

*Annotated Outline*

**The Interface between Domestic and International Law: The Process of Socialization**

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What are the prospects for effective monitoring and promotion of human rights by international organizations (IOs)? Many students of human rights law consider the promise of IOs limited if not illusory. This sort of pessimism is especially strong with respect to economic, social, and cultural (ESC) rights,<sup>1</sup> but by no means restricted to that domain.<sup>2</sup> Such pessimism only deepens with the recognition that IOs generally shrink from applying material sanctions to violator states and that most IOs do not even have the power to levy sanctions in the first place.<sup>3</sup> This dismal outlook is met in idealist circles by efforts to invest IOs with coercive authority—to expand criminal prosecutions, tailor economic sanctions, employ military force, leverage financial benefits. Both these perspectives share a common fixation on material rewards and punishments. They accordingly fail to understand the full range of mechanisms for socializing states and how exactly those mechanisms operate in practice. Proponents of softer techniques—constructive engagement, dialogue, naming and shaming—generally do not escape similar failures. They often consider these techniques second-best, or even bleak, alternatives. They also fail to consider the conditions under which various methods of influence work and how those methods interact with (if not counteract) one another.

The important question, in effect, is: How should international human rights organizations be designed to monitor and improve state practices? In addressing that inquiry, one can derive important lessons from the interdisciplinary study of social logics that drive state behavior. Effective institutional design requires understanding how, and under what conditions, states respond to diverse influences such as material inducements and reasoned argument. It also requires understanding whether, and under what conditions, states are susceptible to

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<sup>1</sup> Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 Hum. Rts. Q. 81, 81 (1998) (“Of all the domains where state and intergovernmental action on human rights have failed to achieve anything more than modest success, the development of effective measures for the prevention and remedying of violations of economic, social and cultural rights must surely classify as one of the most glaring.”).

<sup>2</sup> Posner and Goldsmith.

<sup>3</sup> Krasner 1993.

influence through shaming, relationships to reference groups, and social and psychological pressure to conform.

Scope of this essay:

1. We examine issues of effectiveness and institutional design. We bracket normative issues concerning the desirability of international monitoring and enforcement—such as the democratic pedigree of supranational institutions.

2. We analyze two types of IOs: intergovernmental human rights organizations (e.g., the ESCR Committee; the UN Human Rights Council) and international nongovernmental organizations (e.g., Human Rights Watch; Fédération Internationale des Droits de l'Homme).

## **I. Intergovernmental Organizations (IGOs)**

### **A. International versus National Institutions**

An acculturation model can help determine whether to invest international institutions, especially IGOs, with regulatory authority. As a threshold matter, regime architects may consider it necessary to decide upon the value of an IGO compared with domestic institutions—for example, whether to dedicate limited political and economic resources to support an Optional Protocol for individual complaints under the ESCR Covenant or instead to support domestic-level institutions in this domain. Second-order questions involve managing relationships between IGOs and national legal systems—for example, whether an IGO should require a high or low threshold for exhaustion of domestic remedies before reviewing state practices.

Many commentators question, for instance, whether a treaty body is well positioned to review decisions taken by national governments and whether governments would substantially adjust their practices simply on the intervention of such an institution. Michael Dennis and David Stewart, for example, argue that the ESCR Committee is poorly positioned, relative to national institutions, to judge governmental practices: “Even assuming unparalleled skill, energy, expertise, and impartiality on the part of the members of an international adjudicative body, there is still no reason to believe that they would, in fact, have ... [the] ability to make more informed or effective choices about the allocation of limited resources in a malfunctioning economic system.”<sup>4</sup> Dennis and Stewart also question the prospect of the ESCR Committee influencing states: “Should it

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<sup>4</sup> Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights*, 98 *Am. J. Int'l L.* 462, 515 (2004).

be the function of the adjudicators to ‘second-guess’ deliberate decisions concerning the use of scarce resources ... [a]nd how likely is the government to adhere to such a decision?’<sup>5</sup>

Under an acculturation model, it is important to invest monitoring authority in IGOs. First, global institutions often exert special symbolic influence in the articulation and application of international norms. Two significant findings of acculturation studies are that normative change often takes place “top-down”—inspiring and accelerating national efforts to pursue agendas legitimated at the international level—and that these changes occur in the absence of legally binding authority or forcible measures. Global institutions accordingly serve as key vehicles for expressing international praise and criticism of state practices and thus applying global pressure to conform. These effects may be more pronounced, for instance, when a supervisory organ is considered the agent of an intergovernmental principal. As the agent of the Assembly of State Parties, for example, a treaty body can issue decisions that carry special significance for state actors who are concerned to emulate and meet other governments’ commitments and expectations.

Second, as a result of monitoring and scrutinizing a great many state practices, international institutions are well positioned to set progressive, aspirational standards for rights regarding behavior. Setting a forward-looking standard can provide a global target—a community expectation—that pulls states toward it. An international body may also occupy a good vantage point, superior to decentralized national authorities, to gauge the potential effects of a standard across a population of states—whether it raises all boats, lifts only the most desperate cases, or outstrips the ideational and material commitments of different categories of countries. It is questionable whether IGOs possess all the requisite capacity and willpower to perform these functions. However, the question concerning which level of authority—national or international—is theoretically better equipped to perform these functions leaves less to doubt.

Third, IGO monitoring bodies are perhaps the best suited institutions, certainly far better than most national authorities, to collect comparative state practices and exploit that information to promote human rights. In reviewing myriad governmental practices and situations over time, institutions such as treaty bodies can also claim a level of expertise and authoritativeness in comparative state human rights practices. Treaty bodies can accordingly employ such information to inspire recalcitrant states to emulate others’ best practices. Various

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<sup>5</sup> Dennis & Stewart, at 498; *Id.* at 466 (“Nothing persuades us that the aspirational goals set forth in the ICESCR can be achieved—or can be achieved more effectively—only by means of an international adjudicative mechanism for individual complaints. ... We see no convincing evidence that a legally binding adjudicative mechanism would lead to greater compliance by states with their ICESCR obligations.”).

gradations of criticism and praise that treaty bodies currently employ in concluding observations already involve implicit cross-national comparisons. As we discuss below, treaty bodies ought to invoke—much more explicitly and frequently—exemplary models of comparative state practice while reviewing state reports.

Fourth, IGOs are uniquely able to encourage self-reporting by states, a process that has considerable benefits from an acculturation perspective. States have no obligation to respond to the criticisms of international nongovernmental organizations (INGOs), let alone a duty to report proactively to INGOs. The authority to compel state reports is the special preserve of IGOs, and treaty bodies in particular. Encouraging states to submit periodic reports and to provide official responses to individual complaints can help propel the spread of human rights vertically and horizontally. Vertically, reporting practices foster a “culture of justification” in which state actors are encouraged to expound how their government conforms to global models of human rights behavior. Additionally, the associated processes, including the preparation of official reports, can prompt internal reflection in which state actors, including their national bureaucracies, are compelled to consider whether national laws match global standards and whether the status quo can be defended before an international expert body. Also, once states make positive representations before an international body, they may be less likely to backslide or take regressive steps. In short, in these institutional environments, state actors are likely to make efforts to be seen by others, and to see themselves, as conforming to shared norms. These are the types of efforts associated with the diffusion of norms via acculturation, and procedures for self-reporting provide considerable opportunities for such efforts to take place.

Horizontally, reporting procedures build a public record of states’ espousing and striving discursively to meet international human rights standards. Of course these official representations may not reflect true preferences or may be decoupled from local conditions on the ground. Nonetheless, such representations can help create an environment that signals community intolerance of human rights violations and shapes the social meaning of outward hostility to core human rights norms.<sup>6</sup> The resulting global cultural environment can notably affect the expectations and conformity of even those states who fail to report routinely, if ever, to the IGO.

All these lessons are notably also instructive for deciding how to structure self-reporting before IGOs. First, multiple, and even “redundant,” opportunities for reporting interactions should be encouraged. Second, current proposals to unify and streamline the UN treaty body system, whether to gain efficiency or to focus on the worst abuses, may exact an intolerable cost. Multiple treaty bodies

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<sup>6</sup> Cf. Elster; Jeffrey J. Rachlinski, *The Limits of Social Norms*, 75 *Chicago-Kent Law Review* 1537, 1547-56 (2000).

provide opportunities to explore more issues in greater depth than a single, condensed report would provide. It is also important not to focus on violations of greatest concern, as a unified and streamlined approach might do, but also to create a record of self-reported compliance and praise for preferred practices. Third, the lack of an individual complaints procedure for the ESCR Covenant precludes advances that could be made in that human rights domain. The ESCR Committee has structural advantages that cannot be replicated through diffuse national-level monitoring. Finally, IGOs should not be evaluated solely in terms of state interaction directly with the institution. The collateral effects on third-party states (e.g., those that do not regularly report to a treaty body) may be among the most important. Indeed, the human rights practices of those states that directly interact the least may be the most concerning.

Once an IGO is operative, second-order questions concern how to balance relationships between the international body and national legal systems. First, the analysis above raises some difficult questions about the standards that IGOs employ in evaluating state parties. Consider, for instance, whether the ESCR Committee should require states to provide only a minimally rational justification for distributional decisions affecting social and economic rights. On the one hand, *de minimus* review captures acculturation-related benefits by fostering a culture of justification in which states are encouraged if not compelled to defend their practices before external audiences. And, *de minimus* review avoids some concerns of ESCR pessimists who generally consider supranational scrutiny of ESCR intrusive. On the other hand, such a minimalist standard may, according to the dynamics of acculturation, encourage a race to the middle. States that would otherwise be considerably more progressive may orient themselves to the lower standard, for instance, by eschewing only the most offensive or irrational choices affecting ESCR. Various actors, the Committee included, would need to take actions to ensure that such minimalist tests are understood to be products of the relationship between supranational review and national authorities, not a substantive component of the norm itself.

Second, the model of acculturation suggests the potential effectiveness of other rules of decision involving deference to national authorities. Consider, for instance, the principle that states should not adopt deliberately retrogressive measures in the ESCR context. As mentioned above, once states make public, positive representations before an international body, they may be less likely to backslide. The ESCR Committee's suggestion that retrogressive measures require especially strong justifications by state parties to rebut a presumption of illegality (General Comment No. 3) can strengthen global social pressure and raise the "social costs" of backsliding. ...

Additional point:

1. Encourage the building of “receptor sites”: Studies of global acculturation suggest that particular domestic arrangements can accelerate diffusion of international norms through “domestic receptor sites.” An important set of studies shows that domestic receptor sites such as natural science associations and environmental institutes facilitate the local transmission of global scripts on environmentalism.<sup>7</sup> International bodies could encourage the establishment of analogous institutions in the human rights context such as: national human rights commissions; human rights ombudsmen; and national commissions on housing (see work of ESCR Committee on housing commissions).<sup>8</sup>

## B. Universal versus Restrictive Membership

The first global human rights institution of the twenty-first century—the U.N. Human Rights Council—provides an especially good case for illustrating the significance of our project. The Council’s architects rejected proposals to create a human rights body composed of all UN member states. The Council instead limits admission to 47 states; no state may serve on the Council for more than six consecutive years; and the criteria for selection and retention of Council members potentially includes evaluation of a state’s commitments to human rights. UN officials, several states, and virtually all major international human rights NGOs are now trying to ensure that the human rights criteria for membership are employed and strengthened over time. These efforts are inspired partly by the belief that membership bestows legitimacy on governments (a reason to exclude the Libyas and Sudans of the world), that states will improve their records to achieve the status of membership, and that states will similarly make changes to avoid a stigma associated with ostracism from the Council. These views are predicated on assumptions about how states behave and the power of particular forms of social influence to affect that behavior.

Our project clarifies those assumptions and illuminates the costs and benefits of such a regime design. For example, although substantial empirical evidence now suggests that the forms of influence envisioned by the Council’s architects are socially meaningful, countervailing effects which operate according to the same social logic have not received adequate consideration. That is, the same body of empirical work provides strong reasons for bringing recalcitrant states into the fold. Specifically, processes of assimilation suggest that illiberal states will begin to imitate the group in which they are included. This “identification”

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<sup>7</sup> David John Frank; Sally Engle Merry

<sup>8</sup> Leckie 2000, at 140-41.

with a group—not banishment from the group—is perhaps more likely to propel the legal and political systems of illiberal states toward conformity with prevailing norms.

Additionally, the acculturation approach differs from the other approaches in how it evaluates “defections” by states inside such an organization. An acculturation approach predicts certain patterns of defection not envisioned by the other approaches, and it accordingly assesses the cost of defection for regime maintenance very differently. The coercion approach, for example, raises the concern that including states with lower commitments to regime objectives will prove unworkable due to frequent defections within the forum. The persuasion approach predicts that few meaningful defections will occur and considers defection in unequivocally unfavorable terms. An acculturation approach, in contrast, predicts that defections will occur and may have salutary features. Specifically, it predicts that pressure to conform will produce a particular form of defection: decoupling, in which structural adherence to globally institutionalized models does not correspond to actual state practices on the ground. This disconnect between local circumstances and universal models is not an impediment to the diffusion of global norms, as other theories would suggest. Rather, this form of decoupling, in important respects, makes possible the diffusion of global models and the resultant convergence of official policies and organizational structures. The important points here are that the acculturation mechanism predicts a peculiar form of defection and that this form of defection assists the transnational diffusion of norms.

Problems with restrictive membership rules may be especially acute for IGOs that conduct “peer review” of state human rights practices. An empirical assumption favoring peer review is that states will be especially responsive to criticisms by their counterparts. Proponents of the new Human Rights Council have expressed that view and expectation. Admittedly, an acculturation model of state interaction generally considers peer review a constructive scheme. However, the effectiveness of review will depend on whether the arrangement is truly “peer”-based or instead involves a select group of insiders evaluating outcasts and outsiders. The social and cognitive pressure of peer review is likely to be effective when an IGO provides universal membership and subjects all member states to review or when an IGO provides an independent opportunity for states to opt into a peer review process (e.g., the New Partnership for Africa's African Peer Review Mechanism). Problems arise with IGOs that restrict membership to certain states and empower those states to review the practices of nonmembers as well as members (the Human Rights Council). Membership rules may systematically exclude some states due to the government's failure to comply with certain normative criteria or due to the government's lack of geopolitical power to secure

votes for admission. And, this excluded class will presumably include countries whose human rights abuses may be of the greatest concern.

Although “peer” review coupled with restrictive membership might achieve benefits related to other social mechanisms, it is likely to be ineffective or counterproductive in harnessing social and cognitive pressures to conform. Indeed, outsiders with little or no prospect of admission may be likely to disregard criticisms by the insider group or, worse, they may be more likely to resist particular ideas *because* those ideas originate from the insider group. For example, a state excluded from the Human Rights Council in part because it fails to embrace ESCR may be even less likely to change its practices in the face of criticism by Council members. Reducing or eliminating the price of admission and conducting peer review of the state’s practices as a consensual, equal member of the organization could provide greater prospects for success.

If the Council continues to combine peer review with restrictive membership, the above concerns can be ameliorated by strengthening the so-called special procedures (e.g., Special Rapporteurs). The special procedures generally enjoy the perception of relative independence, are not considered the handmaidens of Council members, and are thus believed to more fully represent the UN as a whole. Indeed, it may be highly important to insulate the special procedures to a greater degree from the Council’s political cabal. At the very least, the special procedures should not be submerged or replaced by the peer review system as some states have advocated.

#### D. Form of Decision-Making and Rules of Decision

##### 1. *Quality of Reasoning and Precision*

According to a common assumption, international bodies, including supranational tribunals, influence state actors through the mechanism of persuasion. As a consequence, commentators focus on the “quality of legal reasoning” as a determinant of effectiveness.<sup>9</sup> Recall that the touchstone of persuasion is that states internalize human rights norms following an active assessment of the justifications for these norms. On this view, it is the content of the rules and analytic claims that are assessed and, ideally, internalized. Thus the influence of legal opinions and official positions issued by international bodies depends on the “intrinsic rationality” of the opinion, the “internal logic and consistency of the actual results;” and the “framework within which reasoned debate can be conducted.”<sup>10</sup>

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<sup>9</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273, 318-327 (1997) (citations omitted).

<sup>10</sup> *Id.*

Related to this view, the effectiveness of a decision requires the relevant area of human rights law to be precise. Under the persuasion approach, rules are most useful if they sharply reduce uncertainty about the content of obligations. In general, precise rules help clarify points of agreement and disagreement. This clarification facilitates targeted debates in which preexisting agreement on clearly defined obligations provides a normative framework within which parties might move toward further agreement. The precision of legal obligations is central to the project of persuasion.

Accordingly, some commentators contend that ESC rights should not be subject to international adjudication or the right of individual petition. On this view, precision of obligations is a precondition for justiciability and state acceptance of the legal outcome.<sup>11</sup> Or, even more strongly, “there is a significant risk that trying to ‘enforce’ such rights through binding international adjudication will have the opposite result, causing states to deemphasize them and further undermining their stature and acceptability.”<sup>12</sup>

The acculturation model departs significantly from canonical approaches to the “level of precision” problem. With respect to cognitive pressures to change behavior, for example, conformity depends less on the properties of the rule than on the properties of an actor’s relationship to the community, which might be mediated through an IGO. Because constitutive norms may be associated at an abstract level with the identity of the group, rules can foster conformity by “establish[ing] broad hortatory goals with few specific proscribed or prescribed activities.”<sup>13</sup> This effect suggests that imprecision mobilizes “cognitive pressures” to adopt social norms (the first type of acculturation). Precision, on the other hand, is more likely to reveal disagreements--triggering cognitive cues that the would-be reference group is importantly dissimilar from the target actor. ...

Some additional claims:

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<sup>11</sup> Dennis & Stewart, at 465-66 (“A strong case can be made that further clarification and elucidation of the rights and obligations set forth in the ICESCR are vital to promoting greater respect and to achieving more effective implementation of that Covenant. That type of analysis--which has yet to be done--is nevertheless an essential first step before any of those rights can be said to be justiciable in any meaningful sense.”); Dennis & Stewart, at 489 (“Even more significantly, states are unlikely to comply with the decisions [of the Committee on ESC rights] unless they appear to be well reasoned and based upon universally accepted principles.”); cf. Leckie (2000), at 144.

<sup>12</sup> Dennis & Stewart, at 467.

<sup>13</sup> Ronald B. Mitchell, *International Control of Nuclear Proliferation: Beyond Carrots and Sticks*, *Nonproliferation Rev.*, Fall 1997, at 40, 46; David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, *22 Theory & Soc’y* 487, 493-94 (1993) (describing the importance of promulgating general conceptions of state obligations).

1. The point is not to displace legal reasoning, but to suggest it is not always a necessary condition.

2. Acknowledge: The form and content of reasoning may legitimize the social status of an international tribunal as an authoritative voice of the international community.

3. A tribunal may use that reservoir of authority (#2) to issue judgments in some cases due to the authority/status itself and not the quality of the reasoning.

4. This analysis suggests benefits of tribunals that adjudicate both civil and political rights as well as ESCR. The authority gained through reasoning primarily in the former domain (though with some ESCR cases as well) may facilitate a tribunal's efforts to promote rights in the latter domain.

## *2. Comparative Analysis and Best Practices*

1. Comparative analysis provides foreign models for emulation.

2. Comparative analysis can also be combined with praising “positive aspects” of state practices—to encourage association with similar country practices and, as a consequence, reduce risk of backsliding.

3. Comparative analysis calibrated to different tiers of performance can help avert or minimize a race to the middle.

4. Treaty bodies could combine the “General Comment” approach and “periodic reports” by identifying a single theme (e.g., human rights elements of peace agreements) to analyze and promote across state parties.

5. Comparative analysis helps respond to the criticism that treaty bodies have failed to provide concrete models for reform.<sup>14</sup>

## **II. International Nongovernmental Organizations (INGOs)**

International nongovernmental organizations (INGOs), such as Amnesty International and Human Rights Watch, constitute important components of the

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<sup>14</sup> Leckie 2000 132, 132 n. 7 & 136

global regime in monitoring and promoting human rights. An obvious distinguishing feature of INGOs is their lack of coercive authority. Evaluating their potential role and effectiveness requires exploring other mechanisms of influence that these organizations can directly exploit in dealing with state actors.

A contemporary controversy within the NGO community provides a productive starting point for engaging this set of issues. Heads of leading INGOs have expressed reluctance to address ESC rights on the ground that their organizations' capacities to promote change are not well suited for this particular arena.<sup>15</sup> Consider a recent set of well argued articles by Kenneth Roth, Executive Director of Human Rights Watch. Roth's argument relies on three principal but flawed claims. First, targeted state practices must be susceptible to "the core of our methodology [which] is our ability to investigate, expose, and shame."<sup>16</sup> ESC rights elude these methods, according to Roth, because shaming requires precision, and the law on violations, violators, and remedies for ESC rights is generally unclear. Second, the most fertile conditions for spreading human rights require local civil society actors, such as national NGOs, who support the position of INGOs. More specifically, shaming involves exposing state actors to public opprobrium "and the relevant public is best when it is a local one—that is, the public of the country in question."<sup>17</sup> More strongly, Roth echoes concerns raised by Dennis and Stewart in writing: "We can argue that money should be diverted from less acute needs to the fulfillment of more pressing ESC rights, but little reason exists for a government to give our voice greater weight than domestic voices."<sup>18</sup> That is, Roth transfers doubts about international actors' involvement in ESC rights from the realm of IGOs to the INGO context. Third, international efforts such as technical assistance to promote human rights require that state actors already exhibit a genuine interest in respecting those rights. National governments often lack the political interest or will to justify enlisting INGOs for technical assistance.

A close analysis of the mechanisms of influence reveals flaws in these propositions. More fundamentally, this analysis provides lessons for fashioning INGO roles and strategies in general. That said, analyzing the mechanisms does support separate concerns raised by Roth and others. Those concerns, however, are best directed to the project of institutional design—to improve, rather than abandon, INGO efforts. We consider each of these claims and concerns in turn.

#### A. Alternative Forms of Social and Cognitive Pressure

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<sup>15</sup> Roth I; Roth II; Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (2003); Aryeh Neier, *Social and Economic Rights: A Critique*, 13/2 *Hum. Rts. Brief* (2006).

<sup>16</sup> Roth I, at 67.

<sup>17</sup> Roth I, at 67.

<sup>18</sup> Roth I, at 69.

1. Shaming belongs to a family of social logics that motivate state behavior. That is, concerns about status and membership in a group, which underpin shame, can also motivate mimicry of other actors' practices. INGOs could accordingly use the same skills and levers of influence, with which they have become accustomed, to encourage states to emulate positive models of ESC rights protection. If shaming strategies influence states, presumably so shall these other techniques.
2. Precision may be essential only to shaming and other techniques that use social pressure; precision is not necessary to other acculturation processes that rely on cognitive impulses to conform. (See above discussion of precision with respect to IGOs).
3. Shaming strategies might be usefully restricted to situations involving the level of precision for this form of acculturation to work: serious violations of "core minimum obligations" of ESC rights.<sup>19</sup>

#### B. Conditions for Diffusion I: Strength of National NGOs

It is understandable that Roth claims that effective INGO campaigns on ESC rights need support from local advocates or domestic publics. Indeed, the leading social scientific model of human rights advocacy suggests that INGOs should create synergies with local NGOs to move governments through progressive phases of human rights concessions and recognition. That model, however, relies in part on (i) persuasion, in which advocacy groups succeed in "bottom up" dialogical interactions with political elites and (ii) coercion, in which the survival of the ruling government is threatened. The model heavily emphasizes those techniques in the initial phases of pressing a government to accept global human rights standards. There are, however, other ways up that mountain.

Empirical studies tracking patterns of acculturation suggest top-down (global-level) change can influence state actors without significant local advocacy groups supporting that agenda. Consider a few related findings. For example, once the obligation to address domestic violence was institutionalized at the regional level in Latin America, states joined the bandwagon despite dramatic differences in (and sometimes the absence of) women's political influence and women's access

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<sup>19</sup> Cf. Audrey R. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 Human Rights Quarterly 23, 38 (1996) ("[T]he stigma of being labeled a human rights violator is one of the few 'weapons' available to human rights monitors. A violations approach [based on core obligations] offers the possibility of wielding that weapon more effectively and fairly.").

to economic resources at the national level. The researchers conclude that upon regional institutionalization of the practice, “international socialization is more important than domestic politics” in getting “nonconformist states to change their policies to meet the standards of new international norms.”<sup>20</sup> Similarly, consider women’s right to vote. Once the norm of female suffrage was institutionalized at the international level, a strong predictor for whether an individual state would enact women’s suffrage was whether other states in its region had done so in the past five years. The findings suggest that compared with local conditions such as the strength of domestic women’s rights groups “[c]ountries apparently are affected much less strongly by internal factors and much more strongly by shifts in the international logic of political citizenship.”<sup>21</sup> Indeed, late adopters frequently had effectively no woman’s social movement at the time of enactment. Additionally, states adopt educational reforms that do not reflect changes in relevant domestic social and cultural arrangements. Instead, governments adopt models of education promulgated at the international level.<sup>22</sup> States also adopt environmental conservation policies even in the absence of industrialization and degradation, which would presumably be required to mobilize domestic social movements.<sup>23</sup> Finally, states adopt a globally legitimated form of scientific bureaucratic organization; and the modal category of states doing so have less than 7 scientists in the country—essentially little or no scientific community to advocate for these changes.<sup>24</sup> The important point is that, under certain conditions, states may be motivated to make fundamental transformations due to global social and cognitive pressures in the absence of internal constituencies or national social movements advocating those changes.

### C. Conditions for Diffusion II: Governmental Interest in Respecting Human Rights

The success of technical assistance programs does not require, as a precondition, a government committed to respect rights. First, state identity and preferences are not static. State identity and preference formation is endogenous to interactions with global organizations. The diffusion of innovations through

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<sup>20</sup> Id. at 256.

<sup>21</sup> Ramirez et al., at 742.

<sup>22</sup> David John Frank, et al.; Ramirez; Evan Schofer & John W Meyer, *The Worldwide Expansion of Higher Education in the Twentieth Century*, 70 *American Sociological Review* 898 (2005).

<sup>23</sup> David John Frank, et al.

<sup>24</sup> Finnemore.

global mimicry often involves solutions disconnected from problems, and solutions chasing problems. Governments embrace these “solutions” or legitimated models of behavior in the course of interacting with the global cultural environment. Consider Martha Finnemore’s study of the world-wide diffusion of national scientific bureaucracies promulgated by UNESCO. States adopted the global model not because they already accepted the validity of the agenda but because that agenda was associated with what it means to be a modern state. Relatedly, studies by David John Frank, Anna Hironaka, and Evan Schofer show that states enacted global scripts on environmental policy without a preexisting domestic need or interest in making such transformations. The researchers also find that the greater degree to which a state is embedded in the international community (in part through INGO chapters) the more likely it will implement the global model: “More sociocultural ties to world society means greater likelihood of national implementation for every kind of environmental protection on which we have data.”<sup>25</sup> Notably, these studies concern programmatic and administrative domains. Their findings are thus especially relevant to the prospect of governmental changes involving ESC rights.

Second, although a *genuine* governmental commitment to respect human rights may be ideal, it is not necessary to the diffusion of human rights norms. Roth contends that “the provision of technical assistance to a government that lacks a good-faith desire to respect rights can be counterproductive by providing a façade of conscientious striving that enables a government to deflect pressure to end abusive practices.”<sup>26</sup> But, why are states motivated to deflect pressure in the first place? And, how might INGOs tap those same motivations to apply follow-up pressure once a state has made initial, public commitments? Although shallow acts of public conformity might yield some short-term social benefit to the conforming state, INGOs are likely (and ought) to learn over time that these acts do not necessarily signal genuine acceptance of the norm in question. As a consequence, conforming states will be required to enact increasingly meaningful reforms to capture the same social benefit. More generally, public commitments by states to human rights norms can provide a useful entry point for international actors, a foundation for demanding consistency in commitments, and for ratcheting up pressure to conform as steps are taken over time. It should also not be overlooked that one of the features of technical assistance programs is to embed states directly in networks of IGOs and INGOs. There is ample evidence to suggest that those relationships would help diffuse human rights norms. ...

#### D. Unresolved Concerns

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<sup>25</sup> Frank, et al., 106.

<sup>26</sup> Roth I, at 67.

1. Roth correctly identifies an obstacle to ESC rights promotion: shaming is less effective when essentially all states are violators.

1.1 Indeed, one can amplify this concern: Focusing on ESC rights violations may institutionalize, or normalize, such practices.

1.2 These concerns should guide institutional design. They provide additional reasons to focus shaming strategies on serious violations of core obligations. These concerns may also suggest considering the distribution of countries with better practices when defining potential reference groups. They also suggest that a “violations approach”<sup>27</sup> should not be the exclusive or even predominant approach under certain circumstances.

2. Roth correctly identifies another obstacle to ESC rights promotion: assigning (state) responsibility.

2.1 This concern, however, should simply define the goal for institutional design. Indeed, some of the most successful normative campaigns owe their effectiveness to altering (and expanding) conceptions of state responsibility.

2.2. It is important to distinguish political theory from social practice. Despite the lack of clarity regarding whether states ought to bear responsibility as a philosophical matter, INGOs may be able to change sociocultural views on this subject. Note that the former (the merits of the philosophical claim) may be more important to persuasion-based approaches to promoting acceptance of state responsibility.

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<sup>27</sup> Chapman.