Mobilizing for Human Rights

International Law in Domestic Politics

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Why International Law? The Development of the International Human Rights Regime in the Twentieth Century

> It is difficult to restrain myself from doing something to stop this attempt to exterminate a race, but I realize I am here as an Ambassador and must abide by the principles of non-interference with the internal affairs of another country.
>
> Henry Morgenthau, U.S. ambassador in Turkey, to the U.S. secretary of state 11 August 1915[1]

The second half of the twentieth century was the first time in history that human rights were addressed in a systematic manner by the international community. Following the Second World War, official as well as nonstate actors worked together to address a broad range of rights – civil and political, economic and social, rights of nondiscrimination – and to finalize many of these in the form of legally binding covenants. The international legal edifice that thousands worked to shape has attracted criticism as well as praise; it has raised expectations as well as overpromised; it has aspired to universality yet still reflects some of the hegemonic ideas of the most powerful actors in the world polity. Most importantly, though, it has successfully challenged the unconditional assertion of national leaders that the way they treat their own people is exclusively a national sovereign concern. The idea that a government should have the freedom to treat its people as brutally as it wishes while others are helpless to intervene *because of its status as a sovereign state* is legally – and possibly, morally – untenable in the twenty-first century.

This chapter chronicles the evolution of a well-developed (though still contested and sporadically enforced) legal regime that spells out a broad range of individual rights and protections. The regime has been decades in the making and is related to broader developments such as the diffusion of democracy, the

1 Quoted in Kamminga 1992:6.

trend toward more accountability in international law generally, and the increasingly transnational organization of civil society. The fairly recent presumption that individuals have internationally protected rights that states are not at liberty to disregard in the name of sovereignty is profound. How did we move from a world in which a statement such as Morgenthau's reflected prevailing norms to one in which such a statement is hard to imagine a government official uttering publicly? Why have we ended up with a *legal* regime as the primary way human rights norms are expressed and implemented at the international level? How did international law designed to protect individuals come to invade the formerly nearly impenetrable space carved out for state sovereignty?

THE GLOBAL CONTEXT: THE INTENSIFICATION OF STATE ACCOUNTABILITY IN THE TWENTIETH CENTURY

While the Second World War is considered the proximate setting, nothing as complex as the development of an international regime for individual rights could possibly be monocausal. If we want to understand why states might agree to limit their sovereignty through international legal agreements, it is useful to understand why accountability for individual rights through international law was even on the table in the 1940s. There were, after all, other possible answers to the litany of atrocities associated with World War II: Execution without trial, impunity, or the development of soft law arrangements to express collective outrage were some of the available options. But there have been at least three historical trends of reasonably long duration that have supported (not caused) the legalization of international human rights: the trend toward democratization, the elaboration of accountability in international law, and the growth in transnational civil society.

Democratization

It is difficult to understand both the development and the influence of the international human rights regime without acknowledging the crucial fact that over the course of the twentieth century governments increasingly became accountable to their own people. Democratization raises expectations that governments will respect a broad range of individual rights and freedoms, many of which are nearly synonymous with democratization itself. Additionally, establishing a democratic system increases the prospects for limitations on public authority imposed by the rule of law. Finally, of course, democracy provides the institutions – free elections, a relatively free press, relatively free speech – that hold governments accountable for their actions. From the ideas first expressed in the American and French Revolutions to the recent political liberalizations in the post–Cold War period, there has been widespread diffusion of the ideal

of – and the mechanisms for – holding government leaders accountable to their citizens for their actions.

Democracies are the natural allies of human rights. The expansion of democratic accountability itself has been associated with the expansion of domestic rights protections. The rise of the bourgeoisie in the eighteenth century led to franchise extensions to this new social group and did much to secure their property and civil rights as well. The Industrial Revolution created a set of conditions under which workers were more able to organize to demand improvements in their working situations; the extension of the franchise to workers in several countries just before the Great War accelerated afterward as veterans demanded political representation in the nations for which so many had sacrificed. For the first time, social and economic rights were on the table in a number of countries as a result.[2] The defeat of fascism in World War II reestablished democracy in Western Europe, and gave rise to new constitutions[3] as well as regional structures[4] designed to ensconce rights in both domestic and international law. The illegitimacy and in some cases imminent breakdown of largely undemocratic imperial structures in the war's wake gave rise to demands for attention to rights from the nonviolent demonstrations of Ghandi in India to the anticolonial campaigns of Kwane Nkrumah in the region that became Ghana.[5] At the end of the twentieth century, the breakdown of the Soviet Union and its empire in Europe set these countries – however haltingly – on the road to political liberalization and gave rise to a new enthusiasm for participation in international human rights regimes (see Figures 3.2 and 3.3 in the following chapter).

The data on the spread of democracy to many parts of the world offer valuable insight into the connection between the development of an international human rights regime and political liberalization (Figure 2.1). The proportion of countries that can reasonably be called democratic increased fairly consistently from the mid-1800s to the outbreak of the First World War but plunged with the counterthrust of fascism during the interwar years. Despite a further downward turn in the early 1960s due to the proliferation of newly independent states (many of which were hardly democratic), by the late 1960s the number started to climb again. In the 1990s alone, the proportion of democratic countries around the world increased from about 30 percent to about 50 percent. By 2000, about 58 percent of the world's population could cast a

2 Ishay 2004.

3 The Japanese constitution, written largely by Westerners, contained some 31 articles out of 103 total outlining the rights and duties of the people. See generally the discussion in Kishimoto 1988. For an account that highlights the local popular contributions to Japan's postwar constitution, see Dower 1999.

4 Moravcsik 2000.

5 Gandhi 1957; Nkrumah 1957. Decolonization did not, of course, usher in a period of stable democracy in Africa, with a few exceptions such as Botswana, Mauritius, and until recently The Gambia.

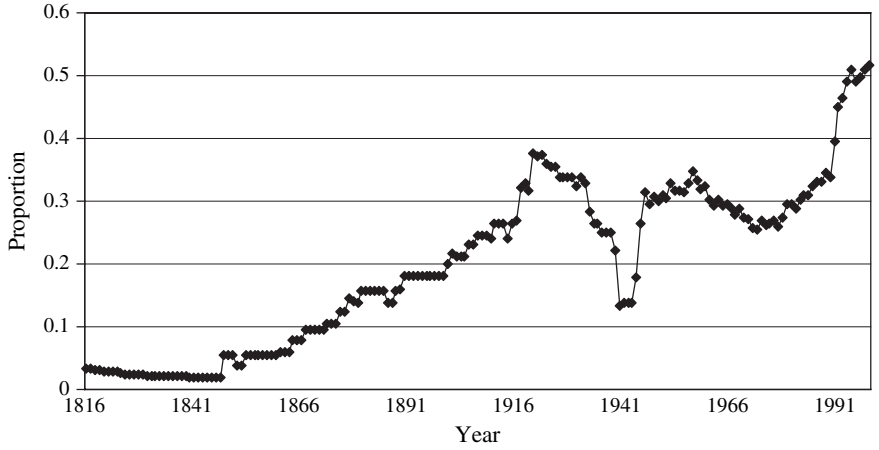

Figure 2.1. Proportion of Democracies in the World. *Note*: Countries are counted as democratic if they score above 6 on the −10 to 10 Polity IV combined democracy–autocracy scale. Data supplied by Kristian Gleditsch.

meaningful vote in reasonably competitive and fair elections, though countries in the Middle East and Central Asia barely participated in this trend.[6] Accompanying this increase in democratic states is another striking trend: The international community is increasingly willing to monitor the quality of domestic accountability by monitoring the election process itself (see Figure 2.2).[7]

The point is this: International legal commitments are now increasingly made by governments that can be held accountable for their commitments by their own people. Xinyuan Dai has argued compellingly that democracy gives rise to constraints that make noncompliance with even weak international regimes potentially costly for governments.[8] As I will argue, even imperfect regimes that allow for the organization of rights demands and the use of law as a legitimating political resource are potentially fertile contexts for international law to influence official rights policies and practices.

6 The population share figure is from Freedom House; see "Democracy's Century: A Survey of Global Political Change in the 20th Century," http//www.freedomhouse.org/reports/century.html (accessed 9 September 2005). The literature on democratization is varied and cannot be reviewed here. Explanations include variations in regional levels of economic development (Lipset 1960), regionally specific cultural values (Almond and Verba 1963; Muller and Seligson 1994; Putnam et al. 1993), characteristic class relations (Rueschemeyer et al. 1992), and specific critical junctures and path dependence (O'Donnell et al. 1986). See also Huntington 1991.

7 In addition, for a complete list of all plebiscites, referenda, and elections held under the supervision or observation of the United Nations in Trust and non-self-governing territories, see Beigbeder 1994: table 4.1. For a discussion of trends in election monitoring, see Santa-Cruz 2005.

8 Dai 2005.

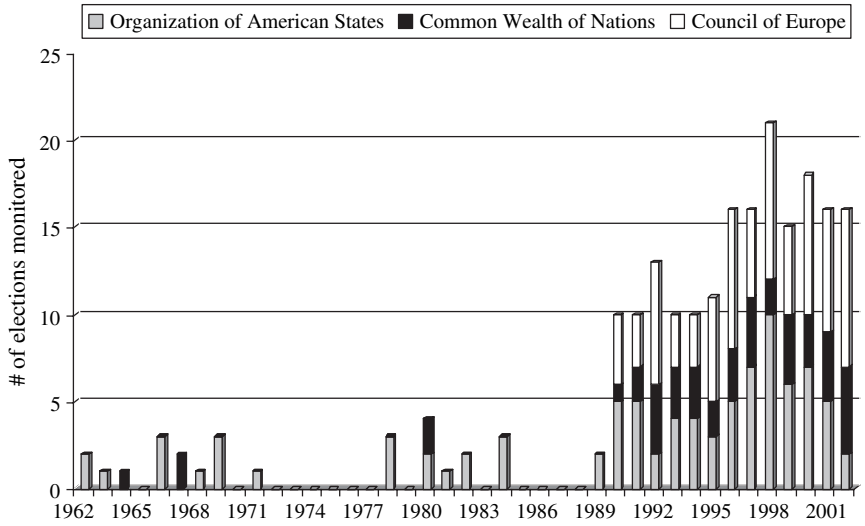

Figure 2.2. Regional Election Monitoring.

Accountability in International Law

Public international law itself has also undergone some important transitions over the course of the past century, and these changes are much broader than the development of human rights conventions that are the focus of this book. A close look at some key areas of law-governed interstate behavior reveals an evolving approach to sovereignty and accountability in governments' mutual relationships with one another. International human rights law is one area in which states have accepted new limits on their sovereignty, but it is not the only one. The trend to submit to monitoring, reporting, and surveillance mechanisms can be found in treaties in areas as diverse as arms control, the laws of war, trade and monetary relations, and dispute resolution and predates the elaboration of the human rights regime.[9]

9 Robert Keohane (1993) has argued that to the extent that these agreements represent incursions into state sovereignty, they are driven by the desire for reciprocal constraints on the actions of their peers. Some scholars have found it useful to distinguish three functional periods in international law development that roughly parallel the intensification of state-to-state accountability I develop here. Johnston (1997:111–13) distinguishes functional "periods" for international law: a "Classical" period up to World War I that concentrated on the containment of power abuse, facilitation of international trade diplomacy, communication, and settlement of interstate disputes; a "Neo-Classical" period (1919–mid-1960s) that institutionalized world society through intergovernmental organizations, promotion of the rule of law through codification, enhancement of human welfare through confirmation, and implementation of individual and social rights; and a "Post-Classical" period focused on correction of distributive justice, development of international regimes, and the transformation of international society from a nation-state system to a world community based on humanitarian ethics and cooperative behavior. See also Ku 2001.

Consider as an example an area that governments have long attempted to regulate through formal agreements: the control of armaments. Today few governments would consider negotiating an arms agreement that is unverifiable, yet the idea of including verification and monitoring mechanisms in arms control agreements is of fairly recent vintage. Documentary histories of nineteenth-century arms agreements reveal no efforts to hold signatories accountable to one another.[10] It was only after World War I, with the Treaty of Versailles and the creation of the League of Nations, that formal mechanisms of state accountability in arms control and disarmament were implemented.[11] The most important arms control agreement of the interwar years, the Washington Naval Treaty (1922), required the parties to "communicate promptly" plans for replacement tonnage;[12] it did not, however, provide for monitoring or verification of these reports.[13] By contrast, after World War II, practically no arms control efforts were considered that lacked monitoring, reporting, and verification.[14] The Cold War era inaugurated important superpower agreements in this regard, including the inspection regimes associated with the Anti-Ballistic Missile Treaty and two rounds of Strategic Arms Limitations Talks.[15] Similarly, governments with a broad range of ideological and cultural backgrounds agree

10 If arms control agreements were successful during that period, it is largely because they dealt with readily observable activities. For example, the American–British (Rush–Bagot) agreement of 1817 to reduce naval forces on the Great Lakes worked well without monitoring agreements (Blacker and Duffy 1984), likely because noncompliance was reasonably easy to detect.

11 Treaty of Versailles, 28 June 1919, Section IV: "Interallied Commission of Control," providing for inspections. Disarmament was addressed by the League of Nations (28 June 1919), which called for consultations and information exchange (Article 8 [4–6]). The Convention for the Control of the Trade in Arms and Ammunition, 10 September 1919, aimed at preventing arms trade in most of Africa and parts of Asia and required contracting parties to "publish an annual report showing the export licenses which it may have granted," with quantities and destinations, to be sent to the secretary general of the League of Nations (Ch. I, Article 5). Similarly, the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, 17 June 1925, requires the parties to "undertake to publish within two months of the close of each quarter, a statistical return of their foreign trade during this quarter in the articles covered by categories I and II in Article I [of the convention]" (Ch. II, Article 6). They also had to publish information for each vessel of war constructed (Article 7) and the export of aircraft and aircraft engines (Article 9).

12 Washington Naval Treaty, 1922, Part 3, Sect. 1(b). Papers Relating to the Foreign Relations of the United States: 1922, Vol. 1, pp. 247–66; Treaty Series No. 671.

13 "Only the 1922 Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, which never came into force, had a clear enforcement mechanism. It provided that violations of its limitations on submarine attacks were to be treated as acts of piracy and prosecuted pursuant to the applicable universal jurisdiction" (Carter 1998:11).

14 On the early postwar acceptance of safeguards and inspections in principle, see Dupuy and Hammerman 1973. The slow start in postwar arms control was largely the result of difficulties in agreeing precisely how this principle of accountability should be implemented.

15 The ABM Treaty (Article XII [1]) provides for the use of "national technical means of verification . . . ," with which each agree not to interfere (Article XII [2]). The SALT I and II treaties have virtually identical provisions. See, e.g., SALT II Article XI [1–3]. http://www.dpi.anl.gov/dpi2/hist_docs/treaties/salt2.htm.

that the international community has the right to inspect national sites for weapons of mass destruction.[16]

Mechanisms of accountability also became integral to the laws of war-fighting over the course of the twentieth century. For the first time in history, governments agreed in the 1906 Geneva Conventions to exchange information on the condition of prisoners of war, though there was no real mechanism to enforce this commitment.[17] The idea of an independent agency, the International Red Cross, as a credible source of information to which the parties had an obligation to report, was ensconced in the accords on the Wounded and Sick in Armies in the Field (1929).[18] State and individual responsibilities under these conventions were further spelled out in the First Protocol (1949), which created an independent fact-finding commission to further secure belligerent states' – and their armies' – accountability.[19]

Peer accountability has also intensified in the economic realm. It was not until the founding of the Bretton Woods institutions that governments became legally accountable to their peers for their exchange rates.[20] While legal accountability for currency stability dissolved with the breakdown of the entire system in the 1970s, governments are still legally accountable to one another to maintain

16 The Nuclear Non-Proliferation Treaty provides for verifiable safeguards to ensure compliance with the appropriate use of fissionable materials (Article III). http://disarmament.un.org/wmd/npt/npttext.html. The postwar Chemical Weapons regime "provides for the most comprehensive and intrusive system of verification to date of any disarmament treaty applied globally (or in any other global treaty for that matter)" (Scott and Dorn 1998:88). The treaty requires detailed disclosure and on-site inspections by international civil servants (Article IV). http://www.defenselink.mil/acq/acic/treaties/cwc/cwc.htm. See also Goldblat 1982; Kessler 1995.

17 The 1906 Geneva Convention "enhanc[ed] compliance by further provisions for exchange of information on the sick and wounded. . . . A duty was imposed on the commanders-in-chief of belligerent armies now to provide the details of implementing the provisions of the convention. . . . In the same vein a requirement to make the provisions of the convention broadly known among not only the groups most directly affected but also the general population enhanced both knowledge and acceptance of the convention obligations" (Carter 1998:8).

18 The 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. See especially Articles 77–88.

19 Geneva Conventions, Protocol I, Article 90. See Carter 1998. Article 91 provides that a party to a conflict that violates OP I's provision would in certain cases be liable to pay compensation for such violations and reiterates state responsibility for all acts committed by persons forming part of its armed forces. For a discussion of the "humanizing" of the laws of war since World War II, see Meron 2000.

20 As the Permanent Court of International Arbitration noted in 1929, the international community had quite clearly "accepted [the] principle that a State is entitled to regulate its own currency." Case of Serbian Loans, 1929, Permanent Court of International Justice, series A., nos. 20/21, p. 44. Cited by Gold 1984b:1533. The IMF statutes explicitly recognized for the first time that exchange rates were properly a matter of international concern. See IMF Articles of Agreement, Article IV, sect. 4. Furthermore, Article IV, sect. 2, provided that "no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin." A central bank could not enter into any gold transaction with another central bank other than at par without one or the other violating the articles. On the public international law of money generally, see Schuster 1973.

convertible currencies[21] and are subject to regular on-site surveillance by staff members of the International Monetary Fund (IMF) to encourage members to follow "responsible" economic policies.[22] Accountability in the form of formal policy review has also intensified in the trade area, with regular (though voluntary) "trade policy reviews" under the auspices of the World Trade Organization (WTO).[23] These trends are consonant with the general direction of accountability that has developed over the past few decades.

Finally, states are increasingly accountable to their peers for the way they resolve disputes. Paul Jessup noted in his public lectures that up to the time of the Hague Conferences held at the turn of the twentieth century, even to tender an offer of mediation or good offices in a dispute among sovereigns was considered officious meddling.[24] That view was to change drastically over the course of the twentieth century. Figure 2.3 illustrates the phenomenal growth in international judicial and quasi-judicial institutions that have been created over the course of the past 100 years.[25] Some of these institutions involve individuals as defendants or complainants, but many resolve disputes between state parties, including the International Court of Justice and the Permanent Court of International Arbitration, the WTO's Dispute Settlement Mechanism, and the International Maritime Court, which handles disputes arising from the Law of the Seas Treaties.[26] While participation in these arrangements is typically voluntary, and while governments strive to maintain mechanisms of control over these adjudicative institutions,[27] Figure 2.3 illustrates the institutional instantiation of a growing norm of peer accountability.[28]

21 See Simmons 2000. IMF Articles of Agreement, Article VIII, sect. 2, para. (a), and sect. 3.

22 Gold 1983:474–5; James 1995:773, 775. Consultations with Article VIII countries were established in 1960 but were completely voluntary. De Vries and Horsefield 1969:246–7.

23 Marrakesh Agreement, April 1994, Article III (entry into force, 1995). According to the Marrakesh Agreement, "the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system." Annex III A(ii). http://www.wto.org/english/tratop_e/tpr_e/annex3_e.htm. On the Trade Policy Review Mechanism, see Abbott 1993; Blackhurst 1988; Curzon Price 1991; Forsythe 1989; Mathews 1997; Mavroidis 1992; Norris 2001; Qureshi 1990.

24 Jessup 1959.

25 Ad hoc arbitration procedures were used extensively toward the end of the nineteenth century (Mangone 1954:esp. 117), but these transient bodies can be contrasted with the permanent or semipermanent nature of the institutions discussed in this section. See also Gray and Kingsbury 1992; Grieves 1969; Nussbaum 1954:222–3. On the issue of compliance with these early institutions, see Nantwi 1966.

26 A series of studies have also documented the increased usage of the International Court of Justice. See, for example, Peck 1996; Rosenne 1989. Nonetheless, there is a clear tendency for "defendants" to contest the court's jurisdiction; see Fischer 1982. On the Dispute Settlement Mechanism of the WTO see Hudec 1999; Vermulst and Driessen 1995; on the International Maritime Court, see Charney 1996.

27 Reisman 1992.

28 Keohane et al. 2000; Romano 1999. Note that the proliferation of quasi-adjudicative institutions is not always an unalloyed positive development. For an argument that multiple institutions in the human rights area has led to forum shopping, which in turn has led to a certain degree of legal incoherence, see Helfer 1999.

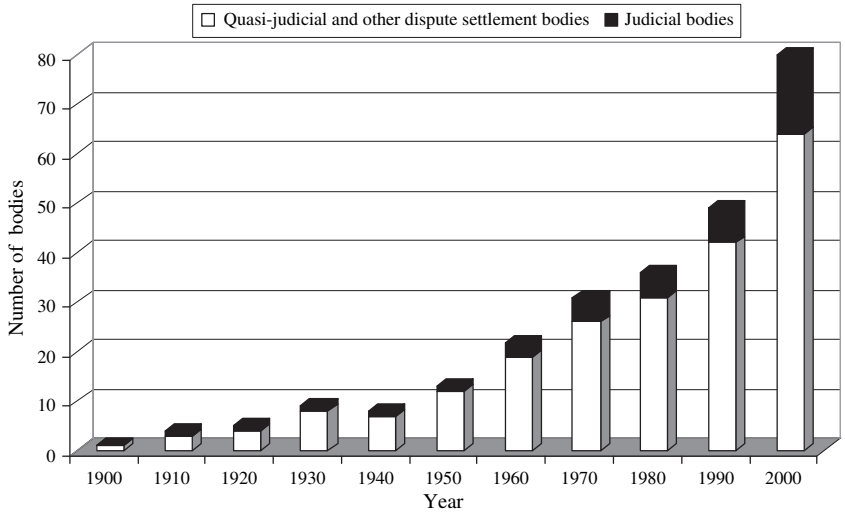

Figure 2.3. Growth in International Judicial, Quasi-judicial, and Dispute Settlement Bodies. *Source*: The Project on International Courts and Tribunals: The International Judiciary in Context, at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (November 2004; accessed 11 August 2008).

In short, increasingly robust forms of state-to-state accountability were adopted over the course of the twentieth century. More treaties in a broader range of areas require consultations, reporting, verification, monitoring, and surveillance. Despite the obvious roots of these developments in the nineteenth century,[29] formal peer accountability structures in the contemporary period express the widely held view that sovereign governments are, and of right should be, consistently accountable to one another. The innovation of mid-century was not that governments should be held accountable for their legal commitments to one another. Rather, it was the idea that human rights – rights of domestic citizens – could be brought under this broader accountability trend in public international law.

International Civil Society

No discussion of the evolving context for international human rights law would be complete without mention of the growing role of international civil society. The details of the role of transnationally organized private actors in the

29 For an account of the history of international law and institutions that stresses continuity across the centuries, see Mangone 1954.

legalization and implementation of the human rights regime will be discussed in more detail later; here I stress the capacity of organized nonstate actors to influence policies more generally. There have, of course, always been groups of private citizens who have organized, often across national boundaries, to advocate public purposes of various kinds. But what has made these groups so central in the international public policy arena of the late twentieth and early twenty-first centuries is the drastic reduction in the start-up, organizational, and transactions costs they face to make their positions heard. This, in combination with states' (somewhat grudging) willingness to allow formal and informal access to official international decision-making venues has made NGOs far more influential than they have been in the past.

There is nothing new about civil society groups' efforts to influence issues of transnational or international public interest. Many have been recognized with the day's highest honors for their accomplishments. Antislavery and religious groups were active – and reasonably influential – in the nineteenth century, as Margaret Keck's and Kathryn Sikkink's research has emphasized.[30] Although much smaller in number than the welter of such groups today, transnational nongovernmental groups have long been active in the peace movement, in disarmament, and in issues related to human rights. As evidence of their perceived effectiveness, a number of NGOs were early winners of Nobel Peace Prizes, including the Institute of International Law (1904), the Permanent International Peace Bureau (1910), and the International Committee of the Red Cross (1917, 1944, and 1963).[31]

The influence of NGOs on a broad range of policy issues has increased significantly as start-up and operational costs for such groups have drastically fallen. The end of the Cold War also spurred the growth of civil society organizations in countries once dominated by communist parties.[32] As a result, there has been a rapid increase in the number and range of NGOs worldwide and a corresponding growth in opportunities for advocacy and policy influence.[33] Figure 2.4 provides a sense of how rapidly traditional NGOs have sprouted over the past five decades.

The explosion in the organizational capacity of transnational civil society can be traced directly to technological changes that have reduced drastically their costs of organization and operation. It now costs a fraction of what it once did for these groups to communicate and to disseminate information. In 1927,

30 Keck and Sikkink 1998.

31 Other NGOs that have more recently won a Nobel Prize for Peace include Friends Service Council and American Friends Service Committee (Quakers, 1947); Amnesty International (1977); International Physicians for the Prevention of Nuclear War (1985); Pugwash Conferences on Science and World Affairs (1995); International Campaign to Ban Landmines (1997); and Médecins sans Frontières (1999). For a complete list of recipients, see http://nobelprize.org/nobel_prizes/peace/laureates/ (accessed 28 November 2006).

32 For a discussion of the emergence of international civil society after the Cold War, see Otto 1996.

33 Boli and Thomas 1999; Otto 1996; Skjelsbaek 1971.

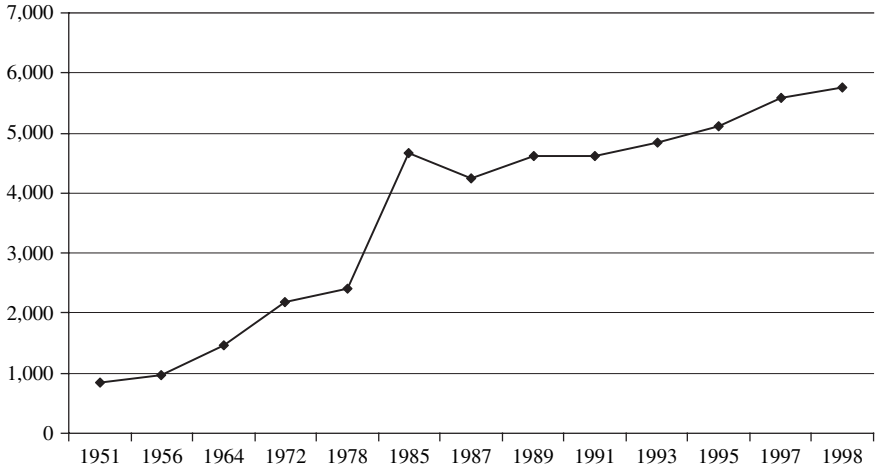

Figure 2.4. Total Conventional NGOs. *Source*: Union of International Associations, http://www.uia.org/statistics/organizations/ytb299.php. *Note*: Includes nonprofit NGOs (excludes multinational enterprises). All included bodies have members in at least three countries. Types of organizations include federations or "umbrella" organizations, universal membership organizations (involving members from at least 60 countries), and intercontinental and regional organizations (those whose members and purposes focus on a particular continent or subcontinental region). For a detailed description of included NGOs, see http://www.uia.org/uiadocs/orgtyped.htm#typet.

only about 2,000 transatlantic phone calls were placed, at a cost of around $16 for three minutes. From the United States, it is now possible to phone much of the rest of the world for 2 cents per minute.[34] The goals of traditional advocacy NGOs have been furthered significantly by the growth of, and growing access to, the Internet (Figure 2.5). It is hard to think of a communication medium that has done more to loosen governments' centralized control over information at such a low cost to small users than e-mail and the World Wide Web.[35] True, Internet access is quite uneven within and across regions[36] and is limited where

34 For rates associated with the first transatlantic cable, see http://en.wikipedia.org/wiki/Transatlantic_telephone_cable. For current rates, see, for example, http://www.pennytalk.com/ (accessed 7 December 2006).

35 While observers generally acknowledge the greater difficulty governments have in controlling the Internet than they do other forms of media, the Internet has not proved impossible to control. See Sussman 2000.

36 In the Americas, for example, the United States at one extreme had 200 hosts per 1,000 persons in 2000 and the Dominican Republic had .003 host per 1,000. In Africa, as of 2000, South Africa had more Internet hosts than all of Africa combined, though other areas are gaining rapidly. Senegal's number of Internet hosts jumped more than 200% in a six-month period in the late 1990s, for example (Quarterman 1999).

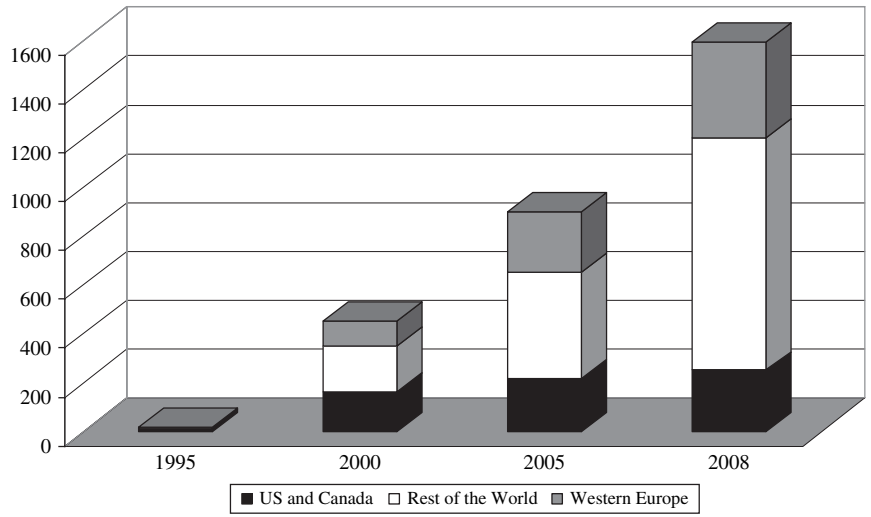

Figure 2.5. Number of Internet Users (Millions). *Source*: Nua, http://www.nua.ie/surveys/how_many_online/.

governments tend generally to suppress free communication (North Korea, Afghanistan, Iraq, Guyana, St. Helena, and Guinea-Bissau, to name a few).[37] Nonetheless, the net effect has been fundamentally to alter the ability of governments to maintain a monopoly on information. Most observers agree that relative to states, NGOs have been empowered disproportionately by cheap and decentralized information technology. This has a tremendous impact on the ability of NGOs to do practically everything mentioned in the preceding paragraph, from mobilizing coalitions to publicizing governmental policies and practices to participating in the enforcement of existing law.[38]

As a result of their greater ability to organize and communicate at drastically lower costs than was possible previously, NGOs have developed the capacity to hold governments accountable for their decisions.[39] Many NGOs have the potential to set behavioral or policy standards, to produce independent information, and to lobby governments to justify, clarify, and/or change their policies.[40] Some provide policy input in various governmental and intergovernmental organizations.[41]

37 http://www.matrix.net/publications/mn/mn1012_hosts.html (accessed 10 October 2002).
38 Mathews 1997; Norris 2001; Perritt 1998.
39 The NGO literature in the human rights area is vast and cannot possibly be reviewed here. On the importance of NGOs in this area, see Chinkin 2000; Clark 2001; Forsythe 1985; Korey 1998; Wiesberg and Scoble 1981. Regional studies are also plentiful. On the influence of NGOs in Latin America, see Burgerman 1998; Sikkink 1993; USIP 2001. On the influence of NGOs in Africa, see Welch 1995.
40 Forsythe 1989; Shepard 1981; Smith et al. 1998.
41 Charnovitz 1997; Otto 1996; van Boven 1989–90.

In 1968, NGOs were first permitted to participate in United Nations (UN) proceedings;[42] by the 1990s, their presence in that organization had become pervasive.[43] NGOs help hold governments accountable to existing laws by participating in and sometimes initiating litigation.[44] More broadly, they educate the public to demand greater accountability as well.[45] The new and decisive fact of the waning years of the past millennium was the presence of NGOs almost everywhere – in the halls of the UN, at major conferences, in capitals around the world, and in the headlines.[46]

The end result is that international politics have become more populist in nature,[47] if not more democratic.[48] Of course, there are valid arguments that these groups do not necessarily improve the quality of representation for most of the world's population. Many of these groups themselves are not clearly accountable to any constituency, or only to a fairly narrow one. But even if they do not represent a democratic improvement on state-centric representation, they have quite likely contributed to official accountability. By publicizing their version of public affairs and challenging governments to refute their information or to justify – or alter – official practices, these groups have challenged the official quasi-monopoly on information that many states enjoyed in earlier times. The growing role of NGOs certainly serves to break the state monopoly on information, standard-setting, and norm creation, even if it does not usher in a new era of democratic international politics.

The twentieth century saw at least three important contextual developments that were largely underway before any sustained effort to develop an international legal regime for human rights. The "Rights of Man" had begun to make its way into a growing number of states institutionalizing democratic forms of government. In their official relationships with one another, states were increasingly willing to acknowledge the rights of other states – or their agents – to monitor, verify, and practice surveillance, a trend that began prior to World War II but accelerated thereafter. Nongovernmental actors had long taken up various international causes, from slavery to peace to disarmament, but the

42 Resolution 1296 (XLIV) of the ECOSOC (23 May 1968). Prior to the adoption of the UN Charter, in only one international institution (the ILO) did NGOs have formal legitimacy and power (Korey 1998:52).

43 Christine Chinkin writes that, through the accommodation of NGO demands for inclusion in the international forum "the concept of civil society has infiltrated the formal structures of the international legal system" (2000:135). However, some scholars have noted how uncertain and irregular NGO involvement is in UN human rights activities; see Posner 1994.

44 Shelton 1994.

45 Ron et al. 2005; Tolley 1989; Wapner 1995.

46 For a discussion of NGO participation in major conferences, see Azzam 1993; Friedman et al. 2005; on NGO presence in capitals around the world, see van Boven 1989–90.

47 Johnston 1997. For a general discussion of nonofficial challenges to state authority, see Mathews 1997; Schachter 1997.

48 For an argument that these processes help to democratize the process of international standard setting, see van Boven 1989–90.

pervasiveness of these actors has undeniably intensified. Yet, none of these developments alone can adequately explain why the issue of human rights assumed central importance at mid-century or why governments agreed for the first time to fashion international legal agreements to bind their domestic policies and practices. In order to understand the international legalization of human rights, we need to understand the broader pattern of international conflict and domestic oppression in the twentieth century.

THE INFLUENCE OF WARTIME ON HUMAN RIGHTS

The most striking fact about the international law of human rights is its nearly complete absence prior to the end of World War II. To give the sense of a revolution in legal thinking in the rights area, Michael Ignatieff has noted, "In 1905, a leading textbook in international law concluded that the so-called 'Rights of Man' enjoyed no legal protection under international law, because it was concerned exclusively with the relations between states."[49] In fact, some have noted that international law served largely to denigrate human rights because it was often complicit in supporting imperialism, which in turn rested on wide-ranging forms of exploitation. At the same time, imperial law demanded institutional changes supportive of European freedoms – freedom of movement, religion, property, commerce, and dignity.[50] Nineteenth-century British legal scholars were apt to hold that "International law has to treat natives [of Africa, for example] as uncivilized. It regulates for the mutual benefit of the civilized states the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded."[51] Martti Koskenniemi has written of the period that treatment of natives within European empires had, practically speaking, no implications in international law.[52] True, there were a number of international agreements in the nineteenth century with a "humanitarian" character,[53] but when it came to the rights of local subjects, respect for sovereignty typically provided a convenient pretext to remain aloof. Henry Morgenthau's quotation at the beginning of this chapter captures the tragic indifference international law displayed toward human rights early in the twentieth century.

The Great War provided the context to revisit the human rights issue – especially as it applied to the self-determination of peoples in the wake of the breakup of the Austro-Hungarian Empire and the last gasps of the Ottoman

49 Ignatieff 1999:313. The book he was referring to is A. H. Robertson and J. G. Merrils (1905), *Human Rights in the World*, 4th ed., Manchester: Manchester University Press, 1–23.
50 Anghie 2005:86.
51 Westlake 1896:143. Quoted by Koskenniemi 2002:127.
52 Koskenniemi 2002:128. Koskenniemi writes that the appeal to a broad civilizing mission as justificatory rhetoric for the imposition of European sovereignty was "the shadow of a disturbed conscience" (148).
53 Nussbaum 1954:198.

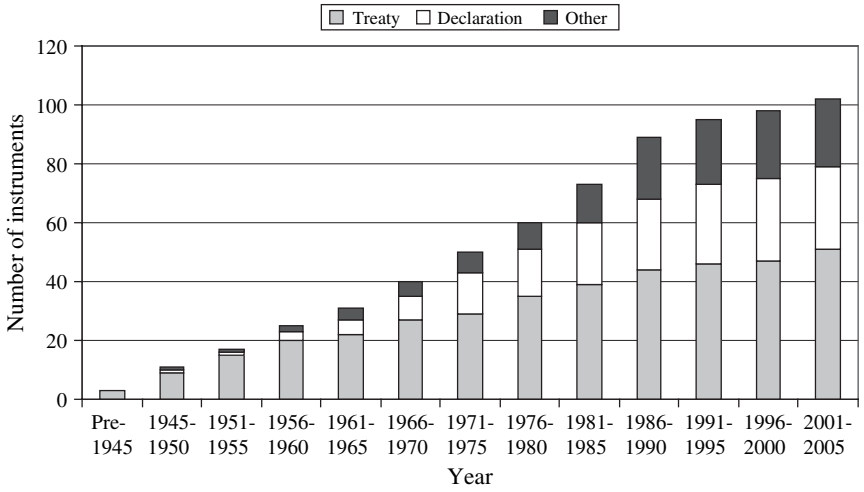

Figure 2.6. International Human Rights Instruments in Force. *Source*: UN, Office of the High Commissioner for Human Rights, http://www.unhchr.ch/html/intlinst.htm. "Other" includes a wide range of nonbinding instruments, such as proclamations, understandings, principles, safeguards, guidelines, recommendations, and codes of conduct.

Empire. Upon his arrival in France in 1918, American President Woodrow Wilson was seen as the harbinger of a new era,[54] his "Fourteen Points" ushering in "the principle of justice for all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another. . . ."[55] Such lofty goals, however, were undermined by more traditional great power concerns, and while a few plebiscites were held to honor this vision of self-determination, the decisions on the boundaries of new states were for the most part made by the victorious powers.[56] Moreover, while the language appealed to a universal vision,[57] the major European powers favored only the independence of

54 See Manela 2006.

55 Woodrow Wilson, "The Fourteen Points Address," as quoted in Ishay 1997:303–4. Wilson's speech can also be found online at http://www.lib.byu.edu/~rdh/wwi/1918/14points.html (accessed 17 November 2006).

56 After World War I, plebiscites were held under international auspices, as provided by the peace treaties or by the Venice Protocol as follows: Schleswig, 10 February and 14 March 1920; Allenstein and Marienwerder, 11 July 1920; Klagenfurt Basin, 10 October 1920; Upper Silesia, 20 March 1921; Sopron, 14–16 December 1921. See the discussion in Beigbeder 1994:80–8.

57 Recent historical studies of the "Wilsonian Moment" examine how "the call for self-determination fired the imaginations of countless nationalists in the colonial world." Steigerwald 1999:98. See also Manela 2001. The Atlantic Conference had a similar effect during World War II.

nationalities in the Balkans and ignored independence claims from their colonies. Nor did the newly created League of Nations promote these claims, although it did oversee a system of mandates administered by the victorious European powers that was designed to move certain territories toward self-government. Racial and religious impartiality were written into the League Covenant,[58] but the mandate system was based on the assumption of "tutelage" rather than rights as such. The Polish Minority Treaty of 1919 and the Treaty of Riga, which brought a formal end to the Polish–Bolshevik war in 1921, contained provisions to protect Jewish, Ukrainian, Belarussian, and Lithuanian groups upon Polish independence.[59] These agreements had little effect as ethnic tensions intensified with the Great Depression and the rise of fascism.

The experience of the Great War touched other areas related to human rights as well. The war had empowered workers to a much greater extent than in the past. The International Labor Organization (ILO) was founded in 1919 to enforce better labor standards. It also called for a maximum working day and week, an adequate living wage, and the protection of various classes of workers against a range of risks and forms of employer abuse.[60] The war had orphaned thousands of children across Europe and beyond, concern for whom gave rise to new NGOs to defend children's rights. A terse Declaration of the Rights of the Child[61] was drafted by Eglantyne Jebb (founder of Save the Children Fund) in 1923 and adopted by the League of Nations in 1924. The war experience also provided an impetus to try to inject humanitarian considerations into the laws of war themselves. In Geneva in 1929, the major powers concluded an important agreement relating to the treatment of prisoners of war, which, among other provisions, was meant to protect such prisoners from being forced to provide information to captors and to guarantee them adequate food, shelter, and medical attention.[62] For the first time, warring states accepted neutral inspection of prison camps and the exchange of prisoners' names and agreed to correspondence with prisoners. Significantly, however, neither Japan nor the Soviet Union was to become a party. Nonetheless, these agreements represented "considerable progress" toward improving the rights of soldiers in wartime.[63]

Despite this progress, these efforts were far from a comprehensive approach to human rights. Treaties were concluded ad hoc, based on the salience of particular issues, but without serious institutional supports. Their geographical

58 Article 22 of the League Covenant says in part: "the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals. . . ." See http://www.yale.edu/lawweb/avalon/leagcov.htm#art22 (accessed 17 November 2006).

59 Some 15 or 16 treaties were concluded after the First World War on the issue of minorities. See, for example, the discussion in Burgers 1992:449–50; Claude 1955.

60 See relevant passages on the ILO in Endres and Fleming 2002.

61 The text can be found at http://www1.umn.edu/humanrts/instree/childrights.html.

62 The text can be found at http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm.

63 Nussbaum 1954:267.

reach was limited, and important powers often opted out. Some were nonbinding. On the whole, these efforts paled in comparison to the challenges presented by the Great Depression, which intensified ethnic conflicts in many countries. Despite ardent liberal hopes to the contrary,[64] these accords were also trampled under the boots of the growing fascist movements in Europe and Japan. As Martha Minow summarizes this period, "Struggles to create new institutions to promote and secure respect for human rights, however impressive compared with their predecessors, produced more an idea than a practiced reality."[65] It is only a slight exaggeration to say that prior to the end of the Second World War, the state, with respect to the treatment of its own people, was a "moral black box."[66]

The turning point for the development of the rights regime was World War II. The turn came before the full revelations of Nazi atrocities; it began with the articulation of war aims themselves. The Allied powers – and especially the United States, which remained until December 1941 formally out of the war – needed a clear articulation of war aims behind which their publics could unite. For the United States, that statement was initially articulated by President Franklin D. Roosevelt in January 1941 in his famous "Four Freedoms" speech to Congress. By sketching a blueprint for a new world order founded on freedom of speech, freedom of religion, freedom from fear, and freedom from want, Roosevelt hoped to galvanize American support for the war effort but he also raised hopes about the nature of the new world order. In a ship anchored off the coast of North America, Roosevelt and Winston Churchill reiterated these values in the form of the Atlantic Charter. Whether these were genuine visions of the future of human rights or a way to get material support for the Allied cause,[67] these pronouncements had a singular impact on the hopes of oppressed peoples the world over. Not least was the effect among those within the United States itself. As Caroline Anderson has written, "For African Americans . . . the Atlantic Charter was revolutionary. It was something, as NAACP Board member Channing Tobias declared, that black people would be willing to 'live, work, fight and, if need be, die for.'"[68]

Exactly how these principles would be ensconced in the postwar multilateral architecture was a central issue in discussions framing the charter of the new UN. Despite the hopes they raised in 1941, neither the United States nor Great

64 See a maudlin contemporary plea for international law development in the early postwar years in Nippold and Hershey 1923.
65 Minow 2002:61.
66 Wenar 2005:286.
67 Universalizing human rights is interpreted as part of the U.S. hegemonic strategy for winning the war and assuming a central place in the new world order by Evans (2001:18–19). See also Loth 1988. For a brief historical treatment of the struggle between liberal ideals and realpolitik as it pertains to the Atlantic Charter – in particular, the shifting positions of Roosevelt and Churchill – see Olson and Cloud 2003.
68 Anderson 2003:17.

Britain was especially keen to give the new global institution much power to take action to protect human rights. In the United States, support for a formal role of the UN in enforcing rights ran up against the power of the southern Democrats in the Senate. Congressional leaders in the South were confronting a civil rights movement that had gathered steam during the war;[69] the last thing they wanted was a new international institution that would have the authority to meddle in the South's unique form of racial "justice."[70] Nor were the British especially enthusiastic to give the UN an expansive human rights mandate, given the restive state of some parts of their empire.

The problem was that the door to universal rights as an ordering principle of the postwar peace had been opened more than a crack by grandiose references to "Four Freedoms" and reinforced in the Atlantic Charter and elsewhere.[71] The full extent of the Holocaust was just in the process of becoming fully revealed to a world reeling from unspeakable atrocity on a massive scale.[72] Despite the clear absorption with realpolitik at the highest levels of the U.S. and British governments, grassroots movements demanding attention to human rights were cropping up around the world, not least within the United States itself.[73] Not to include *some* reference to human rights in the charter of the new global institution would have been almost impossible. At their meeting at Dumbarton Oaks in 1944 to discuss the outlines of the postwar peace, the United States, the United Kingdom, the Soviet Union, and China drafted a plan for a Security Council they would dominate, but the plan was harshly criticized by smaller powers for hardly addressing human rights.[74] These views were also expressed at the San Francisco conference in April 1945, to which prospective member states and NGOs were invited. One of the concerns of several Latin American countries – Chile, Cuba, and Panama in particular – was that the organization should more squarely address human rights. The initial great power proposal was condemned by anticolonial leaders, from Mahatma Ghandi to Carlos Romulo to Ho Chi Minh to Kwame Nkrumah, for disregarding the rights of

69 See Berman 1970:41.

70 According to Anderson (2003:44), "The Southern Democrats ruled the Senate. That was the bottom line. Circumventing the Constitution already required their eternal vigilance; the last thing they wanted was a UN Charter that provided yet another legal instrument that the NAACP and African Americans could use to break Jim Crow."

71 Borgwardt 2005.

72 While the horrors were being revealed to the world at large, there is considerable historical evidence that by 1942 – and earlier, by some accounts – the leading Allied figures had a fairly detailed knowledge of the plight of the Jews and still were late to act. Polish courier Jan Karski was smuggled into a death camp near Izbica, Estonia, and was able to provide a firsthand report to, among others, Anthony Eden and President Roosevelt. See Olson and Cloud 2003:208; Wood and Jankowski 1994. Slightly less well known, Roosevelt's response to the Katyn massacre – in which thousands of Polish officers were executed by Red Army personnel – was one of annoyance rather than concern over the violation of human rights. The "graves question," thought Roosevelt, "wasn't worth such a fuss . . ." (Olson and Cloud 2003:269–70).

73 Lauren 1998.

74 Waltz 2001.

indigenous peoples living under colonialism. Presentations were made by Frederick Nolde of the Council of Churches and Judge Joseph Proskauer, president of the American Jewish Committee. The World Trade Union Conference, the Provisional World Council of Dominated Nations, the West Indies National Council, the Sino-Korean People's League, and the Council of Christians added their voices calling for revisions to strengthen the UN's rights mandate.[75]

The major powers relented, eventually backing the NGOs' proposals. The charter's preamble would contain the statement that "We the people of the United Nations . . . affirm faith in fundamental human rights. . . ."[76] But in so conceding, the United States was careful to ensure that the UN itself would not have the authority to actually intervene in the domestic rights sphere in any important way. John Foster Dulles, wary of the constraints posed by the U.S. Senate, inserted an amendment into the charter that "nothing in the charter shall authorize . . . intervention in matters which are essentially within the domestic jurisdiction of the State concerned." This move drew opposition from a number of delegations, including those of Chile, Belgium, and Australia. Nonetheless, it was "abundantly clear that the domestic jurisdiction clause was America's price for allowing human rights to seep into the UN Charter."[77]

There was no denying the reality, however, that human rights *had* seeped into the consciousness of governments and individuals around the world as one of the most pressing issues of the new international order. Nazi atrocities – the extent of which were revealed fully only toward the war's end – provided the galvanizing outrage that motivated the drafting of the world's first formal commitment to universal human rights. The UDHR,[78] negotiated as practically the first piece of business of the new UN, has been interpreted as a nearly line-by-line response to the horrors the Nazi Third Reich had perpetrated. Johannes Morsink's documentary account of the negotiations over each provision of the declaration leaves little doubt that the negotiating delegations were motivated to declare rights that had been systematically violated by Adolf Hitler, his followers, and those of his ilk. "This shared outrage explains why the Declaration has found such widespread support."[79] The postwar consensus eventually gave rise to unanimous support for the declaration, with seven abstentions, including those of the Soviet Union, Saudi Arabia, and South Africa.[80]

75 Ishay 2004:214. William Korey (1998:29) argues that inclusion of human rights in the charter would not have been possible without the relentless pressures from these and other NGOs.
76 Preamble to the UN Charter; http://www.un.org/aboutun/charter/.
77 Anderson 2003:50.
78 Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 127A(III), UN GAOR 3d Session (Resolutions, Part 1), at 71, U.N. Document A/810 (1948). The UDHR, as well as the six core treaties discussed here, can be accessed in full at http://www.un.org/Overview/rights.html. For a history of the diplomatic discussions leading to the UDHR, see Glendon 2001; Korey 1998; Morsink 1999; Waltz 2001; Weissbrodt and Hallendorff 1999 (specifically on fair trials provisions).
79 See Morsink 1999:91. On this point, see especially ch. 2 (pp. 36–91).
80 Abstainers also included Ukraine, Belarus, Yugoslavia, and Poland.

TOWARD LEGALIZATION: PROGRESS AND HESITATION

The UDHR has been widely noted as a crucial milestone in the creation of the international rights legal regime. The declaration was a consolidation of liberal rights propounded in the seventeenth and eighteenth centuries, as well as (thanks largely to the contributions of Chile's Hernán Santa Cruz and other Latin Americans)[81] many of the social and economic rights that had gained adherents during the Industrial Revolution and more recently during the Great Depression. These rights were acknowledged as universal, in sharp contrast to those extended under imperialism. Its inclusiveness and breadth have made this document, according to Mary Anne Glendon, "part of a new 'moment' in the history of human rights."[82] For writers such as Norberto Bobbio, the unique value of the declaration was the consensus it represented; he terms it "the greatest historical test of the 'consensus omnium gentium' in relation to a given value system."[83] Asbjorn Eide represents a broadly held view that lauds the UDHR as having inspired "an unprecedented evolution of international standard-setting both at the global and the regional level."[84] Certainly, representatives of the world's states had never explicitly acknowledged such a broad range of rights in a multilateral setting at any other time in history. Eleanor Roosevelt, the U.S. representative to the UN Commission on Human Rights (UNCHR), herself triumphantly compared the UDHR to the Magna Carta, the French Declaration of the Rights of Man, and the American Bill of Rights in her speech before the General Assembly upon its passage.[85]

Putting on the Brakes: The United States and the Politics of Opposition to Legalization

This important milestone had one characteristic that was, ironically, essential to its acceptance: It was not legally binding. Even in the aftermath of as shocking an historical epic as World War II, the world's initial commitment to international human rights was in the form of a nonbinding declaration, not a legally binding treaty.[86] The United States, for one, would not have been comfortable with the document otherwise. For one thing, opposition formed against the panoply of economic rights that drafters of the declaration such as the Canadian John Humphrey, a social democrat (supported by much of Latin America), had

81 Glendon 2003:35.
82 Glendon 1998:1164.
83 Bobbio 1996:14.
84 Eide 1998:abstract.
85 Roosevelt 1947:867.
86 The weakness of the declaration – its lack of enforcement and institutionalization; the degree to which states had unanimously agreed on its nonbinding nature – signaled the triumph of mere symbolism over effective action, according to Hersch Lauterpacht, one of the major international legal scholars of the day. See the discussion of Lauterpacht 1950:397–421 in Koskenniemi 2002:395.

included. The United States, along with France, had opposed most of this language, but much remained prominently featured in the final document.[87] Even the commitment to civil and political rights provoked concerns among restive southerners in Congress about UN meddling in local affairs. In the end, the United States voted in favor of the UDHR, but precisely because it was "only" a statement of principle. Carol Anderson captures American sentiment well: "As John Foster Dulles later explained to a very wary and hostile [American Bar Association] the Declaration of Human Rights, for all that it was, was not a legal document. Rather it was more like America's 'Sermon on the Mount' in the 'great ideological struggle' between the United States and the Soviet Union."[88]

The gathering Cold War in fact had an important effect on the development of the human rights regime. Competition with the Soviet Union had a great deal to do with U.S. policy – both domestic and international – in the realm of rights. Domestically, the heating up of the Cold War gave urgency to civil rights reform in the United States, while internationally, it made the United States ever more wary of international authority to enforce rights. One early episode was especially telling in this regard. In October 1947, soon after the founding of the UN Commission on Human Rights, the Soviet Union supported a proposal to consider a petition by the National Association for the Advancement of Colored People (NAACP), drafted by the historian W. E. B. Du Bois, calling attention to the long history of cultural deprivation suffered by the African American.[89] The commission rejected the proposal that December, but from that incident many in the United States drew the lesson that the commission should be made as toothless as possible.[90] According to William Berman's compelling account, the embarrassment caused by the constant reminders during the human rights debates of the late 1940s and 1950s of "imperfections" in American democracy helped to build a fire under the Truman administration to confront racial injustice to a limited extent at home.[91] Much evidence suggests that the Truman administration was acutely conscious of the difficulty the

87 Irr 2003; Morsink 1999.

88 Anderson 2003:131. U.S. courts have consistently upheld the nonbinding nature of the declaration. See Connor (2001) on the unwillingness of the United States to accept international legal obligations (as opposed to declarations); see also Evans 1996.

89 "A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress, Prepared for the NAACP," drafted by W. E. B. Du Bois, with the assistance of Milton Konvitz, Earl Dickerson, and Rayford Logan (Box 354 NAACP Papers, Library of Congress); cited by Berman 1970:66.

90 Eleanor Roosevelt, as the U.S. representative on the commission, also opposed a complaint submitted to the UNHRC charging South Africa with human rights violations associated with apartheid, concerned that "it would set a dangerous precedent that could ultimately lead to the United Nations investigating the conditions of 'negroes in Alabama'" (Anderson 2003:3).

91 This is the main theme of Berman's (1970) book; see also Dudziak 2000; Krenn 1998. Anderson (2003) cautions that the Cold War should also be understood to have undermined the ability of African Americans to claim social and economic rights, as these were characterized as inspired by and sympathetic toward Communism.

United States would have in credibly leading the "free world" when much of its own population was denied basic political rights and legal protections.

Just one day before the vote ratifying the UDHR, the UN General Assembly (UNGA) had adopted – also unanimously – its first legally binding multilateral treaty text, the UN Convention on the Prevention and Punishment of the Crime of Genocide. Adopted after relentless lobbying pressure from private groups and individuals such as Raphael Lemkin, a Polish émigré turned Duke University law professor,[92] no treaty could be a clearer response to the treatment of the Jews, Slavs, and other ethnic groups at the hands of the Nazis. The convention came on the heels of the Nuremberg trials (1945–46) and the Tokyo trial (1946), in which former Nazi and Japanese leaders were indicted and tried as war criminals, thus vindicating the persecuted and setting the precedent that national leaders were not immune from responsibility for such atrocities.[93] The Genocide Convention reinforced these rulings, making individuals – heads of state included – punishable for such crimes.[94]

The debates over the Genocide Convention revealed for the first time the difficulty that some states might have in ratifying a legally binding international human rights treaty. In the United States, the debate over ratification led to one of the most acrimonious discussions surrounding postwar foreign policy of the period. The Genocide Convention was opposed by conservative southerners in the Senate, who were concerned that its provisions might be used to hold individuals accountable in American or international courts for lynching and other forms of racial "justice."[95] Opponents of the convention raised the specter of federal power overcoming the rights of the American states in areas dealing with rights. The American Bar Association, and especially its Peace through Law Committee, led the charge in articulating these concerns: "If there is to be a succession of treaties from the United Nations dealing with domestic questions, are we ready to surrender the power of the States over such matters to the Federal Government?"[96] This group was largely responsible for making the arguments that converted a convention outlawing a heinous crime into "a subversive document undermining cherished constitutional rights. . . ."[97] The fight

92 Power 2002:51–76.

93 The effort to hold individuals accountable for war crimes has a longer history than this, including some roots in the fifteenth century. See, for example, Neier 1998. For a detailed discussion of the evolution of individual responsibility in international criminal law, see Ratner and Abrams 2001:ch. 1.

94 The convention provides (Article IV) that "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." The Genocide Convention entered into force in 1951. The text can be found at http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed 21 November 2006).

95 See the discussion in Tananbaum 1988.

96 Carl Rix, American Bar Association Committee Through Law, quoted in Kaufman 1990:41. For a flavor of the constitutional arguments made at the time, see MacBride 1955.

97 Kaufman 1990:62.

in the Senate over the ratification of the Genocide Convention inspired John William Bricker of Ohio to offer an amendment to the U.S. Constitution that would have severely limited the ability of the federal government to enter into international treaties. It failed by only one vote. But the episode was important for the development of the international legal regime for human rights, which would have to be constructed largely without the leadership of the most powerful democracy in the world.[98]

Meanwhile, the UN Human Rights Commission began to draft the first legal instantiation of the UDHR: a covenant to secure states' assent to the declaration's contents in legally binding form. The debate over the declaration proved prescient of the differences that were to develop over the contents of the first comprehensive human rights treaty. An early divide, aggravated by Cold War politics, opened up over civil and political versus economic rights, with the United States and some of its allies championing the former and the Soviet Union and much of the developing world the latter. The United States was an early advocate of separating the civil and political rights from the economic social and cultural rights in two distinct treaties.[99] Economic rights were "socialism by treaty," as far as Dwight Eisenhower was concerned.[100] On the other hand, the United States could enthusiastically endorse civil rights, such as free speech and expression and property rights, both of which dovetailed nicely with its opposition to the Soviet Union, and made these the centerpieces of its international rights campaign.

Yet, the bitter debate over the Bricker Amendment kept the Eisenhower administration from supporting even a free-standing ICCPR. The legacy of that debate, conjuring as it did threats to the U.S. Constitution and the intrusion of the UN into a cherished way of life, threatened U.S. participation in the international legal regime for decades to come. The Eisenhower administration's final decision to withhold support from the two human rights covenants was in the end not a difficult decision to make.[101] The United States proposed instead an "action program" that would focus on voluntary reporting of the status of rights to the commission.[102] Dulles, in his testimony to the U.S. Senate on the Bricker Amendment, asserted that the United States would work to influence human rights through "persuasion, education, and example" rather than through binding treaties.[103] In 1953, Eisenhower opened his remarks to the UN with the comment that there were better ways of achieving respect for human rights than by drafting formal treaties on the subject.[104] For the remainder of the

98 Kaufman and Whiteman 1988. On the problem of lack of leadership, see Moskowitz 1974.
99 Kaufman 1990:92–3.
100 Eisenhower 1963:287.
101 See, for example, Pruden 1998.
102 Anderson 2003:229.
103 Anderson 2003:230.
104 Anderson 2003:236.

Cold War period, the United States would remain officially quite aloof to the legalization of international human rights,[105] leaving the initiative to draft and campaign for ratification to the smaller states and legally oriented NGOs.

Early Agents of Legalization

The immediate task of converting the UDHR into binding law was carried out by the UN Human Rights Commission, supported by a coalition of smaller democracies, newly independent states, and private individuals and groups. The commissioners continued to act in their capacity as experts, but they could not help but be influenced by developments in the United States and the world more broadly. The withdrawal from active support of the Eisenhower administration was a major setback. The British were also losing whatever enthusiasm they had had for the project of legalization, at least at the global level. In 1951 the Foreign Office had instructed British representatives to the UN to "prolong the international discussions, to raise legal and practical difficulties, and to delay the conclusion of the Covenant for as long as possible."[106] The "go slow" approach was reflected in the attitudes of the UN leadership at the top level. In 1953, Swedish diplomat Dag Hammarskjold became secretary general; surveying the political terrain, he told John Humphrey, the director of the UN Division of Human Rights, "There is a flying speed below which an airplane will not remain in the air. I want you to keep the program at that speed and no greater."[107] Citing budgetary problems, Hammarskjold reduced staffing at the division and support for the UN *Yearbook on Human Rights* between 1954 and 1956.[108]

Whatever leadership was to be had for treaties "with teeth" at this time was to come from individuals from the smaller democracies. Charles Malik of Lebanon and Max Sorenson of Denmark were in favor of tough binding accords and worked to influence the drafting in this direction. Several French citizens in their capacity as international civil servants were active supporters of a strong covenant as well, including Rene Cassin, who had been vital to the drafting of the UDHR, and Henri Laugier, assistant secretary-general for the UN Department of Social Affairs (resigned in 1951).[109] Perhaps the most consistent advocate

105 Quite clearly, this is not to say that the United States did not support human rights around the world in very material ways. One consequence of the Cold War was that the United States poured millions of dollars into Japan and Germany in order to shore up liberal regimes there. See, for example, Orend 2002:230.

106 As quoted in Lester 1984.

107 The original quote can be found in John Humphrey's diaries; see Humphrey et al. 1994:163–5. According to Humphrey's diary entry of 13 March 1954, Hammarskjold had instructed him to "throw the Human Rights Covenants out the window."

108 King and Hobbins 2003:348–50.

109 See Laugier 1950. Glendon (2001:209) notes that Cassin was by this time somewhat removed from the drafting process, given his other responsibilities and his involvement with the elaboration of the European human rights regime.

of the meaningful legal elaboration of the covenants was John Humphrey, who had a strong hand in moving the declaration along toward its legally binding form.[110]

These liberals had to make room for the demands of an emerging coalition of newly independent states with different priorities that can be summarized in two words: anticolonialism and development.[111] The new reality in the commission was the presence of new voices representing the views of individuals from former colonial societies whose primary interest was assuring the right of control over political development as well as natural and other economic resources necessary for national development. The Soviet bloc allied with these new countries, championing the inclusion of national self-determination rights in Article 1 of both covenants, to the delight of governments from Asia to the Arabian Peninsula to the Americas.[112] The move served ultimately to broaden legal protections for "peoples' rights," but it also inserted delay and further polarization into the official debate about the treaties.[113]

Much of the unofficial rights dialog was taking place outside of the UN Human Rights Commission. The Cold War was a competition not only for military supremacy, but also for symbols that could be used to recruit allies and political adherents. Human rights became one of these symbols. The "high ground" from which such critiques were launched was often the standard of law, with its undertones of legitimacy and neutrality. Both the United States and the Soviet Union used legal critiques of one another's practices in their global competition to win respect and adherents. The Soviets supported the work of the (purportedly nongovernmental) International Association of Democratic Jurists (IADJ),[114] which had been very critical of McCarthyism in the early 1950s.[115] Concerned that the Soviets had "'stolen the great words – Peace, Freedom, and Justice',"[116] venerable establishment figures in the United States such

110 Glendon 2001:ch. 11.

111 Charles Malik wrote in his diary of ". . . a new host of questions subsumed under the rubric of 'self-determination of peoples' . . ." (Glendon 2001:207). On the importance of economic rights to developing countries, see Vincent 1986:76–91.

112 The two covenants thus begin identically: "Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." See http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

113 See, for example, Agi 1979.

114 Also sometimes translated as International Association of International Lawyers (IADL); see Tolley 1994.

115 Dezalay and Garth n.d.:24.

116 Dezalay and Garth 2006:234.

as John McCloy (high commissioner for Germany, 1949–52) and a small group of political lawyers (including Alan Dulles, president of the Council on Foreign Relations and deputy director of the Central Intelligence Agency [CIA]) formed the International Commission of Jurists (ICJ) in 1952. One of the original purposes of the ICJ was to take a law-based approach to countering the propaganda and policy moves of the Soviet Union: in Howard Tolley's words, to "mobilize the forces – in particular the juridical forces – of the free world for the defense of our fundamental legal principles, and in doing so to organize the fight against all forms of systematic injustice of the Communist countries."[117] In its earliest years, the ICJ did not concern itself directly with international law development; it did, however, articulate for a global audience Western conceptions of the rule of law that were to be reflected in the ICCPR, and to a much lesser extent in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[118]

The ICJ became important for the legalization of the international human rights regime because of whom it mobilized and the strategy it developed for rights protection. First, it is important to point out that despite its funding from the CIA, its early members were true liberals who took rights seriously both nationally and internationally. Indeed, their passion in the Cold War was tied to these values. And these were *jurists*; they wanted to use *law* to influence governmental practices, especially in parts of the world where the Soviet Union was gaining influence. Moreover, many of the early members were from the liberal New York Bar Association,[119] not the more conservative American Bar Association that had fought the Genocide Convention. Despite CIA backing (which was exposed in 1967), as early as 1955 the ICJ came to criticize communist regimes as well as fascist ones.[120] It truly did become an equal opportunity critic of the exercise of arbitrary governmental power vis-à-vis the individual, investigating, analyzing, and exposing such practices not only in the Soviet Union and the new People's Republic of China, but also in Spain and South Africa.[121]

Some of the same individuals who had been active in the legal battles in the Cold War context brought the strategy of legalization to later initiatives in the human rights area. Yves Dezalay and Bryant Garth's recent work reveals the networks of individuals whose first international human rights experience was with the ICJ, who became invested in – and experienced with – legal approaches to human rights and then branched out to other activist organizations, such as Amnesty International and Human Rights Watch.[122] These

117 Tolley 1994:34.
118 The ICJ dealt with economic rights largely in an individual property rights framework, for example. See the declaration on economic rights passed at the Congress of Athens (Weeramantry 2000:19).
119 Tolley 1994:33.
120 Tolley 1994; Weeramantry 2000.
121 Tolley 1994:50–1.
122 Dezalay and Garth 2006.

individuals applied their legal experience to the campaigns of these and other human rights organizations, which in turn played an important role in negotiating the wave of new treaties over the course of the next two decades.

The coalition of smaller democracies, newly independent former colonies, and increasingly legal activists were the prime movers in codifying most of the provisions of the UDHR in treaty form over the course of the 1950s and 1960s. The ICCPR, the ICESCR (both of which opened for signature in 1966 and entered into force in 1976), and the Convention on the Elimination of Racial Discrimination (CERD) (opened for signature in 1966 and entered into force in 1969) were among the earliest products of this effort. The ICCPR is a global expression of the broadest set of civil and political rights articulated in binding treaty form, enumerating rights to be free from arbitrary arrest, detention, and torture; freedom of thought, religion, and expression; equality before the law, and others. The ICESCR provides for a right to work, to reasonable working conditions, to form trade unions, social insurance, an adequate standard of living, education, and various cultural rights.[123] The CERD was especially salient during the process of decolonization and the dismantling of systems of apartheid and entered into force in only three years' time (open for signature in 1966; entered into force in 1969).[124] It explicitly prohibited apartheid and provided for a host of rights to be provided equally and without respect to race.

THE 1970S AND BEYOND: THE ACCELERATION OF LEGAL DEVELOPMENT

The ideological competition of the early Cold War period eventually gave way to the more pragmatic approach of the Nixon administration. Human rights had settled into a fairly "well-defined consensus" that, in Evans's view, had "simpli[fied] the politics of human rights by reducing the debate to little more than an ideological struggle. . . ."[125] This struggle was subject to the ebb and flow of the foreign policies of the major powers, which under the Nixon administration had taken a distinctly pragmatic turn. More generally, as Kenneth Cmiel has noted, "as the Vietnam War wound down, human rights emerged as a new way to approach world politics."[126] The détente policy of Richard Nixon and Henry Kissinger had less use for a strident appeal to human rights – but also reduced the role that rights played in U.S. foreign policy.[127] For the first time since the late 1940s, it became possible to think of the project of human rights as only loosely coupled with the containment of Communism.

123 For a discussion on economic, social, and cultural rights, see Felice 2003.
124 Banton 1996.
125 Evans 2001:25.
126 Cmiel 1999:para. 7.
127 Boyle 1993.

While the policies of the Carter administration have drawn the most attention as reorienting global attention to human rights,[128] some of the most profound changes in this period with implications for the legalization of the regime preceded Jimmy Carter's election. One was the decision of the U.S. Congress, shocked by State Department support for dictators such as Augusto Pinochet and lobbied by a growing network of organizations,[129] between 1974 and 1976, to begin to tie U.S. foreign aid to rights performance. Whether or not the United States used this policy wisely or consistently, one consequence was the premium it placed on *information gathering*.[130] Once aid depended on it, once the topic was open to debate on the floor of the Congress, fledgling NGOs had much more incentive to collect the facts in a systematic and credible way. The political market for credible human rights information had begun to boom.

A number of entrepreneurial groups formed to meet the demand and to have a voice in shaping the direction of U.S. rights policy. New organizations included the Lawyers' Committee for Human Rights (1975), Human Rights Watch (1978), and the Human Rights Internet (1976). New funding sources opened up as well, notably the Ford Foundation, which decided in 1973 to begin to fund human rights advocacy groups.[131] In the 1970s, Amnesty International decided to shift its tactics from advocating exclusively for the release of individuals to exposing broader patterns of abuse and advocating broader policy positions as well.

These developments had a resounding impact on the legalization of the international human rights regime. The repressive turn in Latin American politics provided a focal point for Amnesty International and other organizations to fasten on issues of physical integrity and torture. Amnesty International launched a campaign against torture in 1973 that, through its constant lobbying efforts, led to a UNGA Declaration Against Torture (1975) and eventually to the legally binding CAT (1984). Many published accounts of the CAT emphasize the crucial role that NGOs – Amnesty International, the ICJ, and the International Association of Penal Law, among others – had in prodding governments to negotiate the treaty and their role in shaping it as well.[132] Nigel Rodley,

128 Jimmy Carter's human rights policies are discussed in Crockatt 1995; Garthoff 1994.

129 For a discussion and critique, see Farer 1988:88. "Direct bilateral U.S. aid [to Chile] rose from $10.1 million in 1973 to $177 million in 1975, despite indisputable evidence of mass murder and savage torture authorized at the highest levels of the Chilean government." Farer notes that in 1975, Chile received $57.8 million under PL480 (Food for Peace), while the rest of Latin America, with 30 times Chile's population, received only $9 million.

130 Cmiel 1999:para. 32.

131 Cmiel 1999:para. 11; Sikkink 1993.

132 On the growing importance of NGOs in the treaty-drafting process of the 1970s and 1980s, see Forsythe 1985; Korey 1998; Leary 1979; Tolley 1989; van Boven 1989–90:214. Tolley (1989) notes that by 1989 the ICJ had contributed significantly to several notable successes: the 1977 Protocols to the Geneva Conventions, the UN CAT, the European Torture Convention, the African Charter on Human and People's Rights, and several declarations of principles approved by the General Assembly.

Amnesty International's chief legal adviser, was an especially active lobbyist and publicist during the campaigns of the 1970s and 1980s.[133] The coalition for legalization was a now-familiar one of officials from the smaller democracies (on the CAT, the Swedish UN delegation as well as Dutchman Jan Herman Burger) working in cooperation with NGOs. Neither the United States (which supported universal jurisdiction but did not become a cosponsor and did not immediately sign the draft) nor the Soviet Union (which wanted to reduce significantly the power of the implementation committee) were among the leaders in the effort to ban torture in a dedicated multilateral treaty.[134] Nonetheless, Jack Donnelly's research supports the conclusion that these efforts contributed significantly to the institutionalization of legally binding accountability structures over the course of the 1980s and 1990s.[135] The CAT is the first internationally binding treaty to define torture, and to obligate parties to prohibit it and to investigate allegations of its practice within their jurisdictions.[136]

In the meantime, rules against discrimination against particular groups were strengthened as well. Women's political rights had been an early matter for legalization. As early as 1948, the UN Economic and Social Council (ECOSOC) had created a Commission on the Status of Women (CSW), though it would be decades before the commission would become active.[137] The early postwar mood was favorable in many countries; the Convention on the Political Rights of Women promised greater political participation, and women won the right to vote in France, for example, for the first time in 1944 thanks to General Charles de Gaulle's wartime decree.[138] Discrimination against women had been prohibited by Article 3 of the ICCPR,[139] and discrimination against women in the workforce was taken up by the ILO in the 1950s.[140] But there was hardly any legal development at the international level until the mid-1970s, when the

133 For Rodley's assessment of the legal and institutional accomplishments during this period see Rodley 1986.

134 See the discussion in Clark 2001:60–4.

135 Donnelly 1998:ch 1; Orentlicher 1994.

136 The CAT is one of "... a growing number of international instruments [that] generally require the state to punish those who commit human rights crimes, such as extra-legal killings, disappearances, and torture, and to assure that victims are afforded redress" (Orentlicher 1994:426). Increasingly, decisions of the Inter-American Court for Human Rights and the European Court for Human Rights reflect legal norms requiring states to punish those who commit atrocious crimes (Orentlicher 1994:431).

137 Hernandez-Truyol 1999:18.

138 French women obtained the right to vote by the ordinance of 21 April 1944 issued by the Comité Français de Libération Nationale (CFLN, French Committee of National Liberation). See James F. MacMillan, http://www.leedstrinity.ac.uk/histcourse/suffrage/coredocs/coredoc3.htm (accessed 17 January 2007).

139 Article 3: "The States Parties to the recent Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

140 ILO Conventions No. 100, Equal Remuneration Convention (1951), and No. 111, Discrimination (Employment and Occupation) (1958). See Trebilcock 1999.

women's movement began to press for a treaty covering a broad panoply of rights for women.[141]

Women's issues gained international attention in 1975, which was proclaimed "International Women's Year." The first World Conference on Women was also held that year in Mexico City and was followed by the UN Decade for Women (1976–1985). The UN General Assembly adopted the most comprehensive treaty on women's rights in history with the passage of the CEDAW in 1979. The CEDAW defines and prohibits discrimination against women, and obligates parties to work to alter cultural patterns based on assumptions of women's inferiority and to provide women equal access to political rights, education, employment, and social benefits. The CEDAW did more than call for equal political and civil rights for women; as the result of input from the Women in Development (W.I.D.) lobby, it also acknowledged Third World perspectives in its preamble by making specific references to the rights of rural women to participate in development on a basis of equality with men.[142] The Second World Conference on Women, held in Copenhagen (1980), helped to maintain the momentum.

What certainly did *not* contribute to the momentum for international law to protect women's rights was the now familiar attitude of the U.S. Senate. The Clinton administration attempted to secure passage of the CEDAW in the 1990s but ran into many of the same concerns that human rights treaties had historically encountered, including the argument that the treaty would intrude on the balance of power between the federal and state governments.[143] In the face of opposition, the administration entered a series of fairly significant reservations, and in her effort to sell the treaty to the Senate Foreign Relations Committee, the State Department's deputy legal adviser earnestly noted, ". . . we are not talking about . . . changing U.S. law in any respect."[144] While U.S.-based women's groups were behind legalization, the United States, once again, decided to remain outside the formal treaty framework.

By the late 1970s, the international legal framework for protecting children's rights was still quite underdeveloped. The Polish government was the first to

141 Ashworth 1999:252.

142 Otto 1999:120.

143 In September 1994, the Senate Foreign Relations Committee reported favorably on the convention, and the Clinton administration announced at the 1995 Beijing Conference that ratification was one of its priorities. Two resolutions supporting ratification were referred to the House Committee on International Relations in 1997: HR Res. 96, 105th Congress, 1st Session (1997) and HR Res. 39, 105th Congress, 1st Session (1997). The newly Republican Senate took no action.

144 Halberstam 1999:147. Halberstam discusses U.S. reservations to exempt itself from obligations in four areas: private conduct (the obligation to enact legislation or take other action with respect to private conduct except as mandated by the U.S. Constitution); military service (the obligation to assign women to combat units); comparable worth (the obligation to enact comparable worth legislation; and maternity leave (the obligation to legislate to require paid or job-guaranteed maternity leave).

propose a comprehensive convention to address the needs of children and submitted a proposal to this effect to the UN Commission on Human Rights in 1978.[145] Poland's interest in this issue flowed from its experiences during the Second World War, when over 2 million Polish children were killed.[146] As was the case for the CAT and the CEDAW, NGOs played a significant role in both galvanizing states and developing an actual text. Several NGOs – Save the Children International,[147] the Polish Association of Jurists, the ICJ, and the International Association of Democratic Lawyers – were involved at various points early on. These and other organizations contributed to the working group set up by the UN Commission on Human Rights to address children's issues. By 1983, an alliance of 23 NGOs was participating in the drafting process. Some groups lobbied hard on specific issues; Rädda Barnen, the Swedish Save the Children Organization, for example, pressed hard for a provision making 18 years the minimum age for military service.[148] By most accounts, this alliance of NGOs had an important impact on the drafting of the convention: Their "imprint can be found in almost every article."[149]

The relatively swift and now nearly universal ratification of the CRC makes it easy to forget that there was actually quite a bit of resistance to the idea of a children's rights treaty in the late 1970s. Poland, several socialist allies, and many developing countries were supportive, but many among the Western developed countries were not convinced of the need and were wary of the timing. Representatives of the United States argued that few states had moved to implement provisions of the (nonbinding) 1959 Declaration on the Rights of the Child.[150] Canada's and Sweden's representatives called for a measured pace, noting that governments, specialized agencies, and other organizations needed time to express their views on the need for a convention. The United Kingdom's

145 The Rights of the Child, Fact Sheet No. 10 (Rev. 1). http://www.unhchr.ch/html/menu6/2/fs10.htm. Several histories discuss the history of the CRC negotiations. See, for example, LeBlanc 1995. For the history of specific articles, see Kaufman and Blanco 1999 (Article 27).

146 On the motives and role of Poland for the Children's Convention, see Cantwell 1992; Tolley 1987.

147 Established at the end of World War I in Geneva, this group had also drafted the 1924 declaration (Cohen 1990). The world's major NGO on children's issues, it now comprises 27 member organizations and operates in more than 110 countries. Information on the Save the Children Alliance can be found at http://www.savethechildren.net/alliance/index.html.

148 Rädda Barnen was not successful in its effort, however. The minimum age for children in armed conflict of 15, as laid out in the Geneva Protocol, was not raised to 18 in the CRC. One of the NGO group's major successes concerned juvenile justice protection. See Cohen 1990. More information on Rädda Barnen can be found at http://www.rb.se/eng/.

149 Cohen 1990.

150 The CRC had been preceded in 1959 by the Declaration on the Rights of the Child and in 1986 by the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, With Special Reference to Foster Placement and Adoption Nationally and Internationally. According to Pais, "The prevailing consideration in this body of texts was that children should be cared for, protected, and guided by their parents within the unity, harmony, and privacy of the family" (1994:185).

representative also thought that the convention was not well justified and was premature.[151] Nonetheless, these countries (especially the European ones) were among the most active participants in the drafting process. Human rights – especially children's rights – were, after all, politically awkward to oppose. Ironically, the states that participated the most in the drafting process were not the quickest to ratify.[152]

With the exception of the ICESCR, five of the six "core" human rights treaties discussed previously – relating to civil and political rights, nondiscrimination on the basis of race, banning torture, eliminating discrimination against women, and protecting the rights of children – contain optional obligations that enhance the ability of the international community to scrutinize implementation and compliance.[153] For example, the ICCPR's first optional protocol gives states an opportunity to express their acceptance of the competence of the UN Human Rights Committee (UNHRC) to review and make recommendations on individual complaints alleging state violations of the treaty. Article 41 invites states to make an optional declaration that they accept the competence of the UNHRC to review and make recommendations on complaints of other state parties. The ICCPR's second optional protocol bans the use of the death penalty by those states that accept its provisions. The CAT provides that states may optionally declare that they recognize the competence of the Committee Against Torture to hear individual complaints arising from allegations of violations under the treaty (Article 22). The CERD has a similar optional provision (Article 14), as does the CEDAW in the form of an optional protocol. The CRC has optional protocols relating to child soldiers (OP I) and the sale of children, child prostitution, and child pornography (OP II).[154]

The legal regime has been supplemented with important institutional supports over the years as well, many of which go beyond these consensual treaty commitments.[155] Methods were devised to subject the most egregious cases of massive rights abuse to collective scrutiny, without the consent of the alleged violator, through what has come to be known as "1503 procedures."[156] At the instigation of groups such as Amnesty International and the ICJ, the fact-finding capacity of the UN was improved through the use of increasingly credible special rapporteurs convened in cases of egregious alleged abuses in the areas of arbitrary execution, torture, and religious intolerance and discrimination.[157] Many observers view the development of UN monitoring to be on a positive path, see growth in the authority and stature of monitoring bodies, and believe

151 LeBlanc 1995:19.
152 LeBlanc 1995:47.
153 For a balanced and policy-oriented discussion of the way these treaty-based oversight mechanisms work in practice, see Klein and Universität Potsdam. Menschenrechtszentrum 1998.
154 For a discussion of the monitoring mechanisms related to the CRC, see Cohen et al. 1996.
155 On the phases of the strengthening of the role of the UN, see Pace 1998.
156 Tardu 1980.
157 Rodley 1986; Weissbrodt 1986.

the UN is playing an important role in socializing states about global human rights expectations.[158] Others are highly skeptical that an institution that itself has been plagued with corruption, and some of whose members with enforcement roles themselves have poor rights records, can credibly oversee important improvements.[159] As I will argue, the true significance of the treaties has been neither in the willingness of the UN collectively to enforce them nor in the will of individual governments to do so. Rather, the impact of international commitments on domestic politics has been most significant in realizing actual gains in most cases.

CONCLUSIONS

The political environment in which states make international legal commitments has changed fairly drastically over the past half century. The presumption of state accountability on multiple levels places treaty-making in a new and dynamic political context. The most important change has been at the domestic level: The spread of democracy around the world has made governments accountable to citizen voters. Norms of peer accountability have also grown, as reflected in the significantly greater number of agreements of all kinds among states that explicitly call for surveillance, monitoring, and reporting. Finally, states are increasingly held to account by international civil society – private groups that position themselves to offer new information, alternative interpretations, and unofficial judgments about state policies and practices.

These were important structural changes that have taken a century or more to unfold. Together, they have made the choice to use international law as a tool to enhance individual rights seem plausible. But the death and destruction of the Second World War lent an undeniable urgency and legitimacy to the enterprise. The promise that the war was fought in the name of Four Freedoms raised hopes for the place for human dignity in the new world order. The decision to place human rights in the UN Charter and then to enumerate an officially and universally endorsed set of rights as the General Assembly's first order of business sent a message that in the end was difficult to amend, elide, or retract. The message had been heard loud and clear from Montgomery, Alabama, to the villages of Kenya. New governments were at the table for the first time, and they had an interest in legitimizing the decolonization process and assuring their national self-determination, free from external interference. Neither superpower wanted to be bound by international law to provide its people with

158 On the strengthening of the system of UN monitoring, see Myullerson 1992; Pace 1998; Szasz 1999. On the growth in the stature and authority of the Human Rights Committee (the implementation committee for the ICCPR), see Ghandhi 1986; McGoldrick 1991. On the general success of the UN's socializing functions, see Forsythe 1985.

159 For generally skeptical accounts of UN enforcement mechanisms, see Donnelly 1986; Robertson 1999; Weisburd 1999. For a highly critical account, see Robertson 1999.

human rights, but ideological competition made it hard to come out against the new legal approach. Each in fact sponsored "nongovernmental" organizations that operated transnationally whose purpose was to demonstrate how the rival power was not living up to international rights standards. The U.S. Senate refused to ratify the treaties that a coalition of public interest lobbies demanded and the smaller democracies championed, but the process was both difficult to oppose and not easily controlled. Once the move had been made to draw up the twin treaties that made the principles of the UDHR legally binding, a precedent had been set. The Cold War pushed human rights treaties to the background, but the thaw of the 1970s offered an opportunity to deal with issues such as women's rights and the brutal repression in several Latin American countries in new ways. The "advocacy revolution" of which Michael Ignatieff has written was a critical part of the story by that time.[160]

But what remains to understand is how governments decided – or not – to engage the formal set of rules that these forces had set in motion. This chapter has set the context for understanding the appeal of legalizing human rights internationally in the mid-twentieth century. It has discussed how the gears were set in motion to build an international legal edifice to address individual rights. But each government faces its own choice as to whether to commit itself fully to the agreements reached in the multilateral setting. The United States, as we have seen, chose to support the principles but to eschew the obligations. What about other countries? How can we understand the decision to take these treaties through the formal process of ratification? It is one thing to participate in this process – but why commit to the outcome? The next chapter presents a theory of human rights treaty commitment that discusses governments' preferences for rights, as well as the domestic institutional barriers some face in formally ratifying. It also theorizes the strategic behavior in which governments sometimes have incentives to engage. Major parts of the legal regime were put in place by the mid-1960s, but its ultimate success would depend on governments' willingness to explicitly commit to the rights project, which is the focus of the following chapter.

160 Ignatieff 2001.