit analysis, civil society strength also has a beneficial effect on human rights in nonratifying countries, but the effect becomes stronger still in countries that have ratified the Optional Protocol due to the significant interaction term (column 4). The conditional effect of ratification in interaction with democracy does not uphold in ordered probit estimation.

In Table 4, we analyze the effect of the European Convention for the Protection of Human Rights (ECHR) and the European Convention for the Prevention of Torture. Note that in these regressions, the external conflict variable was dropped from the estimations since none of the European countries experienced an armed external conflict on its territory during the period of study. The conflicts in the former Yugoslavia and in the Caucasus are either coded as internal conflicts or are missing from the sample due to insufficient data on some of the control variables. In fixed-effects estimation, ratification of the European Torture Convention has no unconditional or conditional impact (column 1). Democracy is negatively and civil war positively associated with rights violation. In ordered probit estimation, ratification of the convention in pure autocracies is associated with a worsening of human rights, but the effect of ratification becomes more beneficial the more democratic the country (column 2). Per capita income is now statistically significant with the expected negative coefficient sign, whereas the opposite is the case for population size. Results for ratification of the ECHR are rather

TABLE 3
ICCPR and Civil Rights Violation

	ICCPR		ICCPR Optional Protocol	
	Fixed Effects (1)	Ordered Probit (2)	Fixed Effects (3)	Ordered Probit (4)
Rights violation ($t - 1$)	0.642 (31.43)***	1.733 (21.74)***	0.636 (30.85)***	1.731 (21.67)***
Ratification	0.047 (0.92)	0.176 (2.31)**	-0.199 (3.27)***	0.038 (0.36)
Ratification \times INGO p.c.	-0.000 (1.28)	-0.001 (2.37)**	-0.000 (0.14)	-0.001 (2.76)***
Ratification \times Democracy	0.001 (0.35)	-0.011 (1.79)*	0.009 (2.35)**	-0.003 (0.43)
INGO p.c.	-0.000 (0.90)	-0.001 (1.81)*	-0.001 (2.41)**	-0.001 (3.19)***
Democracy	-0.063 (12.55)***	-0.099 (12.76)***	-0.064 (13.68)***	-0.103 (13.93)***
External conflict	-0.036 (1.30)	0.005 (0.09)	-0.037 (1.33)	0.004 (0.07)
Internal conflict	0.093 (5.20)***	0.174 (5.36)***	0.098 (5.46)***	0.172 (5.30)***
GDP p.c. (ln)	-0.077 (1.66)*	-0.144 (7.39)***	-0.089 (1.93)*	-0.146 (7.61)***
Population (ln)	-0.009 (0.10)	-0.046 (2.28)**	0.023 (0.27)	-0.044 (2.16)**
Observations	3,634	3,634	3,634	3,634
R^2	0.94	0.65	0.94	0.65

NOTE: Fixed-effects and ordered probit estimation with robust standard errors. Absolute t - and z -statistics in parentheses. Year-specific time dummies included but coefficients not reported. ICCPR = International Covenant on Civil and Political Rights; GDP = gross domestic product; INGO = international nongovernmental organization. *Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.

TABLE 4
European Conventions, Personal Integrity, and Civil Rights Violation

	European Torture Convention Personal Integrity Rights		European Human Rights Convention Personal Integrity Rights		European Human Rights Convention Civil Liberties	
	Fixed Effects (1)	Ordered Probit (2)	Fixed Effects (3)	Ordered Probit (4)	Fixed Effects (5)	Ordered Probit (6)
Rights violation ($t-1$)	0.015 (0.20)	0.879 (6.70)***	0.031 (0.43)	1.079 (8.07)***	0.665 (15.31)***	2.377 (13.60)***
Ratification	0.484 (0.97)	1.839 (3.09)***	0.541 (1.65)*	1.962 (4.10)***	0.217 (0.83)	1.941 (2.63)***
Ratification \times INGO p.c.	-0.002 (1.59)	0.000 (0.12)	-0.002 (2.34)**	-0.002 (0.95)	-0.001 (1.39)	-0.004 (2.40)**
Ratification \times Democracy	-0.007 (0.23)	-0.062 (1.73)*	-0.014 (0.73)	-0.085 (2.61)***	-0.001 (0.08)	-0.068 (1.56)
INGO p.c.	0.001 (0.34)	0.001 (0.25)	0.001 (0.46)	0.003 (1.51)	-0.000 (0.57)	0.003 (1.43)
Democracy	-0.041 (2.17)**	-0.056 (1.98)**	-0.034 (2.51)**	-0.043 (1.82)*	-0.082 (7.01)***	-0.139 (4.34)***
Internal conflict	0.410 (4.67)***	0.515 (3.87)***	0.356 (5.00)***	0.418 (3.53)***	0.149 (3.63)***	0.295 (2.67)***
GDP p.c. (ln)	-0.623 (1.42)	-0.483 (4.61)***	-0.424 (1.30)	-0.435 (4.29)***	0.215 (1.18)	-0.456 (4.54)***
Population (ln)	0.089 (0.05)	0.210 (1.80)*	-0.915 (1.26)	0.258 (2.70)***	-0.389 (1.00)	0.112 (1.47)
Observations	304	304	396	396	766	766
R^2	0.80	0.43	0.80	0.44	0.97	0.77

NOTE: Fixed-effects and ordered probit estimation with robust standard errors. Absolute t - and z -statistics in parentheses. Year-specific time dummies included but coefficients not reported. ICCPR = International Covenant on Civil and Political Rights; GDP = gross domestic product; INGO = international nongovernmental organization. *Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.

inconsistent across rights and estimation techniques (columns 3-6). However, generally speaking, ratification of the ECHR often has conditional effects on human rights in both fixed-effects and ordered probit analysis similar to the pattern we have already observed before. Ratification is sometimes associated with more rights violation in countries with no strong civil society or in pure autocracies but becomes more beneficial as either civil society or democracy strengthens. Results on control variables are typically in line with expectations.

The American human rights conventions are looked at in Table 5. The Inter-American Convention to Prevent and Punish Torture is associated with better personal integrity rights in fixed-effects estimation, an effect that strengthens as civil society becomes stronger (column 1). However, surprisingly, the beneficial effect of ratification tapers off as countries become more democratic. Results are very consistent if estimated via ordered probit analysis (column 2). The main difference is that population size switches signs. As explained before, the reason is probably that population size as a slowly changing variable is highly correlated with country fixed effects. Ratification of the American Convention on Human Rights (ACHR) has no effect on personal integrity rights in fixed-effects estimation (column 3). In ordered probit analysis, ratification is associated with worse human rights the more democratic a country becomes, which resembles the result for the Inter-American Torture Convention, only this time ratification has no statistically significant effect in pure autocracies (column 4). The conditional treaty ratification effects in interaction with democracy appear counterintuitive and should be addressed in more detail in future research. However, one needs to keep in mind that for the ACHR in particular, the average democracy score of ratifying countries is very high (15.7). Also, comparing the size of the coefficient for the individual democracy component and its interaction term suggests that a greater extent of democracy is always associated with a net beneficial impact on personal integrity rights. Strangely, external conflict is associated with less rights violation in ordered probit analysis. This might be due to chance or caused by statistical problems following the inclusion of the lagged dependent variable as this result does not emerge in fixed-effects estimation or when the lagged dependent variable is dropped from the model (the latter result is not shown in table). When it comes to civil rights, ratification of the ACHR is the more beneficial the stronger is civil society but the less beneficial the more democratic a country is. Looking at the coefficient sizes again shows that a greater extent of democracy has a net beneficial effect on civil rights. These results hold true both in fixed-effects (column 5) and in ordered probit analysis (column 6).

Last, results for the African Charter on Human and People's Rights are reported in Table 6. In fixed-effects estimation, greater civil society strength is associated with greater personal integrity rights violation, an effect that is mitigated if the country has ratified the charter (column 1). Comparing the size of the coefficients suggests that the mitigating effect is not strong enough to compensate for the fact that greater civil society strength seems associated with more rights violation. If capturing a true effect, this could be interpreted to the effect that governments in African countries perceive a strong civil society as a challenge and contest of their mostly autocratic rule, to which they react with more violations of personal integrity rights. However, the result needs

TABLE 5
American Conventions, Personal Integrity, and Civil Rights Violation

	American Torture Convention Personal Integrity Rights		American Human Rights Convention Personal Integrity Rights		American Human Rights Convention Civil Liberties	
	Fixed Effects (1)	Ordered Probit (2)	Fixed Effects (3)	Ordered Probit (4)	Fixed Effects (5)	Ordered Probit (6)
Rights violation ($t-1$)	0.143 (2.26)**	0.887 (8.08)**	0.334 (5.86)**	1.000 (9.86)**	0.477 (8.00)**	1.248 (8.10)**
Ratification	-0.750 (1.93)*	-1.112 (1.94)*	-0.157 (0.40)	-0.596 (1.37)	0.048 (0.31)	0.223 (0.84)
Ratification \times INGO p.c.	-0.004 (2.20)**	-0.004 (2.16)**	-0.000 (0.14)	-0.001 (0.81)	-0.002 (2.41)**	-0.004 (3.06)**
Ratification \times Democracy	0.056 (2.29)**	0.106 (2.79)**	-0.010 (0.44)	0.076 (2.82)**	0.022 (2.03)**	0.052 (2.85)**
INGO p.c.	0.001 (0.27)	0.002 (1.39)	-0.007 (1.55)	0.002 (1.14)	-0.001 (0.49)	0.000 (0.08)
Democracy	-0.019 (1.40)	-0.010 (0.52)	-0.011 (0.68)	-0.079 (3.58)**	-0.097 (7.58)**	-0.184 (7.44)**
External conflict	0.061 (0.34)	0.510 (1.88)*	-0.179 (1.35)	-0.596 (2.28)**	-0.048 (0.18)	0.170 (0.33)
Internal conflict	0.310 (4.77)**	0.641 (5.69)**	0.276 (4.28)**	0.480 (5.55)**	0.189 (4.36)**	0.278 (4.93)**
GDP p.c. (ln)	-0.950 (2.35)**	-0.625 (4.53)**	-0.932 (2.66)**	-0.372 (3.04)**	-0.316 (1.77)*	-0.303 (3.22)**
Population (ln)	-3.972 (3.40)**	0.424 (3.33)**	-3.447 (3.55)**	0.332 (3.03)**	1.311 (3.68)**	0.015 (0.19)
Observations	362	362	425	425	692	692
R^2	0.78	0.40	0.76	0.41	0.88	0.57

NOTE: Fixed-effects and ordered probit estimation with robust standard errors. Absolute t - and z -statistics in parentheses. Year-specific time dummies included but coefficients not reported. ICCPR = International Covenant on Civil and Political Rights; GDP = gross domestic product; INGO = international nongovernmental organization.
*Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.

TABLE 6
African Charter, Personal Integrity, and Civil Rights Violation

	Personal Integrity Rights		Civil Liberties	
	Fixed Effects (1)	Ordered Probit (2)	Fixed Effects (3)	Ordered Probit (4)
Rights violation ($t-1$)	0.310 (7.85)***	0.862 (12.72)***	0.613 (15.93)***	1.710 (12.62)***
Ratification	-0.031 (0.27)	-0.052 (0.38)	-0.067 (0.96)	-0.133 (0.93)
Ratification \times INGO p.c.	-0.002 (1.93)*	-0.000 (0.07)	-0.000 (0.54)	0.002 (1.40)
Ratification \times Democracy	-0.001 (1.09)	-0.005 (2.71)***	0.000 (0.15)	-0.002 (1.55)
INGO p.c.	0.005 (2.06)**	-0.002 (0.88)	0.001 (0.78)	-0.002 (1.76)*
Democracy	-0.006 (0.53)	0.020 (1.30)	-0.065 (7.01)***	-0.111 (6.62)***
External conflict	0.190 (1.75)*	0.197 (0.98)	0.076 (1.37)	0.074 (0.62)
Internal conflict	0.251 (7.02)***	0.381 (8.15)***	0.090 (3.03)***	0.198 (3.15)***
GDP p.c. (ln)	-0.524 (4.89)***	-0.006 (0.11)	-0.243 (3.46)***	-0.191 (2.97)***
Population (ln)	-1.237 (1.69)*	0.058 (1.00)	-0.712 (1.40)	-0.080 (1.36)
Observations	762	762	919	919
R^2	0.66	0.30	0.87	0.57

NOTE: Fixed-effects and ordered probit estimation with robust standard errors. Absolute t - and z -statistics in parentheses. Year-specific time dummies included but coefficients not reported. ICCPR = International Covenant on Civil and Political Rights; GDP = gross domestic product; INGO = international nongovernmental organization. *Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.

to be treated with some caution as it does not uphold in ordered probit analysis. Such analysis suggests instead that treaty ratification is the more beneficial the more democratic the country (column 2). For civil rights, neither fixed-effects nor ordered probit analyses find any statistically significant effect of treaty ratification, neither unconditionally nor conditionally (columns 3 and 4).

SENSITIVITY ANALYSIS

In sensitivity analysis, we replaced the personal integrity rights measure based on Amnesty International reports with that based on U.S. State Department reports. Results were generally consistent, but civil society strength has much less impact on human rights, both unconditionally and in interaction with treaty ratification, if measured with these data. The reason is not quite clear. Restricting sample sizes to be the same showed that the difference in result is not simply caused by differences in sample size. Instead, it seems to be the coding itself that matters. We leave closer investigation of this matter to future research. Lagging the independent variables by one year to mitigate potential simultaneity bias did not affect results much and might misspecify the model if the effects are contemporaneous. To deal with sample selection bias in the Amnesty International personal integrity rights measure, we employed a Heckman (1979) sample selection model. For such a model, it is very useful to have a variable that affects the stage, in which countries are selected into the sample, but not the stage with the actual estimations on the dependent variable. In addition to the control variables (without the country fixed effects, the ratification variables, and the interaction terms and, of course, without the lagged dependent variable), we included the year of independence and the colonial status of countries. The idea is that newly independent countries receive greater attention with respect to their human rights record as do former colonies, whereas neither of the two variables should have a direct impact on human rights contingent on the presence of the other control variables. Results from the Heckman model were very consistent with the fixed-effects results, suggesting that sample selection bias is not a major problem for our estimations. Last, we dropped observations in the year of and the two years immediately following ratification to deal with the potential measurement error discussed in the methodology. However, results were little affected.

The ICCPR contains a very interesting provision, allowing state parties to take measures derogating from their obligations (even though not all obligations can be derogated from). Its article 4.1 states, "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation." In further analysis, we included a dummy variable, which is set to 1 for times in which state parties have declared a derogation from their obligations in the relevant estimations. The nonreported results suggest that when states declare a derogation, they mean business: for both personal integrity rights and civil rights, periods of derogation are unconditionally associated with an increase in human rights violations. That

countries intent on violating some human rights during specified periods bother to derogate from the ICCPR obligations that they are otherwise bound, to provide some indirect evidence that human rights treaty ratification matters. However, no evidence for statistically significant interaction terms of derogation with either democracy or civil society strength was found.

DISCUSSION AND CONCLUSION

Do international human rights treaties improve respect for human rights? Our quantitative analysis suggests that the answer is more complex than a simple yes or no. On one hand, in the absence of civil society and/or in pure autocracies, human rights treaty ratification often makes no difference and can even make things worse. This provides some tentative evidence for Hathaway's (2002a) argument on how such countries can exploit the "expressive role" of treaty ratification without any change for the better. Like her, we also found that treaty ratification often becomes more beneficial to human rights the more democratic the country is. In addition, we also find evidence that ratification is more beneficial the stronger a country's civil society, that is, the more its citizens participate in international NGOs. This provides evidence in favor of liberal theories and the theory of transnational human rights advocacy networks. We found only few cases in which treaty ratification has unconditional beneficial effects on human rights. In most cases, for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality. Hafner-Burton and Tsutsui (2005) are right in suggesting a positive role of civil society strength on human rights, but it is the interaction with treaty ratification that often matters.

In terms of future research, it would be very interesting to estimate the determinants of ratifying international human rights treaties simultaneously with estimating the effects of ratification on human rights performance. At the moment, the two strands of literature are not linked.⁷ If, however, treaty ratification allows some countries to sustain or even step up their rights violation, then this strategic choice needs to be included in the estimation of the effects of treaty ratification. Conversely, rational expectations would lead governments to take the likely effects of treaty ratification on human rights into account, thus influencing their decision to ratify. Another avenue for future research is an exploration of the role that reservations to ratification play and whether they inhibit or promote greater respect for human rights. On one hand, one could argue that a country, which becomes a state party only subject to reservations, is less committed to the human rights treaty in question. On the other hand, a country that intends to ignore the treaty provisions wholeheartedly might not bother to set up reservations at the time of becoming a state party. From this perspective, state parties that intend to take the treaty seriously also have the greatest incentive to declare a reservation to a

7. See Simmons (2000), Landman (2002), Hathaway (2002b), Vreeland (2003), and Allred, Goodliffe and Hawkins (2004) for the recent surge in attempts at explaining human rights treaty ratification.

particular article they do not want to be bound to. Goldsmith and Posner (2005) argue that reservations are predominantly used by liberal democracies to circumvent any treaty obligation they do not want to comply with. Maybe, but the important point is that liberal democracies' intent to comply with the treaty and reservations can thus be a sign of seriousness on the part of a state party.

Even if we had not found any statistically significant conditional or unconditional effect of treaty ratification, this would not necessarily imply that these treaties are ineffective. It could be that one fails to find such effects due to the manifold statistical problems described above. It could be that it takes a longer period of time for these effects to leave statistically significant traces in the data. Even if there are no significant direct effects, it could be that there are indirect effects on all countries via, for example, providing a common human rights language, reinforcing the universality of human rights, signaling the consensus of the international community, creating stigma for offenders, providing support to human rights campaigners, and the like (Cassel 2001). Heyns and Viljoen (2001, 487) claim that the available qualitative evidence shows that the international human rights treaty system has these indirect effects. Treaties thus engage countries in a human rights process that is extremely difficult to demonstrate quantitatively (Goodman and Jinks 2003). Yet, despite these difficulties, we believe to have demonstrated quantitatively and rigorously that ratification of human rights treaties often does improve respect for human rights, conditional on the extent of democracy and the strength of civil society.

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THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

GLOBAL ACHIEVEMENT OR MISSED OPPORTUNITY?

Philippa Webb^{*}

ABSTRACT

The United Nations Convention Against Corruption represents the first binding global agreement on corruption. It has elevated anticorruption action to the international stage. This article sets the context for the Convention by considering the first wave of anticorruption initiatives that occurred at the regional level. It then assesses the significance of this new international convention by examining the negotiating process and the strategic positions of different countries. In particular, it analyzes the four areas that generated the most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and monitoring. Although the Convention contains many innovative provisions, the article suggests that it also suffers from some basic weaknesses that may prevent it from having a real impact on corrupt behavior.

INTRODUCTION

Amid great fanfare, the United Nations Convention Against Corruption (UNCAC) was signed by 95 states at a conference in Merida, Mexico in December 2003.¹ As of November 2004, it had 113 signatories and nine parties.² The UNCAC represents the first binding global agreement on corruption.

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¹ United Nations Convention Against Corruption (UNCAC), 9 December 2003, in *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions*, G.A. Res. 58/4, U.N. GAOR, 58th Sess., 50th & 51st plen. mtgs., Annex, Agenda Item 108, U.N. Doc. A/58/422 (2003). See 'UN Anti-corruption Treaty off to Flying Start at Signing Conference', *UN News Center*, 10 December 2003; '95 Countries Sign U.N. Anti-corruption Convention', *Deutsche Presse-Agentur*, 12 December 2003.

² United Nations Office on Drugs and Crime, 'United Nations Convention against Corruption', http://www.unodc.org/unodc/en/crime_signatures_corruption.html (visited 3 November 2004). The nine parties are: Algeria, El Salvador, Kenya, Madagascar, Mexico, Namibia, Sierra Leone, Sri Lanka, and Uganda.

The earliest action against the international dimensions of corruption was when the United States (US) outlawed transnational bribery in 1977.³ At the time, the US urged the United Nations Economic and Social Council to consider an international convention, but due to North–South divisions, the talks were abandoned in 1981.⁴ This article explores what changed in the intervening two decades and whether the UNCAC represents a global achievement in the fight against corruption.

There is an increasing awareness that corruption causes enormous harm and respects no borders. It impoverishes national economies, threatens democratic institutions, undermines the rule of law, and facilitates other threats to human security such as organized crime and terrorism.⁵ The UNCAC arose in the context of this heightened consciousness of corruption as a problem of transnational significance. The existing multilateral anticorruption initiatives not only indicated key areas of concern, but also helped build the necessary consensus to commence negotiations on an international instrument. Moreover, the fact that the Convention was being negotiated under the auspices of the United Nations – the most representative international organization with 191 member states – meant that it was going to be truly global. The question is whether the UNCAC has fulfilled the world’s weighty expectations.

This article takes two approaches to this question. First, it takes a political science approach that looks at the negotiating process, the strategic positions of different countries, and how this impacted on the outcomes. Second, it analyzes specific aspects of the Convention from a legal perspective to assess whether or not the UNCAC really has ‘teeth’.⁶ To put the UNCAC in context, Part I surveys the major multilateral initiatives against corruption. Part II then examines the four areas of the UNCAC that generated that most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and monitoring. Part III evaluates the prospects for compliance with the UNCAC based on three broad theoretical approaches about why states obey international law. Part IV finally assesses whether the Convention is a global achievement or a missed opportunity.

³ Foreign Corrupt Practices Act (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78(m)(b)(3), 78dd-1, 78dd-1, and 78ff (2000)).

⁴ Kenneth W. Abbott and Duncan Snidal, ‘Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption’ (Paper presented at the American Political Science Association Meeting, Boston, 30 August 2002, on file with the author) at 24. The South refused to discuss ‘demand’ side measures like restrictions on solicitation of bribes and the North resisted linking bribery rules to the proposed UN code of conduct for multinational corporations.

⁵ Secretary-General Kofi Annan, ‘Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity’, delivered by Dileep Nair (Under-Secretary-General for Internal Oversight Services), 29–31 May 2003.

⁶ See ‘General Assembly Approves International Treaty Against Corruption’, *UN News Service*, 31 October 2003 (quoting Antonio Maria Costa, Executive Director of the UN Office on Drug and Crime, saying the ‘the convention has teeth’).

I. MULTILATERAL INITIATIVES AGAINST CORRUPTION

Since the end of the Cold War, corruption has become an item on the international agenda. This is partly due to the removal of the compelling need to support corrupt regimes for national security reasons, the visible corruption and organized crime in the former Eastern bloc and other parts of the world, and the new corrupt opportunities created by moves towards privatization and deregulation.⁷ The flow of information, money, drugs, and arms across borders has also destroyed the illusion of corruption as a domestic political issue to be left to individual countries. The first wave of anticorruption initiatives occurred at the regional level. They range from binding legal instruments to softer, normative measures and political declarations. These initiatives set the context for the transition from regional to international instruments represented by the UNCAC. This section surveys the major multilateral initiatives, including the type of organization that established them, their main features and their current status.

A. Organization of American States Inter-American Convention Against Corruption

The Organization of American States Inter-American Convention Against Corruption (OAS Convention) was the first binding multilateral agreement on corruption. It was signed by 22 states, including the US, in 1996 and entered into force in 1997.⁸ It currently has 33 ratifications and countries that are not OAS members may also accede to it.⁹ The initiative for the OAS Convention came from a group of Latin American governments led by Venezuela, and was strongly supported by the US.¹⁰ The Convention is distinctive in including developed countries, some in the middle range, and some poor countries.¹¹ The OAS Convention is a manifestation of the spread of democratic government in Latin America which has publicly led to less patience for, and even rejection of, corruption.¹² Consequently, the Convention emphasizes the need to protect democratic institutions because 'representative democracy, an essential condition for stability, peace and development of the

⁷ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: Cambridge University Press, 1999) 177.

⁸ Inter-American Convention Against Corruption (OAS Convention), done at Caracas, 29 March 1996, 35 I.L.M. 724 (entered into force 6 March 1997), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>.

⁹ OAS, 'Inter-American Convention Against Corruption', <http://www.oas.org/juridico/english/sigs/b-58.html> (visited 1 November 2004); Article XXIII of OAS Convention.

¹⁰ David A. Gantz, 'Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus', 18 NW. J. Int'l L. & Bus. (1998) 457, at 477.

¹¹ Susan Rose-Ackerman, 'Corruption and the Global Corporation: ethical obligations and workable strategies', in Michael Likosky (ed), *Transnational Legal Processes* (London: Butterworths, 2002) 148-71, at 150.

¹² Gantz, above n 10, at 477. See also, article 2 of the OAS Charter, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>.

region, requires, by its nature, the combating of every form of corruption in the performance of public functions.¹³

The OAS Convention has a broader scope than the OECD and European instruments. It applies to active bribery (the offence committed by the person who promises or gives the bribe) and passive bribery (the offence committed by the person who receives the bribe).¹⁴ It seeks not only to make bribery of foreign officials a crime, but also encourages governments to deal with domestic corruption. It requires states parties to criminalize: the solicitation, acceptance or offer of illicit payments; acts or omissions of government officials for the purpose of obtaining a bribe; fraudulent use of property derived from such activities; and participation as a principal, accomplice or accessory after the fact.¹⁵ Its provision on transnational bribery is broader than the equivalent provisions of the OECD Convention because it covers not only bribery where the purpose relates to a contract or business transaction, but also any other case where the bribe relates to 'any act or omission in the performance of that official's public function'.¹⁶ States parties are also asked to consider criminalizing a series of further offences on improper use of confidential information or government property by an official, seeking a decision from a public authority for illicit gain, and improper diversion of state property, monies or securities.¹⁷ Interestingly, if adopted, these become 'acts of corruption' under the Convention and trigger cooperation requirements even among states which have not criminalized the offences.

The weakness of the OAS Convention lies in the mechanism for monitoring its implementation. The text of the Convention is silent on this matter and the creation of the follow-up mechanism appears to have been an afterthought. It was not until four years after the Convention came into force that the Conference of States Parties met to establish a follow-up mechanism.¹⁸ OAS uses a peer review system whereby a government-appointed Committee of Experts selects countries for review, obtains information using questionnaires, and prepares a preliminary report. This report is first reviewed by the country and then a final version is submitted to the Conference of States Parties and published.¹⁹ It was not until February 2003 that the first report – on

¹³ Preamble, para 2 of the OAS Convention, available at <http://www.oas.org/main/main.asp?sLang=E&Link=http://www.oas.org/documents/eng/aboutoas.asp>

¹⁴ Peter J. Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law', 18 *Ariz. J. Int'l & Comp. Law* (2001) 793, at 807.

¹⁵ Articles VI, VII of the OAS Convention.

¹⁶ Article VIII of the OAS Convention. See also Global Programme Against Corruption, *United Nations Manual on Anti-Corruption Policy* (2002) 104.

¹⁷ Article XI of the OAS Convention.

¹⁸ OAS General Assembly Resolution AG/RES.1784 (XXXI-O/01), 5 June 2001, and Summary of the Minutes of the Conference of States Parties, annexed, 2–4 May 2001, Buenos Aires.

¹⁹ Global Programme Against Corruption, above n 16, at 105.

Argentina – was adopted.²⁰ However, the pace has improved recently and the Committee of Experts has now analyzed Colombia, Nicaragua, Paraguay, Uruguay, Ecuador, Chile and Panama. It has also agreed upon a timetable in order to accelerate the process of analysis and produce twelve reports per year.²¹ The Committee can recommend improvements but not sanctions.

B. OECD Convention on Combating Bribery of Foreign Public Officials

The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) is a significant initiative because of the nature of the organization itself. The 30 members of the OECD represent 70 percent of world exports and 90 percent of foreign direct investment;²² they are home to over 75 percent of multinational corporations.²³ The Convention therefore represents an effort to guide the anticorruption activities of governments that influence the flow of most of the world's investment, trade, and goods. Moreover, the OECD probably has an even more global reach than the OAS through its active relationships with 70 other countries and its engagement with civil society.²⁴ The OECD Convention reflects the organization's interest in democratic government and the market economy as well as its specific objective of fighting corruption in international business to help level the playing field for companies.²⁵ The Convention was signed in 1997 and entered into force in 1999.²⁶ It has been ratified by 35 countries.²⁷

The OECD Convention was negotiated under strong pressure from the US. Because the Watergate investigations had revealed that a number of US firms had used foreign connections to funnel illegal contributions to the Nixon campaign, the Carter Administration passed the Foreign Corrupt

²⁰ Technical Secretariat for Legal Cooperation Mechanisms, 'Follow-up Mechanisms for the Implementation of the Inter-American Convention against Corruption', <http://www.oas.org/juridico/english/followup.htm> (visited 2 November 2004).

²¹ Technical Secretariat for Legal Cooperation Mechanisms, 'Schedule for Accelerating the Process of Analysis within the Framework of the First Round', http://www.oas.org/juridico/english/mec_sched_2005.htm (visited 2 November 2004).

²² Gemma Aiolfi and Mark Pieth, 'How to Make a Convention Work: The OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law', in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement* (Dordrecht: Kluwer Law International, 2002) 349.

²³ Gantz, above n 10, at 483.

²⁴ OECD, 'About OECD', http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (visited 3 November 2004).

²⁵ OECD, 'Fighting Bribery and Corruption', http://www.oecd.org/about/0,2337,en_2649_34855_1_1_1_1_37447,00.html (visited 3 November 2004).

²⁶ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), done at Paris, 17 December 1997 (entered into force 15 February 1999), OECD/DAFFE/IME/BR(97)16/FINAL; 37 I.L.M. 1.

²⁷ OECD, 'Ratification Status as of 10 March 2004', <http://www.oecd.org/dataoecd/59/13/1898632.pdf> (visited 3 November 2004).

Practices Act (FCPA) in 1977.²⁸ The US private sector felt that it was at a trade disadvantage due to this legislation and was pressing the US government to level the playing field.²⁹ Consequently, the US used the forum of the OECD to extend the principles of the FCPA to the international business community.³⁰ This pressure first resulted in some non-binding documents that were used to build up consensus for the Convention. In 1994, the OECD Council issued a series of non-binding Recommendations on Bribery in International Business Transactions which called on member states to 'take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions'.³¹ The Recommendations were revised in 1997 to include specific suggestions for criminal procedure, tax laws, business accounting practices, banking provisions, and making bribery illegal under civil, commercial and administrative laws.³² The OECD also addressed the problem of bribes being written off as tax deductions in its 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.³³

Unlike the non-binding Recommendations, the OECD Convention has a limited scope, which reflects the influence of the FCPA. Its central objective is to use domestic law to combat the bribery of foreign public officials.³⁴ It does not purport to require states parties to criminalize the bribery of their own public officials, unlike the OAS Convention. In this sense, it takes a narrow and unilateral approach, albeit 'collectively unilateral'.³⁵ The Convention applies to both active and passive bribery, but does *not* apply to bribery which is purely domestic or in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not apply when the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining some undue advantage in such business. Moreover, the Convention does not apply to forms of corruption other than bribery. States are, however, required to ensure that incitement, aiding and abetting or authorizing bribery are criminalized and offences are applicable to corporations

²⁸ FCPA, above n 3. See also Christopher F. Corr and Judd Lawler, 'Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures', 32 *Vand. J. Transnat'l L.* (1999) 1249.

²⁹ Aiolfi and Pieth, above n 22, at 350.

³⁰ Rose-Ackerman, *Corruption and Government*, above n 7, at 149.

³¹ OECD Council Recommendation on Bribery in International Business Transactions, 27 May 1994, 33 I.L.M. 1389, 1390, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³² OECD Council Revised Recommendation on Bribery in International Business Transactions, 23 May 1997, 36 I.L.M. 1018, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³³ OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, 35 I.L.M. 1311, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³⁴ Article 1(1) of the OECD Convention.

³⁵ Aiolfi and Pieth, above n 22, at 350.

and other legal persons.³⁶ Sanctions must be ‘effective, proportionate and dissuasive’ and of sufficient gravity to trigger the application of domestic laws on mutual legal assistance and extradition.³⁷ There are provisions on seizure and forfeiture of proceeds, but not their return.³⁸

Unlike the OAS Convention, the implementation of the OECD Convention is monitored by an apparently rigorous system. The terms of the Convention are vague, simply stating that the OECD Working Group is to be the framework for ‘a programme of systematic follow-up to monitor and promote the full implementation of this Convention.’³⁹ The OECD Working Group has therefore been free to develop a peer review system, drawing on experiences gained through OECD accession procedures, UN human rights audits, and the mutual evaluation procedures of the OECD’s Financial Action Task Force.⁴⁰ A team of experts from two countries monitors implementation of the OECD Convention in essentially two phases. Phase 1 evaluates whether the country has implemented the Convention in its national laws based on answers to questionnaires and the submission of legal materials.⁴¹ The reports of phase 1 are published on the internet after discussion between the experts and the country under review and a hearing by the OECD Working Group.⁴² In ‘phase 1 bis’, the team evaluates the adaptation of laws based on the critique made in phase 1, and the phase 1 reports are accordingly supplemented.⁴³ Phase 2 concentrates on the enforcement of the implementing legislation *in practice* by examining the structures in place for dealing with foreign bribery cases, the level of resources deployed, and personnel training.⁴⁴ The team uses questionnaires and conducts an on-site visit. Civil society groups are permitted to provide information or opinions, but the nature of their involvement is subject to consultation with the country being examined.⁴⁵

The OECD Convention’s two-stage monitoring process has had mixed results. Phase 1 has been successful as 35 countries (all the states parties) have been reviewed.⁴⁶ However, phase 2 reviews of the actual implementation of the Convention have been disappointing. Phase 2 did not commence until

³⁶ Articles 1(2) and 2 of the OECD Convention.

³⁷ Article 3(1) of the OECD Convention.

³⁸ Article 3(3) of the OECD Convention.

³⁹ Article 12 of the OECD Convention.

⁴⁰ Aiolfi and Pieth, above n 22, at 353.

⁴¹ OECD, ‘Bribery Convention: Procedure of Self- and Mutual Evaluation – Phase 1’, http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html (visited 2 November 2004).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ OECD, ‘Bribery Convention: Procedure of Self- and Mutual Evaluation, Phase 2’, http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html (visited 2 November 2004).

⁴⁵ Ibid.

⁴⁶ Ibid.

late 2002 and to date 10 countries have been reviewed instead of the 14–16 originally planned.⁴⁷ Transparency International (TI) suggests that this slow start is a result of inadequate funding; additional funding has been provided for 2003–2004, but only partial funding is in place for the following years.⁴⁸ In addition, a survey by Control Risks Group of companies in the US and Europe found that only 56 percent of British companies, 38 percent of German companies and 30 percent of Dutch companies were familiar with the OECD Convention.⁴⁹ Moreover, the new domestic laws based on the OECD Convention have not resulted in a single conviction.⁵⁰ In the case of the United Kingdom (UK), although it has introduced legislation in compliance with the OECD Convention and has even updated it under the Anti-Terrorism Act of 2001, there have been no prosecutions for corruption.⁵¹ This is unlikely to be due to an absence of corrupt activity; a TI opinion poll found 52 percent of people thought UK businesses may still be affected by corruption.⁵² The OECD Convention demonstrates the challenges of reducing corruption in practice. Despite its focused scope, widespread ratification, and well-developed monitoring system, it is yet to produce significant changes on the ground.

C. Council of Europe's Criminal Law Convention on Corruption and Civil Law Convention on Corruption

The Council of Europe (COE) has actively developed two significant anti-corruption instruments that are also open to adoption by non-European countries. The COE is Europe's oldest political organization, founded in 1949, and groups together 45 countries, including 21 countries from Central and Eastern Europe. Its original aim was to defend human rights, parliamentary democracy and the rule of law, but since the fall of the Berlin Wall, it has started 'acting as a political anchor and human rights watchdog for Europe's post-communist democracies' by assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform.⁵³ Its anticorruption

⁴⁷ Ibid.

⁴⁸ Transparency International, 'Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials', Report on Paris Meeting of 2–3 October 2003, at 3. Transparency International is an international non-governmental organization devoted to combating corruption. It is made up of a coalition of representatives from civil society, business, and government.

⁴⁹ 'Laws Fail to Halt International Business Bribery', *USAID Democracy and Governance Anti-Corruption News*, 23 August 2003, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption/news/403_2.html

⁵⁰ Ibid.

⁵¹ Michael Smith, 'Britain Needs to Get its International Anti-Corruption Act Together', *The Guardian*, 13 October 2003, 25.

⁵² Ibid.

⁵³ COE, 'About the Council of Europe', http://www.coe.int/T/e/Com/about_coe/ (visited 15 October 2004).

conventions reflect this impulse through their active monitoring and evaluation mechanisms.

The Criminal Law Convention on Corruption (COE Criminal Convention) was adopted in 1999 and is open for ratification by non-European countries that participated in its drafting.⁵⁴ It entered into force in 2002 and currently has 30 ratifications.⁵⁵ It has a broad scope because it applies to public and private sectors as well as transnational cases involving bribery of foreign public officials, members of foreign public assemblies, officials of international organizations, and judges and officials of international courts.⁵⁶ However, the range of conduct that states are required to criminalize is fairly narrow; the majority of offences are limited to active and passive bribery.⁵⁷ Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, nepotism and insider trading are not.⁵⁸ The Convention does provide for some support mechanisms such as requiring states parties to protect informants and to have specialized authorities dedicated to the fight against corruption.⁵⁹ The tracing, seizure and freezing of property is provided for, but the text is phrased in terms of ‘facilitating’ such actions and does not deal with the return of assets.⁶⁰ Mutual legal assistance may be refused if it undermines the ‘fundamental interests, national sovereignty, national security or *ordre public*’ of the requested state.⁶¹

The Civil Law Convention on Corruption (COE Civil Convention) was adopted in 1999 and entered into force in 2003.⁶² It currently has 21 ratifications and non-European countries may join.⁶³ It represents the first attempt to define common international rules for civil litigation in corruption cases.⁶⁴ It requires states parties to provide in their internal law for ‘effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of

⁵⁴ Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention), done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>. Other states can also join by accession after entry into force subject to the consent of all the contracting states which sit in the COE’s Council of Ministers.

⁵⁵ COE, ‘Treaty Office’, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (visited 1 October 2004).

⁵⁶ Articles 5, 6, 9 and 11 of the COE Criminal Convention.

⁵⁷ Criminalization requirements are in articles 2–14 of COE Criminal Convention.

⁵⁸ Articles 12 and 13 of COE Criminal Convention.

⁵⁹ Article 22 and 20 of COE Criminal Convention.

⁶⁰ Article 23 of COE Criminal Convention.

⁶¹ Article 26(2) of COE Criminal Convention.

⁶² Council of Europe Civil Law Convention on Corruption (COE Civil Convention), done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm>.

⁶³ COE, ‘Treaty Office’, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (visited 1 October 2004).

⁶⁴ Global Programme Against Corruption, above n 16, at 100.

obtaining compensation for damage'.⁶⁵ It is drafted as a legally binding instrument and applies to public and private sector cases. It is narrower than the COE Criminal Convention because it only applies to bribery and similar acts. Damages can be recovered against anyone who has committed or authorized the act of corruption, or failed to take reasonable steps to prevent such an act, including the State itself, if a causal link between the act and the damages can be shown.⁶⁶ It is also possible for parties to a contract whose consent has been 'undermined by an act of corruption' to have a court declare the contract void.⁶⁷ There are provisions on the protection of employees who report corruption, ensuring the validity of private sector accounting and audits, and international cooperation.⁶⁸ The advantage of the civil law approach is that it makes corruption controls partly 'self-enforcing by empowering victims to take action on their own initiative'.⁶⁹ However, it also reduces the control of government agencies over the overall anticorruption strategy, excludes potential litigants who do not have sufficient resources or access to the courts, and could lead to conflicting civil and criminal proceedings.⁷⁰ Businesses that are concerned about a flood of civil suits may also use methods of settling or avoiding cases that undermine the anticorruption goals of the Convention.

The COE Conventions share a sophisticated monitoring system involving the Group of States against Corruption (GRECO) which was established in 1999 by 17 European states.⁷¹ It now has 38 members, including the US. GRECO uses a combination of mutual evaluation and peer pressure to monitor implementation. Ad hoc teams of experts are appointed, on the basis of a list proposed by GRECO members, to evaluate each member in each evaluation round.⁷² These evaluation teams are the 'cornerstone' of the GRECO procedure; they examine replies to questionnaires, request and examine additional information to be submitted either orally or in writing, visit member countries to seek additional information, and prepare draft evaluation reports for discussion and adoption at the plenary sessions.⁷³ In less than five years, GRECO has issued 42 evaluation reports which are publicly available on the internet.⁷⁴

⁶⁵ Article 1 of the COE Civil Convention.

⁶⁶ Articles 4 and 5 of the COE Civil Convention.

⁶⁷ Article 8 of the COE Civil Convention.

⁶⁸ Articles 9, 10 and 13 of the COE Civil Convention.

⁶⁹ Global Programme Against Corruption, above n 16, at 100.

⁷⁰ *Ibid.*

⁷¹ Article 24 of the COE Criminal Convention and Article 14 of the COE Civil Convention. GRECO was set up under Resolution (99)5, Adopted on 1 May 1999, available at [http://www.greco.coe.int/docs/ResCM\(1999\)5E.htm](http://www.greco.coe.int/docs/ResCM(1999)5E.htm)

⁷² COE, 'Group of States against Corruption', <http://www.greco.coe.int/> (visited 4 November 2004).

⁷³ *Ibid.* See also Articles 10 to 16 of the Statute of the GRECO (Appendix to COE Resolution (99)5) and Title II of GRECO Rules of Procedure, Doc. No. Greco (2003) 6E Final Rev (11 July 2003).

⁷⁴ COE, 'GRECO Evaluations', <http://www.greco.coe.int/evaluations/Default.htm> (visited 1 November 2004).

D. Convention of the European Union on the Fight Against Corruption involving officials of the European Communities or officials of member states

The European Union (EU) has addressed some forms of corruption in legally binding documents, but these are narrowly confined to acts harmful to its own economic interests and only deal with the conduct of its 15 member states. The 1995 Convention on the Protection of the European Communities' Financial Interests and its two Protocols in 1996 and 1997 (EU Protection Convention and Protocols),⁷⁵ aim to combat fraud affecting expenditure and revenue using criminal law.⁷⁶ The Protection Convention covers public and private sectors and deals with acts designated as 'fraud affecting the European Communities' financial interests'.⁷⁷ Each member state must take necessary measures to ensure such conduct is punishable by 'effective, proportionate and dissuasive criminal penalties'.⁷⁸ It also calls for specific individual criminal liability for the heads of businesses in cases where the business commits a fraud. The first Protocol deals with active and passive corruption and the second Protocol addresses the liability of legal persons, confiscation, money laundering and the cooperation between member states and the European Commission. A third Protocol is on the verge of validation and will address 'dirty money laundering', the responsibility of legal persons, and the role of the Commission regarding judicial cooperation.⁷⁹

In 1997, the EU adopted a Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention).⁸⁰ Despite its strong title, it incorporates essentially the same terms as the Protection Convention, but is even narrower because it only deals with the conduct of officials. It mainly deals with bribery and does not address fraud or money-laundering.⁸¹ However, the attention of the EU was directed towards the private sector in the Joint Action of 1998 (EU Joint Action) which lays down harmonized definitions to combat corruption in the private sector, placing particular emphasis on prevention.⁸² The

⁷⁵ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ 1995 C 316 at 2, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33019.htm>.

⁷⁶ Article 1 of the EU Protection Convention.

⁷⁷ Article 3 of the EU Protection Convention.

⁷⁸ *Ibid.*

⁷⁹ EU, 'Follow-up Work', <http://europa.eu.int/scadplus/leg/en/lvb/l33019.htm> (visited 10 October 2004).

⁸⁰ Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention), done at Brussels, 26 May 1997, 37 I.L.M. 12; OJ 1997 C 195, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33027.htm>.

⁸¹ Global Programme Against Corruption, above n 16, at 102.

⁸² Joint Action 98/742/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ 1998 L 358, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm>.

text is drafted in legally binding terms and member states were required to make proposals for implementation by 2000. It is not clear if such proposals have been made, but in July 2002 Denmark presented an initiative aimed at drawing up a common definition of active and passive corruption and the applicable penalties.⁸³

To date, it seems the EU makes bold statements in non-binding instruments, but drafts narrow and specific legal initiatives. For example, in 2003 the European Commission adopted a Communication on a Comprehensive EU Policy against Corruption.⁸⁴ The Communication is admirable in its scope and intent. It appeals to EU leaders to undertake more efforts to detect and punish all acts of corruption, to confiscate illicit proceeds and to reduce opportunities for corrupt practices through transparent and accountable public administrative standards. It asks member states to swiftly enact all relevant supranational and international anticorruption instruments, particularly those of the EU, OECD and COE. It also emphasizes the crucial role of monitoring and peer review evaluation between countries participating in these initiatives. Yet, in the final analysis, the terminology is 'should' not 'shall'; it is an exercise in communication rather than legislation.

E. African Union Convention on Preventing and Combating Corruption

The most recent regional initiative is the African Union Convention on Preventing and Combating Corruption (African Union Convention) which was adopted in Mozambique in 2003.⁸⁵ The African Union was established in 2000 as the successor to the Organization of African Unity (OAU). It represents the change in priorities for Africa: whereas the OAU focused on removing the vestiges of colonization and apartheid, the African Union aims to expedite the process of economic and political integration in the continent.⁸⁶

The Convention's objectives reflect the African Union's focus on economic and political development. It aims to promote mechanisms to fight corruption in the public and private sectors, to facilitate cooperation among states parties, and to coordinate the policies and legislation relevant to corruption.⁸⁷ The Convention's scope is broad and covers active and passive bribery, influence peddling, illicit enrichment, concealment of proceeds derived from corrupt acts.⁸⁸ Its requirements are extensive and appear to be binding. States parties

⁸³ EU, 'Follow-up Work', <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm> (visited 2 November 2004).

⁸⁴ Communication on a Comprehensive EU Policy against Corruption, COM(2003) 317, Adopted 28 May 2003, available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0317en01.pdf.

⁸⁵ African Union Convention on Preventing and Combating Corruption (African Union Convention), done at Maputo, 11 July 2003, 43 I.L.M. 1, available at <http://www.africa-union.org/home/Welcome.htm>.

⁸⁶ African Union, 'About AU', <http://www.africa-union.org/home/Welcome.htm> (visited 2 November 2004).

⁸⁷ Article 2 of the African Union Convention.

⁸⁸ Article 4 of the African Union Convention.

'undertake to' adopt legislative and other measures to establish the Convention's offences, strengthen national control measures to ensure the setting up and operations of foreign companies in their territory are subject to the national legislation, establish independent national anticorruption authorities, pass laws to protect informants and witnesses, and punish those who make false and malicious corruption reports.⁸⁹ States parties must adopt legislation to give effect to the right of access to any information that is required to assist in the fight against corruption.⁹⁰ The African Union Convention will be monitored by an Advisory Board on Corruption made up of 11 members elected by the Executive Council.⁹¹ States Parties have to report on their implementation progression to the Board on an annual basis and the Board will then report to the Executive Council. The Board will adopt its own rules of procedure, but as of yet it is not obliged to verify the country reports in any way.

As of November 2004, only 4 of the 53 states had ratified the Convention; it requires 15 ratifications to come into force.⁹² The African Union Convention is comprehensive on paper and is largely phrased in mandatory terms. However, its expansiveness may actually deter countries from ratifying it and the lack of a follow-up mechanism enables countries to delay or avoid implementation.

F. United Nations Convention Against Transnational Organized Crime

The United Nations Convention Against Transnational Organized Crime (UNCTOC) is the organization's first foray into creating a legally binding instrument that addresses corruption.⁹³ It also signals the transition from regional to global initiatives in this field. A committee of 127 member states drafted the Convention in 18 months from 1999 to 2000. It entered into force on 19 September 2003 with the deposit of the fortieth instrument of ratification. To date, 147 nations have signed and 93 have ratified it.⁹⁴

The UNCTOC arose in response to international calls to address global organized crime by closing major loopholes that hinder international enforcement efforts and allow organized crime to flourish.⁹⁵ It focuses on the activities of 'organized criminal groups', but recognizes that corruption is often an instrument

⁸⁹ Article 5 of the African Union Convention.

⁹⁰ Article 9 of the African Union Convention.

⁹¹ Article 22 of the African Union Convention.

⁹² African Union, 'List of Countries which have Signed, Ratified/Acceded', <http://www.africa-union.org/home/Welcome.htm> (visited 4 November 2004).

⁹³ United Nations Convention Against Transnational Organized Crime (UNCTOC), done at Palermo, 12–15 December 2000, (entered into force 19 September 2003) 40 I.L.M. 353; G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex, Agenda Item 105, U.N. Doc A/RES/55/25 (2000), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

⁹⁴ United Nations Office on Drugs and Crime, 'Signatories to the UN Convention against Transnational Crime and its Protocols', http://www.unodc.org/unodc/en/crime_cicp_signatures.html (visited 4 November 2004).

⁹⁵ Luz Estella Nagle, 'The Challenges of Fighting Global Organized Crime in Latin America', 26 *Fordham Int'l L.J.* (2003) 1649, at 1665.

or effect of organized crime and includes several provisions to address this.⁹⁶ The main one is the requirement that each party adopt laws and other necessary measures to criminalize active and passive bribery in connection with the exercise of the duties of government officials.⁹⁷ It also provides that each party 'shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.⁹⁸ This provision is important because it focuses on successful law *enforcement*, not just simple law enactment.⁹⁹ However, the provision also provides an escape hatch by stating that each party shall take measures that are 'appropriate and consistent with its legal system'.¹⁰⁰ This means that states can avoid enforcement on constitutional grounds, claim a domestic conflict, or rely on a lack of devices for implementation.¹⁰¹ Other sections of the UNCTOC on money-laundering and the tracing, seizure and forfeiture of the proceeds of crime may be useful in specific corruption cases.¹⁰² The application of the provisions on international law enforcement cooperation will only apply to corruption cases if they involve an 'organized criminal group' and are 'transnational in nature'.¹⁰³

Monitoring of the UNCTOC is through a Conference of States Parties, which also has the power to recommend improvements.¹⁰⁴ However, no specific time frame is set: reviews need only be made 'periodically' and there is no process for verifying country reports.¹⁰⁵ Despite these weaknesses, the UNCTOC did introduce the idea of mandatory criminalization requirements at the global level and established a wide range of cooperation and technical assistance provisions. Moreover, its relatively rapid negotiation and entry into force indicated that there was a sufficient level of consensus for an international agreement on corruption.

G. United Nations Convention Against Corruption

In December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the UNCTOC, was desirable.¹⁰⁶ It decided to establish an Ad Hoc Committee for the negotiation of such an instrument in Vienna at the headquarters of the Centre

⁹⁶ Global Programme Against Corruption, above n 16, 91–92.

⁹⁷ Article 8 of the UNCTOC.

⁹⁸ Article 9(2) of the UNCTOC.

⁹⁹ Nagle, above n 95, at 1667–68.

¹⁰⁰ Article 9(1) of UNCTOC.

¹⁰¹ Nagle, above n 95, at 1668.

¹⁰² Articles 7 and 12 of UNCTOC.

¹⁰³ Article 27 of UNCTOC.

¹⁰⁴ Article 32 of UNCTOC.

¹⁰⁵ Ibid.

¹⁰⁶ G.A. Res. 55/61, U.N. GAOR, 55th Sess., Agenda Item 105, at 1, U.N. Doc. A/RES/55/61 (2001).

for International Crime Prevention, UN Office on Drug and Crime (UNODC).¹⁰⁷ As a first step, an Intergovernmental Open-Ended Expert Group was asked to prepare draft terms of reference for the negotiation of the Convention. These terms of reference were set out in a further General Assembly resolution which requested the Ad Hoc Committee to ‘adopt a comprehensive and multidisciplinary approach’ and to consider the specific elements.¹⁰⁸

The text of the United Nations Convention against Corruption (UNCAC) was negotiated during seven sessions of the Ad Hoc Committee held between 21 January 2002 and 1 October 2003. The draft Convention was adopted by the General Assembly in October 2003.¹⁰⁹ At the High-Level Political Signing Conference at Merida, Mexico from 9–11 December 2003, high expectations and intense optimism surrounded this latest addition to the multilateral initiatives against corruption.¹¹⁰ The UN Secretary-General asserted that the Convention ‘can make a real difference to the quality of life of millions of people around the world’.¹¹¹ However, the experiences of regional organizations suggest that creating meaningful anticorruption instruments is a difficult task.

II. ANALYSIS OF THE CONVENTION AND ITS NEGOTIATING HISTORY

The Ad Hoc Committee certainly met the request of a ‘comprehensive and multidisciplinary approach’ by drafting a Convention that runs to 71 articles.¹¹² The UNCAC is the most wide-ranging instrument to date, covering three major aspects of fighting corruption:¹¹³

- *Prevention*: An entire chapter of the UNCAC is devoted to preventive measures addressed to both the public and private sectors.¹¹⁴ Provisions relate to the prevention of corruption in the judiciary and public

¹⁰⁷ Ibid.

¹⁰⁸ These were: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation: G.A. Res. 56/260, U.N. GAOR, 56th Sess., Agenda Item 110, at 2, U.N. Doc. A/RES/56/260 (2002).

¹⁰⁹ G.A. Res. 58/4, U.N. GAOR, 58th Sess., Agenda Item 108, U.N. Doc. A/RES/58/4 (2003).

¹¹⁰ See ‘UN Anti-corruption Treaty off to Flying Start at Signing Conference’, *UN News Center*, 10 December 2003; Adriana Barrera, ‘New UN Pact Aims to Stop Leaders Looting Coffers’, *Reuters*, 10 December 2003.

¹¹¹ ‘Secretary-General Congratulates Ad Hoc Committee on Successful Conclusion of Negotiations on UN Convention against Corruption’, *M2 Presswire*, 2 October 2003.

¹¹² See the UNCAC.

¹¹³ See generally, ‘Highlights of the United Nations Convention Against Corruption’, *UNODC Update*, December 2003, available at http://www.unodc.org/unodc/newsletter_2003-12-01_1_page003.html.

¹¹⁴ Ch II of the UNCAC.

procurement as well as the establishment of anticorruption bodies.¹¹⁵ The Convention calls on states parties to actively promote the involvement of nongovernmental organizations (NGOs) and other elements of civil society in the fight against corruption.¹¹⁶ However, the language of this chapter is non-mandatory.

- *Criminalization*: States parties are required to adopt legislative and other measures to criminalize not only basic forms of corruption, such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption.¹¹⁷ Most provisions are mandatory, but there are references to adopting legislative measures ‘in accordance with fundamental principles of its domestic law’ or taking measures ‘to the greatest extent possible within its domestic legal system’.¹¹⁸ These qualifying clauses provide a potential escape clause for reluctant legislators.
- *International cooperation*: States parties agree to cooperate in prevention and investigation activities and the prosecution of offenders.¹¹⁹ The Convention binds parties to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. Countries must also take measures to support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

Due to the large number of issues covered by the UNCAC, this section focuses on the four areas that generated the most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and implementation. It outlines the problems that the negotiators sought to address, examines their strategic positions, and evaluates the outcome. The way these controversies were resolved provides a good indication of the strengths and weaknesses of the Convention, and its potential to have a meaningful impact on corruption around the world.

A. Asset recovery

Asset recovery is a vital issue for developing countries where cases of grand corruption have exported national wealth to international banking centers and financial havens, and where resources are badly needed for the reconstruction of societies under new governments. The Nyanga Declaration on the Recovery and Repatriation of Africa’s Wealth states: ‘An estimated US\$20–40 billion has over the decades been illegally and corruptly appropriated from some of the world’s poorest countries, most of them in Africa, by

¹¹⁵ Articles 11, 9 and 6, respectively of the UNCAC.

¹¹⁶ Article 13 of the UNCAC.

¹¹⁷ Chapter III of the UNCAC.

¹¹⁸ See, e.g., Articles 23 and 31 of the UNCAC.

¹¹⁹ Chapter IV of the UNCAC.

politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets'.¹²⁰

Although the full extent of the transfers of illicit funds is hard to measure, it is certain that this form of corruption has 'a cancerous effect on economies and politics around the globe'.¹²¹ The International Monetary Fund estimated that the total amount of money laundered on an annual basis is equivalent to 3 to 5 percent of the world's gross domestic product (between \$600 billion and \$1.8 trillion) and it can probably be assumed that a 'significant portion of that activity involves funds derived from corruption'.¹²²

There are severe consequences of exporting funds derived from corruption for the country of origin. It 'undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade, and increases poverty levels'.¹²³ There is no shortage of examples of corrupt leaders sacrificing their country's future for personal enrichment. Between 1995 and 2001, Haiti, Iran, Nigeria, Pakistan, the Philippines, Peru, and the Ukraine claimed losses ranging from \$500 million to \$35 billion due to the corruption of former leaders or senior officials.¹²⁴ President Mobutu Sese Seko looted Zaire's treasury of \$5 billion, an amount equal to the country's external debt at the time.¹²⁵ The late Nigerian dictator, Sani Abacha, and his inner circle looted around \$2.2 billion in a country where 70 percent of the population lives on less than \$1 a day.¹²⁶ The 'steal and run' strategy has been used by at least 4,000 Chinese officials who are suspected of embezzling about \$600 million and then fleeing overseas.¹²⁷

Given the staggering amount of money being siphoned out of developing countries, the issue of asset recovery was a high priority from the very beginning of the negotiations. It importantly had the support of the US. When 58 nations gathered in Buenos Aires for the preparatory meeting in which countries were asked to submit proposals that would be used as the

¹²⁰ The Nyanga Declaration was made by representatives of TI in 11 African countries on 4 March 2001, available at http://www.transparency.org/pressreleases_archive/2001/nyanga_declaration.html.

¹²¹ 'Global Study on the transfer of funds of illicit origin, especially funds derived from acts of corruption', Ad Hoc Committee for the Negotiation of a Convention Against Corruption, 4th Sess., Agenda Item 3, at 3, U.N. Doc. A/AC.261/12 (2002).

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid. See also, 'Crooked Officials Said to Cost Asia a Fortune', *AFX Asia*, 4 December 2003 (saying one-third of public investment in many Asia-Pacific countries is squandered on corruption, with governments paying between 20 to 100 percent over the top for goods and services due to corrupt procurement practices).

¹²⁵ See Andrea D. Bontrager, 'From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery', 7 *Indian Journal of Global Legal Studies* (2000) 655.

¹²⁶ Global Study on the transfer of funds of illicit origin, above n 121, at 3.

¹²⁷ Renmin Wang, 'International Conventions will Help "Extradition" of "Corrupt Officials"', *World News Connection*, 28 September 2003.

basis for negotiations, the US submitted text regarding asset recovery only.¹²⁸

The organs of the UN were also engaged with this issue. Even before the terms of reference were drafted, the General Assembly had passed a resolution in 2000 specifically requesting the Intergovernmental Open-Ended Expert Group examine the question of illegally transferred funds and the repatriation of such funds.¹²⁹ This request was reiterated in the 2002 resolution on the elements to be examined by the Ad Hoc Committee.¹³⁰ The Economic and Social Council passed its own resolution requesting the Secretary-General to prepare a global study on the transfer of funds of illicit origin to assist the deliberations of the Ad Hoc Committee.¹³¹ Due to a proposal by Peru, this study was supplemented by a one-day technical workshop on asset recovery during the second session.¹³² No other aspect of the UNCAC was treated with the same depth.

Within the Ad Hoc Committee, a tremendous amount of political will coalesced around the issue of asset recovery. At the first session, the representatives of the Group of 77 and China, EU, Africa, and Latin America and the Caribbean stated that it was essential that the Convention address this issue effectively.¹³³ At the second session, the Chairman made the significant statement that: 'the question of asset recovery [is] one of the fundamental aspects of the Convention and would also serve as an indicator of the political will to join forces in order to protect the common good'.¹³⁴

Asset recovery therefore became a sort of 'litmus test' for the success of the negotiating process as a whole. Although there were intense debates on how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed, the representatives always emphasized its importance throughout the negotiations.¹³⁵ The high priority of the issue was bolstered by the Security Council resolution deciding that all UN member states should take steps to freeze funds removed from Iraq by Saddam Hussein or his senior officials and immediately transfer them to the Development Fund for Iraq, and take steps

¹²⁸ In contrast, the proposal of Austria and The Netherlands covered almost all matters in the Terms of Reference and ran to 30 pages: Lisa M. Landmeier *et al.*, 'Anti-Corruption International Legal Developments', 36 *Int'l L.* (2002) 589, at 590.

¹²⁹ G.A. Res. 55/188, U.N. GAOR, 55th Sess., Agenda Item 93, U.N. Doc. A/RES/55/188 (2000).

¹³⁰ G.A. Res. 56/260, U.N. GAOR, 56th Sess., Agenda Item 110, U.N. Doc. A/RES/56/260 (2002).

¹³¹ ECOSOC Res. 2001/30, U.N. ECOSOR, at 10, U.N. Doc. E/2001/30-E/CN.15/2001/13 (2001).

¹³² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its second session, held in Vienna from 17 to 28 June 2002*, Annex 1, U.N. Doc. A/AC.261/7 (2002).

¹³³ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its first session, held in Vienna from 21 January to 1 February 2001*, at 6–8, U.N. Doc. A/AC.261/4 (2002).

¹³⁴ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its second session, held in Vienna from 17 to 28 June 2002*, at 3, U.N. Doc. A/AC.261/7 (2002).

¹³⁵ 'Consensus Reached on UN Convention Against Corruption', *UN Information Service*, 3 October 2003.

to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed.¹³⁶ The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.¹³⁷

In the end, provisions on asset recovery formed an entire chapter of the UNCAC.¹³⁸ The provisions have been hailed as ‘ground-breaking’,¹³⁹ but this overstates their true impact. The Convention says the return of assets pursuant to this chapter is a new ‘fundamental principle’ of international law.¹⁴⁰ However, the *travaux préparatoires* indicate that the expression ‘fundamental principle’ has no legal consequences on the other provisions of the chapter.¹⁴¹ The article on prevention and detection of transfers of the proceeds of crime sets out useful provisions on ‘know-your-customer’ requirements for financial institutions and the prevention of ‘phantom banks’ that have no physical presence and are not affiliated with a regulated financial group.¹⁴² However, states parties need only ‘consider’ establishing effective financial disclosure systems for public officials.¹⁴³ There are mandatory provisions on establishing measures to allow states parties to recover property through civil actions or via international cooperation in confiscation.¹⁴⁴ Although the seizure and freezing of property is compulsory for states parties, they need only ‘consider’ preserving property for confiscation.¹⁴⁵ The Convention recognizes the complexity of many asset recovery cases by drawing distinctions between how assets will be returned in response to different crimes. In the case of embezzlement or laundering of public funds, the confiscated property is returned to the requesting state party.¹⁴⁶ In the case of proceeds from any other offence under the Convention, the property is returned as long as there is proof of ownership or recognition of the damage caused to the requesting state party.¹⁴⁷ In all other cases, priority consideration is given to returning the property to the requesting state party, returning property to

¹³⁶ S.C. Res. 1483 (2003), U.N. SCOR, 4761 mtg., at paras 23 and 7, U.N. Doc. S/RES/1483 (2003).

¹³⁷ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, at 5, U.N. Doc. A/AC.261/22 (2003).

¹³⁸ Ch V of the UNCAC.

¹³⁹ Mark Turner, ‘Step Forward for Fight Against Global Corruption’, *Financial Times*, 1 October 2003.

¹⁴⁰ Article 51 of the UNCAC.

¹⁴¹ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 8, U.N. Doc. A/58/422/Add.1, (2003).

¹⁴² Article 52(1) and (2) of the UNCAC.

¹⁴³ Article 52(5) and (6) of the UNCAC.

¹⁴⁴ Articles 53 and 54 of the UNCAC.

¹⁴⁵ Article 54(2)(c) of the UNCAC.

¹⁴⁶ Article 57(3)(a) of the UNCAC.

¹⁴⁷ Article 57(3)(b) of the UNCAC.

its prior legitimate owners, or compensating the victims of the crime.¹⁴⁸ States parties are also to consider setting up a financial intelligence unit to keep track of suspicious financial transactions.¹⁴⁹

The effectiveness of the asset recovery provisions depends to a large extent on the measures for mutual legal assistance.¹⁵⁰ During the negotiations, many developed countries insisted on ‘dual criminality’ before such assistance would be made available – that is, that both the requesting and requested states parties must have comparable offences in their criminal law.¹⁵¹ TI, which was observing the negotiations, reported that many developed countries appeared to prefer to continue to use their extensive bilateral and multi-lateral agreements on extradition and mutual legal assistance rather than rely on the Convention.¹⁵² In the end, a compromise was reached so that dual criminality is only required when the legal assistance requires coercive action.¹⁵³

Overall, even though the chapter on asset recovery is not as revolutionary as some people say, it is a significant step forward in dealing with a complex problem in international affairs. Most importantly, the Convention ties the asset recovery provisions to a wide range of corrupt acts, not just bribery.¹⁵⁴ The Conventions of the OAS, OECD and COE have promoted the understanding of corruption as synonymous with bribery. This view has ‘inherent limitations’, especially in cases where officials become enriched from illicit payments, such as skimming and kickbacks, that do not fit within the definition of active or passive bribery.¹⁵⁵ The Convention addresses the complexity of corruption by recognizing its many forms and providing for appropriate recovery actions in each case.

To date, the recovery of assets derived from grand corruption has been hampered by at least four major obstacles. First, these cases are usually enormously complex and require a sustained effort by experts in forensic accounting, money laundering, and the civil and criminal laws of different countries.¹⁵⁶ The provision on the financial intelligence unit and the Convention’s chapter on technical assistance and information exchange¹⁵⁷ may help in this regard. Second, pursuing assets overseas is highly expensive due to the

¹⁴⁸ Article 57(3)(c) of the UNCAC.

¹⁴⁹ Article 58 of the UNCAC.

¹⁵⁰ Article 46 of the UNCAC.

¹⁵¹ Transparency International Press Release, ‘US weakens UN Convention by blocking measures tackling political corruption’, 11 August 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.08.11.us_blocking_measures.html.

¹⁵² The US, for example, has 110 such agreements: *ibid.*

¹⁵³ Article 46(9)(b) of the UNCAC.

¹⁵⁴ Article 57 of the UNCAC.

¹⁵⁵ Global Study on the transfer of funds of illicit origin, above n 121, at 7.

¹⁵⁶ Global Programme Against Corruption, above n 16, at 120.

¹⁵⁷ Chapter VI of the UNCAC.

need to retain experts, transport evidence and witnesses, translate testimony, and carry out investigations and prosecutions in a number of countries.¹⁵⁸ The Convention's mutual technical and legal assistance provisions may mitigate some of these costs. Third, a common legal complication in recovery actions is straddling the boundary between civil and criminal proceedings because each type involves different procedural safeguards, burdens of proof and remedies.¹⁵⁹ In this regard, the mechanisms for recovery directly, or through international cooperation, help harmonize procedures.¹⁶⁰ If the Convention is implemented by enough state parties, the civil/criminal dilemma will be alleviated. Fourth, asset recovery actions raise complicated political considerations. The requesting state party may face internal political obstacles from supporters of the former leader or senior officials who allegedly transferred the assets. On the other hand, the requested state party may have concerns about the political legitimacy of the requesting state's government, the motivations behind the recovery efforts, or the fate of the returned assets if corruption is still ongoing.¹⁶¹ The Convention does not directly address these concerns, but the very process of negotiating the asset recovery provisions helped generate a high level of political will about the importance of this issue. This consensus may encourage states parties to better address the political obstacles to asset recovery.

The asset recovery chapter has been greeted with delight by many countries that have been cheated by their leaders. For example, the Philippines, which has been trying to recover billions of dollars transferred overseas by former President Ferdinand Marcos for 17 years, has warmly welcomed the asset recovery provisions.¹⁶² Rose-Ackerman argues that national criminal prosecutions of former officials of the previous regime are likely to absorb resources that could be put to better use elsewhere, but she makes an exception for allegations of corruption: 'Such prosecutions can be part of an effort to locate and repatriate corrupt proceeds deposited abroad... [and] can bring a net financial gain to the state as it seizes the former official's assets.'¹⁶³ The UNCAC could make this type of asset recovery more feasible. But, Rose-Ackerman warns that caution must be exercised: 'Too often, former rulers are accused of corruption at the same time as the new rulers are creating corrupt structures of their own that will repeat the pattern. The effort to

¹⁵⁸ Global Programme Against Corruption, above n 16, at 120. See also, Global Study on the transfer of funds of illicit origin, above n 121, at 10.

¹⁵⁹ Global Study on the transfer of funds of illicit origin, *ibid.*, at 9.

¹⁶⁰ Articles 53, 54 and 55 of the UNCAC.

¹⁶¹ Global Study on the transfer of funds of illicit origin, above n 121, at 10.

¹⁶² See Roel Landingin, 'Philippine Commission's Hopes High in Hunt to Recoup the Marcos Billions', *Financial Times*, 2 October 2003; 'Gov't to Push for OK of Pact vs Corruption', *Manila Bulletin*, 30 October 2004 (noting that the ratification of the UNCAC is specifically cited in the Government's Medium-Term Philippine Development Plan for 2004 to 2010).

¹⁶³ Susan Rose-Ackerman, 'Establishing the Rule of Law', in Robert Rotberg (ed), *When States Fail: Causes and Consequences* (Princeton: Princeton University Press, 2004) 182–221, at 185.

retrieve looted funds should be combined with affirmative programs of reform.¹⁶⁴ The impact of the asset recovery provisions should therefore not be exaggerated; they focus attention on a certain aspect of corruption that afflicts developing countries, but do not supply a panacea to their problems.

B. Private sector

The recognition that private sector corruption is a problem has been intensifying in developing and developed countries for three reasons. First, the private sector is larger than the public sector in many countries.¹⁶⁵ In the UK, 82 percent of all workforce jobs were in the private sector in 2000.¹⁶⁶ The private sector has even been experiencing exponential growth in China where its share of industrial employment reached more than 18 percent of the national total by 1995; the private sector accounted for 34.3 percent of national industrial output by 1997, compared to 2 percent in 1985.¹⁶⁷ A second and related reason is that the line between the public and private sectors is being blurred by privatization and outsourcing.¹⁶⁸ In the US, 86 percent of state agencies said they either increased or maintained the level of privatization activity from 1993–98.¹⁶⁹ The World Bank found that privatization surged in developing regions in 1997, but there was a decline everywhere except for Latin America and the Caribbean due to the East Asian crisis in 1997 and the Russian crisis in 1998.¹⁷⁰ Activity has since picked up and more aggressive privatization programs will be launched, or are in progress, in the Middle East and North Africa (countries that will enter the Free Trade Agreement with the EU), Eastern and Central Europe (countries acceding to the EU), and South Asia.¹⁷¹ Privatization not only increases the number of public-oriented activities

¹⁶⁴ Ibid.

¹⁶⁵ Transparency International Press Release, 'TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption', 11 March 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html.

¹⁶⁶ Duncan MacGregor, 'Jobs in the Public and Private Sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors' (Economic Trends, Working Paper No. 571, 2001) at 1, <http://www.statistics.gov.uk/cci/article.asp?id=88> (visited 1 November 2004).

¹⁶⁷ Yang Yao, 'The Size of China's Private Sector', *China Update* 1 (1999), at 2, available at <http://old.ccer.edu.cn/faculty/yao/Size%20of%20PS.pdf>.

¹⁶⁸ Transparency International Press Release, 'TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption', 11 March 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html.

¹⁶⁹ Keon S. Chi and Cindy Jasper, 'Private Practices: A Review of Privatization in State Governments', (Council of State Governments Report, 1998) 7, available at <http://stars.csg.org/reports/1998/private/98private-all.pdf>.

¹⁷⁰ World Bank, *Global Development Finance 2000*, Appendix 4: Progress in Privatization, 135 (2000), available at <http://www.worldbank.org/prospects/gdf2000/app4.pdf>. See also, World Bank, *Global Development Finance 2003*, Figure 4 &fig4; .3, 86 (2003), available at http://www.worldbank.org/prospects/gdf2003/gdf_ch04_web.pdf.

¹⁷¹ Ibid.

being conducted in the private sector, but also creates opportunities for corruption through the very process of transferring assets of large state enterprises. There could be insider dealing, assurances of lenient regulatory oversight, and retention of monopoly rents.¹⁷²

Third, the huge economic influence of multinational corporations (MNCs) and the consequent leverage they have in relation to states, means that they are an actor that cannot be excluded from an international anticorruption strategy. If the size of countries and MNCs are measured by value added, the world's largest MNC, ExxonMobil, with an estimated \$63 billion value added in 2000, ranked 45th in a combined list of countries and non-financial companies; this is equivalent to the size of the economy of Chile or Pakistan.¹⁷³ In the top 100 combined country-company list for 2000, there were 29 MNCs. These powerful non-state actors can make deals with developing country governments that represent a sizable share of a state's national income or resource endowments; they often negotiate with top public officials and, if it is a corrupt environment, the MNC must decide whether to participate actively, quietly refuse to deal, or report the corruption.¹⁷⁴

Extending the Convention to cover the private sector was one of the most contentious issues during the negotiations. The EU spearheaded the drive to criminalize bribery in the private sector.¹⁷⁵ It was supported by the Latin American and Caribbean States whose representative argued that in view of the linkage between the two sectors, adopting a 'limited' approach that only targeted the public sector 'would adversely affect the implementation of the future convention'.¹⁷⁶ However, the US resisted intrusions on 'purely private sector conduct'; a US official explained, 'Private sector bribery is not a crime in the United States. We get at it in other ways'.¹⁷⁷ The US position is somewhat surprising because it has led the way with the FCPA legislation outlawing bribes paid to obtain business, preceding the OECD Convention by two decades. Admittedly the FCPA applies to bribes paid abroad in private-to-public contexts rather than

¹⁷² Rose-Ackerman, *Corruption and Government*, above n 7, at 36–37.

¹⁷³ UNCTAD, *World Investment Report 2002* (2002) 90, available at <http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf>. The value added measure is used because a comparison of the sales of MNCs with the GDP of countries is 'conceptually flawed' (according to UNCTAD) since GDP is a value added measure and sales are not. A comparable yardstick requires that sales be recalculated as value added. For MNCs, value added is estimated as the sum of salaries and benefits, depreciation and amortization, and pre-tax income.

¹⁷⁴ Rose-Ackerman, *Corruption and Government*, above n 7, at 187–88.

¹⁷⁵ 'UN Anti-corruption Pact Raises Last-Minute Alarms', *Reuters*, 29 June 2003.

¹⁷⁶ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002*, at 3, U.N. Doc. A/AC.261/9 (2002).

¹⁷⁷ Quoted in 'UN Anti-corruption Pact Raises Last-Minute Alarms', *Reuters*, 29 June 2003.

private-to-private transactions, but the legislation gave US firms a head start in developing corporate codes of conduct¹⁷⁸ and many such codes cover purely private sector bribery.¹⁷⁹

The US views prevailed in the final version of the Convention which only has a non-mandatory framework for criminalizing bribery and embezzlement in the private sector.¹⁸⁰ The Convention takes a slightly stronger stance on prevention by requiring each state party, ‘in accordance with the fundamental principles of its domestic law’, to take measures to prevent corruption in the private sector, enhance accounting and auditing standards, and ‘where appropriate’ provide effective civil, administrative or criminal penalties for failure to comply with such measures.¹⁸¹ It provides a non-exhaustive list of measures such as promoting the development of codes of conduct, preventing the misuse of procedures for subsidies and licenses, and preventing conflicts of interest.¹⁸² It requires states parties to prohibit off-the-books accounting.¹⁸³ In terms of private-to-public corruption, the UNCAC strengthens the standards set by the OECD Convention. First, it criminalizes the bribery of not just foreign public officials, but also national public officials and officials of public international organizations.¹⁸⁴ Second, it requires each state party to disallow the tax deductibility of expenses that constitute bribes¹⁸⁵ – an issue on which the OECD has only made a non-binding recommendation.¹⁸⁶

US businesses were concerned that extending the Convention to the private sector could create a private right of action that would open the door to lawsuits in foreign courts over contract and procurement irregularities.¹⁸⁷ Partly due to the lobbying efforts of TI in the US business community, a provision was included in the Convention requiring each state party to ensure that entities or persons that have suffered damage from corruption ‘have a right to initiate legal proceedings against those responsible for that damage in order to obtain compensation’.¹⁸⁸ To guard against the unintended effect of increasing US exposure to lawsuits from overseas, the *travaux préparatoires*

¹⁷⁸ Rose-Ackerman, *Corruption and Government*, above n 7, at 187–88.

¹⁷⁹ While not limited to US firms, an OECD survey of corporate codes of conduct found that of 56 codes that dealt with bribery, 64 percent addressed bribery of private actors: Kathryn Gordon and Maiko Miyake, ‘Business Approaches to Combating Bribery: A Study of Codes of Conduct’ (OECD Working Papers on International Investment, No. 2000/1, 2000) at 6, available at <http://www.oecd.org/dataoecd/45/32/1922830.pdf>.

¹⁸⁰ Articles 21 and 22 of the UNCAC.

¹⁸¹ Article 12(1) of the UNCAC.

¹⁸² Article 12(2) of the UNCAC.

¹⁸³ Article 12(3) of the UNCAC.

¹⁸⁴ Articles 15 and 16 of the UNCAC.

¹⁸⁵ Article 12(4) of the UNCAC.

¹⁸⁶ OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, 35 I.L.M. 1311, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

¹⁸⁷ ‘UN Anti-corruption Pact Raises Last-Minute Alarms’, *Reuters*, 29 June 2003.

¹⁸⁸ Article 35 of the UNCAC.

indicate that this provision does not restrict the right of each state to determine the circumstances under which it will make its courts available, and gives the example of legal action ‘where the acts have a *legitimate relationship* to the state party where the proceedings are to be brought’.¹⁸⁹

In sum, the UNCAC does not significantly alter the (absence of) rules regarding private-to-private corruption. The Chairman of the Ad Hoc Committee noted that there were concerns about placing ‘unwarranted, undue and unwanted restraints on trade and the ability of private sector entities to pursue their activities for the benefit of national economies and international development’.¹⁹⁰ However, requiring the private sector to comply with similar anticorruption laws to the public sector surely benefits ‘national economies and international development’ by eliminating loopholes and recognizing the increasing convergence between the sectors in many areas of economic life. In failing to criminalize bribery and embezzlement in the private sector, the Convention falls short of the standard set by the EU Joint Action.¹⁹¹ Nonetheless, the Convention does go further than the OECD Convention with respect to private-to-public corruption and its provision on the private right of action, even if it is restricted to certain circumstances, follows the COE Civil Convention by empowering victims of corruption to take action on their own initiative.

C. Financing of political parties

The most intense debate during the negotiation of the Convention was reserved for the provision on the financing of political parties. There are two dynamics underlying this controversy. The first, more general, dynamic is that corruption in elections is of universal concern. TI’s Global Corruption Barometer surveyed 40,000 people in 47 countries and found that in three out of four countries, corruption in the political process is the most important issue.¹⁹² The message is that a lack of trust in political parties undermines their legitimacy and can ‘encourage a culture of corruption throughout public administration and the public sector’.¹⁹³

The second, more specific, dynamic is the issue of campaign finance. As Offe observes, the party competition that is an integral part of democratic

¹⁸⁹ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 6, U.N. Doc. A/58/422/Add.1 (2003) (emphasis added).

¹⁹⁰ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its fourth session, held in Vienna from 13 to 24 January 2003*, at 3, U.N. Doc. A/AC.261/13 (2003).

¹⁹¹ Joint Action 98/742/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ 1998 L 358, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm>.

¹⁹² James Auger, ‘International Survey Sheds Light on Corruption Blackspots’, *World Markets Analysis*, 7 July 2003.

¹⁹³ *Ibid.*

government ‘generates an insatiable appetite for campaign funds’.¹⁹⁴ Moreover, the costs of this competition are increasing in a ‘media democracy’ where opportunities for communicating must be purchased.¹⁹⁵ Yet, this flow of campaign finance generates two problems. First, when large amounts of money reach a politician, there is a temptation to divert the funds for personal use.¹⁹⁶ Second, even if the donations are not diverted, they can be used, in effect, to ‘purchase’ an elected official’s support or vote on legislation.¹⁹⁷ Democracies have sought to reduce corruption in campaign finance in a variety of ways, but each has proved unsatisfactory. The US requires disclosure of donors and imposes limitations on the total amount that individuals can directly contribute to a candidate.¹⁹⁸ However, third-party organizations can legally collect unlimited contributions.¹⁹⁹ Germany has very stringent laws,²⁰⁰ but in the 1980s, contributions requiring *quid pro quos* were disguised as charitable contributions.²⁰¹ There have also been allegations that former Chancellor Kohl maintained a secret campaign contribution fund.²⁰²

The negotiations in the Ad Hoc Committee centered around Article 10 on the funding of political parties proposed by Austria, France and the Netherlands.²⁰³ At the fourth session of the negotiations, the article read:

1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
 - (a) To prevent conflicts of interest;
 - (b) To preserve the integrity of democratic political structures and processes;
 - (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

¹⁹⁴ Claus Offe, ‘Political Corruption: Conceptual and Practical Issues’, in Janos Kornai and Susan Rose-Ackerman (eds), *Problems of Post Socialist Transition: Building a Trustworthy State*, vol 1, (New York: Palgrave Macmillan, 2004) 290 at 308.

¹⁹⁵ *Ibid* at 309.

¹⁹⁶ Henning, above n 14, at 842–43.

¹⁹⁷ *Ibid*.

¹⁹⁸ 2 United States Code (USC) § 434(b) (2000).

¹⁹⁹ The US Supreme Court affirmed the ban on the ‘soft money’ that national political parties collected from corporations, labor unions and wealthy patrons. However, some believe major donors will now direct that money to third-party organizations: Glen Justice, ‘Court Ruling Affirms New Landscape of Campaign Finance’, *N.Y. Times*, 11 December 2003.

²⁰⁰ It requires detailed information on donors of more than DM20,000 (US\$10,000), anonymous donations must not exceed DM1,000, and any political party caught accepting improper donations must pay twice that amount to charity: see German Embassy, ‘Party and Campaign Finance in Germany’, <http://www.germany-info.org/relaunch/info/archives/background/partyfinance.html> (visited on 12 October 2004).

²⁰¹ Rose-Ackerman, *Corruption and Government*, above n 7, at 134.

²⁰² See Charles P. Wallace, ‘Greasing the Wheels’, *Time (Europe)*, 7 February 2000; ‘Comparative Corruption’, *Economist (US)*, 17 May 2003.

²⁰³ *Proposals and Contributions Received from Governments: Austria, France and The Netherlands*, U.N. Doc. A/AC.261/L.21 (2002).

- (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
2. Each State Party shall take measures to avoid as far as possible conflicts of interest owing to simultaneous holding of elective office and responsibilities in the private sector.²⁰⁴

The article's legally binding language and broad scope elicited a negative reaction from several delegations. The US refused to endorse the Convention if it included that article and called for its deletion.²⁰⁵ It is ironic that the US was such a strong opponent of this aspect of the UNCAC. Two decades ago, during the negotiations for the OECD Convention, the US was very concerned about corruption in political parties. In fact, it was a 'major disappointment' to the US that the definition of 'foreign public official' in the OECD Convention excluded political party officials.²⁰⁶ The US delegates believed that excluding political party officials 'would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials'.²⁰⁷

The US ultimately triumphed in the negotiations and Article 10 was deleted during the penultimate session of the Ad Hoc Committee, as the deadline for completion quickly approached. Following the decision, the representatives of Benin, Burkina Faso, Cameroon and Senegal expressed their wish that the report of the Ad Hoc Committee 'reflect their preference for a separate binding article on the financing of political parties; however, because of their willingness to accommodate the concerns of other delegations and to ensure the successful finalization of the draft convention, they felt compelled to join the consensus on the deletion of article 10 and the incorporation of a new paragraph in article 6'.²⁰⁸

Article 6 represented a substantial compromise. The strong language of Article 10 was watered down to two non-mandatory clauses asking states to 'consider' adopting measures to 'prescribe candidature for and election to public office' and to 'enhance transparency in the funding of candidatures... and, where applicable, the funding of political parties'.²⁰⁹

²⁰⁴ *Revised Draft United Nations Convention Against Corruption*, at 18, U.N. Doc. A/AC.261/3/Rev. 2 (2002).

²⁰⁵ 'Transparency International Zambia President Dr. Chanda Criticizes US' Unilateralism', *Africa News*, 15 August 2003. See also, Transparency International Press Release, 'US Weakens UN Convention by Blocking Measures Tackling Political Corruption', 11 August 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.08.11.us_blocking_measures.html.

²⁰⁶ Gantz, above n 10, at 486.

²⁰⁷ *Ibid.*

²⁰⁸ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, U.N. Doc. A/AC.261/22, Aug 22, 2003, 10.

²⁰⁹ Article 6(2) and (3) of the UNCAC.

Although the US already has strong domestic laws on transparency in political funding, it was only willing to support a discretionary paragraph on this issue.²¹⁰

The outcome of the negotiations acknowledged that the relationship between money and politics is complex and hard to constrain without creating incentives for illegality. The Ad Hoc Committee ultimately had to recognize that campaign contributions are a crucial part of the election systems in many countries and it had to tread carefully in order to avoid the Convention coming into conflict with a core aspect of democratic politics. Despite the intense public concern about corruption in the political process, no multilateral initiative deals expressly with the financing of political parties because this is an area fraught with uncertainty.²¹¹ Indeed, several delegations to the Ad Hoc Committee questioned whether the negotiation of such a provision was practical given the ‘enormous variations in political systems’.²¹²

Campaign finance appears not to be well-suited to regulation through international conventions. The mixed results of domestic laws suggest that that ‘reformers need to look beyond the details of the campaign finance law to seek ways to limit the discretion of politicians to favor gift givers’.²¹³ Offe also makes the interesting argument that in addition to formal controls, there should be standards of political virtue observed by elites and non-elites.²¹⁴ Reducing political corruption requires reliance on ‘endogenous sources of discipline’.²¹⁵ While this is a rather abstract idea, the failure to reach consensus on Article 10 and the way domestic campaign finance laws have been continually circumvented supports Offe’s point that formal controls are insufficient to counter the appetite of competing political parties.

D. Implementation, enforcement, and monitoring

The signing conference of the UNCAC in Mexico signals the beginning, not the end, of the work needed to make the Convention become a reality. The Convention can be seen as a blueprint for policy reform on a global level, and as with any reform proposal, there is a need to consider not just the formal provisions, but how they will impact on societies. ‘Law’, in the sense of a set of formal written documents, will be largely irrelevant if the rules are not embedded in an institutional and organizational structure that favors

²¹⁰ Article 6(3) of the UNCAC. See 2 United States Code (USC) § 434(b) (2000).

²¹¹ Henning, above n 14, at 853.

²¹² *Revised Draft United Nations Convention Against Corruption*, 18 (commentary in footnote 76), U.N. Doc. A/AC.261/3/Rev. 2 (2002).

²¹³ Rose-Ackerman, *Corruption and Government*, above n 7, at 139.

²¹⁴ Offe, above n 194, at 320.

²¹⁵ *Ibid.*, at 321.

compliance.²¹⁶ The work by Thomas and Grindle puts forward an ‘interactive’ model of reform²¹⁷ that requires states parties to follow through on their decision to sign and ratify the Convention; the UNCAC must be translated into visible, meaningful, and sustainable changes on the ground.

The survey of multilateral initiatives in Part I demonstrated how implementation, monitoring and enforcement are the areas where most conventions fall down. In the case of the OAS Convention, the monitoring mechanism did not produce any results until 2003. The mechanism’s questionnaire methodology is also open to criticism because it will:

have little bearing or weight or force on whether the States Parties actually benefit from or adhere to the intent of the [OAS Convention] . . . The [Convention] and any other anticorruption instrument can only be successful if the officials responsible for implementation are themselves held accountable for their own conduct. It is one thing to tell the world that one’s Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself.²¹⁸

The OECD Convention has a more robust monitoring mechanism with on-site visits and a focus on practical changes in institutional structures. However, significant problems still exist. Phase 1 reviews have found that domestic laws are being implemented in compliance with the Convention, but the content of these laws may not be conducive to practical change. Australia’s Criminal Code Amendment (Bribery of Foreign Officials) Act 1999 (Cth) has many provisions that are either undefined or ‘so broad that companies engaging in borderline acceptable conduct may be more likely to be within the realms of the offence than not’.²¹⁹ Moreover, surveys by TI and Control Risks Group indicate that such laws are not enforced in practice.²²⁰ Phase 2, which is meant to address enforcement, has been disappointingly slow in exposing the reasons for the lack of prosecutions and in compelling states parties to remedy the situation. TI has made useful recommendations for strengthening the OECD monitoring process including recognizing that the effort must be long-term, introducing a ‘Phase 3’ with further on-site

²¹⁶ Rose-Ackerman, ‘Establishing the Rule of Law’, above n 163, at 83.

²¹⁷ See John W. Thomas, ‘After the Decision: Implementing Policy Reforms in Developing Countries’, 18 *World Development* (1990) 1163.

²¹⁸ Nagle, above n 95, at 1678.

²¹⁹ Martijn Wilder and Michael Ahrens, ‘Australia’s Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’, 2 *Melb. J. Int’l L.* (2001) 568, at 586.

²²⁰ Transparency International, ‘Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials’, Report on Paris Meeting of 2–3 October 2003, 1; ‘Laws Fail to Halt International Business Bribery’, *USAID Democracy and Governance Anti-Corruption News*, 23 August 2003, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption/news/403_2.html.

reviews, including more experienced prosecutors on country review teams, and encouraging civil society participation.²²¹

The COE Civil and Criminal Conventions have a similar peer review and mutual evaluation system to the OECD Convention. The COE mechanism also supplements questionnaires with on-site visits. It has proceeded at a good pace and completed first round evaluations of all states parties in 2002.²²² It is now engaged in second round evaluations arranged around three themes: proceeds of corruption, public administration and corruption, and legal persons and corruption.²²³ The COE system appears to be faring slightly better than the OECD mechanism because it includes training for evaluators, appears to have a consistent level of funding, and is flexible enough to make adjustments to its rules and procedures as it goes.²²⁴ Most importantly, the formation of GRECO – a group of member states, non-member states, and organizations – puts the COE Conventions in a broader context. Nonetheless, there does not appear to have been any empirical work on whether the COE Conventions are actually being enforced so it is quite possible that they suffer similar problems to the OECD Convention.

Perhaps conscious of the failings of previous instruments, the negotiations over the UNCAC's monitoring mechanism started off strongly. At the second session, Austria and The Netherlands submitted a proposal for a monitoring mechanism.²²⁵ They suggested the establishment of a Conference of States Parties with the objectives of facilitating training and technical assistance, exchanging information, cooperating with regional organizations and NGOs, reviewing implementation 'periodically', and making recommendations to improve the Convention.²²⁶ They also called for a Subsidiary Body of ten experts elected by the states parties which would assess reports submitted by states parties on their implementation of the Convention.²²⁷ The weakness of this proposal was that reports need only be submitted every five years and even though the Subsidiary Body could request further information, there was no mention of on-site visits or other means of verifying the accuracy of the country reports.²²⁸ Norway then submitted an amendment to this aspect of the Convention that was much more rigorous. It proposed a regional evaluation process whereby states parties in Africa, America, Asia, Europe and

²²¹ Transparency International, *ibid.*, at 3–4.

²²² Third General Activity Report of GRECO (2002) 2, available at [http://www.greco.coe.int/docs/2002/GRECO\(2002\)34E.pdf](http://www.greco.coe.int/docs/2002/GRECO(2002)34E.pdf)

²²³ *Ibid.*, at 4.

²²⁴ See *ibid.*

²²⁵ *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2003).

²²⁶ Article 66 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

²²⁷ Articles 67 and 68 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

²²⁸ Article 68 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

Oceania appoint a Bureau to assist the Subsidiary Body.²²⁹ It also set out a two-phase evaluation process, based on the OECD Convention: Phase 1 would focus on whether the domestic laws of each state party fulfil the requirements of the Convention; Phase 2 would study the structures put in place to enforce the laws, with provision for on-site visits.²³⁰ Norway's proposal also set out innovative methods for addressing non-compliance with the Convention, including positive (targeted technical assistance) and negative (suspension of the state party from the Convention) measures. This goes a step further than any previous multilateral initiative against corruption.

However, neither of these proposals secured enough support. The Austrian and Dutch proposal for establishing a Conference of States Parties to facilitate activities and information exchange was retained.²³¹ However, the proposals on the Subsidiary Body and the regional evaluation process did not make it into the final Convention. Instead, each state party is to provide information on its implementation measures 'as required by the Conference of States Parties'.²³² The role of civil society is weak: the UNCAC may consider inputs from NGOs 'duly accredited' in accordance with procedures that are yet to be decided, with no time limit specified for such a decision.²³³ The Conference of States Parties may establish a mechanism to 'assist in the effective implementation of the Convention', but only if 'it deems it necessary'.²³⁴ The *travaux préparatoires* indicate that nothing in this section is intended to limit the discretion of the Conference of States Parties in making this decision.²³⁵ However, the absence of timelines and concrete commitments means that the UNCAC might be what Reisman calls a *lex simulata*: 'a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied'.²³⁶

This is an area where UNCAC has not shown any innovation. It follows the formula of the weakest regional conventions by giving state parties a large degree of leeway to decide if and how far to incorporate the Convention into national law. Deferring consideration of a monitoring mechanism until the Conference of States Parties is convened one year *after* the Convention acquires 30 ratifications and enters into force²³⁷ will probably result in a delay

²²⁹ *Proposals and Contributions Received from Governments: Norway: Amendments to Article 68 as Submitted in the proposal by Austria and The Netherlands*, U.N. Doc A/AC.261/L.78 (2002).

²³⁰ *Ibid.*

²³¹ Article 63 of the UNCAC.

²³² Article 63(6) of the UNCAC.

²³³ *Ibid.*

²³⁴ Article 63(7) of the UNCAC.

²³⁵ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 12, U.N. Doc. A/58/422/Add.1 (2003).

²³⁶ W. Michael Reisman, *Folded Lies: Bribery, Crusades and Reforms* (New York: Free Press, 1979) 31.

²³⁷ Articles 63(2) and 68 of the UNCAC.

of several years. In the meantime, governments have little incentive to pass implementing laws. As imperfect as they are, the monitoring mechanisms of the OECD and COE demonstrate that peer review and mutual evaluation can produce some results such as raising public awareness and encouraging the passage of implementing laws. Moreover, the UNCAC could have taken this opportunity to propose the creation of a new international institution for review and adjudication. Rose-Ackerman suggests that tribunals in the fields of human rights, international labor standards and nuclear energy might be models.²³⁸ She says another option may be to use the leverage of the World Trade Organization to give victims of corruption a means of lodging a complaint.²³⁹

III. PROSPECTS FOR THE CONVENTION: THEORIES OF COMPLIANCE

When a treaty comes into force, ratifying states are legally obliged to comply with it according to the principle of *pacta sunt servanda*.²⁴⁰ However, the international legal environment is very different to domestic legal systems. The International Court of Justice (ICJ) is not equivalent to a domestic court because it cannot enforce its judgments.²⁴¹ The General Assembly is not equivalent of a domestic legislature because its resolutions are not binding. The Secretary-General is not an analog to a president. As former Secretary-General Boutros Boutros-Ghali once said, 'I can do nothing. I have no army. I have no money. I have no experts. I am borrowing everything. If the member states don't want [to do something], what can I do?'.²⁴² In sum, international law is largely voluntary in nature and lacks any central enforcement power. This section considers the prospects for the UNCAC in a legal environment where compliance is complex and elusive in practice. It examines three broad theoretical approaches that seek to explain the conditions under which international law exercises influence on state behavior.²⁴³

A. Compliance as function of normativity

The first school of theory is composed of international law scholars who argue that governments comply with treaties not only because they expect a reward

²³⁸ Rose-Ackerman, *Corruption and Government*, above n 7, at 195.

²³⁹ *Ibid.*, at 196. The European Union has said that it wants to expand the agenda of the World Trade Organization to include anti-corruption measures: Hugh Williamson and Guy de Jonquières, 'EU Wants WTO to Tackle Corruption', *Financial Times*, 9 January 2004.

²⁴⁰ Article 36 of the Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969 (entered into force 27 January 1980), 1155 U.N.T.S. 331.

²⁴¹ The ICJ can ask the Security Council to enforce its judgments under Article 94 of the United Nations Charter, but this has only happened once in 50 years (in the Lockerbie Case) and it was with the prior agreement of Libya.

²⁴² Quoted in PBS, 'Kofi Annan: Center of the Storm', http://www.pbs.org/wnet/un/print/job_print.html (visited 21 October 2004).

²⁴³ See Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Mich. J. Int'l L.* 345, for an overview of competing concepts of law and the problematic notion of compliance.

for doing so, but also because of their commitment to the ideas embodied in the treaties.²⁴⁴ This normative approach to analyzing state behavior has given rise to a number of different, yet related, views. For Brierly, state consent is the critical factor: nations obey international law because they have consented to it.²⁴⁵ Franck, on the other hand, places emphasis on process, arguing that states comply with international law because it comes into existence through a legitimate (i.e. transparent, fair, inclusive) process.²⁴⁶ The Chayes also examine the treaty-making process, but stress the interplay between actors, rather than the overall legitimacy of the procedure. They argue that compliance is fostered by a 'managerial model' whereby nations comply with treaties because of an 'iterative process of discourse among the parties, the treaty organization and the wider public'.²⁴⁷ Koh offers a related vision in his explanation of the 'transnational legal process' – 'the interaction, interpretation and internalization of international norms into domestic legal systems'.²⁴⁸ For Koh, this process of norm internalization is pivotal to understanding why nations obey international law.²⁴⁹ Finally, Hathaway offers a political theory of international law that describes three levels of incentives that shape a state's decision to commit to and comply with international treaties: domestic legal incentives arising from expected enforcement of the law by national actors; transnational legal incentives arising from enforcement by international bodies or other states parties; and non-legal incentives created by the anticipated reactions of domestic and transnational actors.²⁵⁰

Several features of the UNCAC bode well for compliance, according to this theoretical approach. First, the Convention was negotiated under favorable conditions with high participation, with an average of over 100 states attending each session.²⁵¹ Second, the final draft of the Convention commanded broad support from all the regional groups.²⁵² Third, the UN and the public were involved in the process through the presentation of the Convention to the Third Committee and the General Assembly, and the publication of all documentation on the internet.²⁵³ Fourth, the UNCAC explicitly involves the

²⁴⁴ Oona A. Hathaway, 'Between Power and Principle: A Political Theory of International Law', 71 U. Chi. L. Rev. (forthcoming May 2005), at 6.

²⁴⁵ James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, New York: Oxford University Press, 1963).

²⁴⁶ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

²⁴⁷ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 3, 25.

²⁴⁸ Harold Hongju Koh, 'Why Do Nations Obey International Law?', 106 Yale L.J. (1997) 2599, at 2603.

²⁴⁹ *Ibid.*

²⁵⁰ Hathaway, above n 244.

²⁵¹ Participation ranged from 97 states at the first session to 114 states at the seventh session; attendance never fell below 97: *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions*, at 3–14, U.N. Doc. A/58/422 (2003).

²⁵² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions*, at 16, U.N. Doc. A/58/422 (2003).

²⁵³ See United Nations Office on Drugs and Crime, 'Documentation', http://www.unodc.org/unodc/crime_cicp_documentation.html (visited 11 October 2004).

transnational legal process through the requirement that states parties translate many of its provisions into domestic law. However, the lack of a robust monitoring mechanism for the UNCAC means that the domestic and transnational legal incentives for enforcement are low.

B. Compliance as a cooperation problem: competition or coordination?

The second theoretical approach views compliance in international law as either a prisoner's dilemma or a coordination problem. In both situations, the actors are better off if they all cooperate. Under a prisoner's dilemma, the cooperative solution is unstable since each individual has an incentive to cheat when everyone else is cooperating.²⁵⁴ In contrast, in a pure coordination game, the cooperative solution is stable. Once everyone behaves morally, there is no incentive for anyone to defect. 'The only problem is inducing firms [and states] to move to such a strategy, because being the only honest firm [or state] in a sea of corruption is costly'.²⁵⁵ If the UNCAC is an exercise in coordination, the prospects are good. If it is a prisoner's dilemma, then it will have little impact.

Two questions are raised by this theory. First, what does a coordination game look like? Second, how does one trigger a switch from a prisoner's dilemma to a coordination game? In terms of the first question, Ginsburg and McAdams describe coordination games as 'situations where parties have fully or partially common interests that can be achieved only if they coordinate their strategies among multiple possible equilibria'.²⁵⁶ 'Pure' coordination games where interests are perfectly aligned are a very rare situation in international affairs given the diversity of politics, laws, and cultures. However, that does not mean that coordination is not significant in 'mixed motive' games where even though states have divergent interests, they also retain some interest in coordinating their conduct.²⁵⁷ When states encounter coordination situations repeatedly, this iteration can produce conventions – 'a form of spontaneous order that emerges even in a state of anarchy'.²⁵⁸ Here, Ginsburg and McAdams are not talking about international agreements, but a particular pure strategy equilibrium that emerges in an iterated game when more than one is possible.²⁵⁹ However, the UNCAC arguably represents this type of strategic 'convention' as well. The coordinated expectations underlying it allow states parties to avoid conflict.

²⁵⁴ Rose-Ackerman, 'Corruption and the Global Corporation', above n 11, at 163.

²⁵⁵ *Ibid.*

²⁵⁶ Tom Ginsburg and Richard H. McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *Wm. & Mary L. Rev.* (2004) 1229, at 1235.

²⁵⁷ *Ibid.*, at 1245.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, at 1247.

As for the second question, some claim that a prisoner's dilemma can be converted into a coordination game through dialogue and public relations.²⁶⁰ There has indeed been a greater willingness to discuss corruption over the past ten years. In addition to the regional initiatives discussed in Part I, discourse about corruption has appeared in the context of other international issues. The preamble to the General Assembly resolution on the UNCAC states that the importance of fighting corruption has been recognized by the UN's two largest international conferences on financing for development and sustainable development.²⁶¹ This discourse has 'generated shared understandings of the negative impacts of corruption'.²⁶² The role of TI, as the first international NGO devoted to combating corruption, cannot be underestimated. Its awareness-raising campaigns, monitoring efforts, and lobbying work in over 100 countries has kept corruption on the global agenda.²⁶³

Another way in which a coordination game can come about is through gradualism and legalization. Abbott and Snidal analyze the emergence of the OECD Convention and how the OECD offered a setting where states could 'learn about the problem of corruption, reduce their uncertainty, change their positions, craft a series of steps towards a cooperative agreement and resolve their assurance problems'.²⁶⁴ They examine why the US was unable to gain international agreement on foreign bribery rules between 1977 and 1990, but then was successful in achieving cooperation between 1990 and 1997.²⁶⁵ The transition from the 'soft law' of the 1994 and 1997 Recommendations to the binding 1997 OECD Convention was a process of 'ratcheting up' cooperation.²⁶⁶

Under this game theoretical approach, the prospects for compliance with the UNCAC are good if it serves a coordinating function. There are strong indications that we are dealing with a coordination game rather than a prisoner's dilemma. First, there has been extensive dialogue and public relations around the issue of corruption on national, regional and international levels.

²⁶⁰ Rose-Ackerman, 'Corruption and the Global Corporation', above n 11, at 163.

²⁶¹ A/58/422, p. 19. The Monterrey Consensus adopted by the International Conference on Financing for Development in March 2002, underlined that fighting corruption at all levels was a priority. The Johannesburg Declaration on Sustainable Development adopted by the World Summit on Sustainable Development in September 2002, declared corruption a threat to the sustainable development of people. See also *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18–22 March 2002*, (United Nations publication, Sales No. E.02.II.A.7), chap. 1, resolution 1, annex and *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 1, annex, para 19.

²⁶² Alhaji B.M. Marong, 'Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa', 30 *Denv. J. Int'l L. & Pol'y* (2002) 99, at 101.

²⁶³ Hugh Williamson, 'Keeping Corruption on the Global Agenda', *Financial Times (London)*, 16 October 2003, 13.

²⁶⁴ Abbott and Snidal, above n 4, at 3.

²⁶⁵ *Ibid.*, at 20–21.

²⁶⁶ The Recommendations each exerted influence on their own, facilitated additional progress forward and limited backsliding: *ibid.*, at 30.

Second, the UNCAC can also be seen as the culmination of a ‘ratcheting up’ that began with the US unilateral action with the FCPA and progressed to soft law and then finally binding agreements by regional organizations. Even if the states parties to the UNCAC have mixed motives, it is likely that they still have some interest in coordinating their actions in the ‘anarchic’²⁶⁷ environment of international relations. However, the question is how far will this coordination go? If it only extends to lawmaking and not law enforcement, the UNCAC will not change much.

C. Moral imperialism, norms and behavior

The third theoretical approach focuses on anticorruption conventions so its critiques are more specific. Salbu has put forward a moral imperialism critique. In terms of the extraterritorial legislation like the FCPA, he contends that the so-called ‘global village’ has yet to develop into a single viable community that can be subjected to ‘a single set of extrinsically imposed rules’.²⁶⁸ The moral peril consists of the ‘dangers of intrusiveness, paternalism, imperialism, and disrespect that arise whenever one state imposes its discretionary values upon another state’.²⁶⁹ Salbu extends his critique to multilateral efforts, such as the OECD Convention, saying that such treaties ‘cannot avoid cultural imperialism simply by virtue of their multilateralism’.²⁷⁰ He says that ‘even if all the countries of the world were to sign the Convention’, their ability to evaluate activities outside their own borders would be subject to ethnocentrism and moral imperialism.²⁷¹ Salbu admits that one day such a critique will become obsolete due to the forces of globalization, but writing in 2000, he argues that the level of globalization has not yet been reached.²⁷² According to this view, the UNCAC will be unsuccessful because its provisions enshrine values that are not yet shared and any attempts to monitor or enforce them would be ethnocentric.

Salbu’s concerns are answered in two ways. First, the growing consensus about the negative effects of corruption suggests that its proscription may be considered a ‘hypernorm’ that transcends national boundaries.²⁷³ Conventions like the UNCAC are not acts of moral imperialism but are instead attempts to ‘give voice to or contribute to the creation of the values of a larger community’.²⁷⁴ Second, Windsor and Getz draw a useful distinction between

²⁶⁷ Ginsburg and McAdams, above n 256, at 1233.

²⁶⁸ Steven R. Salbu, ‘Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village’, 24 *Yale J. Intl L.* (1999) 223, at 226.

²⁶⁹ *Ibid.*, at 227.

²⁷⁰ *Ibid.*, at 252–53.

²⁷¹ *Ibid.*

²⁷² Steven R. Salbu, ‘A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery’, 33 *Cornell Intl L.J.* (2000) 657, at 682.

²⁷³ Philip M. Nichols, ‘Regulating Transnational Bribery in Times of Globalization and Fragmentation’, 24 *Yale J. Intl L.* (1999) 257, at 302–03.

²⁷⁴ Duane Windsor and Kathleen A. Getz, ‘Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values’, 33 *Cornell Intl L.J.* (2000) 731, at 762.

moral, or value-oriented, and normative, or behavior-oriented, regimes. A multilateral ‘moral regime’ is a matter of intrinsic commitment to global hypernorms and assumes either widespread value concurrence or value enforcement by a dominant actor.²⁷⁵ This is the type of regime Salbu is concerned about. In contrast, a ‘normative regime’ merely requires voluntary consent concerning specific forms of behavior, without respect to motives or attitudes.²⁷⁶ Moral values need not be at stake other than rhetorically; a normative regime may address whether corruption is morally acceptable, but it really turns on a practical question, ‘namely, whether bribery and extortion are economically and politically tolerable’.²⁷⁷

According to Windsor and Getz, the OAS, OECD and EU Conventions represent the beginnings of a multilateral normative regime because each constitute formal consent by states parties to the basic principle of suppressing business bribery of foreign public officials.²⁷⁸ Applying this theory, the UNCAC represents a significant step in the development of a multilateral normative regime because it not only broadens the principle to include forms of corruption other than bribery, but also has the potential – by transcending regional arrangements – to secure the consent of a larger range of states parties. Windsor and Getz predict that a normative regime could develop with time and experience into a moral regime.²⁷⁹ However, they rightly point out that, ultimately, this evolution is not the crux of the issue: instead, for the sake of all the victims of corruption, what is important is that corrupt behaviors decline and then cease.²⁸⁰

According to this theory, the UNCAC will be complied with not necessarily because it reflects a moral consensus, but because it taps into practical concerns about corrupt behaviors. There are positive indicators that the UNCAC engaged with such practical issues such as the strong support for its innovative asset recovery provisions. However, the precedents set by other multilateral initiatives suggest there is still an ‘implementation gap’ between formal compliance in terms of laws on the books and practical compliance that changes behaviors.

CONCLUSION

The former head of the Hong Kong Independent Commission Against Corruption, Tony Kwok Man-wai, said the UNCAC was his ‘dream come true’.²⁸¹ It is true that the Convention symbolizes a defining moment in the

²⁷⁵ Ibid.

²⁷⁶ Ibid, at 763.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid, at 771.

²⁸⁰ Ibid.

²⁸¹ Quoted in Peter Michael, ‘UN Deal Will Help Curtail Global Graft, Says ICAC’, *South China Morning Post*, 7 October 2003, 2.

normative consensus that has been building up around corruption. It has helped elevate anticorruption action to the international stage. However, finalizing the text is only the beginning of the long journey to having an impact on corrupt behavior. The Convention must now be ratified by at least 30 states, domestic legislation must be reworked, and, most importantly, its provisions must be enforced.

As with every international legal agreement, the UNCAC struggles with the tension between domestic sovereignty and international obligations. During the third session of the negotiations, the Chairman of the Ad Hoc Committee expressed his concern about the repeated references in the text of the Convention to its conformity with domestic law:

Such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national laws. [These] [n]egotiations... [offer] an opportunity to codify innovative approaches to common problems, to which national laws [can] aspire. Such an opportunity should not be missed.²⁸²

Was an opportunity missed? In some ways, it was. Purely private sector corruption is only subject to a non-mandatory framework which fails to recognize the large size of this sector in many countries and its increasing linkages with the public sector. However, the most disappointing aspect of the UNCAC was its failure to incorporate a robust monitoring mechanism even though the proposals of Austria, The Netherlands and Norway were on the table. The experience of the OAS Convention suggests that a vague provision for monitoring will result in a long delay before even the most rudimentary action is taken to hold states parties accountable. It is undeniably challenging to design a monitoring mechanism that does not encroach too far on state sovereignty, especially on a subject as contentious as corruption. Yet, the OECD and COE models prove that monitoring mechanisms can achieve some results, especially in the area of domestic implementation of laws. Instead of improving on such models, the UNCAC retreated back to the safety of noncommittal legal language and deferral of the hard decisions to another day.

However, there *are* some aspects of the UNCAC that are innovative or build on the strengths of previous initiatives. Its provisions on asset recovery go a long way to addressing the major obstacles to retrieving assets derived from grand corruption. If ratified widely, the asset recovery provisions provide a solid foundation for international cooperation in this area. Moreover, the Convention's provisions on private-to-public bribery strengthen the standards set by the OECD Convention, and its creation of a private right of action internationalizes the impact of the COE Civil Convention. In the case

²⁸² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002*, at 7, U.N. Doc. A/AC.261/9 (2002).

of the financing of political parties, the UNCAC did as best it could given that this is a difficult problem that probably requires creative solutions outside of formal legal controls.

It is too early to accurately predict the tangible contribution that the UNCAC will make to the fight against corruption. Writing about international bribery 25 years ago, Reisman observed, 'To date, the international efforts that have been mounted seem more on the order of a crusade than reform. Their major contribution appears to be a feeling that something laudable is being done.'²⁸³ It would be a great shame if the Convention became another example of *lex simulata*. Ultimately, the UNCAC will only become a global achievement – and succeed where other conventions have failed – if the rhetoric becomes a reality. That is a challenge that now rests with political and business leaders, civil society, the media, and the individuals that make up the international community for whom this Convention was drafted.

²⁸³ Reisman, above n 236, at 157.



Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia

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Accepted 23 February 2004

Abstract. The signing of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) radically extended international law on transparency and accountability in environmental governance. For the countries of Eastern Europe, Caucasus and Central Asia (EECCA) that have now ratified, the Convention could prompt profound democratic changes. This article, based on the authors' experiences, analyses changing cultures of governance in EECCA countries. The first so-called pillar of access to information sets in place rights that directly contradict the fundamental secrecy of the former Soviet Union countries. Some officials' reluctance to share environmental information may also be linked to the economic duress of the current transition period, where information may be an official's only asset. The second pillar of public participation also poses difficulties for officials for whom the highest praise is to be considered a "professional". In their belief that no one knows better than they do, they are reluctant to spend time and resources to make decision-making transparent and to involve the public. The third pillar of access to justice breaks new ground for post-socialist countries still developing their judicial systems. Though several highly sophisticated NGOs have been successful in using courts, it remains difficult for an ordinary EECCA citizen to bring an environment-related legal action. Changing these attitudes and practices will be a long and troublesome process. The Aarhus Convention will not be truly implemented until openness, transparency and accountability in environmental decision-making become everyday habits.

Key words: Aarhus Convention, access to information, access to justice, accountability, culture, EECCA, environmental information, governance, multilateral environmental agreements, post Soviet states, public participation, transparency

Introduction

For the countries of Eastern Europe, Caucasus and Central Asia (EECCA), successful transition to democratic and accountable governments depends in part on the manner in which information is provided to citizens and on the opportunities pro-

vided for public participation in decision-making. Transparency and accountability in governance are particularly important to ensure an adequate level of environmental protection.

European law was radically extended in these areas with the signing of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

The Aarhus Convention grew out of the Environment for Europe process that started in 1991 with the first Conference of European Environmental Ministers at Dobris in Czechoslovakia. It was developed with the active participation of environmental non-governmental organisations (NGOs) from Central and Eastern Europe, Western Europe, and the United States, and signed in 1998 at the fourth Conference of European Environmental Ministers in Aarhus, Denmark, by 36 European and Central Asian governments.¹

The Aarhus Convention came into force on 30 October 2001, after 17 countries, one more than necessary to bring the Convention into force, became Parties to the Convention.² The first Meeting of the Parties to the Convention took place in October 2002 in Lucca, Italy.³

Many of the provisions of the Aarhus Convention are already fundamental to environmental governance in Western European and North American countries. Prior to the Aarhus Convention, EU legislation had established minimum standards for public access to information and public participation in, e.g., environmental impact assessment and permitting of industrial installations.⁴

However, the Aarhus Convention extended EU requirements in a number of provisions, by *inter alia* giving broader definitions of environmental information and public authority, and recognizing the right of citizens and environmental NGOs to bring suits in courts of justice when an environmental right has been infringed. The European Union is therefore in the process of revising its legislation to set in place all of the Aarhus Convention obligations, to enable ratification⁵. This would then bring the Convention into force for the Member States that have not yet ratified, and also encourage ratification by the remaining EU applicant countries.

But it is especially for the countries of Eastern Europe, Caucasus and Central Asia (EECCA) that the civil rights established under the Aarhus Convention could prompt profound democratic changes. Certainly these rights go far beyond those provided in the former centrally planned economies. The Aarhus Convention is therefore considered a unique instrument for democratisation in general and for making environmental governance in particular more accountable.

The literature developed since the signing of the Aarhus Convention includes manuals providing guidance on implementation of the Convention,⁶ analyses of the legal implications of the Convention for the European Community, for the Member States as well as the EU institutions themselves,⁷ and descriptions of the experiences accumulated by different stakeholders on the themes relevant to the Convention.⁸ However, the question of how culture and traditions of governance in the post Soviet

states may affect implementation of the Aarhus Convention has not yet been properly and fully explored.

This article offers a reflection on some of the difficulties that EECCA countries face in changing their cultures of governance as needed to implement the Aarhus Convention.

It is based on the authors' first-hand experiences working in the EECCA countries in the context of the Aarhus Convention. In the period 1998 to 2002, they carried out missions to six post Soviet countries (Moldova, Ukraine, Kazakhstan, Belarus, Russian Federation, and Estonia) and two other Central and Southeastern European countries (Poland and Croatia), in order to develop technical assistance projects aimed at building administrative capacity for implementing the Aarhus Convention particularly within ministries of environment.⁹

The process of project preparation involved intensive information gathering *inter alia* through interviews and literature review. The authors carried out some 10–15 interviews in each country, focusing in particular on ministry of environment officials involved on a day-to-day basis with information management, environmental impact assessment, permitting of industrial installations and other regulatory activities relevant to implementation of the Aarhus Convention. They also carried out field visits to regional environmental protection offices and met with a cross-section of representatives from non-governmental organisations. In some countries they also interviewed officials in ministries of justice as well as staff working for the national parliament. The article also draws on the authors' some 15 years experience working in other countries in the EECCA region on themes relevant to the Aarhus Convention, either as local professionals or expatriate legal experts. In examining the origins of the traditions of governance still influencing post Soviet countries, it suggests elements that should be taken into account in designing implementation strategies or technical assistance relevant to the Convention.

The Aarhus Convention as a Force for Transforming Environmental Governance

When the Aarhus Convention came into force in October 2001, eleven of the 17 initial Parties were former Soviet Union countries: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Ukraine. Currently, of all 15 former Soviet republics, only the Russian Federation and Uzbekistan have neither signed nor acceded to the Aarhus Convention. Since Estonia, Latvia and Lithuania will become EU Member States in May 2004, they are obliged to align with the laws and practices in place within the European Union. This article therefore focuses on the other ten Parties to the Aarhus Convention that were formerly Soviet Union republics. These countries, as well as other European countries formerly linked to the Soviet bloc, have a lot in common in the traditions of governance developed during the socialist past.

In discussions with some Western and Central European officials, the authors frequently heard criticisms of the EECCA ratifying countries for rushing to

ratification, perhaps as a demonstration of their commitment to democracy, before taking the practical steps necessary for implementation. The many EECCA officials interviewed in the course of the authors' investigations in the region expressed a commitment to the Aarhus Convention principles that could seem a bit idealistic, given the obstacles described below, but nonetheless appeared genuine.

Other observers see steady progress in the implementation efforts of the EECCA Parties to the Convention.¹⁰ In any case, whereas the legal tradition of Western European countries is to ratify an international instrument only after EU and national laws and regulations have been brought into compliance, the tradition in EECCA countries is the opposite. There it is more common to first ratify the international instrument and then bring their national laws in correspondence with the international requirements.

The Aarhus Convention differs from other international instruments in a number of ways. It does not focus on a specific environmental problem and its consequences, as a majority of multilateral environmental agreements do. Rather it provides a rights-based approach to addressing environmental problems. It is the first international treaty that links the basic human right to live in an environment adequate to people's health and well-being with procedural guarantees concerning the rights of the general public to access to information, public participation in decisionmaking, and access to justice in environmental matters – the three so-called “pillars”.¹¹ The rights provided to the public under the Convention are to be non-discriminatory as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or effective centre of its activities.

At the same time, the Aarhus Convention places obligations on the governments of the countries that are Party to the Convention – in particular, the executive branch. In this sense, the Aarhus Convention draws directly on certain traditions of democratic governance¹² and requires a process of transformation in those countries where such traditions are lacking. Indeed, it goes further than other international environmental instruments to intervene into the culture and traditions of governance. For EECCA countries, therefore, implementing the Aarhus Convention is not only about enacting new legal requirements and rules, but most of all about introducing new ways of environmental governance. For this reason the discussion of measures necessary for implementation of the Aarhus Convention in the EECCA region should be constantly woven together with an examination of the traditions and cultures of governance that may be in need of transformation.

For the Central and Eastern Europe countries that are about to become European Union (EU) Member States, implementation of the Aarhus Convention is linked to efforts to harmonise national legislation and practices with EU requirements in order to complete the conditions for EU membership.¹³ Approximation with the EU requirements on access to environmental information and public participation in environmental decisionmaking is fundamental, since these apply throughout the EU environmental acquis. Implementation of the Aarhus Convention is therefore an essential part of the preparation of these countries for EU membership.

In a related process, many of the EECCA countries have entered into bilateral agreements with the European Union, known as Partnership and Co-operation Agreements (PCAs). Each PCA is a ten-year bilateral treaty that sets forth a legal framework for cooperation based on the respect of democratic principles and human rights¹⁴. In addition to defining the political, economic and trade relationship between the EU and the partner country, the PCA commits the partner country to bringing its legal system closer to the requirements of the European Union. PCAs are now in force with ten EECCA countries, including Ukraine, Moldova, Kazakhstan and Russia¹⁵.

The governments of these countries vary in the degree to which they are moving forward on bringing their legal systems into alignment with the requirements of the EU. Nonetheless, the EU legal framework has become a reference point for most legislative changes in the region. In certain countries all pending legislation is in theory required to be approximated to the EU requirements as much as possible¹⁶. In any case, those EECCA countries that have ratified the Aarhus Convention or entered into PCAs have committed themselves to aligning with democratic traditions with respect to environmental governance. The process of implementing these commitments will require fundamental transformations within ministries of environment and other agencies in order to ensure compliance by officials in their everyday work.

Reflections on Implementing the First Pillar of Access to Information

The Aarhus Convention comprises three so-called “pillars”: access to environmental information, public participation in environment-related decision making, and access to justice in environmental matters. These three pillars are related and interdependent on each other. Access to the environmental information held by authorities is necessary for informed public participation in decision-making, while access to justice is crucial for safeguarding the rights to receive information on request and to participate in certain environment-related decision processes.

The first pillar of access to environmental information (Articles 4–5) recognises the rights of citizens to request and to receive environment-related information held by public authorities. It also places a number of obligations on the executive branch of government.

For example, Parties are required to inform their citizens about the types of environmental information held by public authorities and how it may be obtained. Governments are to establish and maintain practical arrangements for making this information accessible,¹⁷ e.g., publicly accessible lists, registers or files, and identification of points of contact. Moreover, governments are to make environmental information progressively available in electronic databases easily accessible to the public.¹⁸ Finally, governments are to establish a coherent, nationwide system of pollution inventories or registers compiled through standardized reporting and available in a computerized and publicly accessible database¹⁹.

With respect to the rights of citizens concerning the environmental information held by public authorities,²⁰ governments must:

- Ensure that public officials make information on the environment available to anyone requesting it as soon as possible and, at the latest, within one month, unless the information comes under certain specified exceptions.
- Define the practical arrangements by which such information is made available, e.g., public authorities intending to charge for supplying information must provide applicants with a schedule of charges that may be levied.

These rights and obligations are in direct contradiction to the secrecy that was a fundamental characteristic of the former Eastern Bloc countries. The political system in place during the former Soviet Union did not recognize the right of citizens to know or to access information in the hands of the government, and governmental institutions considered information they possessed as their own domain. The notion that information which relates to the interest of the whole society (as environmental information does) should be open and accessible to the general public, even if held in the hands of government, was, and often still is, absent from the thinking of many government officials.

The weakness of a system of governance that is not obliged to provide environmental information to the public was profoundly demonstrated by the 1986 Chernobyl catastrophe. For days after the accident that led to the massive release of radiation from the Chernobyl nuclear power plant, the general population of the Soviet Union was not informed that the accident had occurred, nor of the possible consequences to human health and the environment.²¹

The public outrage at this failure to inform the citizenry on such a crucial matter of their health and safety helped to fuel the pressures for change in the area of access to information that followed in the late 1980s and included calls by prominent environmental activists and intellectuals to raise environmental awareness and to end the Soviet policy of secrecy.²²

It is not surprising that Ukraine (the homeland of Chernobyl) became the first country that, even before independence, adopted regulations on the collection and dissemination of environmental information. The 1990 Decree of the Government of Ukraine (at the time, Ukrainian Soviet Socialist Republic) charged the State Committee for Nature Protection with responsibility to collect all relevant environmental information on behalf of the public and then to disseminate it to the public through mass media.²³ In the early 1990s, articles pointing out the importance of the right to know and direct access to information by citizens became a part of the public discussion concerning newly developed draft laws on public health and environment.²⁴

In the early 1990s, Ukraine became the first country in the post-Soviet region to adopt a general law on information,²⁵ with several other countries eventually following this lead.²⁶ Introduction of such laws was an important step for these countries in their efforts to find new ways to build open societies. Nevertheless, this first generation of laws by and large focused on the collection, organisation and

collection of information by government agencies, and gave only limited (if any) attention to guarantees for access to that information for the public at large. In this regard it is interesting to note how the titles of some EECCA countries' laws, such as the 1995 Law N. 24-Φ3 on Information, Informatization and Protection of Information of the Russian Federation²⁷ reflects the government's concern with the need to safeguard information rather than to provide the public with access to that information.

To better understand how complicated the process of opening up the societies of EECCA countries turned out to be, it should be noted that in almost all those countries where laws of information emerged, such laws were usually preceded or followed within two years by laws on state secrets.²⁸ The fact that the tradition of secrecy kept manifesting itself even years after these states became independent indicates that this is not an easy tradition to uproot.

At the same time, environmental information has at times been viewed as a special case. For example, the 1995 Russian Law described above includes an important provision stipulating that information concerning the environment cannot be classified.²⁹

In a number of post-socialist EECCA countries, governments started to publish annual national state of the environment reports and distribute such reports to the public.³⁰ Ministries of environment began to develop public education campaigns, in order to build more awareness and public support for environmental protection.

These trends are in line with elements of the first pillar of the Aarhus Convention. For example, the Convention specifically obliges governments to possess and update environmental information, including the establishment of systems to ensure an adequate flow of information about proposed and existing activities. In the event of any imminent threat to human health or the environment, all information that could enable the public to take preventive or mitigating measures is to be immediately disseminated.³¹

On the basis of their discussions with ministry of environment officials in the EECCA region, the authors found a strong commitment to providing information on the state of the environment to the public. But these discussions also indicated that the other access to information obligations – though relatively straightforward – will be much more difficult to put in practice. In several interviews, activities to implement the Aarhus Convention were described as “propaganda and education”³² – terms straight from the socialist past. In their focus on providing pre-packaged information to the public, these officials seemed to overlook the two-way obligation on access to information – that governments are also obliged to provide members of the public with the information they want to know, whenever asked.

In one discussion in 2000, a senior Kazakhstan official had difficulty acknowledging that members of the public might want information different from that which the government wanted them to know. He questioned how the public could know what information was important. He insisted that only scientists knew and could decide what information should be made available to the public: “My six-year-old

daughter asks me a lot of questions, but I as her father know what should or should not be answered".³³

The authors also found this bias outside of the EECCA region. In 2000, the unit for public information within the Croatian Ministry of Environmental Protection and Physical Planning was labeled with a Croatian term that meant "propaganda department".³⁴ Croatian NGO representatives told the authors that this was indicative of what they felt was a generally paternalistic attitude on the part of the ministry, and a lack of genuine information sharing and dialogue with NGOs and other members of the public.

Interest in up-to-date information management technologies and in developing capacity to collect and manage environmental information via electronic means is high in all of the EECCA ministries of environment visited by the authors. However, the related Aarhus Convention requirement – that such electronic databases be easily accessible to the public – is frequently overlooked and sometimes even obstructed.

In Ukraine in 2000, top-level officials in the Ministry of Ecological Safety and Natural Resources refused to introduce agency-wide email, even though the Ministry already had a local area network (LAN) linking all officials served by desktop computers. All electronic communications with the outside world had to go through one computer supervised by an official authorised to receive and send emails. The ministry leadership defended the decision to restrict line officials from individual access to email and to the Internet by arguing that Internet access would cost too much and would be too much of a distraction from the Ministry's real work. To outside observers watching the queue of Ministry officials waiting for their turn at the single on-line computer, it seemed that the Ministry leadership was more interested in controlling its staff than in helping them to do their jobs efficiently and openly.³⁵

The reluctance of some officials to share environmental information may be partly linked to the dramatic changes in economic circumstances that have accompanied the current transition period. The salaries of government officials – especially in the public agencies directly concerned with environmental matters – have shrunk to humiliating levels, sometimes well below what is necessary for properly providing for a family, while inflation and other economic shocks have eliminated any savings accumulated in earlier times. The information that government officials possess may often be their only asset and source of pride as well as of professional recognition. For such an official, it can be difficult to let go of this information to somebody "from the street" just because that person has an interest in it. The suspicion that someone may make money from using that information does not increase the attractiveness of giving the information freely.

Thus there is often a type of cognitive dissonance to be found within EECCA ministries of environment concerning the first pillar of the Aarhus Convention. On the one hand, officials are eager to inform the public about the environment. On the other hand, they seek to control and channel the environmental information they hold. The logical extension of this attitude was found in Belarus in 2001, where

officials within the Belarussian Ministry of Environment had contracted with a scientific organisation to carry out an extensive survey, including public hearings, to discover what environmental information people would want to know. They then intended to set up a comprehensive database that would gather the information needed to answer all possible questions from the public in advance. Ministry officials discounted the possibility that the public might want more than pre-packaged information if specific problems arose.

At the same time, environmental officials mentioned in side conversations that they could not obtain certain environment-related information, particularly data on the radiation contamination of southern Belarus stemming from the Chernobyl disaster.³⁶ Radiation monitoring was a task carried out by the military and the information was kept secret from environmental officials as well as from the general public.

This illustrates another challenge in implementing the first pillar of the Aarhus Convention – how to ensure access to the environment-related information collected and held by public agencies other than ministries of environment. For example, much of the information held by ministries of health and agriculture, committees on land resources and forestry, agencies on nuclear safety and emergencies, and ministries of defence is environment-related. When ministries of environment do not always have a clear picture of the different types of environmental information gathered by other central, regional and local governments, it is even more difficult for citizens and NGOs to know where to look for specific environmental information. One of the more useful measures for ensuring access to environmental information can therefore be to develop inventories of the types and scopes of the environmental information held by different public authorities, and to make those inventories available to the general public in electronic as well as printed form.³⁷

The difficulty of determining the scope of government-held information that is environment-related was reportedly the key issue behind the refusal of the Kremlin to allow the Russian Federation to become a Signatory of the Aarhus Convention in 1998. State security officials in particular raised concern that guaranteeing access to environmental information could pose a threat to Russia's state security.³⁸ In 2003, in the framework of Danish-financed technical assistance to Russia, the question of possible accession to the Aarhus Convention was revisited, including the possibility of developing a national definition of environmental information that was both acceptable to state security officials and within the scope of the Aarhus Convention.³⁹

Complexity of Implementing the Second Pillar of Public Participation

The Aarhus Convention also obliges the executive branch of governments to provide opportunities for public participation in a number of scenarios. For example, governments are required to provide the public with the opportunity to participate in decisions of authorities concerning whether to allow certain proposed activities to proceed that may have a significant effect on the environment.⁴⁰ The Convention

specifies the classes of activities where environmental impact assessment (EIA) with public participation must be carried out, as well as the information to be provided and the procedures for consulting the public. Public participation is also required in decisions concerning operating permits, as well as during the preparation of plans and programmes related to the environment.

Moreover, the Convention obliges governments to promote effective public participation during the preparation of executive regulations or legally binding norms. The participation is to occur at an appropriate stage while options are still open, and the results of the participation are to be taken into account “as far as possible”.

However, these obligations are not so easy to put in practice and not always entirely understood by environmental officials or NGOs. More to the point, implementation of the Aarhus Convention pillars in the EECCA countries will run into old habits and traditions of governance that cannot be easily overcome. An examination of the origins of these traditions of governance may help to illuminate ways to gradually bring about change.

The socialist legal and political systems were based on supremacy of the state at the expense of individual human rights. It is worth noting that a Russian term for government official is “state servant”,⁴¹ rather than “public servant”. Government officials served the state, not the public. By and large, they felt accountable only to the state, which in practical terms meant higher officials.

Under the socialist legal system, citizens were not provided the possibility to participate in and give opinions as input for governmental decision-making. The typical approach in environmental legislation, for example, was to prescribe that citizens and their organizations should assist government bodies to implement government policies.⁴² The notion that citizens should have an impact on shaping these policies was nowhere to be found.

In the years just before the fall of the Berlin wall and the breakdown of the Soviet Union, a majority of the socialist states experienced a groundswell of efforts to create open and democratic societies. This closely coincided with a major wave of environmental awareness in the aftermath of the Chernobyl disaster and in the face of overwhelming evidence of widespread environmental catastrophe.⁴³

The magnitude of the environmental degradation – depletion of the Aral Sea, pollution of the Baltic and Black Seas, industrial “hot spots” of pollution that harmed human health – resulted in the enactment of special laws on environmental protection in several then still Soviet Republics, as for example in Russia⁴⁴, Belarus,⁴⁵ Ukraine,⁴⁶ and Kazakhstan.⁴⁷ These laws became the legal foundations for national environmental protection law and policy after independence.⁴⁸ They also contributed to providing the awareness and social climate for including in the post-Soviet Constitutions separate articles about the human rights to a safe, favourable, and healthy environment and to access to information about the environmental situation.

Starting in the late 1980s, legal scholars began to emphasize the need for public participation in environmental decision-making.⁴⁹ In the early 1990s some law review articles explored Western experiences and highlighted the importance of access

to information, public participation and citizens suits as private enforcement of environmental laws for a successful transition to democratic societies and as effective tools for environmental law enforcement.⁵⁰

In 1994, the first Russian-language guide devoted to public involvement in environmental decisionmaking, access to information, and appeals to court was published with support from the Natural Resources Defense Council.⁵¹ Several other citizens guides followed, addressing different aspects of defending the ecological rights of the Russian public and reflecting the rapidly changing Russian laws and regulations.⁵² In 1994, the Hungary-based Regional Environmental Centre (REC) published a manual in English that described public participation techniques and presented reports on the situation in different CEE countries.⁵³ In 1997, a manual that presented international experience and legal means and tools available for Ukrainian citizens to protect their ecological rights appeared in Ukraine.⁵⁴

At the same time, other initiatives – often funded by outside donors – successfully demonstrated the practical aspects of developing processes of public participation in environmental decisionmaking. For example, Ukraine's National Environmental and Health Action Plan (NEHAP), adopted by the government in 1999, was developed through a broad participatory process of discussion involving a coalition of environmental NGOs led by MAMA-86.⁵⁵ In 1997–1999, Ukrainian specialists from across a wide range of disciplines and sectors were brought together to set priorities for conserving Crimea's biodiversity, based upon principles of public participation and transparent decisionmaking.⁵⁶ In 1997, Kazakhstan NGOs also took part in a participatory process to identify national environmental priorities, during the development of the National Environmental Action Programme for Sustainable Development (NEAP/SD), adopted by the Kazakhstan government late that year.⁵⁷

From the examples above, it is clear that the process of democratisation in post socialist societies led to changes in legislation and introduced social practices that coincided with approaches embodied later in the Aarhus Convention.⁵⁸ These trends involved government officials as well as NGO communities. Thus efforts to implement the second pillar of the Aarhus Convention do not start from zero.

Nonetheless, even after ten years of NGO efforts and democratic reforms, structures for holding government administrators accountable to the public are still rare. Most government institutions do not make decision-making processes transparent nor have openings for inputs from the public.

For example, in Kazakhstan, the Ministry of Environment had sponsored seminars on the Aarhus Convention, and senior Ministry officials were able to use the vocabulary of the Convention with fluency. But discussions concerning how they intended to set in place implementing techniques revealed that long-standing attitudes had not really changed that much. One senior official stated quite frankly that “it is good for people to think and to talk about democracy, but it is important for society that government by its actions maintain strict order and control at all times”.⁵⁹ The Russian word used for describing the essence of government actions can only be translated into English as the word “dictatorship”.⁶⁰

In almost all EECCA countries visited, environmental officials viewed the Aarhus Convention as political endorsement for their information activities, but did not see the necessity to put in place practical measures to implement the Convention's public participation requirements within their agencies. Ministry officials were keen to organise more workshops and seminars for NGOs, but sometimes forgot that their own officials needed guidance on how to meet the Convention requirements with respect to public participation.

Much more needs to be done in order to build strong administrative capacity and put in place implementation measures that will make the Aarhus Convention principles and requirement for public participation in decision-making an essential part of everyday practices for public agencies at each hierarchical level.

This will require transforming a lasting conviction among governmental officials that they know what should be done better than anybody else. In the socialist past and continuing today, the highest term of praise that an official can use in referring to a colleague is that s/he is "a professional", meaning that s/he has a strong knowledge, expertise and rich experience in the area in question. These officials do not find it easy to acknowledge that somebody without proper training and years of work in the agency might bring something valuable to the process of making decisions. In their sincere belief that nobody knows better than they do what kind of decisions should be made, some officials are reluctant to spend time and resources to make decision-making transparent and to involve the public.

While many EECCA countries have provisions requiring public consultation during an ecological expertise (see Note 69 concerning ecological expertise), very often no rules are in place to stipulate when public participation is necessary or what procedures to follow. Without clear rules specifying what is adequate public participation, assigning legal responsibility for ensuring such participation, and the consequences for violating the responsibility for involving the public, the reality may be far from the intention of the Aarhus Convention. For example, in Belarus, the responsibility to involve the public in a state ecological expertise is assigned to the developer, who can meet it simply by publishing a notice in a newspaper.⁶¹

Pilot projects to develop procedures for ensuring public participation in a specific situation can be used to work out how best to apply the Aarhus Convention requirements in a particular country and national culture. Such projects can help to build skills and expertise within ministries and local governments and ideally assist governmental officials to learn new ways of working that can gradually become a part of everyday routine. If chosen wisely, pilot projects also can demonstrate the value of public involvement and dialogue.

Implementing the Third Pillar of Access to Justice

The Convention safeguards the right of appeal in case requests for information are refused and establishes a system for judicial or administrative review, if a person

considers that a request for information has been unreasonably refused or inadequately answered.⁶² It provides that members of the public with a sufficient legal interest shall have access to administrative or judicial procedures to challenge acts or omissions by private persons and public authorities that violate provisions of national environmental law. Moreover, they can challenge the substantive and procedural legality of a decision subject to the provisions of Article 6 on public participation in decision making on specific activities.

These procedures are to provide adequate effective remedies and not be prohibitively expensive. NGOs promoting environmental protection and meeting requirements under national law are deemed to have an interest. Governments are encouraged to establish appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

The access to justice provisions of the Aarhus Convention break new ground in many Western European countries, let alone the countries of Eastern Europe, the Caucasus and Central Asia. The environmental requirements of the EU do not yet include provisions on access to justice, so these provisions are among those currently under debate among the Member States as part of the European Union's pre-ratification preparations.⁶³

The rights to access to justice guaranteed under the Aarhus Convention are directly connected to how effectively the requirements on access to information and public participation can be enforced. It is particularly important in this regard to keep in mind that post-socialist countries are still developing their judicial systems, which were severely weakened during the socialist years.

During the Soviet era, interference in litigation by Communist Party officials was common. At the same time, no civil action brought to the court was as frightening to a director of a major polluting plant as a call from the local Communist Party office to appear before it for a hearing. The Communist Party played a law enforcement role whenever it believed laws needed to be enforced, which left little room for the authority of the judiciary to develop.

Post-socialist Constitutions announcing that the judicial branch of government would be independent from the legislative and executive branches of power did not automatically create independent, strong and respected judiciaries. Partly responding to this challenge, many post-socialist states have created Constitutional Courts or Tribunals as separate supreme courts to oversee the constitutionality of laws and regulations, and their implementation.

Over the past decade, a few dedicated environmental lawyers in Russia, Ukraine and other EECCA countries have developed a pioneering and influential track record of turning to the courts to defend the public interest with respect to environmental protection. In Russia, the experienced players now are lawyers from Ecojuris Institute in Moscow and a few Ecojuris-trained lawyers around Russia, as well as the Regional Public Center "For Human Rights and Environmental Defense". For example, in 1997 the Ecojuris Institute brought a legal suit against the construction of a Moscow-St. Petersburg high-speed rail system on the grounds that

no environmental impact assessment had been carried out. The action led to broad opposition, and to President Yeltsin's cancellation in 1998 of his previous decrees permitting the project.

Another appeal brought by Ecojuris resulted in an October 1999 ruling by the Russian Supreme Court that invalidated a decree issued by former Prime Minister Stepashin. The decree had attempted to waive environmental law requirements for Exxon and its Russian partners on marine discharge of toxic wastes from oil drilling off the country's Pacific coast.⁶⁴

In Ukraine, a network of three independent Ecopravo organisations – in Kyiv, Kharkiv and Lviv – has brought a number of legal cases to courts. Ecopravo-Lviv represented the public interest (and nearly 100,000 people) in a 1997 case in which the Supreme Arbitration Court of Ukraine ruled that a state ecological study on a chemical site construction conducted by the Ministry of Environmental Protection and Nuclear Safety of Ukraine violated procedural requirements.⁶⁵ Though this decision was later reversed by the Collegium of the Supreme Arbitration Court, it created an example of how citizens can use the courts in their efforts to bring about environmental improvements.

Other examples include EcoPravo-Kharkiv's successful 1997 argument before the Supreme Arbitration Court on behalf of a group of citizens against the illegal decision of local authorities to construct a solid waste site. The victory was the culmination of a two year fight by local citizens.⁶⁶ EcoPravo-Kyiv brought a complaint against Kyiv municipality that its municipal waste site threatened the lives and welfare of nearby living citizens. The public outcry created by this case resulted in resettlement of the affected families.⁶⁷

Kazakhstan NGOs have also explored ways to expand access to justice on environmental matters. In 1999, an Almaty-based NGO (Law and Environment Eurasia Partnership) filed a case on behalf of local citizens against a proposed petrol station, charging that no environmental expertise had been carried out.⁶⁸ The court ruled against the citizens, on the basis that no ecological expertise was required in that instance, and that the petrol station would not present an environmental risk. The group has developed strategies to pursue a legal fight in this matter.⁶⁹ However, in November 2000, the owners of the petrol station and the NGO reached an agreement, calling for the implementation of several environmental safeguards.

But apart from such highly sophisticated groups mostly financed by Western sources and located in big cities, it remains very difficult for an ordinary EECCA citizen to pursue an environment-related action before the courts.⁷⁰ The environment-related rights set forth in many Constitutions in the regions cannot be easily enforced through a traditional court under a civil code-based legal system unless developed into specific laws designed to be enforceable using the courts. In the majority of EECCA countries, there remains a need for implementing laws and regulations that specifically provide for the right to take a government agency to court if environmental information is arbitrarily withheld or public participation denied. The strengthening of the judiciary remains another major long-term challenge for all former socialist countries.

The Aarhus Convention as a Catalyst for More Accountable Governance

Implementing the Aarhus Convention's obligations in the executive branch of government is not an easy task. In view of the challenges described above, EECCA environmental ministries need to put in place implementing measures that in themselves work to bring about changes in how ministries relate to the public. The right kind of technical assistance can make a real difference in this respect. The hope is that gradually these ministries will develop experience in being accountable before the public and more open to public involvement in decisionmaking.

A major threshold question in any country concerns who is responsible for implementing the Aarhus Convention. In most EECCA environmental ministries, public information departments or sometimes individual officers serving as focal points for the Aarhus Convention are expected to carry out the task of implementing the Convention's provisions single-handedly. Few ministries have considered that the obligations under the Aarhus Convention reach to all departments of the ministry, including regional environmental protection offices.

Even fewer countries have started to think about how the Aarhus Convention places obligations on all other public authorities holding environmental information or making environment-related decisions. While it is logical for ministries of environment to take leadership in implementing the Aarhus Convention nationally, it is also important to keep in mind that the Aarhus Convention applies to every governmental body performing duties, activities or services in relation to the environment and possessing environment-related information.

Building broader understanding of the Convention's application to different governmental agencies is therefore essential. Interministerial working groups to investigate the ways in which the Convention applies to other ministries and government bodies can help in this task.

Most of the positive obligations on the executive branch of government are found in the first and second pillars of the Aarhus Convention. The first step to be undertaken is establishing the detailed legal and institutional framework for implementation of the Convention. Almost all EECCA countries have already carried out substantial work on legal analysis either through other international assistance projects or at the initiative of local NGOs. But while framework laws on environmental information may be in place, implementing regulations setting in place the detailed procedures necessary for enforcement are often lacking.

In terms of public participation it should be noted that very often countries and local experts insist that national laws correspond to the Aarhus Convention requirements on public participation. Indeed, most EECCA countries can point to articles in their national legislation affirming the necessity of public participation in environmental decision-making. But such assertions need to be examined more precisely in terms of practical measures and procedures in place to ensure public participation in all areas addressed by the Aarhus Convention.

For example, the view of Kazakhstan officials with respect to implementing the Aarhus Convention was to develop the Ministry of Environment's capacity to get out information to the public in order for its policies to receive more public support. A top ministry official frequently mentioned the need to "consolidate with the public".⁷¹ The term was strange to outsiders expecting to hear about "consulting with the public", as per the Aarhus Convention provisions on public participation. But the interpreter confirmed that the Russian word used was indeed "consolidation"⁷², i.e., to bring the public into accordance with the Ministry's point of view.

Likewise in other EECCA countries, senior environmental officials often expressed the wish to bring environmental NGOs into a common understanding with the ministry. They enthusiastically supported the Convention and did not dismiss public participation and access to information by the general public as might have been observed just a few years ago. They wished to cultivate connections with a few sympathetic NGOs, and in some instances entered into cooperation agreements with environmental NGOs or created boards of NGOs for consultation.

Several EECCA environmental officials stressed with some pride that their ministry had no contradictions with NGOs. It seemed difficult for them to acknowledge that at times NGOs may take a different position on a specific environmental issue than that held by the ministry. They wanted recognition from NGOs that officials could also be committed to effective environmental protection. It was difficult for these officials to accept that constructive conflict with citizens and NGOs could lead to better environmental decisions. On the other hand, at a public meeting in a remote area of Belarus, regional environmental officials were seen to enter into a very open debate with NGO representatives concerning a recent environmental assessment of a proposed project, with no apparent defensiveness.⁷³

An alternate problem in some countries seemed to be that the Convention, which is primarily a set of procedural requirements and guarantees, was in danger of becoming an end unto itself, rather than used as a set of democratic tools for solving environmental problems.

NGOs in particular, in their eagerness to promote the rights provided them in the Aarhus Convention, seemed to forget that the significance of the Convention will come in its application to specific environmental problems. Many NGOs were focusing so much on promoting the Aarhus Convention per se that they seemed to lose sight of the Convention as a tool to be used to resolve specific environmental issues and to foster better and more accountable environmental decisionmaking.

Conclusion

A fundamental principle of the Aarhus Convention is that well-informed citizens and more government accountability will lead to better environmental decisions and better environmental management of specific environmental problems.⁷⁴

As this article describes, the changing of attitudes and approaches in governance from the past is a long and troublesome process, the success of which is largely

dependent on governmental officials seeing and understanding the benefits from public involvement in making decisions and public access to information. In broader terms, as long as democratic changes in EECCA countries in transition continue, a wider awareness will spread that transparency and public involvement in environmental decision-making are an essential part of well-functioning societies. In this regard, the role of the Aarhus Convention as an instrument to bring together responsible governmental agencies and concerned citizens in their mutual intention to protect the environment that belongs to everybody can hardly be underestimated.

In several EECCA countries, NGOs have emphasized the need to develop strategies to implement the Aarhus Convention. As this article suggests, full implementation of the Aarhus Convention requires changing patterns and traditions of governance. In this sense, the Aarhus Convention is itself a kind of strategy. It can be used to address a specific environmental problem using the rights guaranteed under the Convention itself, i.e., access to environmental information, right to public participation in environment-related decisionmaking, and access to justice when rights have been infringed.

In other words, the Aarhus Convention will become an effective force for democratisation when it is applied in practice – when, for example, a citizen wonders about the quality of his drinking water, or when an NGO becomes concerned about a new development project and seeks to have an impact on the decision process.

For EECCA ministries of environment, implementation of the Aarhus Convention involves more than assigning an official to be the national focal point for international contacts or to open a public information department. It should mean, first of all, to open doors for a constructive dialogue between the ministry and the public. It should oblige all departments of ministries and their local branches to work in a transparent way on a routine basis. Above all, it means holding government accountable before the general public for its environment-related decisions.

Significant international resources are currently available for assistance to countries on the Aarhus Convention related projects. Availability of these resources sometimes inspires projects that overlook why those resources are available in the first place. This financial support will not and should not exist forever. It should help countries in transition to understand how to implement the Convention and to break through mentalities and traditions of governance that do not correspond to the Aarhus Convention or block its implementation. Practical projects that create long-term sustainable outcomes and projects that help to learn practices and develop new skills of transparency and dialogue are the best use of international assistance for implementing the Aarhus Convention.

The challenge of successful implementation of the Aarhus Convention in the EECCA region by and large goes beyond implementation of any other multilateral environmental agreement because it requires changing practices that are rooted in the Soviet traditions and culture of governance. At the same time, the Aarhus Convention has a unique significance for this region, a significance that is much broader than for democracies of Western Europe. There is no doubt that for

EECCA countries implementation of the Aarhus Convention is an exercise in learning tools and skills of democratic governance based on accountability and transparency. And this is directly connected with building the base of democracy and transparency in these countries needed for a successful transition to being a more stable and safer part of the world. This is why implementation of the Aarhus Convention in EECCA region should remain a focus for the international community.

The EECCA governments that have become Parties to the Aarhus Convention have taken a significant step in expanding the legal rights of their citizens with respect to the environment. But the measures required to carry out the executive branch obligations fully will involve more than legal changes. As this article suggests, implementation of the Aarhus Convention will entail a far-reaching process of changing the cultures of control lingering from socialist times. It is when new practices of openness, transparency and accountability in environmental decisionmaking become everyday habits that the Aarhus Convention will be truly implemented.

Acknowledgement

The authors would like to extend their gratitude to Dinne Smederup Hansen of the Danish Environmental Protection Agency for numerous discussions and insights relevant to the observations presented in this article and comradeship during challenging missions to develop the Aarhus Convention related project in the EECCA region.

Notes

1. Four additional governments signed before the formal time period for signature ended, bringing the total number of signatories to 40 (39 countries and the European Community).
2. As of December 2003, 27 countries had become Parties to the Convention. They include: Albania, Armenia, Azerbaijan, Belarus, Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Georgia, Hungary, Italy, Former Yugoslav Republic of Macedonia, France, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Malta, Moldova, Norway, Poland, Romania, Tajikistan, Turkmenistan, and Ukraine.
3. For more information, refer to the Aarhus Convention's website at <http://www.unece.org/env/pp>.
4. See Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment; Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended; and Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control.
5. In 2003 the European Parliament and the Council adopted Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; and Directive 2003/35/EC of 26 May 2003 providing for public

participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. In addition, on 24 October 2003, the European Commission adopted a “package” of three legislative proposals to complete alignment of Community legislation with the requirements of the Aarhus Convention, thereby enabling ratification: (1) proposal for a Directive on access to justice in environmental matters; (2) proposal for a Regulation on application of the Aarhus Convention to EC institutions and bodies; and (3) proposal for a Council Decision on the conclusion of the Aarhus Convention, on behalf of the European Community.

Other recently adopted environmental directives containing provisions on public participation in decision-making include Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment; and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.

6. For example, for an article by article description of the measures necessary for implementation of the Aarhus Convention by the governments, see Stephen Stec, Susan Casey-Lefkowitz and Jerzy Jendroska, eds., *The Aarhus Convention: An Implementation Guide*, DANCEE, United Nations, and the Regional Environmental Center; 2000; available at <http://www.unece.org/env/pp/publications.htm>. The UNECE also publishes a *Handbook of Good Practices in Public Participation at Local Level and Layperson's Guide to the Convention* available at the same website. See also Svitlana Kravchenko, *What is the Aarhus Convention? – Citizens' environmental rights under the Aarhus Convention*, PLAN 2000 INC., EEB, Belgium.
7. See, e.g., Christine Larssen, “La Convention d’Aarhus et son application en droit belge”, *Aménagement-environnement*, 2001/4, pp. 269–297. Michael Zschiesche, “The Aarhus Convention—More Citizens Participation by Setting out Environmental Standards?” *Environmental Law Network International*, 1/2002, pp.21–29; Maria Lee and Carolyn Abbott, “The Usual Suspects? Participation under the Aarhus Convention: Public Participation in Environmental Decision-Making”, *Modern Law Review*, January 2003, pp 80–108.
8. See, e.g., Elena Petkova with Peter Veit, “Environmental Accountability Beyond The Nation-State: The Implications of the Aarhus Convention”, *Governance Notes*, April 2000, Washington, DC: World Resources Institute, pp 1–12; Resources for the Future, et al., *Public Access to Environmental Information and Data: Practice Examples and Lessons from the United States, the European Union, and Central and Eastern Europe*, Washington, DC: Resources for the Future, 2001; Carl Bruch, ed., *The New Public: The Globalization of Public Participation*, Washington, DC: Environmental Law Institute, 2002 (also available at <http://www.elistore.org/reports.asp>); Elena Petkova, et al, *Closing the Gap: Information, Participation, and Justice in Decision-making for the Environment*, Washington, DC: World Resources Institute, 2002; *Handbook on Access to Justice under the Aarhus Convention*, The Regional Environmental Center for Central and Eastern Europe, 2003 (on-line version only at <http://www.rec.org>). See also Ruth Greenspan Bell, Jane Bloom Stewart and Magda Toth Nagy, “Fostering a Culture of Environmental Compliance through Great Public Involvement”, *Environment*, October 2002, pp. 34–44, and Ruth Greenspan Bell and Sandor Fulop, “Like Minds? Two Perspectives on International Environmental Joint Efforts”, *Environmental Law Reporter*, 5-2003, pp. 10344–10351, for observations on a technical assistance project on implementing the Aarhus Convention in Hungary and Slovenia.
9. The projects were subsequently financed through the Danish Cooperation for Environment in Eastern Europe (DANCEE) facility, managed by the Danish Environmental Protection Agency.
10. See, e.g., Svitlana Kravchenko, “Ratification and Early Implementation of the Aarhus Convention in NIS”, *Participate*, Autumn 2000, p. 2.

11. See Preamble to the Aarhus Convention.
12. Indeed, Directive 90/313/EEC on freedom of access to environmental information inspired the first pillar of the Convention.
13. One of the so-called Copenhagen criteria established by the Council of the European Union as a precondition for consideration for EU membership is that a prospective member must adopt the common rules, standards and policies that make up the body of EU law.
14. The PCAs share a common structure. Article 2 always states that “respect of democracy, the principles of international law (...) constitute essential elements of partnership and of this agreement”. Title VII is typically dedicated to Cooperation on matters relating to democracy and human rights, the exceptions being the PCAs agreed with Russia and Ukraine.
15. See, e.g., the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine (*Official Journal* L 049, p. 3). Six PCAs (with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan and Uzbekistan) came into force on 1 July 1999. The PCA with Russia came into force on 1 December 1997, while the PCAs with Ukraine and Moldova came into force in March 1998 and in July 1998, respectively. A PCA was signed with Turkmenistan in May 1998 and is in the process of ratification. Finally, a PCA was signed with Belarus in March 1995, but the EU has not taken action to bring it into force, because of the national political situation.
16. *1998 Decree of the President of Ukraine “On Approval of the Strategy of Integration of Ukraine with the European Union”*.
17. Article 5 requires active dissemination of information on the environment.
18. Article 5.3.
19. Article 5.9. This article was further developed as an independent Protocol on Pollutant Release and Transfer Registers (PRTRs) which was opened for signature at the Extraordinary meeting of the Parties to the Aarhus Convention on 23 May 2003, in Kyiv, Ukraine. To date 37 countries and the EC have signed the PRTR Protocol (Malta and the Slovak Republic are the only acceding countries not having signed the Protocol).
20. Article 4.
21. For example, M. Feshbach & A. Friendly, Jr., *Ecocide in the USSR: Health and Nature Under Siege* (Basic Books, 1992) discusses secrecy in Soviet society with respect to environmental matters.
22. See, e.g., Alexey Yablokov, *Ecological Ignorance and Ecological Irresponsibility. Obstacles on the Way of Perestroika, No Other Way*, Moscow: Progress, 1988 (in Russian), pp. 238–253.
23. *Sobranie postanovlenii pravitelstva Ykraiiskoi Sovetskoi Sotzialisticheskoi Respybliki (Collection of Government Decrees of Ukrainian Soviet Socialist Republic)*, 1990, N. 8, st. 42.
24. See, e.g., Sofia Slobodyanik and Tatiana Zaharchenko, “*Right to Know: From a Draft to a Law*”, *Holos Ykrainu* (The Voice of Ukraine), September 18 1992, N. 178, p. 7 (in Ukrainian).
25. Law on Information of Ukraine from October 2, 1992, *Holos Ykrainu* (The Voice of Ukraine), November 13 1992, N. 217, pp. 3–5 (in Ukrainian).
26. See, e.g., the 1993 Law on Informatization and the 1997 Law on Guarantees and Freedom of Access to Information of Uzbekistan; the 1995 Federal Law on Information, Informatization and Protection of Information of the Russian Federation; the 1998 Law on Freedom of Information and the 1998 Law on Information, Informatization and Protection of Information of the Republic of Azerbaijan; and the 1998 Freedom of Information Law of Latvia.

27. *Sobranie zakonodatelstva Rossiiskoi Federatzii (Collection of Legislation of the Russian Federation)*, 1995, N. 8 (in Russian).
28. See, e.g., the 1994 Law on State Secrets of Ukraine, the 1993 Law on State Secrets of the Russian Federation, the 1997 Law on State Secrets of the Republic of Azerbaijan, and the 1997 Law on State Secrets of Latvia.
29. See Article 10 of the 1995 Russian Law on Information, Informatization and Protection of Information.
30. For example, since 1992 Ukraine publishes annual national reports on the state of natural environment; see, e.g., *Natzionalnaya dopovid pro stan navkolushnogo prupodnogo sered-ovusha*, 1993, Kyiv (in Ukrainian). National reports of Ukraine starting from 1996 can be accessed at the website of the Ministry for Environmental Protection of Ukraine at <http://www.menr.gov.ua/>.
31. Article 5.1.
32. *Propaganda i obrazovanie* in Russian.
33. Interviews in Kazakhstan during August 22–27, 2000.
34. Information gathered during mission to Croatia December 3–7, 2000.
35. The Ministry has since received technical assistance from the Danish EPA to build and expand its capacity to implement the Aarhus Convention pillars on access to information and public participation. For more information see Aarhus Convention page at the Ministry website: <http://www.menr.gov.ua>.
36. Information gathered during mission to Belarus May 27–June 1, 2001.
37. This element was integrated into most of the technical assistance projects related to the Aarhus Convention financed by the DANCEE facility.
38. Information gathered during mission to Russia May 13–17, 2002.
39. For more information, see <http://rusrec.ru/aarhus/index.htm>.
40. Articles 6–8 of the Aarhus Convention.
41. *Gosydarstvennui slyzhashii* in Russian.
42. See, e.g., Article 12 on public participation of the 1994 Law on Subsoil of Ukraine which replicating a typical approach from the recent socialist past says that citizens and their associations shall assist the local authorities in implementation of measures with regard to using and protecting the subsoil resources.
43. For descriptions of the environmental problems accumulated in the Soviet Union by this period, see, e.g., M. Feshbach & A. Friendly, Jr., *Ecocide in the USSR: Health and Nature Under Siege* (Basic Books, 1992); D. J. Peterson, *Troubled Lands: The Legacy of Soviet Environmental Destruction* (Westview Press, 1993).
44. The 1991 Law on Protection of Natural Environment of the Russian Federation, 1992 *Vedomosti Siezda narodnuh depytatov Rossiikoi Federatzii*, N. 20, St. 641 (in Russian).
45. The 1992 Law on Protection of Environment of the Republic of Belarus, 1993 *Vedomosti Verhovnogo Soveta Respybliki Belarus*, NN. 1, 10 (in Russian).
46. The 1991 Law on Protection of Natural Environment of the Ukrainian Soviet Socialist Republic, 1991 *Vidomosti Verhovnoi Radu Ykrainu*, N. 41, St. 546 (in Ukrainian).
47. The 1991 Law on Protection of Natural Environment of the Kazakh Soviet Socialist Republic. 1991. Almaty (in Russian).
48. For an overview of changes in environmental policy and law in the former Soviet Union during this period see Tatiana Zaharchenko, “The Environmental Movement and Ecological Law in the Soviet Union: The Process of Transformation”, *Ecology Law Quarterly* 17/3, Berkeley CA (1990), pp. 455–497.
49. See, e.g., N. P. Malysheva, “Democratization of Environmental Decision-making Process”, *State and Public Control in the Area of Environmental Protection*, Kiev, 1988, p. 28 (in Russian).

50. See, e.g., T. R. Zaharchenko, "Social-legal factors of the US environmental law realization", (1992) 2 *Soviet state law*, pp. 131–140 (in Russian).
51. Tatiana Zaharchenko, *Citizen Guide for Environmental Democracy in Russia* (in Russian), NRDC, Saint Petersburg, 1994.
52. See M. I. Vasiliyeva, *Judicial Protection of Ecological Rights: Legal Questions of Compensation and Prevention of Environmental Damage* (in Russian), Center for Ecological Policy of Russia, Moscow, 1996; S. A. Bogolubov, *Protection of Ecological Rights: Guidebook for citizens and NGOs* (in Russian), Center for Ecological Policy of Russia, Moscow, 1996; *How to Defend Your Ecological Rights. Guide for Citizens and NGOs*. (in Russian), Newspaper Green World (Zelenui mir,) N. 6, 1997 (electronic version available at <http://www.ecoline.ru/mc/books/ecojuris/>), Ecojuris Institute, Moscow, 1996.
53. *Manual on Public Participation in Environmental Decisionmaking: Current Practice and Future Possibilities in Central and Eastern Europe*. Regional Environment Centre (REC), 1994. (A version was made available also in Hungarian; in 1995 a *Baltic Supplement* covering the three Baltic Republics was published in English.)
54. *Ecological Rights of Citizens: How to Protect Them with Help of Law* (in Ukrainian), ABA/CEELI and others, Informatziine Agentstvo "Eho-Vostok" Kyiv, 1997.
55. For additional information on-line, see <http://www.mama-86.org.ua/>.
56. *Priority-setting in Conservation: A New Approach for Crimea* (in Russian and English with Executive Summaries in Ukrainian and Crimean Tatar). Biodiversity Support Program (USA), 1999.
57. *National environmental action plan for sustainable development of the Republic of Kazakhstan* (in Russian and English). 1999. For additional information on-line, see <http://www.neapsd.kz/>.
58. For overview of trends and developments in public participation during this period in Armenia, Belarus, Moldova, Russia, and Ukraine, see *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in the Newly Independent States*, The Regional Environmental Center for Central and Eastern Europe, June 1998; for 15 CEE countries, see *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe*, The Regional Environmental Center, June 1998; see also *Doors to Democracy: A Pan-European Assessment of Current Trends and Practices in Public Participation in Environmental Matters*, The Regional Environmental Center, June 1998.
59. Information gathered during mission to Kazakhstan 22–27 August, 2000.
60. *Diktatyra* in Russian.
61. Article 12 of the 2000 Law on State Ecological Expertise of the Republic of Belarus stipulates that a developer should provide for participation of concerned citizens and NGOs in preparation and discussion of the materials of environmental impact assessment (part 3). However, the 2001 Instruction on the Order of Conducting the Environmental Impact Assessment in the Republic of Belarus, which obliges a developer to conduct public hearings of environmental impact assessment (point 14.1), also says that public hearings may be conducted by publishing in mass media suggestions about planned projects or discussion of these suggestions on the meetings of citizens and NGOs (point 16).
62. Article 9.
63. The proposals for a Directive on Access to Justice in environmental matters and for a Regulation on the application of the provisions of the Aarhus Convention on access to information, public participation in the decision-making and access to justice in environmental matters to the EC institutions and bodies are currently in the EU legislative process.

64. For information on-line on Ecojuris Institute and updates on cases, see <http://webcenter.ru/~ecojuris/>.
65. For additional information on EcoPravo–Lviv and updated cases, see <http://www.ecopravo.lviv.ua/>.
66. For information on EcoPravo–Kharkiv and cases, see <http://www.ecopravo.kharkov.ua/>.
67. For information on EcoPravo–Kyiv and cases, see <http://www.ecopravo.kiev.ua/>.
68. An ecological expertise (EE) in EECCA countries is the analogue of an environmental impact assessment (EIA) in the West but with significant differences. Under the Soviet tradition of environmental law, there are two main kinds of EE: the state EE and the public EE. For example, Moldova’s 1996 Law on Ecological Expertise and EIA provided for three kinds of EE: (1) “state EE” – carried out only by the Ministry of Environment; (2) “sectoral EE” – carried out by the Ministry involved in that sector; and (3) “public EE” – carried out by an NGO. The state EE is commissioned by the environmental authority and usually carried out by technical experts working in a scientific institute linked to the government, rather than by technical experts working on behalf of the project proponent. The state EE (essentially a scientific report assessing the environmental impact of the proposed project) is then used as the basis for the environmental authorities to decide whether or not to give their approval to the project. The state EE did not have the procedural requirements including a public comments stage that are typical for the western EIA, and therefore there was no opportunity for the public concerned to express its opinion with regard to the state EE. However, the public concerned could initiate a public EE, at its own expense. According to the established Soviet legal approach, the results of the public EE *may be* taken into account by the state authorities (but may be not). More recently, the environmental laws of some post-Soviet states have started introducing more Western style public participation requirements to EE. For example, Article 14 of the 1995 Law on Ecological Expertise of the Russian Federation (as amended) requires that among the materials presented for the state EE should be the results of discussions of the project with citizens and NGOs.
69. Interviews gathered in Kazakhstan during 22–27 August, 2000.
70. See *Handbook on Access to Justice under the Aarhus Convention*, Regional Environmental Center for Central and Eastern Europe, 2003, p. 153. This publication includes other examples of citizens and NGOs accessing courts in the EECCA region. However, the cases presented predate the Convention’s coming into force on October 17, 2000, so are not examples of access to justice under the Aarhus Convention.
71. Interviews gathered in Kazakhstan during 22–27 August, 2000.
72. *Konsolidatziya* in Russian.
73. Meetings observed during mission to Belarus May 27–June 1, 2001.
74. Preamble of the Convention and Article 1.