

## **Compliance without Ratification. Using International Law in Non-Binding Scenarios**

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State Compliance with International Human Rights Law:  
State-of-the-art, Improvement and Challenges

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### Article abstract

While the end goal of international treaties is full participation, states are often resistant to ratification. As such, it is worthwhile to examine the effects that international law, including international treaties, have on states prior to ratification. This paper endeavors to determine the extent to which non-state-parties utilize international legal instruments, including the ways in which such law is included in domestic legal regimes and by looking at case studies where international law, used as a proxy for “rejoining the international community” has played a significant role in policy making despite a lack of ratification. The paper also examines the pushback on this framing and potential negatives. By examining the effects of international law on non-state-parties it opens up new forms of advocacy based on international legal norms and instruments, even in states that have not ratified such instruments in conjunction with advocacy efforts on ratification.

# COMPLIANCE WITHOUT RATIFICATION

## USING INTERNATIONAL LAW IN NON-BINDING SCENARIOS

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While the end goal of international treaties is full participation, states are often resistant to ratification. As such, it is worthwhile to examine the effects that international law, including international treaties, have on states prior to ratification. This paper endeavors to determine the extent to which non-state-parties utilize international legal instruments, including the ways in which such law is included in domestic legal regimes and by looking at case studies where international law, used as a proxy for “rejoining the international community” has played a significant role in policy making despite a lack of ratification. The paper also examines the pushback on this framing and potential negatives. By examining the effects of international law on non-state-parties it opens up new forms of advocacy based on international legal norms and instruments, even in states that have not ratified such instruments in conjunction with advocacy efforts on ratification.

Si l'objectif final des traités internationaux est la pleine participation, les États sont souvent réticents à la ratification. Dans ce contexte, il vaut la peine d'examiner les effets qu'a le droit international, y compris les traités internationaux, sur les États avant la ratification. Cet article s'efforce de déterminer dans quelle mesure les États non parties utilisent les instruments juridiques internationaux, y compris la manière dont ce droit est inclus dans les régimes juridiques nationaux, et d'examiner des cas où le droit international, utilisé comme un moyen pour « rejoindre le communauté internationale », a joué un rôle important dans l'élaboration des politiques malgré l'absence de ratification. L'article examine également les contestations et les effets négatifs potentiels de cette perspective. En examinant les effets du droit international sur les États non parties, il ouvre de nouvelles formes de plaidoyer fondées sur les normes et instruments juridiques internationaux, même dans les États qui n'ont pas ratifié ces instruments, de pair avec des efforts de plaidoyer en faveur de la ratification.

Aunque el objetivo final de los tratados internacionales es la plena ratificación, los Estados suelen resistirse a ratificar los tratados. Por ello, merece la pena examinar los efectos que el derecho internacional, incluidos los tratados internacionales, tienen sobre los Estados antes de su ratificación. Este artículo busca determinar hasta qué punto los Estados no partes utilizan los instrumentos jurídicos internacionales, incluidas las formas en las que dicho derecho se incluye en los regímenes jurídicos nacionales, y examinar casos en los que el derecho internacional, utilizado como un medio para “incorporarse a la comunidad internacional”, ha desempeñado un papel importante en la formulación de políticas a pesar de la falta de ratificación. El artículo también examina las oposiciones y los efectos negativos potenciales de ésta perspectiva. Al examinar los efectos del derecho internacional en los Estados no partes, se abren nuevas formas de promoción basadas en normas e instrumentos jurídicos internacionales, incluso en los Estados que no han ratificado dichos instrumentos, junto con esfuerzos de promoción hacia la ratificación.

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The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ("Migrant Workers Convention"), adopted in 1990, counts only 55 of the world's 197 countries as state parties. That gives the Convention the dubious title of "least-ratified" of the OHCHR's nine main international human rights conventions.<sup>1</sup> It is closely followed by the *International Convention for the Protection of all Persons from Enforced Disappearance*, which has only 62 state parties.<sup>2</sup> When such an international legal mechanism is ratified, accepted, approved or acceded to, "a State establishes on the international plane its consent to be bound"<sup>3</sup> This consent is legally binding, and enforced in various manners, depending on the justice system of a given state. Outside of this consent, treaties provide no legally binding obligations. Using this as a guide, it would be easy to conclude that treaties, when counting less than a third of the world's states among their state-parties, are banished to the dustbin of history. After all, they provide legal obligations and influence on a rarified and select group of states. However, in practice, there are a variety of ways that treaties, and international law write-large, play a role in policymaking beyond binding legal obligations.

As Louis Henkin once observed, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"<sup>4</sup>, an assertion that has largely aligned with further empirical study.<sup>5</sup> In one example, when faced with an issue that was not covered by duly ratified treaties or other instruments of international law, Justice Arthur Chaskalson of the South African Constitutional Court wrote "[w]e can derive assistance from public international law...but we are in no way bound to follow it."<sup>6</sup> Justice Chaskalson's writing not only sets forth the lack of obligations, but succinctly describes the usefulness of public international law. States have historically had a wide range of interaction with human rights treaties, from ratification and judicial enforcement, as envisioned by treaty drafters, to examination for inspiration and guidance as described by Justice Chaskalson. Beyond such interaction, there is also Professor Henkin's almost, which includes outright rejection of the advocated-right or backlash against the wider human rights project and those working for its expansion. To start, the belief that an unratified treaty has no effect on the policymaking of states makes the false assumption that the only reason to avoid becoming a state-party to a treaty is a substantive rejection of the rights within. This is simply untrue. There are a number of reasons that a state may opt against joining a treaty regime. Domestic politics may play a significant role, with key constituencies concerned or vocal about the particular subject matter or difficult ratification processes that would stand in the way of leaders' other policy priorities

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<sup>1</sup> This does not include the nine optional protocols.

<sup>2</sup> OHCHR, "Status of Ratification Interactive Dashboard" (last visited 14 November 2020), online: OHCHR <[indicators.ohchr.org/](https://indicators.ohchr.org/)> [Status of Ratification Interactive Dashboard].

<sup>3</sup> *Vienna Convention on the Law of Treaties*, 16 December 1969, 1155 UNTS 331, art 2(1)(b) (entered into force 27 January 1980).

<sup>4</sup> Louis Henkin, *HOW NATIONS BEHAVE: Law and foreign policy*, 2nd ed (New York: Publishers of the Council of the Foreign Relations by Columbia University Press, 1979) at 47 cited in Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale LJ 2599 at 2599 [Hongju Koh].

<sup>5</sup> *Ibid.*

<sup>6</sup> *S v Makwanyane and Another*, [1995] ZACC 3 at para 39, [1995] 3 S Afr Const Ct 94.

("political capital"). There may also be concerns about one element of a treaty while other sections remain uncontroversial. There may also be unique situations within states, such as a general populace or political-class disapproval of all or nearly-all international agreements, seen as ceding sovereignty or an inroad to dread "global government", sometimes replete with images of black helicopters enforcing far away edicts.<sup>7</sup> As there are many reasons outside of substantive rights criticism that may lead to state disapproval of treaties, the rights espoused in such documents may still be respected, or may be the targets of advocacy movements. It is the aim of this paper to examine the way in which international law, in particular international human rights law, may be used to influence decision-making and policy determinations amongst non-state-parties to treaties. Put differently, when a state is not bound by a treaty, in what situations can that treaty still influence state policy? While the narrow question itself is vital for individual advocacy movements, it is perhaps more helpful as a general exercise to look at the larger body of international law. Thus, the paper will attempt to examine situations in which international law is influential in state decision-making, despite the notable disadvantage of such law being non-binding.

Influence in state decision-making can take many forms. In addition to traditional lawmaking processes, policymaking can encapsulate "non-hierarchical modes of guidance, such as persuasion and negotiation" and can include "public or private actors [...] engaged in policy formulation."<sup>8</sup> This substantially expands the definition of "influential in state decision-making" from above. It includes both public and private actors and encapsulates both top-down and bottom-up processes. For purposes of discussion, where international law plays a significant role in the "persuasion and negotiation" processes, rather than a raw appeal to normative "right" or national interest, it will be highlighted and examined for potential lessons. In an effort to interrogate the influence of international law in non-binding situations, the paper will proceed thusly. First, a broad literature review will examine the ways that international law has been examined as an element of political and legal decision-making and will attempt to situate this analysis within the existing literature. Second, the substantive portion of the analysis will take two tracts in determining the extent to which non-state-parties utilize international legal instruments: first, through a comparative survey, examining the ways in which international law is constitutionalized into domestic legal regimes, to what extent that includes the examination of non-binding international legal instruments, and how judicial branches have utilized or examined non-binding international law; second, by examining case studies in which international law has played a role in state decision-making despite being non-binding. Finally, the paper will conclude with an attempt to draw lessons from the ways in which non-binding international law is treated, both *de jure*, in constitutional regimes, and *de facto*, in case studies with an eye towards further study and potential advocacy strategies.

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<sup>7</sup> Anne-Marie Slaughter, "Global Government Networks, Global Information Agencies, Disaggregated Democracy" (2003) 24 Mich J Intl L 1041 at 1054.

<sup>8</sup> Adrienne Heritier, *New Modes of Governance in Europe: policy making without legislating?* Reihe PolitikWissenschaft: Political Science Series (Vienna: Institut für Höhere Studien, 2002) at 1.

## I. Literature Review

Across legal, political science and international relations literature, there have been myriad attempts to understand the ways in which international law affects domestic policymaking and jurisprudence utilizing a number of different methodologies.

To start, there have been repeated efforts to understand the manner in which international law is implemented through domestic systems. Take, for example, the 2017's *Research Handbook on the Politics of International Law*. This book, edited by Wayne Sandholtz and Christopher A. Whytock, worked to understand "international law at different stages of governance and in different governance systems."<sup>9</sup> It included analysis on various institutional elements of international law compliance including actors, the implementation and entry-points. This formalized, domestic approach fits well within the implementation methodology envisioned in a number of international conventions. Take, for example, the *International Covenant on Civil and Political Rights* ("CCPR"), which requires state-parties

[...] to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>10</sup>

Similar provisions are found in nearly all prominent international human rights treaties created under the auspices of the OHCHR.<sup>11</sup> As there is a domestic focus on the implementation of international human rights treaties, it stands to reason that there is also substantial comparative literature on implementation regimes. The United States constitutional regime has received particularly robust treatment, no-doubt based on the prominence of American legal scholarship and potentially based on the country's complex relationship with international law. Such articles both ask questions about the depth of state interaction with and commitment to international law, and normative questions about the desirability of such interaction. This includes articles with titles such as "Constitutional Commitment to International Law Compliance?" and "Should International Law Be Part of Our Law?" which examine both the theories of interpretation<sup>12</sup> and compliance as well as implementation and compliance mechanisms.<sup>13</sup> Those that take the normative tract examine the potential

<sup>9</sup> Wayne Sandholtz and Christopher A. Whytock, *Research Handbook on the Politics of International Law* (Cheltenham: Edward Elgar Publishing, 2017) at 22.

<sup>10</sup> *International Convention on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 2(2) (entered into force 23 March 1976).

<sup>11</sup> See *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 art 2(1) (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 34/180, Doc GA, 1979, UN DOC A/20378 13, art 2 (entered into force 3 September 1981); *Convention on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 2(2) (entered into force 3 January 1976), etc.

<sup>12</sup> David H. Moore, "Constitutional Commitment to International Law Compliance" (2016) 102:15-05 *Va L Rev* 367 [Moore].

<sup>13</sup> *Ibid.*

benefits and pitfalls of international law compliance, including a potential "democracy deficit" in allowing international law to override domestic preferences.<sup>14</sup>

The domestic focus of such implementation literature also takes a comparative tract in determining how and why nations behave in the way they do. Literature such as Harold Hongju Koh's "Why Do Nations Obey International Law?" or Louis Henkin's "How Nations Behave" attempts to answer this question by looking at the interactions of multiple states with the international community and international law. This literature attempts to determine the motivation behind the actions of states generally, while recognizing the substantially complex networks and institutions that can influence and change the activity of individual states. Indeed, in acknowledging the complexity of state action, Abraham Chayes and Antonia Handler Chayes put forth a theory whereby understanding the making of international law, including treaty negotiation, agreement and implementation must take into account

[...] a hugely complex interactive process that engages not only states and their official representatives but also, increasingly, international organizations and their staffs, nongovernmental organizations, scientists, business managers, academics and other nonstate actors, and that...penetrates deeply into domestic politics.<sup>15</sup>

While the particularities of individual treaties may alter the inclusion of various actors, such as scientists, business managers and others, the literature on motivation behind compliance with international treaty regimes recognizes the complexities involved in determining the motivation behind state action and compliance. It also, de facto, examines the importance of lobbying and advocacy both within the processes that create international legal mechanisms and within the processes that ensure their domestic implementation, a major source of their normative value.

Within this analysis structure, there is also a theory that the reason behind compliance is not based on the institutions of accountability, but rather the fundamental fairness of a rules-based international order based on sovereignty. Under this view, most prominently espoused in Thomas Franck's "Fairness in International Law and Institutions",<sup>16</sup> the egalitarian nature of international law leads states to obey rules without regard to punishment for rule breaking because of the fundamental legitimacy of said rules: e.g., if everyone worked together to make the rules, then everyone should follow them. This view is well questioned by many scholars of the global south, prominently including those of the Third World Approaches to International Law ("TWAIL") school of thought that inquires further into who was at the table when such rules were mandated.<sup>17</sup> This leads to a fairly significant gap in the legitimacy argument, especially

<sup>14</sup> John O McGinnis & Ilya Somin, "Should International Law be a Part of Our Law?" (2007) 59:5 Stanford L Rev 1175 at 1198.

<sup>15</sup> Abraham Chayes & Antonia Handler Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (Cambridge : Harvard University Press, 2009) at x.

<sup>16</sup> Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford Scholarship Online, 1998).

<sup>17</sup> See generally Makua Mutua, "Standard Setting in Human Rights: Critique and Prognosis " (2007) 29 Human Rights Quarterly 57 [Mutua].

as developing states, that were largely ignored at the foundations of international law, grow in international influence. An examination of the above literature review leads to various conclusions. To start, international law has been widely studied. When treaties are formally adopted, it is widely examined how they are implemented in international law, including the actors that influence how they are brought into the domestic legal regime, how they are interpreted and the effects on governance. This is examined both in a comparative or, from an advocacy standpoint, a "best-practices" perspective as well as under domestic lens, seeing how individual states have worked with international law. However, the synopsis provided above works to answer a number of questions on the formal influence<sup>18</sup> of international law, but there is a dearth of study on informal influence. There is also broad literature on the tendency of states to abide by international law and the motivations that go into such compliance. However, this leaves a hole that this analysis hopes to fill. That is, when states are not required to abide by international law, as they have not signed onto relevant treaties, how can such law still have an influence on domestic legislation and policy? This question draws from the domestic-focused and motivation section of the literature by recognizing the diverse constituencies that may have an impact on domestic decision-making while borrowing from the implementation and "best-practices" analysis to understand particular entry-points for advocacy efforts and pressure campaigns.

## II. Influence of Non-Binding International Law

The substantive section of this analysis will be broken down into two parts. The first segment will look at constitutional references to international law, with a particular focus on ways in which policymakers and judiciaries point to international law as an influence. It will also look at jurisprudential influences, examining how domestic courts treat international law, whether it be legally binding through ratification or examined based on the needs of a particular case.

This examination is a vital part of the overall paper as it provides one avenue for the influence of non-binding international law. Where the legislature or executive is directed to examine relevant international law for guidance, even when non-binding, advocates can point to both the body and spirit of international legal mechanisms to influence policy debates. Where the judiciary is directed to, or has shown a willingness to, examine international legal practice, another argument structure is open for litigation, both the individual and the impact variety.

The second portion will examine real-world examples of public policy debates framed through international law and advocacy efforts in states where treaties have not been ratified and, as such, compliance is non-mandatory.

This section serves as the crux of the article. Advocacy, in all its forms, should be built on international best practices and the sharing of tactics. On-the-ground

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<sup>18</sup> In this particular instance, "formal influence" refers to formal under the operational requirements of treaties, in contrast to formal in the "formal versus informal justice" understanding.

examples abound in mass demonstration movements, ranging from shared methods to prevent security force advancement or repression to methods for handling common crowd-dispersal weapons and others. In one recent example, the tactics of Hong Kong protesters were shared broadly, including efforts to prevent police incursions and methods for limiting the efficacy of tear gas canisters.<sup>19</sup> The same is true in policymaking and legal advocacy. The influence of the impact litigation strategy of the NAACP's Legal Defense Fund ("LDF") in shaping legal advocacy in the United States is well documented, including both allied causes and those with end goals across the political aisle.<sup>20</sup> Additionally, the success of the LDF led to similar tactics used across the globe, including Canada, South Africa, Brazil and across Europe, often with the technical assistance of the LDF.<sup>21</sup> While not all tactics are universal, especially across systems with limited civil society space and differing legal systems, transnational tactical influence cannot be understated. The methodological approach will differ between these two parts. As the first section is meant as a large-scale survey, it will be fundamentally comparative, examining language in constitutions and legislation to determine how states interact with international law. The second element will look at case studies, examining individual instances where international law played a role in the creation of legal regimes, policy-making decisions or advocacy efforts despite not having been formally adopted.

## A. Domestic Law Treatment of International Law

The domestic treatment of international law is necessarily understood as a pair of continua. The first of these scales looks at incorporation and ranges from the (nonexistent) express full incorporation of any internationally ratified legal mechanism into domestic law to the (also nonexistent) express full rejection of any and all international legal norms from the domestic legal regime. The second, equally relevant, continuum concerns the enumerated influence of any incorporated or referenced international law. On one side is the full incorporation of international law, with the ability of the same to be used in litigation with the potential to override or render invalid duly promulgated domestic legislation, while the other side merely requires international law to be examined and used as a guide and influence for those making policy and the judiciary in tough cases, without the same justiciability or required legal influence. With these two continua guiding the analysis, the survey below aims to provide representative provisions and treatments. This need not include provisions that are prominent or influential, or exist in states that are prominent actors or critics of international law.<sup>22</sup> Instead, the provisions examined serve as markers at various areas

<sup>19</sup> See generally William Yang, "How Hong Kong protests are inspiring movements worldwide" (22 October 2019), online : DW <[www.dw.com/en/how-hong-kong-protests-are-inspiring-movements-worldwide/a-50935907](http://www.dw.com/en/how-hong-kong-protests-are-inspiring-movements-worldwide/a-50935907)>.

<sup>20</sup> See generally Martha Davis, "Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Socia Change Litigation" (2001) 9:1 Am UJ Gender Soc Pol'y & L119 at 119.

<sup>21</sup> Scott Calnan, *The Effectiveness of Domestic Human Rights NGOs: A Comparative Study* (Boston: Martinus Nijhoff Publishers, 2008) at 117.

<sup>22</sup> For a useful definition of influential on the international stage, see: David S. Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYUL Rev 762.



of the continua, providing examples of places in which many such provisions exist or the outward bounds of the international legislative universe.

## 1. CONSTITUTIONAL TREATMENT

Of the 195 constitutions currently in force, 183 contain specific references to international law.<sup>23</sup> Such references vary widely across constitutional regimes in their language, purpose and prescribed processes.

Cameroon's 1972 constitution is representative of most such regimes. The country's preamble specifically reaffirms "all duly ratified international conventions", while further articles dictate the domestic authorities tasked with negotiating international agreements and treaties and the procedure for ratifying such agreements, as well as what bodies are responsible for interpretation and where the law is to sit vis-à-vis domestic law ("supremacy").<sup>24</sup> In this manner it acknowledges the importance of international law and gives a process for bringing it into domestic enforceability and a procedure for such enforcement.

Of more interest to the current analysis are states that specifically include elements of international law in their constitutional regime without references to their ratification. Such references to "international norms" or "principles of international law" are found in considerably fewer constitutional regimes.<sup>25</sup> While fewer in total number, these references also vary widely.

Some constitutional regimes, such as Bosnia and Herzegovina which states "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina,"<sup>26</sup> specifically incorporate such principles and norms into their law without reference to ratification. This stands in stark contrast to states such as Cape Verde, which incorporates "[r]ules, principles of International Law, validly approved and ratified internationally and internally, and in force" [Emphasis added],<sup>27</sup> clearly requiring approval and ratification as well as some internal enforcement criteria.

Other states utilize norms and principles for interpretative purposes. South Africa, for example, instructs its judiciary that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."<sup>28</sup> Similar to above, this can be contrasted with such interpretative instructions that specifically reference ratification or accession, such as

<sup>23</sup> Constitute Project, "Explicit References to International Law; International Law", online: *Constitute Project* <[www.constituteproject.org/search?lang=en&key=intlaw&status=in\\_force](http://www.constituteproject.org/search?lang=en&key=intlaw&status=in_force)> [Explicit References to International Law].

<sup>24</sup> *Constitution of Cameroun No. 96/06* of 1996 at Preamble, arts 36, 44, 45, 47.

<sup>25</sup> See generally Explicit References to International Law, *supra* note 23.

<sup>26</sup> *Bosnia and Herzegovina Constitution No 25/09* of 1995, art 3(1)(b).

<sup>27</sup> *Cape Verde Constitution No 2/III/90* of 1980, art 11.

<sup>28</sup> *South Africa Constitution No 5-2005* of 1996, s 233 [*South Africa Constitution*].

Colombia's instruction that "[t]he rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia" [Emphasis added].<sup>29</sup>

The Timor-Leste constitutional regime seems to utilize both approaches. The document specifies that "[a]ll norms that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor are invalid" [Emphasis added].<sup>30</sup> However, it also requires that "[t]he legal system of East Timor shall adopt the general or common principles of international law."<sup>31</sup> Taken together, this cuts a middle path between specifically incorporating principles or norms of international law or using them as an interpretative measure without ratification or adoption, while also demanding policymakers to incorporate such norms into the legal system.

The importance of this distinction is not merely theoretical but has been recognized by both scholars and states. The 2004 Transitional Administrative Law of Iraq provided the Iraqi people with "[...] all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations."<sup>32</sup> [Emphasis added]. This language was removed from the 2005 Constitution, causing one scholar to surmise that "[...] Iraqi citizens no longer can rely on customary international law as a direct source of rights and duties to be enforced in Iraqi courts."<sup>33</sup>

## 2. JURISPRUDENTIAL TREATMENT

The murkiness of the above constitutional provisions has led to two separate questions that courts have sought to resolve.

First, when, and to whom, does international law apply? Are all actors of a state even bound by duly ratified international legal instruments, much less the "principles" or "norms" of international law?

Second, what are the "principles" or "norms" of international law? It may be said that the broad concepts of "principles" or "norms" of international law are used in constitutional provisions as synonyms for "customary international law". Whether or not this is true, disagreements about both the substance and methodology for determining customary international law<sup>34</sup> lends itself to interpretive difficulties that

<sup>29</sup> *Colombia Constitution* No of 1991, art 93 [*Colombia Constitution*].

<sup>30</sup> *Timor-Leste Constitution of 2002*, online (pdf) : [www.constituteproject.org/constitution/East\\_Timor\\_2002.pdf?lang=en](http://www.constituteproject.org/constitution/East_Timor_2002.pdf?lang=en), art 9(3).

<sup>31</sup> *Ibid*, art 9(1).

<sup>32</sup> *Law of administration for the State of Iraq for the Transitional Period*, art 23.

<sup>33</sup> Tom Ginsburg, "Locking in Democracy: Constitutions, Commitment and International Law" (2006) 38 *NYUJ Intl L & Pol* 707 at 708.

<sup>34</sup> See Generally B S Chimni, "Customary International Law: A Third World Perspective" (2008) 112:1 *AJIL/ Am J Intl L* 1.

most often must be resolved through courts or other interpretive bodies, which are then asked to resolve the same questions above. The difficulty in determining the answer to these questions further advances the interest in examining the impact of non-binding international law. When it is difficult to determine the impact of binding international law, whether through treaties or constitutional provisions, the impact of non-binding international law becomes more important. Strategies used pursuant to international law cannot require that such law is binding if such a fundamental element is difficult to know. Additionally, complex legal systems with a variety of entry points lend themselves to experimental advocacy strategies, rather than rigid legalistic strategies that require judicial predictability in an often changing and difficult to foretell legal landscape.

Take, for example, the United States of America. As mentioned above, the American legal system's relationship to international law is well discussed in academic literature. This is, no-doubt, partially due to the outsized prominence of literature on the American (or Anglo-American) legal and political structure.<sup>35</sup> It may also be due to the complex relationship between the United States of America and international law, going back to the League of Nations and the earliest international human rights treaties (while the United States was fundamental in the creation of the League of Nations, domestic political pressures ensured it was never joined).<sup>36</sup> The country's general disinterest in international law can be illustrated by the fact that it is the only country in the world that has not ratified the *Convention on the Rights of the Child*.<sup>37</sup> Indeed, the President has not even submitted the *Convention* to the Senate for ratification.<sup>38</sup> All of this is despite the participation of both the Reagan and H.W. Bush administrations in the drafting of the *Convention*, including in the drafting of provisions.<sup>39</sup> However, for purposes of this paper, the complex relationship between the United States and international law is instructive. To start, it is a common law system, allowing for significant bodies of judge-made law, often drawing on a number of sources and influences. Second, it is a federal system, with a hierarchical, but frequently unaligned, federal court system in addition to 54 further hierarchical judicial systems. This frequently creates differing answers to questions of international law applicability and interpretation. In this question the United States is not unique, as there are currently at least 25 formally federal states in the world, in addition to multiple countries that are federal in all-but-name.<sup>40</sup> There is significant scholarly dispute as to whether the government of the United States is bound by international law under the US

<sup>35</sup> See Generally William Ewald, "What's So Special About American Law?" (2001) 26:3 Okla City UL Rev 1083.

<sup>36</sup> Kathryn C Lavelle, "Exit, voice and loyalty in international organizations, US Involvement in the League of Nations" (2007) 2:4 The Review of International Organizations 371.

<sup>37</sup> Status of Ratification Interactive Dashboard, *supra* note 2.

<sup>38</sup> Luisa Blanchfield, "The United Nations Convention on the Rights of the Child", in *Congressional Research service* (Washington: Library of Congress Congressional Research Service, 2013) at 2 (online ((pdf): <fas.org/sgp/crs/misc/R40484.pdf>).

<sup>39</sup> *Ibid.*

<sup>40</sup> "Federalism by Country" (last accessed 2 March 2020), online: *Forum of Federations*, <www.forumfed.org/countries/>; See generally Andrew B. Friedman, "States, Countries and Peoples: A Comparative Look at Bicameralism in African Federal States" (2018) 42:2 Fletcher F. World Aff. 165 (describing the federal nature of Kenya as well as the ongoing federalization process in Somalia).

Constitution. In addition to that dichotomous debate, there is a wide chasm amongst scholars who believe the constitution incorporates international law as to what bodies are so bound and to what extent they are.<sup>41</sup> Even for duly ratified treaties, the Supreme Court has drawn a distinction between self-executing and non-self-executing treaties, where the former are a part of American law at the time of ratification while the latter must be implemented by legislative provision and do not override state law until such a provision is passed.<sup>42</sup> The distinction between the two, determined merely by "parsing the text" of the treaty,<sup>43</sup> has been strongly criticized as "uncertain" and "far from clear" by scholars.<sup>44</sup> Beyond the American example, there are questions as to the consistency of application of international law in domestic legal regimes. Whether domestic courts have opted to enforce international law on particular issues has depended on a number of factors, including "(1) 'obligation' – the extent to which the norm is legally binding on a state or other actor ; (2) 'precision' – the extent to which the norm unambiguously defines the required, authorized or proscribed conduct; and (3) 'delegation' – the extent to which third party institutions (especially domestic courts, independent agencies and international courts) have authority 'to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.'"<sup>45</sup> This has led to variance in domestic court application of international law across issue areas. According to Sloss and Van Alstine, when addressing issues that arise between states and private parties, including treaty law concerning refugees and human rights, "domestic courts oscillate between harmonization and avoidance techniques, depending partly upon whether they perceive the contested issue as legal or political."<sup>46</sup> Adding to the difficulty of jurisprudential consistency on international law is potential temporal issues that may arise. In the Federal Court of Australia, Judges had the opportunity to examine questions of timing with regard to the *Convention on the Rights of the Child*. Looking at the effects of a statute drafted in 1946 in light of the country's ratification of the *Convention* in 1989, Judge North noted

[i]t is difficult to see how pre-existing legislation can be construed in the light of a latter ratified international instrument alone. But where the international instrument was a product of an historical process of recognition of human rights, it may be that legislation enacted in the period of growing recognition of the rights should be construed consistently with the context of the development of those rights.<sup>47</sup>

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<sup>41</sup> Moore, *supra* note 12 at 373-383.

<sup>42</sup> *Medellin v. Texas*, 552 US 491 at 496 (2008).

<sup>43</sup> *Ibid* at 494.

<sup>44</sup> John Quigley, "A Tragi-Comedy of Errors Erodes Self-Execution of Treaties" (2012) Center for Interdisciplinary Law and Policy Studies at the Moritz College of Law No 170 at 13; Moore, *supra* note 12 at 380.

<sup>45</sup> David Sloss & Michael Van Alstine, *Research Handbook on the Politics of International Law* (California: Santa Clara Law Digital Commons, 2017) at 81 citing Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990) at 41-49 and Wayne Sandholtz and Alec Stone Sweet, "Law, Politics and International Governance" in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 238 at 239-242.

<sup>46</sup> *Ibid* at 84-85.

<sup>47</sup> Donald R. Rothwell & Ben Olborne, "Australian Cases Involving International Law: 1999" (1999) 20 *Australian Yearbook of International Law* 361.

Under this framework, it is up to the Judge to determine whether accession to a treaty represents a break in the law or the culmination of legal trends; a fairly tall order.

In complex legal systems, particularly those with myriad jurisdictions, the applicability of international law at any stage can be unclear, whether the law is through a ratified or acceded-to treaty, customary international law or merely uncertain terms like "principles" and "norms". Far from being a mark against international law's usage, such a complication allows for varied entry points. When justiciability of international law is uncertain, it becomes vital to pursue advocacy through other means.

Needless to say, the lack of clarity on entry points and applicability does not apply to all states. However, the correlation between a clear procedure for examination of international law and its applicability to cases or legislation and the clarified status of such law seems likely, though warrants further investigation. While it has not been studied extensively, it seems unlikely that a state would have hardened methodology for international law review of cases or legislation but an unclear application of international law. This is relevant in advocacy efforts as it provides predictability to the inclusion of international law and requires less experimentation with strategies or entry points. For this reason, such states are outside the scope of this analysis.

## **B. Case Studies**

One argument that is often made in advancing the interests of international law is that that by not following widely accepted rules states risk international pariah status.<sup>48</sup> There are also negative aspects, where international law and the consensus of the international community may be used to shun activists and a particular human right (or the wider human rights project) as a foreign imposition. This section works to illustrate these possibilities through examination of individual cases.

### **1. INTERNATIONAL PARIAH STATES**

Classically, the terms "international community" and "pariah" have had somewhat fluid or subjective meanings. The "international community" was responsible for determining what states were "pariahs," creating something of a hegemonic feedback loop.<sup>49</sup> This structure is particularly problematic in the context of global hegemonies or great power rivalries, where "might makes right" and

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<sup>48</sup> See generally John Dugard, "The Role of International Law in the Struggle for Liberation in South Africa" (1991) 18:1/2 *Social Justice* 83; David M Golove & Daniel J Hulsebosch, "A Civilized Nation : The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition" (2010) *Public Law & Legal Theory Research Paper Series Working Paper No 10-58* (arguing the American Constitution's inclusion of international law provisions was to "facilitate the admission of the new nation into the European-centered community of 'civilized states'" at abstract).

<sup>49</sup> Olawale Lawal, "Pariah State System and Enforcement Mechanism of International Law" (2012) 4 *Journal of Alternative Perspective in Social Sciences* 226 at 227 [Lawal].

international rules and states risk pariah status for nonalignment or other self-interested foreign policy that does not adhere to hegemonic norms. The growth of international law, however, has provided for a more objective definition of "pariah."<sup>50</sup> Baked into the idea of an international pariah state is the "presumption of lack of compliance with international law leading to global ostracization."<sup>51</sup> By this standard, international law should have no impact on the policy of international pariah states. That has often proven true for states content to be viewed as international pariahs, such as the Democratic People's Republic of Korea or, at various times, Libya under the Gaddafi-regime, however, it creates an inroad back into the international community. There are many benefits to a return to the international community. Pariah status "[...] can limit access to international trade and investment, security partners, international institutions, prestige, and influence."<sup>52</sup> This leads to an opening, whereby international pariah states may be interested in rejoining the international community, a requirement of which is compliance with, and respect for, international law.<sup>53</sup> Additionally, this process has a self-reinforcing effect, with increased engagement with the international community leading to greater benefits, which then give former pariah states "more to lose" which then furthers the necessity of respect for international law.<sup>54</sup> Perhaps the most prominent example of a pariah state adapting international law and norms to re-enter the international community is South Africa. In the early 1990's, when transitioning from apartheid and attempting to rejoin the community of nations, the state leaned heavily on international law and norms. This resulted in a progressive legal regime and a constitution that has been pointed to as a beacon for emerging democracies, both in its inclusive adoption process and its substance.<sup>55</sup> Under the apartheid regime, "[...] the hostility of successive apartheid governments to the United Nations and international human rights conventions undoubtedly influenced the attitudes of legislators, judges and lawyers." As such, "[i]nternational law received no constitutional recognition and was largely ignored by the courts and lawyers." This despite the technical inclusion of international law in municipal law, unless it was contrary to legislation, "in accordance with the common law dualist approach." Its use was limited to "politically neutral matters" and was generally seen as an "alien and hostile legal order."<sup>56</sup> This

<sup>50</sup> The question of the objectivity of international law is outside the scope of this paper. There are many reasons to doubt the objectivity or universality of international law, in particular with regard to the process. For purposes of this paper, it is merely relevant that as a matter of definition, pariah states do not abide by international legal norms. For a more detailed discussion, see generally: Mutua, *supra* note 12; Obiora C Okafor, "International Human Rights Fact-finding Praxis in its Living Forms: A TWAIL Perspective" (2012) 1 Transnational Human Rights Review 59; Upendra Baxi, "What May the 'Third World' Expect from International Law?" (2006) 27:5 Reshaping Justice: International Law and the Third World 713, etc.

<sup>51</sup> Lawal, *supra* note 49 at 226.

<sup>52</sup> Jonathan T Chow & Leif-Eric Easley, "Persuading Reform: Myanmar's Strategic Decision to Pursue Reform and Opening" (2016) 89:3 Pacific Affairs 521 at 532.

<sup>53</sup> Derick Becker, "The New Legitimacy and International Legitimation: Civilization and South African Foreign Policy" (2010) 6:2 Foreign Policy Analysis 133.

<sup>54</sup> Hongju Koh, *supra* note 4 at 267.

<sup>55</sup> "In Love with SA's Constitution", *Mail and Guardian* (24 February 2012), online: <[mg.co.za/article/2012-02-24-in-love-with-sas-constitution/](http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution/)>.

<sup>56</sup> John Dugard, "International Law and the South African Constitution" (1997) 8:1 Eur J Intl L 77 at 77.

attitude changed during the transition, where international law became a potent advocacy tool for those seeking progressive policy outcomes.

The constitution's protection against discrimination based on sexual orientation is a shining example of the power of such advocacy.<sup>57</sup> The protection of individuals based on sexual orientation came about in the Technical Committee for Fundamental Rights, the body tasked with drafting an interim bill of rights during the transition. According to the Committee's Explanatory Memoranda,

The UN Human Rights Committee has interpreted sex as a prohibited ground of discrimination in articles 2(1) and article 26 of the [International Covenant on Civil and Political Rights] to include sexual orientation.<sup>58</sup>

The Committee also cited positively to decisions of the European Court of Human Rights, which had ruled anti-sodomy laws to be prohibited under the *European Convention for Human Rights and Fundamental Freedoms*.<sup>59</sup> This strategy proved effective, even if at the time "[i]t [was] less than fully honest to read international legal precedent as encompassing a blanket affirmation of gay and lesbian equal rights."<sup>60</sup> While some Committee members objected based on a lack of "universal acceptance" of LGBT equality, it was pointed out that there was nothing to prevent the constitution from going beyond universal acceptance.<sup>61</sup> In this manner, while international law had been largely absent from the legal and policy decisions of the apartheid regime, "universal acceptance" and international law became an important element of the foundational legal documents in the new South Africa. Such compliance was a substantial element in the return from international pariah state to a member in good standing of the international community. This provides an important lesson for those advocating on behalf of endangered or oppressed minorities. Legal norms and international law may provide protection well beyond the universal acceptance and tolerance of a society, making them a potent tool.

More recent examples of the role of international law in returning a state from international pariah status can be found in Myanmar and Zimbabwe, both of which saw limited successes, but further illustrated the importance that international law can play in a state's return to normalcy from international pariah.

Myanmar was largely excluded from the international community for several decades while under the boot of a harsh, repressive military junta.<sup>62</sup> A major element

<sup>57</sup> *South Africa Constitution*, *supra* note 28 art 9(3).

<sup>58</sup> Memorandum from S. Liebenberg et al in *Overview of Method of Work: Draft Bill of Rights - Volume Two Formulations* (10 October 1995) at s 4.2.3.

<sup>59</sup> *Narris v. Ireland* (1991), 13 ECHR (Ser A) 186, 201 EHRR; *Modinos v. Cyprus* (1993), 259 ECHR, 16 EHRR 485.

<sup>60</sup> Eric C. Christiansen, "Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process" (2000) 32 NYUJ Intl L & Pol 997 at 1035.

<sup>61</sup> *Ibid.*

<sup>62</sup> Bertil Lintner, "The Ex-Pariah", *Politico* (March/April 2014), online: <[www.politico.com/magazine/story/2014/02/myanmar-the-ex-pariah-103887](http://www.politico.com/magazine/story/2014/02/myanmar-the-ex-pariah-103887)>; The opening of political rights in Myanmar proved less than robust, as a military coup took place again in February 2021, including the arrest of Aung San Suu Kyi, causing the international community to reimpose sanctions on

of this international shunning was the imprisonment and house arrest of Nobel Peace Prize recipient Aung San Suu Kyi, a prominent opposition leader, along with countless other authoritarian misdeeds.

Additionally, Myanmar is unique in its rejection of international law. The country has neither signed nor ratified the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, or the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ["Convention against torture"]. Each of these treaties counts at least 85% of the world's countries as state-parties.<sup>63</sup> A parliamentary debate on ratification of the ICCPR took place in September of 2019, well into the country's transition, but was rejected by the ruling party.<sup>64</sup>

Despite the lack of ratification, the international community has frequently used international law as an advocacy tool, in both formal and informal settings.<sup>65</sup> The UN Special Rapporteur on the human rights situation in Myanmar has frequently "expressed ongoing concerns about democratic reforms, electoral changes, discrimination against minorities and women, escalating conflicts, environmental degradation and development inequalities, and the weak rule of law."<sup>66</sup> Such ongoing issues have resulted in the repeated extension of the Special Rapporteur's mandate, in effect ensuring the continued influence of international law because it has not been followed.

When Robert Mugabe came to power in Zimbabwe at the country's independence, he was a darling of the international community. Over the nearly four decades of his rule, this reputation would significantly change, to the point of Zimbabwe gaining international pariah status. It appeared that Zimbabwe saw an opening for a return to the international community when he was deposed in 2017. While the coup boasted no democratic bona fides, some analysts saw potential with the language used by the country's new leadership. New President Emmerson Mnangagwa, formerly a Vice President under Mugabe, promised a break from the authoritarian past, stating it would be a "new Zimbabwe" and it was "open for business."<sup>67</sup>

The language used by President Mnangagwa presented a strategic opening, illustrating the regime's interest in a return to the international community. This opening

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the responsible parties. This coup has effectively stifled all debate on the domestication of international law and remains, at the time of writing, unresolved.

<sup>63</sup> Status of Ratification Interactive Dashboard, *supra* note 2.

<sup>64</sup> Ei Ei Toe Lwin, "Parliament Rejects Motion to Join International Civil Rights Treaty", *MYANMAR TIMES* (12 September 2019), online: <[www.mmtimes.com/news/parliament-rejects-motion-join-international-civil-rights-treaty.html](http://www.mmtimes.com/news/parliament-rejects-motion-join-international-civil-rights-treaty.html)>.

<sup>65</sup> OHCHR, Display News, "Special Rapporteur on the situation of human rights in Myanmar Interactive Dialogue with the Human Rights Council" (10 March 2020), online: <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25698&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25698&LangID=E)>.

<sup>66</sup> Jonathan Liljeblad, "The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission" (2017) 19:1 Yale Human Rts. & Dev L J 95 at 107.

<sup>67</sup> Richard Quest and Sheena McKenzie, "President Mnangagwa: 'Zimbabwe is Open for Business'", *CNN* (24 January 2018), online: <[www.cnn.com/2018/01/24/africa/zimbabwe-president-emmerson-mnangagwa-davos-intl/index.html](http://www.cnn.com/2018/01/24/africa/zimbabwe-president-emmerson-mnangagwa-davos-intl/index.html)>.



was seen by analysts, who recommended international actors "[...] push the government in a coordinated fashion to implement genuine political, economic, and security reforms."<sup>68</sup>

The openness was also taken up by both the domestic and international human rights communities. Alongside Tanzania, Zimbabwe is one of only two African states that has not signed onto the *Convention Against Torture* something that activists have attempted to change since the change in leadership.<sup>69</sup>

Zimbabwe's constitution includes a blanket prohibition on "physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."<sup>70</sup> The document also unequivocally states that "[t]he State must take all practical measures to protect the fundamental rights and freedoms enshrined [in the document and] to promote their full realisation and fulfilment (sic)."<sup>71</sup> Despite this assurance, there is no legislative prohibition on torture in Zimbabwe's criminal law.<sup>72</sup>

As such, Veritas, a Zimbabwean legal and policy organization, used the International Day in Support of Torture Victims to push for the ratification of the *Convention Against Torture*. The group put particular emphasis on the new administration and the strategic opening, concluding that

[i]t is difficult to understand why the Government has not acceded to CAT under the new dispensation. The Government has much to gain from accession: it would show itself to be an integral member of the international community and ready to co-operate with other governments in upholding universally-accepted human rights. It would also demonstrate the Government's willingness to implement the Constitution and to abide by commitments previously given to the UN Human Rights Council and its own citizens [Emphasis added].<sup>73</sup>

Unlike South Africa, it is impossible to see the ultimate resolution of advocacy in Myanmar and Zimbabwe. In Myanmar, the international community has formally filed for protection of the Rohingya minority at the International Court of Justice, despite Myanmar's protestations on jurisdiction. Sanctions have been used to punish perpetrators of such violence, with continued efforts from the country to remove them. Zimbabwe has returned to the political and state violence that were so prominent under the previous administration, but the country's leadership is still working to rejoin the international community with the requisite rewards. This type of strategic opening is understood by both domestic and international actors who utilize international law to press governments to change policy and abide by international human rights norms.

<sup>68</sup> Alexander H. Noyes, "A New Zimbabwe? Assessing Continuity and Change After Mugabe" (2020) online: *Rand Corporation* <[www.rand.org/pubs/research\\_reports/RR4367.html](http://www.rand.org/pubs/research_reports/RR4367.html)>.

<sup>69</sup> Status of Ratification Interactive Dashboard, *supra* note 2.

<sup>70</sup> *Constitution of Zimbabwe No 20* of 2013, art 53.

<sup>71</sup> *Ibid*, art 11.

<sup>72</sup> "Constitution Watch 6/2019 of 28th June [Why Hasn't Zimbabwe Adopted the UN Convention Against Torture?]" (28 June 2019), online: Veritas Zim <[www.veritaszim.net/node/3598](http://www.veritaszim.net/node/3598)>.

<sup>73</sup> *Ibid*.

## 2. PUSHBACK AND FOREIGN IMPOSITION

It would be irresponsible to suggest that the language of international law, particular of human rights and democracy, is universally successful in advocacy and influence efforts. In states that are not bound by international treaties, there is an ever-present possibility that international law will be used as a method to suggest that advocacy efforts are "foreign" or "western-backed." In certain contexts, this designation "invites public denunciation [...] as the term foreign agent carries with it a markedly negative connotation."<sup>74</sup>

As such, resistance to the law, be it accession to treaties or respect for the rights themselves, is framed as resistance to foreign influence or western hegemony while advocates are framed as knowing or unknowing foreign agents. This allows despotic governments to move beyond resistance to individuals or foreign influence, but to the substance of rights, be they free expression or dissent, equality or equity or any other elements of the broader international human rights regime.

Of the transitional states mentioned in the above section, this has been a common tool in the resistance to human rights and international legal norms by tyrannical and authoritarian governments.

In the decades-long struggle in South Africa, the apartheid government continually sought to paint the African National Congress and other anti-apartheid groups as tools of foreign governments attempting to subjugate the South African state to outside influences. An alliance between the ANC and the South African Communist Party, along with the Cold War-era, gave the ruling National Party and apartheid leadership a convenient accusation.<sup>75</sup> In such situations the accusation of foreign malign influence is then not limited to left-wing economic policy, but all policy espoused by rebel groups, including that of international law, human rights and democracy.

The same treatment was given to Robert Mugabe, who was portrayed as a foreign agent when fighting against white-minority rule in Zimbabwe.<sup>76</sup> Ironically, in his nearly four decades in power, Mugabe turned around this accusation with tremendous frequency against activists fighting for international human rights.<sup>77</sup> After Mugabe's ouster, the new Mnangagwa administration has continued lobbying such accusations at activists fighting for internationally recognized human rights. In a recent round of protests concerning security legislation that activists claimed effectively eliminated the right to free assembly, the government "[...] accus[ed]

<sup>74</sup> Lucy Pakhnyuk, "Foreign Agents and Gay Propaganda: Russian LGBT Rights Activism Under Pressure" (2019) 27:4 *Demokratizatsiya: Journal of Post-Soviet Democratization* 479 at 480 [Pakhnyuk].

<sup>75</sup> See generally Katherine Cartwright, "*Perceptions of the 'red peril': The National Party's changing portrayal of the 'communist threat' c.1985 - February 1990*", (Master Dissertation, University of Cape Town, 2002) [unpublished].

<sup>76</sup> See generally Xan Smiley, "Zimbabwe, Southern Africa and the Rise of Robert Mugabe" (1979) 58:5 *Foreign Affairs* 1060.

<sup>77</sup> Jason Burke and Caty Enders, "'Now we are waking up': Zimbabwe protests leader seeks international help", *The Guardian* (11 July 2016) online: <[www.theguardian.com/world/2016/jul/11/zimbabwe-thisflag-protests-leader-calls-for-international-support](http://www.theguardian.com/world/2016/jul/11/zimbabwe-thisflag-protests-leader-calls-for-international-support)>.

unnamed foreign collaborators of working with local civil society organizations to destabilize the country through protests".<sup>78</sup>

The government of Myanmar has used similar methods throughout its history of despotism, and in more recent years through the transition, to deny international human rights. Aung San Suu Kyi, the Nobel Laureate and opposition leader, is forbidden from holding the Presidency as the country's 2008 constitution requires a President, his/her parents, spouse, children or spouses of children

not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country. They shall not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country [...].<sup>79</sup>

Ms. Suu Kyi has two sons who are British citizens.

This accusation that interests in human rights and democracy are part of a foreign plot is not limited to the banning of opposition candidates. In a 2019 debate on the ratification of the ICCPR there were accusations of pressure from the UN and the west, casting the refusal to ratify the document as neo-anti-colonialism.<sup>80</sup> Beyond the ratification, in the wider debate, "[t]he language of democracy and human rights was mocked and treated as inimical to the country's national culture."<sup>81</sup>

While allegations of "foreignness" or "foreign hand" in South Africa, Zimbabwe and Myanmar provides a general understanding of the potential negatives of using the language of international human rights law, over the last several years Russia has provided a far more direct example.

In 2012 the country passed a "foreign agent" law, which mandated that all NGOs register as foreign agents if they receive any foreign funding.<sup>82</sup> This law was then expanded in 2017 to include "[...] any individual who distributes information on the internet and receives money from foreign sources" and "any individual who distributes foreign media."<sup>83</sup> Both foreigners and Russian citizens are covered under the law. This direct attack takes place at the same time as "the growing legitimacy of state homophobia," highlighted by the 2013 anti-LGBT propaganda law, outlawing the promotion of "nontraditional sexual relations."<sup>84</sup>

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<sup>78</sup> "Zimbabwe: Violent crackdown on activists underway ahead of opposition protests", Amnesty International (15 August 2019), online: <[www.amnesty.org/en/latest/news/2019/08/zimbabwe-violent-crackdown-on-activists-underway-ahead-of-opposition-protests/](http://www.amnesty.org/en/latest/news/2019/08/zimbabwe-violent-crackdown-on-activists-underway-ahead-of-opposition-protests/)>.

<sup>79</sup> *Myanmar Constitution* of 2008, available online (pdf): <[www.wipo.int/edocs/lexdocs/laws/en/mm/mm009en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm009en.pdf)>, art 59(f).

<sup>80</sup> Status of Ratification Interactive Dashboard, *supra* note 2 **Erreur ! Signet non défini.**

<sup>81</sup> Priscilla Clapp, "Myanmar: Anatomy of a Political Transition" (2015), online (pdf): *United States Institute of Peace Special Report* <[www.files.ethz.ch/isn/190995/SR369-Myanmar-Anatomy-of-a-Political-Transition.pdf](http://www.files.ethz.ch/isn/190995/SR369-Myanmar-Anatomy-of-a-Political-Transition.pdf)>.

<sup>82</sup> Pakhnyuk, *supra* note 74 at 480.

<sup>83</sup> "Russia's New ' Foreign Agent ' Law, Explained", *The Moscow Times* (2 December 2019), online: <[www.themoscowtimes.com/2019/12/02/russias-new-foreign-agent-law-explained-a68311](http://www.themoscowtimes.com/2019/12/02/russias-new-foreign-agent-law-explained-a68311)>.

<sup>84</sup> Pakhnyuk, *supra* note 74 at 479.

The combination between state-sponsored homophobia and shrinking civil society space fueled by allegations of foreign influence has made advocacy increasingly difficult for the Russian LGBT rights movement. Not only has the anti-LGBT propaganda law signified state acceptance and led to a vast increase in hate-fueled violence against LGBT individuals, it has also limited the movement's ability to work with allies or spread information. In this way, aligning an unpopular movement for freedom (in 2013, 74% of Russians believed homosexuality should be rejected by society)<sup>85</sup> with international influence allowed the government to take a broader tract, fighting the expansion of freedoms and civil society activism in general.

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Nearly a century ago, in what has become one of the foundational principles of international law, the Permanent Court of International Justice wrote that "[r]estrictions upon the independence of states cannot [...] be presumed."<sup>86</sup> This principle of international law makes treaties vital, as the only way to limit the actions of states. For such documents dedicated to international human rights, this is the only means of preventing states from violating the rights of their own populations without regard to the dictates of domestic lawmakers.

While international human rights treaties strive for full international membership, the end goal of any international human rights regime should not be adoption, ratification or accession, but compliance. Put differently, it is respect for international human rights and adoption of a rules-based international order that should drive international human rights advocacy. For this reason, it is necessary to further examine the manners in which compliance is driven, whether rules are seen as binding or not by both international and domestic legal regimes as well as domestic actors and the diverse constituencies of domestic politics.

Determining when and why states follow international law has been an obsession of legal, political science and international relations scholars since the earliest days of international legal regimes. Several theories have been proffered, including the fundamental legitimacy of international law, the influence of domestic constituencies, and others. These theories have also been questioned by scholars of all stripes, as legitimacy and constituencies are only important in international contexts if all such constituencies are consulted and taken into account. Leaving out significant populations makes a "fundamental legitimacy" argument somewhat lacking.

In addition to questions as to why states follow international law, in many states there are questions as to the applicability of international law, even those treaty

<sup>85</sup> "The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries" (4 June 2013) at 1, online (pdf): *Pew Research Center* <[www.pewresearch.org/global/wp-content/uploads/sites/2/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf](http://www.pewresearch.org/global/wp-content/uploads/sites/2/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf)>.

<sup>86</sup> *The Case of the S.S. Lotus, (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 44.

regimes that have been duly ratified or acceded to. The questions that arise may be substantive (e.g. does this right apply to this situation?), federal (e.g. does this right apply to the law of a subnational unit?) or temporal (e.g. did the right apply at this particular time?) or some combination of the three. Even if it is clear that the law applies, it is often unclear whether a court will adjudicate it or leave it to the political realm.

While such applicability questions may not apply to all states, the correlation between clarity of international law application, including justiciability, and clarity on the standing of international legal tenets, is one that warrants further study. It seems unlikely that the procedure for the application of international law would be crystallized in a state, but the applicability of the same international law was left unclear.

This paper aims to contribute to the debate from an advocacy standpoint, dismissing the possibility that international law is irrelevant unless it is binding through treaty accession or ratification. When it is unclear why states follow international law and when binding international law applies, there is a wide array of entry-points beyond traditional litigation strategies.

Democratization movements may prove particularly fertile grounds for the injection of international law-based advocacy. International pariah status cannot be removed without compliance with international law, and such a status has significant negative implications for the conduct of economic and political affairs. This may be through the ratification or accession to treaties, or may be through the increased acceptance of international human rights rules and norms.

Like all advocacy strategies, however, there exists substantial risk. The adoption of international legal norms and principles as the foundation of an argument risks being labeled as a foreign agent or a pawn of international interests. This has been a long-running strategy of autocrats attempting to fight against the adoption of internationally recognized human rights.

The continued expansion of international law should lead to greater areas of relevance for such norms as policymaking and advocacy tools. Developing bodies of law, such as the role of international human rights law in regulating businesses and private industry,<sup>87</sup> the right to a healthy environment and other environmental rights,<sup>88</sup> the expanding body of law on LGBTQ rights,<sup>89</sup> and many others will create new and innovative legal mechanisms and more robust international advocacy networks. Long dormant areas of law, such as the once-envisioned right to democratic governance<sup>90</sup> or

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<sup>87</sup> Rory Sullivan & Mary Robinson, *Business and Human Rights: Dilemmas and Solutions* (United Kingdom: Greenleaf Publishing Limited, 2017).

<sup>88</sup> Alan Boyle, "Human Rights or Environmental Rights? A Reassessment" (2006) 18:3 *Fordham Environmental Law Review* 471.

<sup>89</sup> Nathan Madson & Jenny Odegard, "Cause of Action : Using International Human Rights Law to Advance Gay Rights" (2013) 70:2 *National Lawyers Guild Review* 65.

<sup>90</sup> Thomas M Franck, "The Emerging Right to Democratic Governance" (1992) 86:1 *AJIL* 46.

the right to sustainable development<sup>91</sup> may be reinvigorated by advocacy movements looking for a codified standard from which to advocate. While states may opt against being bound by treaties, the advantages of codification do not end with such a decision.

However, such expansion of international law and advocacy cannot be seen as a linear road towards progress. Just as there is a risk of nationalist pushback against individual advocacy efforts, substantial rejections of international law as a fundamental element of the global order risk disincentivizing compliance. That is, the aforementioned economic and political incentives to rejoining the international community through compliance with international law will be jeopardized, making international law a less effective advocacy tool. Should that become the case, its use in advocacy efforts may put the entire human rights project in peril, rather than merely limiting effective tactics. Put plainly, should international law compliance no longer be a precondition to enjoyment of the benefits of membership of the international community, the universality of human right are put at risk and advocacy efforts will have to rely on raw normative good and national self-interest. This is cause to redouble commitments to international law.

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<sup>91</sup> Andrew Friedman, "Operationalizing the Rio Principles: Using the Successes of the Extractive Industries Transparency Initiative to create a Framework for Rio Implementation" (2011) 12 University of Botswana Law Journal 73.