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Measuring the Effects of Human Rights Treaties

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Abstract

Do human rights treaties improve human rights conditions on the ground? In the end, this critical question is empirical in character. The effectiveness of any regulatory strategy turns on whether its rules and institutions actually mitigate the problems they are designed to address. Although empirical questions require empirical study, bad data is worse than no data. In a recent study, Professor Oona Hathaway purports to quantify the effect of human rights treaty ratification on human rights violations. Her findings are striking. She contends that ratification is associated with worse human rights practices (when other important variables are held constant). Of course, it is unsurprising that some states continue to commit substantial human rights abuses even after ratifying human rights treaties. It is, however, startling to suggest that treaty membership — including the labelling, monitoring and reporting of abuses — actually increases violations. In our view, any study advancing such wildly counterintuitive claims carries a heavy burden. While we support the empirical study of these phenomena (and indeed we rely on many such studies in formulating our critique), we identify several problems with Hathaway's project. We suggest that these problems demonstrate serious deficiencies in her empirical findings, theoretical model and policy prescriptions.

Does international law constrain state behaviour? Fundamental to the project of international law is the assumption that legal commitments meaningfully condition the exercise of state power. That is, the normative appeal of international law is predicated upon the view that well-designed rules will — in general and on average — promote peace, stability and good governance. It is, in other words, a radical critique of international law to suggest that international legal regimes actually worsen the problems they were crafted to redress.

In an important, recent article, Professor Oona Hathaway purports to quantify the

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impact of treaty ratification on actual human rights violations.¹ Hathaway maintains that her analysis supports several important empirical claims, including: (1) countries with worse human rights records appear to ratify treaties at a higher rate than those with better records; (2) treaty ratification is associated with worse human rights practices than expected; (3) enforcement procedures reduce non-compliance; and (4) ratification is associated with better practices in full democracies.²

Hathaway asserts that these findings contradict empirical predictions of both rational actor and normative models of treaty compliance; and she offers a theoretical model that, in her view, more adequately explains the empirical evidence.³ She states that treaties ‘operate on more than one level simultaneously. They create binding law that is intended to have particular effects, and they express the position of those countries that join them.’⁴ For Hathaway, this dual role of treaties helps explain the ‘paradoxical patterns of interaction between human rights treaty ratification and human rights practices’.⁵ She suggests that some states ratify treaties to signal to other important actors their commitment to human rights.⁶ Because of the legal character of international human rights treaties, ratification is virtually costless in that unenforced treaty rules do not require any actual changes in state practice. More specifically, international actors (including states and non-governmental organizations) reward ratifying states by reducing political pressure to promote human rights standards, thereby actually increasing human rights violations.⁷ In this way, the law and politics of international human rights treaties provide a structural incentive for some ‘countries [to] take positions to which they do not subsequently conform’.⁸

Hathaway’s project is, in our view, the most well-conceived empirical study of this question in the legal literature. Indeed, Hathaway’s contribution to human rights scholarship will, we expect, influence empirical debates in the legal academy for some time to come. It is because we value this work that we seek to advance the debate with the following critical remarks. In this article, we argue that Hathaway’s project is in important respects flawed. Specifically, we identify (1) defects in Hathaway’s research design; (2) structural deficiencies in her theoretical model; and (3) troubling implications of her policy analysis.

Our position is that Hathaway’s study does not adequately account for the ways in which, and the conditions under which, human rights norms are incorporated into national practice. Because the study seeks to understand more fully the relationship between international human rights law and domestic practices, we suggest that this

¹ Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 112 *Yale L.J.* (2002) 1935.

² *Ibid.*, at 1999 (summarizing empirical findings).

³ *Ibid.*, at 1989–2002.

⁴ *Ibid.*, at 2002.

⁵ *Ibid.*

⁶ *Ibid.*, at 2005–2006 (‘[Ratification] declares to the world that the principles outlined in the treaty are consistent with the ratifying government’s commitment to human rights’).

⁷ *Ibid.*, at 2007 (arguing that this expressive aspect of human rights treaties often ‘serve[s] to relieve pressure for real change in performance in countries that ratify the treaty’).

⁸ *Ibid.*, at 2007.

criticism is central. Indeed, both ‘rational actor’ and ‘normative’ theorists postulate that social processes structure the relationship between international law and state decision-making in that international law is part of the institutional environment within which states act. Of course, these theoretical approaches differ on other important matters, including the logic of social choice utilized by states and the nature of the social process guiding the incorporation of international norms. Because Hathaway does not account for these dynamics, her model is not designed to address the debates between ‘rational actor’ and ‘normative’ theorists. In our view, the incorporation of human rights norms is a process; treaty law plays an important role in this process; and Hathaway’s study does not provide a reason to reject these views.

1 Empirical Analysis

Hathaway’s independent variable (treaty ratification) and dependent variable (reported human rights violations) are subject to measurement errors that call into question her empirical findings. Treaty ratification is used as a proxy for the formal acceptance of international human rights law. And detected, reported human rights violations are used as a measure of actual human rights conditions. As we discuss below, both variables fail to account for the most important axes along which we would expect to see variation. The research design accordingly does not adequately encapsulate the nature of human rights abuses; and it does not account for various ways in which states are oriented to the international legal order.⁹

Hathaway’s focus on ratification as the independent variable is questionable. Ratification is not the ‘magic moment’ of acceptance of human rights norms. Rather, ratification is a point in the broader process of incorporation; and the relative significance of this point will, we would expect, vary widely with diverse impacts on measures of compliance. As a matter of international law, core treaty obligations attach earlier in the incorporation process — that is, upon *signature* of the treaty.¹⁰ As a matter of domestic law, many governments condition their acceptance of treaty obligations on the passage of implementing legislation.¹¹ Some human rights treaties

⁹ As a separate matter, because of Hathaway’s research design (particularly the use of pooled cross-sectional data), one of her major findings — that treaty ratification is associated with worse human rights ratings than otherwise expected — may be largely dictated by the fact that countries with worse practices tend to ratify human rights treaties earlier than others.

¹⁰ Under the general law of treaties, ‘a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty.’ Vienna Convention on the Law of Treaties, opened for signature, 23 May 1969, Art. 18, 1155 UNTS 331. We should add two points here. First, the effect of this rule may obviously have systematic effects on compliance depending on whether the signatory has a Parliamentary or Presidential system of government. Second, in terms of the appeal of this type of formalistic argument, consider that Hathaway relies on a similar provision of the Vienna Convention in evaluating the obligation entailed by ratification with particular reservations. See Hathaway, *supra* note 1, at 1963 n.113.

¹¹ Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86 *AJIL* (1992) 310. The effect of this factor will likely vary according to whether a state’s constitution is dualist or monist. Systematic effects may also vary according to the formal and informal political support required to pass such legislation.

(or particular treaty provisions) are considered self-executing; others are not. More fundamentally, ratification might represent the initiation, culmination or reconfiguration of a domestic political struggle.¹² A government's decision to ratify might be preceded by other actions of international legal significance (e.g., affirming the treaty's fundamental principles, pledging to join the treaty, signing the treaty) and followed by others (e.g., adopting implementing legislation, withdrawing crippling reservations). When these actions occur in the process of incorporation — and whether they do so simultaneously, clustered together, or over time — naturally varies. Moreover, the most important moment in the incorporation process for any given state might well be the decision of another country to ratify a significant human rights treaty. One could make a strong case, for example, that China's ratification of the International Covenant on Civil and Political Rights was one of the most significant recent developments for the human rights policies of Burma, Indonesia, North Korea and Singapore.¹³ The central empirical task, we submit, is identifying the conditions under which the process moves forward — and the conditions under which it stalls.¹⁴

Hathaway's measure of the dependent variable is also problematic. It does not account for strategies governments often adopt in response to improved enforcement of a norm. The main problems here concern strategic behaviour and substitutability. In Latin America in the late 1970s and early 1980s, levels of torture, political imprisonment and unfair trials declined — but governments were replacing those tactics with 'disappearances'. Human rights groups and victims eventually succeeded in reducing the practice of disappearances as well, but the point for statisticians is clear. Measuring one area of human rights without concurrently measuring the others would have misconstrued the patterns and prevalence of human rights

¹² Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *Int'l Org.* (2000) 217, at 219–220 (analysing use of treaties by newly established democracies to solidify liberal gains and to guard against future rollbacks); T. Risse, *et al.* (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999), at 25–28 (modelling transitions from repressive to rights-respecting regimes and role of international treaties and norms at different phases in the process). In these dissimilar situations, the baseline of human rights protections and, more significantly, the purpose of ratifying the treaty (e.g., to improve human rights protections or to keep protections at a plateau) will vary.

¹³ It is also important to note that such interdependencies can be incorporated into a regression analysis. D. C. Montgomery *et al.*, *Introduction to Linear Regression Analysis* (3rd ed., 2001).

¹⁴ Additionally, Hathaway fails to account for reservations and official derogations, which permit a state to suspend particular rights under the terms of a treaty. For instance, her model records violations of fair trial rights as non-compliance with the ICCPR even in years in which a state has officially entered an official derogation legally suspending those obligations. Moreover, these are obviously periods in which we would expect such 'violations' to increase dramatically. Another study of the effect of the ICCPR suggests the importance of taking into account derogation years. See Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?', 36 *J. Peace Res.* (1999) 95, at 105 ('A separate analysis was conducted in which the states that derogated from the treaty were moved into the group of non-party states for the years in which they had officially notified the UN of their derogation. When this adjustment is made, the difference between states parties and non-party states personal integrity abuse increases substantially and become [sic] statistically significant ...').

conditions on the ground. Some political scientists have tried to address this substitutability problem directly. They avoid measuring the effectiveness of a human rights treaty by its impact on only one right contained in the treaty.¹⁵ Assume, for example, that a treaty prohibits both disappearances and unfair trials. The problem for models like Hathaway's is that greater compliance with one obligation (e.g., reduction in disappearances) can show up as lower compliance with another (e.g., increase in unfair trials). Therefore, a model studying only unfair trials would show human rights conditions worsening, even though the overall country conditions may be improving as the treaty's norms are gradually incorporated into domestic practice.

Another difficulty, as many human rights statisticians have explained, is that the standard variables in this field only measure *recorded and reported* human rights violations, not actual violations. The problem is that improving human rights conditions increases access to information on the extent of violations. As a leading political scientist in the field explained,

[t]he availability and reliability of data for contemporary human rights studies deteriorates markedly when the focus shifts to the political, civil, and personal security issues. This is especially true for some of the worst human rights violations such as torture. . . . [I]t is virtually an axiom that the more repressive the regime, the more difficult it makes access to information about its human rights atrocities to researchers.¹⁶

Indeed, regimes that have not fully embraced human rights norms often censor local media, restrict the number and access of international reporters, and harass or threaten local individuals who might otherwise document violations. After describing these types of practices, sociologist Kenneth Bollen concluded, '[i]ronically, it is possible that a nation which is relatively open may appear lower in rights and liberties simply because violations are more likely to be reported to the outside world.'¹⁷ This limitation in the data can produce perverse measurement results: the more rights-protective a state becomes the worse the state's record *may appear* in terms of *detected* human rights violations. In particular, Hathaway's model cannot, for example, adequately distinguish between (1) a state in which levels of torture increase post-ratification and (2) a state in which torture declines post-ratification but appears to increase because liberalization eases the process of documenting and reporting instances of torture.

The measurement errors created by using reported violations would not be a problem if the errors were random. These measurement errors in Hathaway's empirical model are, however, systematic (that is, non-random). The problem for

¹⁵ Keith, *supra* note 14, at 101 n. 8; cf. Lopez and Stohl, 'Problems of Concept and Measurement in the Study of Human Rights', in T. B. Jabine and R. P. Claude (eds), *Human Rights and Statistics: Getting the Record Straight* (1992) 226.

¹⁶ Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses', in Jabine and Claude, *supra* note 15, at 44–45.

¹⁷ Bollen, 'Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984', in Jabine and Claude, *supra* note 15, at 200. Techniques are available for addressing some of these measurement problems. For example, the empirical model could control for (1) the relative freedom of the press; and (2) the relative level of NGO activity.

Hathaway's model is that treaty ratification triggers social and political processes that *exacerbate* this measurement error. First, the decision whether to ratify human rights treaties often turns on the effect that ratification would have on the documentation of human rights practices. Consider that a recent study commissioned by the United Nations concluded that '[t]he most common reason for non-ratification is that the treaties threaten the status quo. States resist ratification of treaties if they do not agree with the norms contained in the treaties, or do not wish their performance in these areas to be subjected to international scrutiny.'¹⁸ Hence, for many governments, the decision to ratify suggests a willingness to increase access to information on, and dialogue about, domestic human rights practices.

Treaty ratification also accentuates the measurement problem by increasing the salience and legitimacy of human rights concepts. As recent case studies and much experience suggest, one beneficiary of such developments is non-governmental organizations (NGOs). Local human rights groups often acquire greater legitimacy and political prominence in their struggle against a repressive regime when the government makes formal, tactical concessions.¹⁹ One such concession can be the signature or ratification of a human rights treaty.²⁰ The discourse of international human rights — facilitated by the educative campaign and media attention preceding and incident to ratification — should also spread the concept of rights guarantees to individuals who have not previously conceptualized abuses committed against them in these terms.²¹ In many jurisdictions, treaty ratification makes possible the initiation of individual legal claims based on the treaty's substantive guarantees. As a consequence, it encourages lawyers and their clients to express injuries in terms of the newly established treaty obligations. To take an example from domestic law: more expansive sexual violence laws are likely to result in statistically higher levels of rape claims, irrespective of whether the actual rate of rape remains constant or declines. We should not expect treaties involving civil and political rights, nor their domestic implementing legislation, to operate differently.

Formal institutional arrangements accompanying ratification are also likely to increase awareness and documentation of human rights. Ratification of a universal human rights treaty creates a special array of relationships between a government and the UN treaty system. Under UN reporting requirements, states are encouraged to

¹⁸ See generally Heyns and Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23 *HRQ* (2001) 483, at 487–488 (article by authors of UN study reproducing their main findings and recommendations).

¹⁹ Risse and Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in Risse, *supra* note 12, at 25–28.

²⁰ Risse and Ropp, 'International Human Rights Norms and Domestic Change', in Risse, *supra* note 12, at 238.

²¹ Heyns and Viljoen, *supra* note 18, at 488 ('[T]he treaties have had their greatest influence domestically in shaping the understanding of government officials and members of civil society as to what is to be considered basic human rights. Although a causal link cannot always be proven, it could hardly be considered coincidental that the very language of human rights in the parliaments and courts of the surveyed countries is largely that which the treaty system has been introducing and reinforcing since the middle 1960s').

monitor, track, and analyse human rights abuses. To this end, the UN Office of the High Commissioner for Human Rights has dedicated funds and services for helping states prepare periodic reports. Each reporting cycle, NGOs are also encouraged to produce 'shadow reports' for submission alongside the government's official reports. Donor agencies are especially inclined to fund this type of NGO activity. While many NGOs generally operate at the national level in their daily practices, such events provide opportunities for bringing their information to the attention of international actors.²² These interactions lend national NGOs formal institutional legitimacy and a forum in which to address state practices.²³ As a result, the more a country engages with the treaty system, the more its actual human rights record on the ground will be exposed.²⁴ Indeed, an important goal of human rights treaty regimes is the capacity-building of international and national monitoring mechanisms. That is, improved human rights documentation and reporting are themselves part of the process of incorporation.

Although Hathaway addresses some of these measurement problems, her brief analysis is unsatisfying. She contends:

if the results were due to greater reporting of violations in the wake of treaty ratification, we would expect to find that ratification would always or nearly always be associated with higher violation ratings. But instead the results suggest that the association between ratification and practices is strongest in the most entrenched areas of human rights and for regional treaties.²⁵

However, variations would be expected to occur. For instance, reporting may be more highly associated with particular thematic issues or with regional systems because those treaties are more effective. The *more effective* the treaty regime is in combating governmental repression, the greater the consciousness and reporting of violations will be. Especially given language and resource barriers, regional treaty regimes may be more effective in encouraging the growth and activities of domestic NGOs.²⁶ And, the most entrenched areas of human rights (such as torture) involve practices that governments try hardest to conceal.²⁷ In addition, these are the areas that donors, NGOs and international actors prioritize when regulatory mechanisms are in place.

²² For a rich discussion of these institutional relationships, see P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000).

²³ Risse and Sikkink, *supra* note 19, at 18.

²⁴ Heyns and Viljoen, *supra* note 18, at 487–488 ('Some countries are highly engaged with the system. They submit substantial reports, their NGOs bring individual complaints. The unfortunate result is that the countries that most often end up being singled out as human rights violators are those that are engaged').

²⁵ Hathaway, *supra* note 1, at 2000 n. 213.

²⁶ Heyns and Viljoen, *supra* note 18, at 520–521 ('[T]he UN is often seen as a remote, invisible, and anonymous body, one that speaks in foreign languages, with little knowledge of local conditions and customs. (This partly explains the greater popularity of regional systems, which are "closer to home").

²⁷ Goldstein, *supra* note 16, at 44–45.

Given these problems with the independent and dependent variables,²⁸ we would expect that Hathaway's empirical model would not account for much of the variation in the data. Thus, we are unsurprised that Hathaway's study yields 'no statistically significant relationship between treaty ratification and human rights ratings' in most of its multivariate analyses.²⁹ This statistical point may require clarification: the lack of a *statistically significant* relationship between ratification and practices does not demonstrate that a treaty's impact is insignificant. Rather, statistically insignificant results suggest likely (and perhaps non-random) measurement errors in the independent and dependent variables.³⁰ That is, such findings are insufficiently robust to confirm or disconfirm any affirmative empirical proposition.

2 Theoretical Model

In addition to the empirical problems, the proffered theoretical model also raises several concerns. That is, even if we assume that Hathaway's quantitative analysis conclusively establishes her empirical propositions, the theoretical implications of these findings are unclear. Some of these theoretical concerns also indicate flaws in the empirical study.

First, the quantitative analysis does not test, nor is it designed to test, the validity of Hathaway's theoretical model. Although Hathaway's theoretical account suggests that the US government reduces pressure (e.g., by the State Department Human

²⁸ Also, several of the human rights violations in Hathaway's model do not match the associated treaty obligations. One problem is over-inclusiveness. For, example, the Genocide Convention does not concern so-called 'politicide'; but Hathaway's reliance on the Maryland data set does. The Torture Convention does not cover extra-judicial killings, but Hathaway's variable for torture does. The Convention on Political Rights of Women (CPRW) does not require proportionate representation of women in legislatures, but Hathaway's variable for testing compliance measures proportionate legislative seats. In fact, state practice suggests that proportionate representation resulting from a governmental sex-based quota system arguably violates the CPRW. See, e.g., Declarations and Reservations to the Convention on the Political Rights of Women <http://www.unhcr.ch/html/menu3/b/treaty1.asp.htm> (Declaration of the Government of Bangladesh). Under-inclusiveness is also a concern. For example, the Genocide Convention prohibits practices beyond those that result in death, it does not require a specific proportion of the victim group to suffer the relevant injury, and it has no state action requirement. Hathaway's variable for genocide, however, concerns only policies by '[1] governing elites or their agents — or in the case of civil war, either of the contending authorities — that [2] result in the deaths of [3] a substantial portion of a communal group or politicized noncommunal group.' Hathaway, *supra* note 1, at 1968–1969 (internal quotation marks and citation omitted); see also *ibid.* at 1969 (describing a substantial portion as 'authorities physically exterminate enough members of a target group so that it can no longer pose any conceivable threat to their rule or interests') (internal quotation marks and citation omitted).

²⁹ Hathaway, *supra* note 1, at 1994.

³⁰ Hathaway suggests that tests of statistical significance are not as relevant to her research design. *Ibid.*, at 1993 n.195. The data set, however, does not approximate the total population. The data set does not contain countries; it contains 'country-years'. *Ibid.*, at 1978. The model only measures a subset of years out of the total population available. The data set also includes only some of the obligations under the treaties, and only some of the human rights treaties in the world. (The study also omits country years when reliable data sources are not available.) Importantly, Hathaway draws inferences from the data set to each of these populations.

Rights Reports under-reporting human rights violations) in the wake of treaty ratification, no documentation of this political pressure dynamic is offered.³¹ The regression analysis does not purport to measure the relationship between (a) state human rights practices and (b) international human rights pressure and reporting. It is important to note that the theory is simply a post-hoc causal explanation (arguably) consistent with, but neither confirmed nor assessed by, the empirical findings. The problem is that important (untested) empirical assumptions are embedded in the theoretical model; and that these assumptions are not always consistent with the assumptions of her empirical model. For example, the empirical model relies on US State Department reports as an objective indicator of human rights practices. That methodological choice, in turn, produces a major flaw in the model. A factual predicate of Hathaway's theoretical model — State Department under-reporting post-ratification — suggests that the chief source of information for her dependent variable (official State Department reports) is *biased*. That is, if we accept that the State Department decreases pressure on a country by under-reporting human rights violations post-ratification, we must reject the State Department reports as a reliable measure of actual human rights conditions. Furthermore, because Hathaway's findings show increased reports of human rights violations post-ratification, the data run contrary to her theoretical prediction of politically motivated under-reporting post-ratification.

Second, the model does not adequately explain state treaty practice. Because Hathaway assumes that treaty ratification is virtually costless, her theoretical model does not account for various forms of non-participation in human rights treaties. For example, the model cannot adequately explain non-ratification or the various forms of qualified participation (such as ratification with reservations or formal notices of derogation). Conversely, the model does not convincingly explain why some problem states ratify treaties at all, given that joining the treaty would signal (as a formal legal matter) the state's acceptance of the human rights principles embodied in the treaty.

Third, Hathaway's conception of 'signalling' postulates a strained view of state treaty practice. The model assumes that international actors are so radically under-informed about human rights practices that treaty ratification alone is used as a proxy for improving conditions irrespective of the fact that ratification carries with it no hard sovereignty costs. That is, Hathaway's model is predicated on the tantalizing oxymoron of a 'costless signal'. However, international legal commitments constitute 'signals' if, and only if, they are in some sense meaningful commitments. In this sense, Hathaway's analysis is difficult to understand. On her view, signalling states often understand that ratification is virtually costless; and are, as a consequence, willing to ratify even if they have no intention of complying with its substantive provisions. On the other hand, the signalled states (and other important actors such as international NGOs) apparently do not understand that ratification is meaningless and, as a consequence, reward ratifying states for the very act of ratification. Moreover, on Hathaway's view, the signalled states do not learn over time that ratification is

³¹ *Ibid.*, at 2000 n. 213.

meaningless. In our view, Hathaway's model systematically underestimates the sovereignty costs of treaty ratification; and, as a consequence, fails to identify the ways in which universal treaty ratification promotes the 'globalization of freedom'.³² Human rights treaty ratification (even if understood only as 'position taking') at a minimum sharply delimits the ways in which states may justify controversial practices. The resultant constraints on legitimation strategies are, we submit, sensibly understood as 'sovereignty costs' by states.³³ In addition, even modest legalization of human rights institutions magnifies this effect by promoting more precise, obligatory treaty rules.³⁴

Fourth, Hathaway does not make explicit important theoretical presuppositions of her model. Hathaway assumes that international political pressure in the area of human rights, under some unspecified circumstances, *causes* states to introduce costly changes. In short, where persuasion fails, pressure often works. In addition, states, on her view, seek to conform their conduct to prevailing international standards while minimizing sovereignty costs. As a consequence, some states would ratify human rights treaties with no intention of altering domestic practices in order to stave off more intrusive (and effective) modes of promoting human rights norms. The model, however, neither identifies a causal mechanism by which international norms are incorporated into national practice, nor the deeper incentives that form or guide state choices. What social logic or process animates the international political order? How and under what conditions do norms travel? These questions have prompted the energetic debates in international relations/international law scholarship on compliance and the role of law in world politics. And, indeed, the 'rational actor' and 'normative' theories identified by Hathaway are defined in large part by their respective answers to these questions. Hathaway's theoretical model thus fails to fulfil the promise made at the beginning of her article to address or improve those debates.

That Hathaway fails to engage these issues is also problematic because her theory, as a result, may rest upon untested assumptions and potential internal inconsistencies. Consider, for instance, that Hathaway expressly questions several empirical predictions of rational actor and normative schools. The crucial point is that those empirical predictions are *derived from the theoretical commitments of the schools*. Because Hathaway does not make her own theoretical commitments clear, her model arguably employs theories of social action that imply the very empirical predictions she disputes.

Consider, for example, Hathaway's critique of realist empirical predictions, despite her own implicit reliance on realist theoretical assumptions. Hathaway suggests that realists (a specie of 'rational actor' theorists) would predict — contrary to her findings — that international human rights treaties would exert no regular causal influence

³² Koh, 'The Spirit of the Laws', 43 *Harv. Int'l L.J.* (2002) 23, at 26.

³³ See generally S. Cohen, *States of Denial: Knowing about Atrocities and Human Suffering* (2001).

³⁴ See generally J. Goldstein *et al.*, *The Legalization of World Politics* (2001).

on state practice.³⁵ This empirical prediction, however, is derived from realism's commitment to a rationalist theory of social choice that treats the interests and preferences of actors as essentially fixed during the process of strategic interaction. On this view, international human rights law is part of the institutional environment within which states rationally pursue given and fixed preferences. International law might, of course, exert influence on state practices by altering the costs or benefits of particular strategic options, but the central causal dynamic would be the state's rational pursuit of its prefigured preferences. As a consequence, international law, as a potential explanation of state choice, is epiphenomenal.³⁶ Because Hathaway's findings purportedly disconfirm the realist's causal prediction, does she also question the theoretical assumption from which this prediction is derived? This may be particularly problematic for Hathaway in that she seems to employ a rationalist theory of social action in her 'pressure' model. Of course, the fundamental point is that Hathaway's under-theorized explanation raises more questions than it answers.

3 Policy Analysis

Finally, Hathaway's brief policy analysis is unpersuasive and ultimately counterproductive. As previously discussed, Hathaway's theoretical model explains the effects reflected in her data in terms of the unique character of human rights treaties — ratification of these treaties is, on her view, 'costless'. Her policy recommendations, therefore, aim — first and foremost — to increase the costs of ratification (and thereby ensure that treaty ratification is meaningful). From this general prescription, she derives several specific suggestions that, in our view, subvert the process of norm internalization by discouraging universal ratification of human rights treaties.³⁷

Because Hathaway's policy analysis is geared to solve one problem ('costless' ratification), she fails to account for the impact her proposals would have on other potentially positive effects of treaty ratification (effects not captured by her empirical or theoretical model). Hathaway explains that the empirical 'findings of this study may also give reason to reassess the current policy of the United Nations of promoting universal ratification of the major human rights treaties'.³⁸ Based on her theoretical analysis, Hathaway advocates making ratification more difficult: 'The solution . . . is . . . to enhance the monitoring and enforcement of treaty obligations to reduce opportunities for countries to use ratification as a symbolic substitute for real

³⁵ Hathaway, *supra* note 1, at 1944–1947. Hathaway arguably pushes this claim a bit too far. She is correct to point out that realists attribute no independent causal significance to legal rules. Realists do, however, acknowledge that states often comply with international rules. For realists, rules constrain and facilitate state behaviour without reconfiguring state interests and preferences. It is in this way that international rules have no autonomous and causal status. See, e.g., Simmons, 'Compliance with International Agreements', *Ann. Rev. Pol. Sci.* (1998) 75 (summarizing this approach).

³⁶ For an example of this type of analysis in international legal scholarship, see Goldsmith and Posner, 'A Theory of Customary International Law', 66 *U. Chi. L. Rev.* (1999) 1113.

³⁷ See, e.g., Alston, 'Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective', in Alston and Crawford, *supra* note 22, at 501.

³⁸ Hathaway, *supra* note 1, at 2024.

improvements.’³⁹ But, by reducing the opportunities for ‘shallow’ ratification by problem countries, Hathaway’s approach would undermine the considerable constitutive effects of these treaties.

In short, our principal policy contention is that broad ratification of human rights treaties plays an important role in the process of building national human rights cultures (and a transnational human rights culture). It is important to note that, even on Hathaway’s view, states attempt to realize the signalling benefits of human rights treaty ratification precisely because the norms embodied in these treaties enjoy widespread (international) acceptance. As previously discussed, treaty regimes help foster this acceptance domestically by increasing the salience and legitimacy of human rights norms. In addition, universal (or broad-based) ratification furthers these objectives on the global plane by increasing the salience and legitimacy of these norms in the international community. In this sense, human rights treaties serve both a (global) expressive function and a (domestic) constitutive function. In terms of expressive significance, Hathaway acknowledges that ‘treaties may have broader positive effects not captured by the analysis’.⁴⁰ That is, even if ratifications are directly associated with negligible or deleterious effects in particular states, on the whole such treaties can have ‘a widespread effect on the practices of *all* nations by changing the discourse about and expectations regarding those rights’.⁴¹ ‘What is important to note — and the reason that this effect would *not be detected* in [Hathaway’s] empirical analysis — is that this influence can be felt by countries regardless of whether they ratify the treaty or not.’⁴² Hathaway even nods to legal process scholars by admitting her empirical analysis may not capture the long-term internalization effects within ratifying countries.⁴³ Despite these two types of effects — global and domestic — Hathaway asserts that we must remedy the short-term, negative effects on individual ratifying countries by raising the costs of ratification. Such a scheme, however, may well disrupt the gradual process of constructing a global normative order (a necessary step in the further legalization of international human rights regimes).

Conclusion

Public international law desperately needs work like Hathaway’s — studies that connect the law to events on the ground. There is a real danger that, absent such efforts, international lawyers will act in ways that have negligible or perverse effects on the injustices they seek to combat. But because the stakes are so high, it is important that we make accurate connections between what the law does and what happens on the ground. Those connections cannot be ascertained through the

³⁹ *Ibid.*, at 2025.

⁴⁰ *Ibid.*, at 2021.

⁴¹ *Ibid.* (emphasis in original); see also *ibid.*, at 2006 (‘[T]he first expressive function of treaties may change discourse about and expectations regarding country practices and thereby change practices of countries regardless of whether they ratify the treaties’).

⁴² *Ibid.*, at 2021 (emphasis added).

⁴³ *Ibid.*, at 2022.

research design that Hathaway employed. Perhaps the answer is to discard this type of statistical modelling and adopt a softer kind of empiricism, something more sociological than economic. Perhaps it's something else. We certainly have not given up hope for statistical approaches in this area, as there are many devices that can be employed to help conduct such studies. In any event, this much is clear: we still do not satisfactorily know the full effects of human rights treaties. Absent such knowledge, the best assumption remains the conventional one: human rights treaties advance the cause they seek to promote, not the other way around.