Measuring Acceptance of International Enforcement of Human Rights: The United States, Asia, and the International Criminal Court

Alexander Dukalskis* & Robert C. Johansen**

ABSTRACT

Developing normative indicators to measure governments’ consent to, promotion of, and compliance with international laws prohibiting genocide, war crimes, crimes against humanity, and other norms constituting the International Criminal Court (ICC) demonstrates that it is possible to calibrate variation in state conduct over time and to compare one state to another. The indicators make compliance more visible and amenable, both to encouragement by nongovernmental organizations and states, and to enforcement by the ICC. They show that legalization of these norms is currently progressing. Tracing the stances of selected states demonstrates the empirical and theoretical utility of the indicators.

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I. INTRODUCTION

Recent experience suggests that respect for human rights has expanded significantly since the origins of the Westphalian system of sovereignty. Yet to explore the evolving relationship between international human rights law and state power requires nuanced assessments of national governments' attitudes toward human rights norms. Such assessments, systematically conducted, can lay the foundation for both accurate explanations for state conduct and a deeper understanding of how to influence norm enhancement. In addition, having a systematic way of measuring closeness or distance among different states' positions on basic human rights could, over time, create awareness of ways that prevailing cultural norms in one or many societies may influence political decisions and value change.

Although excellent scholarship exists on the diffusion and effect of international human rights norms, much of it struggles to measure complex stances that states may take. For example, many studies that conclude that human rights norms do not produce a behavioral impact on state conduct dichotomize norm acceptance and rejection. Such an approach misses nuanced ways in which international law and state conduct interact. To illustrate, even if a national government ratifies a treaty specifying self-constraining norms that might be considered part of an incipient global "constitution," for constraints to be taken seriously usually requires implementation through domestic jurisprudence. In some instances, ratification alone may mean little,

3. For a review of this literature, see Emilie M. Hafner-Burton & James Ron, Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes, 61 World Politics 360 (2009).
while in other cases (e.g., the George W. Bush administration's view of the Rome Statute in 2001) signature alone may mean too much. Other nuances include the variety of different stances that a state may take toward a treaty that it has not signed and its degree of support for the treaty whether ratified or not. In short, gradations of norm acceptance and related conduct exist. Many states are neither “all in” nor “all out” regarding a particular norm, which suggests that to base analysis on the acceptance or rejection of an important treaty is a flawed foundation from which to analyze empirically the influence of international norms.

Developing a more precise metric of support for (or opposition to) norms is necessary to deepen understanding of how international norms and state conduct influence each other. In addition, calibrating more carefully the nature of state engagement with norms can aid understanding and encourage steps toward the further legalization of international human rights and humanitarian law. In the words of Martha Finnemore and Kathryn Sikkink, “norms are no easier to measure today than they were in the 1930s or 1960s, but conceptual precision is essential for both meaningful theoretical debate and defensible empirical work.”

A more subtle understanding of how states and norms interact is important for several reasons. First, it would enable scholars to explore unexamined areas that exist between “acceptance” and “rejection” of a treaty. Second, refining the relationship between norms and state conduct is crucial for constructing more effective strategies to compel compliance with human rights standards. In addition to scrutinizing state conduct and highlighting the small steps states taken toward greater compliance, it would also focus public attention on any negative steps that states take away from honoring human rights. In this sense, a fine-grained measurement of human rights and humanitarian norm disposition could act as an early warning system for those concerned with maintaining or improving the globe’s human rights record. Third, a more detailed analysis of how improvements in human rights have evolved historically suggests that minor steps, if acknowledged, rewarded, and consolidated, often lead to larger, lasting steps. But if unacknowledged and unappreciated, they seldom lead to lasting progress. Whether these expected outcomes may occur, and whether, in this domain of human and state conduct, greater accuracy in grasping reality will contribute to implementing higher ideals remains to be seen.

Finally, a more nuanced awareness of the interplay between conduct and norms would enable better understanding of the dynamics indicating

5. Finnemore & Sikkink, supra note 2, at 891.
6. Lauren, supra note 1, at 261.
that an external enforcer is not a necessary or sufficient instrument to test the influence of international law. Conduct may (or may not) respond to norms (or enforcers). Growing evidence indicating that countries can learn improved human rights performance from the policies of other countries suggests that carefully graduated indicators could help discern the essential ingredients in “learning” some benefits of legalization. A graduated scale could highlight changes in conduct seamlessly from hostility toward both norms and norm enforcers to the internalization of norms and the acceptance of international enforcers. Accumulating evidence on government acceptance of international enforcement of human rights, with the help of a rule-of-law scale, could clarify the correlates of legalization, which are only beginning to be understood.

To capture nuances in how states accept international enforcement of prohibitions of war crimes, genocide, and crimes against humanity, Normative Disposition Indicators (NDI) are developed below and applied to the stances of four Asian states and the United States toward the Rome Statute of the International Criminal Court (ICC). The ICC is an excellent institution on which to focus for this purpose because stances toward the ICC are relatively public and cooperation is easily observed. Furthermore, the ICC could become a profoundly important institution if it realizes its purpose of holding individuals, even heads of government, personally accountable for honoring existing international laws that prohibit genocide, crimes against humanity, and war crimes. This analysis examines Japan and South Korea, both liberal democracies, the People's Republic of China, an authoritarian system, and Bangladesh, a weak, semi-democratic government. The United States features prominently in this analysis because it is a major player in the security system of Asia and, more importantly, because it has the most complex relationship with the ICC due to its global material and normative interests in the role of relevant human rights law.

This analysis proceeds in four sections. The first reviews relevant literature on human rights and norm diffusion on which this study builds. The

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7. When it comes to deterring violations of human rights, Kim and Sikkink find that a mixture of material/coercive and social factors account for norm change. See Kim & Sikkink, supra note 2, at 945.

8. See id. at 945 for evidence of policy learning. See also Kurt Weyland, Theories of Policy Diffusion: Lessons from Latin American Pension Reform, 57 WORLD POLITICS 262 (2005); Peter Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 Int'l Org. 1 (1992).


10. From the Asian region, Afghanistan, Bangladesh, Cambodia, Japan, Mongolia, Republic of Korea, and Timor Leste have ratified the Rome Statute, with quite different meaning and consequences among these diverse states, signaling the need for a more nuanced way of measuring meaning than whether a state has ratified the treaty.
second develops a set of indicators to measure states' dispositions toward the ICC. The third traces each state's engagement with the ICC to illustrate the varied stances that these states have taken toward the ICC treaty, beyond simply accepting or rejecting it. The fourth explains the implications of this study for understanding norm acceptance and the normative context for the future of the ICC.

II. THEORETICAL CONTEXT: HUMAN RIGHTS NORMS AND STATE CONDUCT

During the two decades after the end of the Cold War, human rights and international norms scholarship increased. As balance-of-power politics seemed less able to completely explain the ways states engaged with the international system, scholars began to theorize the construction and circulation of international norms to understand better how legal norms and state behavior interact.

A special issue of *International Organization* dedicated to legalization has provided several useful conceptual tools. "Legalization," described as "a particular form of institutionalization, represents the decision in different issue-areas to impose international legal constraints on governments." Legalization refers to a set of institutionalized legal characteristics with three components: obligation, precision, and delegation. A norm obligation can range from an expressly non-legal norm to a binding rule, while precision can vary from a vague principle to a precise, highly elaborated rule. Delegation refers to how much states may transfer authority over interpretation, monitoring, and enforcement to other institutions. It can range from diplomacy as the least legalized to an international court or forms of binding arbitration as the most legalized. Focusing on legalization raises questions about when and why states would bind themselves in a legal process and how such processes influence state conduct.

The ICC represents what might be considered nearly maximal legalization in this issue area in this historical era: (1) high obligation based on explicit rules sustained by *jus cogens* norms, thereby applying to all, even without formal ratification of a treaty specifying a law; (2) high precision in the sense

13. *Id.* at 744.
15. *Id.*
that carefully elaborated rules specify permissible conduct in honoring the prohibitions of war crimes, genocide, and crimes against humanity; and (3) high delegation insofar as an independent international legal institution, the ICC, can hold individuals criminally accountable to international law if their domestic legal systems do not. If the Security Council makes a referral, a state’s nationals may be brought before the ICC even without the consent of their own state, an unusually high degree of delegation of authority.

If legalization focuses on particular concepts and categories, other work attempts to demonstrate empirically the influence of human rights norms. Early efforts focused on the role of human rights activism in opening closed regimes. These efforts mapped out a three-stage “life cycle” of norms where they emerge, encounter a “tipping point,” and cascade throughout the domestic politics of a state, after which they become internalized. Margaret Keck and Kathryn Sikkink theorized the ways in which activists promote and achieve norm change through what they label the “boomerang model.” This model suggests that activists in closed regimes make linkages with international human rights organizations outside their societies who are able to influence Western governments and international intergovernmental organizations, which in turn put pressure on the target state. Drawing on a similar theoretical perspective, Thomas Risse, Stephen Ropp, and Sikkink elaborate the “spiral model” of norm acceptance wherein states publicly commit to human rights for instrumental purposes, but then get pressed to accept their previously empty commitments by activists engaging in accountability politics. Although these theories have encountered criticism for downplaying the relationship between Western linkage and leverage and choosing cases predisposed to work with each respective model, they nevertheless provide powerful conceptual models for assessing the influence of norms in international politics. The models, however, lack detailed metrics for assessing a state’s normative disposition. Using the scale proposed below with the “life cycle” model, for example, would allow for a more accurate account of when and how “tipping points” occur and what developments encourage or hinder “norm cascades.”

A broader perspective that is considerably more ambivalent toward the autonomous influence of global norms has its roots in world polity

17. Finnemore & Sikkink, supra note 2, at 888.
18. Keck & Sikkink, supra note 2, at 12.
19. Risse et al., supra note 2.
22. Finnemore & Sikkink, supra note 2, at 895.
Polity theory scholars argue that models of political organization diffuse through associational and cultural processes, resulting in structural isomorphism. States gradually organize themselves in similar ways as they repeatedly interact with each other and as global forces and organizations influence emerging states. This theory proposes that the nation-state is a culturally constructed phenomenon that is embedded in a global culture and perpetuates its existence in relation to its external environment. The implication of this perspective for human rights standards is that if these norms become a firm part of global culture, and thus the only culturally acceptable way to organize political power, then they will become more salient in nation-states.

Technological change that alters communication and perceptual patterns may also encourage normative convergence. Peter Singer suggests that when government officials need to defend their conduct before the whole world, rather than simply before their own tribe or nation, they may feel a need to be more sensitive to the interests of people outside their own borders. Still, James Ron, in his study of Israeli interrogation techniques, questions the extent to which entry into the human rights polity improves state practice; it may simply encourage states to mask human rights abuses and repackage them as legitimate uses of force. Thus, while global norms may be adopted rhetorically, the unfortunate realities of domestic politics can obscure a considerable degree of dissonance between the relevant norm and state practice. Often such acceptance is a first step in the human rights legalization processes. How the international community can best employ a metric sensitive enough to identify real progress or backsliding and induce appropriate steps of legalization remains open for exploration.

One approach is to examine how particular norms gain acceptance. Amitav Acharya argues that norm diffusion results from norm-takers "building congruence" between global norms and local beliefs and practices. This perspective becomes more complex, however, if one takes seriously the notion that even if a state enters negotiations with a well-defined set of interests, the process of discussion and persuasion may change officials' perceived interests as various parties make their cases. Negotiation processes, furthermore, are not abstracted from political realities, and alliance or trade networks may influence the stances that particular states take toward certain

24. Id. at 173.
27. Acharya, supra note 2, at 248-49.
The relationship between discourse analysis and power relations is a complex theoretical issue with many normative changes unfolding over extremely long periods of time and after a process of repeated interaction between material reality and argumentative persuasion. Norm creation is rarely as simple as single-issue negotiations. Nor can norm creation simply be switched on or off. Norms unfold over time and thus do not often lend themselves to a simple accept/reject dichotomy. Specific indicators of state stances toward human rights treaties that capture more detail than a simple dichotomous variable are needed to supplement the scholarship reviewed here.

III. THE NORMATIVE DISPOSITION INDICATORS

Human rights norms are notoriously difficult to specify, measure, and assess, but disaggregating the different elements of a state’s disposition toward a norm is a promising way to make these tasks more manageable. Observers need to consider various legal elements of a state’s adoption of a norm such as: (1) signing, ratifying, and incorporating the treaty associated with it; (2) political and diplomatic considerations such as whether a state rhetorically and/or materially supports or opposes a norm; and (3) behavioral compliance with or violation of the norm’s content.

The proposed Normative Disposition Indicators (NDI) in Table 1 range from an “ideally committed state,” with a score of 15, to an “ideally opposed state,” with a score of -15. A government’s overall or composite numerical expression of a state’s normative disposition is the sum of its rating on three dimensions of its stance toward a given set of norms. First, the indicators consider the extent to which a state consents to the norms in question as they are being legalized in international relations. This is measured by the state’s international and domestic legal commitments. At one extreme is a state that receives a score of 5, which means that it has signed, ratified, and incorporated into domestic law the relevant international norm. Moving down the scale, a state has fewer legal commitments until at -5 it has no legal commitments.

Second, the indicators measure the extent to which a state promotes or blocks the norm in question. A state may have signed, ratified, and incorporated a norm, but still not promote it. This position differs from a state that shares the same formal legal commitments and also actively promulgates the

norm through rhetorical and material means. Similarly, a state that refuses to abide by the norm itself is qualitatively different from a state that rejects the norm for itself and also discourages other states from becoming committed states. Moreover, a state may not have ratified a treaty, perhaps because of legislative resistance to an executive initiative to sign a treaty, but still seek to promote it through diplomatic means. In any case, a state that employs diplomatic and substantial material resources to promote the treaty norm scores a 5 in this category while a state that employs those same means to frustrate the norm scores a -5.

Finally, the indicators measure the extent to which a state complies with the relevant set of norms. If a state is legally committed to a particular norm by being party to a treaty but does not thoroughly implement it, the state should be differentiated from a state that both legally commits and politically complies with the norm. Thus, a state that is in compliance with all elements of the treaty and provides support to extend compliance with major treaty provisions scores a 5. Conversely, a state scoring a -5 is not only in violation of the norm, but also spending diplomatic and material resources to defend noncompliance and indict the norm itself. Although state conduct will not always coincide exactly with the precise descriptions in the Normative Disposition Indicators, they provide a graduated calculus that helps measure conduct by assigning scores with consistency and objectivity. The analysis now turns to deploying this measurement scheme against the realities of state disposition toward the Rome Statute.

**IV. TRACING NORM DISPOSITION TOWARD THE ICC**

The following case studies illuminate the utility of indicators able to take account of varying degrees of commitment to legalization. They also show how states that have the same legal commitments under the Rome Statute due to their accession (or lack of) actually have different stances and actions toward the ICC. This complicates the norm acceptance/rejection dichotomy by providing a new foundation for further inquiry and a basis for norm entrepreneurs to offer more sophisticated and effective evaluations of state compliance. The analysis focuses on five states in the complicated Asian security and human rights complex—South Korea, Japan, Bangladesh, China, and the United States—both because these states display wide variation on their stances toward the ICC, thereby testing the utility of the NDI for measuring norms in a nuanced fashion, and because their domestic political systems and human rights commitments differ from one another, thereby testing the NDI’s ability to accommodate different institutional and value contexts.
### Table 1: NORMATIVE DISPOSITION INDICATORS

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<td>5 Signed, ratified, and implemented all treaty provisions</td>
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<td>4 Signed, ratified, and implemented many treaty provisions</td>
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<td>1 Signed and ratified the treaty with minor reservations and no implementation</td>
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<td>0 Signed and ratified the treaty with major reservations and no implementation</td>
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<td>-2 Signed and indicated that it would not ratify without reservations or revisions</td>
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<td>-3 Signed and indicated it does not intend to ratify</td>
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<td>-4 Has not signed</td>
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<td>-5 Indicated it never intends to sign</td>
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**Promote**

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<tr>
<td>5 Employs diplomatic and substantial material resources to promote treaty norms, ratification, and support</td>
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<td>4 Employs diplomatic and modest material resources to promote treaty norms and perhaps ratification</td>
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3 Employs diplomatic but no material resources to promote treaty norms and perhaps ratification
2 Employs only rhetoric to promote treaty norms
1 Employs rhetoric only in self-serving situations to endorse selected treaty norms
0 Does not promote or oppose treaty norms
-1 Employs rhetoric occasionally to oppose treaty norms
-2 Employs rhetoric actively to oppose treaty norms and ratification by others
-3 Employs rhetoric and diplomatic resources actively to oppose treaty norms and ratification by others
-4 Employs rhetoric, diplomatic, and modest material resources to oppose treaty norms and ratification
-5 Employs diplomatic and substantial material resources to oppose treaty norms and punish states that support the treaty

Comply
5 Complies with treaty provisions and decisions of the treaty body; offers diplomatic and material support for treaty implementation
4 Complies with treaty provisions and decisions of the treaty body; offers diplomatic but little material support for implementation
3 Complies with treaty provisions and decisions of the treaty body
2 Complies with most but not all treaty provisions and decisions of the treaty body
1 Complies with only some treaty provisions and decisions of the treaty body
0 Compliance with treaty and treaty body is inconsistent or a non-factor in state behavior
Table 1., continued.

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<td>-1 Compliance with treaty and treaty body is a non-factor; minor violations of norms may occur</td>
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<td>-2 Compliance with treaty and treaty body is a non-factor and significant violations of treaty norms occur</td>
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<td>-3 Occasional noncompliance with major elements of the treaty and decisions of the treaty body</td>
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<td>-4 Frequent noncompliance with major elements of the treaty and decisions of the treaty body; moderate resources employed to justify noncompliance</td>
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<td>-5 Overall noncompliance with treaty; substantial diplomatic and material resources employed to defend noncompliance of self and others and to indict treaty norms</td>
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<td>Normative Disposition Indicators Composite Scores:</td>
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A. South Korea

South Korea demonstrates a deep level of commitment to international criminal justice that is rare in Asia. Indeed, even using a generous geographical designation that runs from Fiji across the Asian continent to the Middle East and including Cyprus, only fourteen other Asian states are parties to the Rome Statute.31

In the years following its ratification of the Rome Statute in 2002, South Korea took many steps to fulfill its commitment to the treaty. Concurrent with ratification, the Ministry of Justice encouraged legislation needed to implement the Statute domestically. Legislation was drafted, circulated, and subjected to open hearings and public debate, after which the National Assembly passed the final bill.32 By virtue of the seriousness with which it implemented the treaty, South Korea achieves a 5 in the consent category of the NDI.

The NDI also calls for examining South Korea’s rhetorical and material support for expanding the norm embodied by the ICC. Korean representatives to the UN have encouraged outreach programs to increase support for the ICC.33 The current president of the ICC, Sang-hyun Song, is a South Korean who actively supports extending the ICC’s jurisdiction. He has led workshops and seminars advocating ICC norms. Furthermore, South Korea makes significant financial contributions to the ICC and, even though European states are vastly overrepresented in the ICC’s employment structure, some South Koreans are also employed by the ICC.34 At the ICC Review Conference in 2010, South Korea voluntarily pledged “to provide education and training programs for . . . other countries . . . with a view to helping them to strengthen their national criminal jurisdictional capacity and thus enhancing the principle of complementarity of the Rome Statute.”35 More-

31. Australia and New Zealand are not included in the Asian group; they are listed under the “Western European and Other States” category in the ICC listing of states parties.
over, South Korea promised “to provide a voluntary financial contribution to the International Criminal Court in order to assist its activities.”

South Korea scores a 5 on the NDI for promotion.

While South Korea is currently in compliance with decisions of the ICC, no decision has thus far directly impinged on South Korean material interests. As with any other state, if at some point the ICC were to render a decision perceived as contrary to South Korean interests, South Korea’s commitment to the ICC would be tested. How the South Korean government would respond is impossible to predict, although legalization can help backstop normative retrogression. This is only one of many situations in which a state’s disposition toward the norm may change when faced with trying circumstances. Research suggests South Korea should receive a 5 on the NDI for compliance. Combining the measurement of its conduct in terms of consent, promotion, and compliance demonstrates that South Korea’s acceptance of ICC enforcement is an increasingly positive disposition with a composite score of 15.

B. Japan

Japan presents a unique case of ICC engagement because, as Meierhenrich and Ko demonstrate, acceding to the norms of the Rome Statute required a renegotiation of the country’s post World War II constitution. In terms of the NDI, Japanese disposition to the ICC has changed markedly over the years as the state has responded to constraints imposed by its own domestic legal arrangements. Japan supported early efforts to create the ICC in the mid-1990s, but did not accede to the Rome Statute until 17 July 2007. While Japan lent substantial diplomatic and rhetorical support before this time, it was not bound by the provisions of the treaty and thus was not an advanced supporter of the norm or the legalization process establishing it. Japan’s combined efforts have moved it from an NDI composite score of 2 in the mid-2000s to an ideal score of 15 today.

The nearly ten year gap between the opening of the Rome Statute for ratification and Japan’s accession to it can be explained by Japan’s constitutional renunciation of force, which had impeded Japan’s full endorsement of international humanitarian law. The endorsement of international legal obligations that would be in force during times of war, it was argued, seemed

36. See id. for state pledges at the Kampala review conference.
to presume that a state of war could exist, which the Japanese Constitution explicitly forbade. Thus, while Japan generally supported the ICC, it was constrained in its ability to sign for several years. This situation illustrates the utility of a tool like the NDI. A binary view of accession/non-accession would have put Japan in the same category as a state like North Korea, which also had not signed the Rome Statute. However, although Japan supported the ICC during this period as much as its legal system allowed, North Korea did nothing to advance the norm of accountability and probably would have actively frustrated the intent of the ICC if it had been necessary from Pyongyang's perspective to do so. Clearly, these two states should be viewed differently with regard to their disposition toward the norm in question.

After legislation was passed between 2003 and 2004 allowing Japan to involve itself more actively in international humanitarian law, Prime Minister Shinzo Abe's government began the legislative process necessary to accede to the ICC. After the legislation passed through various committees, it was adopted in 2007 with widespread support.\(^{39}\) Japan has become a major supporter of the ICC and its largest financial supporter.\(^{40}\) In 2010, Kuniko Ozaki began a term as judge in the Trial Division of the ICC.\(^{41}\)

In addition to Japan's legal, financial, and behavioral support for the ICC, Japanese diplomats have called for the ICC and the international community to strive for universality. Japanese officials have lamented the underrepresentation of Asian states in the Assembly of States Parties.\(^{42}\) Indeed, at the 2010 Review Conference of the ICC in Kampala, the Japanese delegate pointed to Japanese efforts to promote the ICC to other Asian states by organizing conferences in India and Malaysia. He assured the conference that “Japan will continue its efforts to increase the number of States Parties to the Statute, particularly from the Asian region, towards achieving the universality of the ICC.”\(^{43}\) One day after signing the treaty, Japanese ambassador Ryuichiro Yamazaki encouraged the Philippines to join the ICC, saying Japan would “work even more closely with your government, and the same will hold true for other Asian nations that will join the ICC.”\(^{44}\) This new support for the ICC may be evidence of a continuing Japanese effort ultimately to enable

39. Id. at 244.
40. ICC BUDGET & FINANCE COMMITTEE, supra note 34, at 194.
41. Nineteen total judges currently serve in the ICC's three divisions.
it to obtain a permanent seat on the UN Security Council, but it is support nonetheless. Although, as an ally of the United States, Japan has not been pressed by US officials to sign a bilateral immunity agreement against the ICC, Japan’s support for the ICC is even more remarkable given its long-standing and deep-seated cooperation with the United States in its foreign policies.

C. Bangladesh

Bangladesh ratified the Rome treaty in 2010 amidst evolving domestic political developments, including mounting calls to address atrocities committed during the 1971 war between Bangladesh—then East Pakistan—and West Pakistan.45 These requests gained strength with the electoral victory of Sheikh Hasina’s Awami League in December 2008. The war between East and West Pakistan brought large-scale campaigns of terror and sexual violence committed by soldiers from West Pakistan and their domestic allies in Bangladesh. Jamaat-e-Islami (JEI) was one of the collaborators. Today, JEI is one of Bangladesh’s largest political parties, and is part of an opposition coalition with Khaleda Zia’s Bangladesh Nationalist Party (BNP) against the Awami League, one of the parties that had fought against West Pakistani forces in 1971.46

After parliamentary elections in 2008, the Awami League became the leading party in a large coalition with Sheikh Hasina as prime minister. This political configuration facilitated renewed interest in prosecuting those accused of committing crimes while aiding West Pakistani forces. Soon after Sheikh Hasina came to power in 2009, the 1973 International Crimes Tribunal Act was amended, and political will for prosecutions surged.47 The government made clear that it would not try to prosecute any individuals from Pakistan and would focus on Bangladeshi citizens who collaborated with West Pakistani forces. Critics claimed that these trials were mechanisms for the Awami League to undermine one of its main political opponents because the perpetrators targeted were likely members of the JEI. In fact, as a result, the government has detained a handful of JEI leaders and has prohibited others from leaving the country.48

46. See id. See also Blighted at Birth: The Odds are Still Stacked Against an Effective Tribunal, ECONOMIST (1 July 2010), available at http://www.economist.com/node/16485517.
Although the ICC has no jurisdiction over crimes committed during the fighting in 1971, the norms specified in the Rome Statute have served as a starting point for foreign governments and activist groups to push Bangladesh toward conducting trials in a fair and transparent manner. Only nine months after Bangladesh joined the ICC, Stephen Rapp, US Ambassador-at-Large for War Crimes Issues and former prosecutor for tribunals pertaining to Rwanda and Sierra Leone, visited Bangladesh at Dhaka's request to discuss possible prosecutions.\(^4\) In a press conference on 13 January 2011, Rapp argued that language from the ICC could be directly incorporated into the mandate of a Bangladeshi tribunal:

There are elements that have been set out by the ICC which this country is now a part of. The [Bangladeshi] Court could seek guidance in determining the specifics and the definition [of crimes] from those ICC definitions. It wouldn't be mandatory, but . . . the parties would then know what those words mean (Rapp, 2011).\(^5\)

Domestic politics may contribute to international legalization whether intending to do so or not. Officials in the Awami League government recognize that, without safeguards for fair and transparent legal procedures, trials may run the risk of being seen as mere political attempts to target opponents rather than serious efforts to achieve justice and protect human rights.\(^5\) Although the timing and motivation for investigations may be suspect, the initiative, if not compromised too severely, could contribute to the norm of international justice in the long run. In the history of legalization processes, international norms are often adopted for instrumental reasons, yet still become more deeply rooted, impartial, and influential in the long term. Time will tell if Bangladesh follows this course, but political leaders' potential use of ICC standards and protocols as a reference point in conducting important trials indicates that the norms of the Rome Statute may contribute to legalization processes both internationally and domestically.

It may also be possible that support for joining the ICC grew from a recognition by some people that “for many individual states, joining the Court gives them another way to protect their citizens against atrocities” in the future at the hands of others should leadership change.\(^5\) In any case,
Bangladesh's normative disposition has fluctuated significantly in recent years. Before 2010, it would have scored -4 on consent, 0 for promotion, and -1 for compliance, with a composite score of -5. By 2011, it scored 2 for consent, 2 for promotion, and 3 for compliance, with a composite score of 7. The increase from a -5 to a 7 is a major improvement that could further increase by incorporating the treaty norms into domestic legislation and tribunal procedures.

D. China

Although China voted against the Rome Statute in the Preparatory Commission (along with the United States and five other states) and has not moved toward ratification since then, it played an active role in drafting the treaty and has participated as an observer in deliberations by state parties ever since. Lu Jianping and Wang Zhixiang, professors of law at Renmin University and the Law Institute of the Chinese Academy of Social Sciences, respectively, have summarized five reasons why the Chinese government has not joined the ICC.53

(1) The ICC has jurisdiction that is not based solely on the principle of voluntary state acceptance.54 In the Chinese view, this violates the principle of state sovereignty. Moreover, the principle of complementarity, as now formulated, is unacceptable to China because it grants the ICC the authority to judge whether a country's judicial institutions are able and willing to investigate and prosecute the accused, thereby activating (or de-activating) complementarity provisions to restrain the ICC from pursuing a case.55

(2) The ICC may prosecute violations of the rules of war not only in international war, but also in internal armed conflicts. China does not want any international investigations of internal armed conflict in China.56

(3) The ICC may prosecute some crimes, such as crimes against humanity, even though they do not occur in war. Chinese officials argue that such crimes fall outside of international criminal law.57

(4) China opposes allowing the ICC to consider crimes of aggression, as may someday be possible following the approval by states parties of

54. The Court has jurisdiction over people of any nationality who are alleged to have committed a relevant crime in the territory of a state that is a party to the Rome Statute or when cases are referred to it by the Security Council. Yet this Court jurisdiction is over individual people, not states.
56. Id.
57. Id. at 612.
a definition of aggression. The Chinese believe a role for the ICC in that domain would diminish the power of the UN Security Council in handling aggression.\textsuperscript{58}

(5) The powers of the independent prosecutor may enable the ICC to undertake politically motivated proceedings.\textsuperscript{59}

From time to time, Chinese representatives have made cautiously supportive comments about the ICC despite their legal reservations and refusal to ratify the treaty. For example, the Chinese representative said in the United Nations General Assembly’s Sixth Committee in 1999 that “China is ready to join in the effort to set up the Court and to promote its universality and authority.”\textsuperscript{60} Several years later, as the Rome Statute came into force, the Chinese representative said “if the operation of the court could bring to justice all those individuals who have perpetrated most serious international crimes, this would not only help build confidence in international justice, but will also ultimately contribute to the maintenance of international peace and security. This is the outcome we fervently hope for.”\textsuperscript{61} In 2003, in his address to the Sixth Committee, the Chinese delegate said, “China is ready to work tirelessly with other countries towards this end” of “an independent and just international judicial body.”\textsuperscript{62} Again in 2005, the Chinese representative said “we still hope that the Court will win the confidence of non-Contracting Parties and wide acceptance of the international community through its work.”\textsuperscript{63}

Chinese officials have frequently expressed concerns about whether the ICC would avoid political bias, a view that it shares with the United States. However, China has never associated itself closely with US policies toward the ICC, especially US efforts to make exceptions for itself from ICC obligations related to service in UN peace operations.\textsuperscript{64} Although a review of China’s national legal code would be necessary if China wanted to participate in the ICC in order to ensure that the crimes in the Rome Statute would be covered by domestic law to enable national judicial institutions to justify the immunity that could be provided for China by the principle of complementarity, there is no evidence that such a review has been undertaken.

China has shown extreme sensitivity in protecting its own sovereignty and in avoiding any precedents that could compromise its complete control over

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{61} Id. at 2.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
domestic relations. China’s main concern is that all new global mechanisms, including the ICC, “are not going to infringe upon its sovereignty by delving into particularly sensitive cases such as Tibet.” 65 Although there has been a cautious, slight evolution in attitude toward international justice, China is “still hostile to the slightest idea of interference in the domestic affairs of nations and hence, in China’s own affairs.” 66

China willingly voted with other permanent members of the Security Council to establish the ad hoc tribunal for the former Yugoslavia because this tribunal was established only with the concurrence of the permanent members and could not be employed against their wishes. Yet, China abstained in establishing the tribunal for Rwanda due to Rwanda’s opposition to it. 67 Nonetheless, the former chief negotiator for the Chinese delegation at the Rome conference later became the presiding judge of one of the ICTY’s trial chambers. 68

Some observers have noted a clear contrast between China’s stance and that of the Bush administration. China did offer slight, highly qualified support for the ICC, while the Bush administration engaged in overtly hostile rhetoric and diplomatic and financial punishments for states that refused to sign immunity agreements with it. China appeared to enjoy taking higher moral ground than Washington. 69 Although China had supported the first US request for immunity for US nationals in the context of UN peacekeeping, the Chinese ambassador indicated that China could not support a renewal of that US request in 2004, because to do so would seem to extend legal cover for the US military’s “misbehavior [in treatment of prisoners in Iraq], which is a violation of international and humanitarian law.” 70 Unlike the United States, China did not threaten to veto the resolution to transfer the Darfur atrocities to the ICC prosecutor, even though China has well-known protective policies toward Sudan and has blocked a large range of possible sanctions against Sudan. In informal statements, China did say that it would have preferred to see suspects tried before Sudanese courts. Later, China objected to a statement by the Council president calling on the Sudanese government to comply with and execute arrest warrants for Sudanese officials Ahmad Muhammed Harun and Ali Kushyd on grounds that such a statement would not be conducive to peacekeeping efforts. 71 China also had

66. Id.
67. Id.
68. Id.
69. Id.
wanted the ICC not to publicly indict al-Bashir because officials feared that it would cause tension and instability in Sudan.

China has not ratified the Rome Statute (-4). It does offer some rhetorical, frequently self-serving support for treaty norms, and it occasionally votes in the UN Security Council to allow international enforcement of treaty norms. It further supported referring war crimes in Libya to the ICC (2). However, it fails to comply with major elements of the treaty and actively defends its noncompliance and the noncompliance of other states (-4). Its composite score is -6.

E. United States

US policies toward the ICC have varied significantly over time, as becomes clear from comparing the stances of (1) the Clinton administration to those of the early Bush administration, (2) the early Bush administration to the late Bush administration, and (3) the late Bush administration to the Obama administration. Prevailing Congressional views have also varied significantly. However, unlike parliamentary parties in South Korea and Japan, no leadership of either the Democratic or Republican parties in Congress has endorsed US membership in the ICC.

Although the Clinton administration actively participated in drafting the Rome Statute, the US voted against the final version of the draft treaty at the Rome conference in 1998. Nonetheless, the administration strongly endorsed many parts of the treaty and, at the last possible moment in December 2000, signed the treaty so as to retain some possibilities for discussing the treaty further as one of the signatories. At the time of the signing, US officials said the treaty was flawed and that they would not recommend ratification in its existing form.

Bush administration officials sought to reverse the Clinton signature and to achieve the legal equivalence of "unsigning" the treaty because, as a signatory, the US was obligated not to interfere with the treaty coming into

73. See Andrea Birdsall, The "Monster That We Need to Slay"? Global Governance, the United States, and the International Criminal Court, 16 GLOBAL GOVERNANCE 451, 453 (2010).
75. Id. at 381, 383.
76. Id. at 384.
force and the Administration sought to prevent the ICC's establishment. That move enabled it to renounce the treaty, to orchestrate active hostility toward the ICC, to discourage other governments from ratifying the Rome Statute, and to punish, through US termination of military assistance and foreign aid, governments that signed the Rome Statute and refused to sign bilateral immunity agreements with the United States. These agreements called upon signatories to promise that they would never turn over to the ICC anyone who was a US citizen or an employee of a US agency, which included all US security contractors and intelligence operatives throughout the world.

Moreover, Congress passed the American Service-Members' Protection Act (ASPA), which made it illegal for US officials to cooperate with the ICC, unless a national security exception arose, and called upon the United States to use military force, if necessary, to prevent any of its citizens or employees from being taken to the ICC and also to rescue them if they were detained in the Hague. US Presidential special envoy to the UN, John Bolton, said the ICC was “dangerous” and “a stealth approach to eroding . . . [US] constitutionalism and undermining the independence and flexibility that our military forces need to defend our interests around the world.” Earlier, he had said that the US objective should be not to improve the ICC, but to make it “wither and collapse.” On the day that he “nullified the US signature on the International Criminal Court treaty . . . [i] he declared it the happiest moment in his years of service.”

Even though active hostility toward the ICC continued into Bush's second term, soon after Bush's reelection a few military and some State Department officials began to express misgivings about the way that US hostility to the ICC was undermining US strategic interests. Secretary of State Condoleezza

80. Under strong pressure from the Bush administration over several years, more than 100 states eventually signed bilateral immunity agreements with Washington, including more than fifty states that had also ratified the Rome Statute. See Birdsall, supra note 73, at 461 (2010).
Rice acknowledged that, because of US policies toward the ICC, US officials seemed to be "shooting [themselves] in the foot."86 This was particularly true as a consequence of inflicting punishments on small states in Latin America, Africa, Europe, and Asia when they supported the ICC but refused to sign immunity agreements with Washington. These punishments began to reduce US military officials' influence in many states.87

By 2005, clear indications arose demonstrating that the administration was changing its position for reasons that went beyond the simple desire to recoup lost influence caused by withdrawal of US foreign and military assistance.88 The human rights norms undergirding the Rome Statute and their international support began to force a change in the sole superpower's disdain for the ICC, as developments in Sudan made clear.89 US officials had strongly opposed referring the investigation of any atrocities to the ICC because they did not want to do anything to legitimize the ICC, even though the United States had been one of the first states to label atrocities in the Darfur region as acts of "genocide."90 It had supported investigation of these atrocities by the Security Council. Still, to Washington's dismay, when that investigation concluded, the UN Security Council faced a decision about whether to refer the results of its investigation to the ICC.

US diplomats tried to build support for creating a separate ad hoc African court to investigate the atrocities, an initiative which the United States favored because Washington could shape the direction of such a court by wielding its Security Council veto.91 In contrast, the independent ICC was such anathema to the Bush administration that it let people in both diplomatic circles and human rights organizations know that it was likely to veto any resolution calling for the use of the ICC.92

However, when it became clear that most other states refused to create a new Security Council-established ad hoc tribunal and that a large major-

88. Birdsall, supra note 73, at 462.
89. Id.
ity of states on the Council would vote for referral of Sudanese cases to the ICC, US officials faced the grim prospect of turning their back on the only realistic possibility of employing legal processes to call a halt to impunity in Sudan. The United States was forced to choose between (1) vetoing efforts to put alleged criminals on trial for heinous crimes and (2) reversing course, abstaining, and accepting a role for the ICC. The Bush administration chose the latter.

US policies at that point began to earn a somewhat higher score on the NDI. When Clint Williamson, who became US Ambassador-at-Large for War Crimes in 2006, later reflected on what had happened, he said, “there clearly has been an evolution” in US stances toward the ICC. Williamson stated, “I think as most people recognize, when this administration came into office in 2001, they were openly hostile to the ICC, and I think suspicious in general of the whole concept of international justice. You had some very outspoken critics in the administration, people like John Bolton and others, who were determined—not only to oppose the ICC, but to do everything they could to destroy it.”

He said that an event “which shows how far we’ve come” was yet another Security Council vote in which the United States explicitly said that it had refused to vote for a proposed resolution because “the resolution undermined the ICC’s work in the Darfur case. This is a huge change from where we were two years ago . . . where we would have abstained or vetoed a resolution because it merely made mention of the ICC.”

Three reasons seem to explain why the United States began to shift away from overt opposition to the ICC. First, most US allies supported the ICC and asked the United States to change its disposition toward the ICC. Second, punitive US policies toward the relatively large number of governments that had ratified the Statute were steadily undermining US political and military interests. Third, US international influence suffered because Washington had abandoned the high moral ground to others on legalization issues related to the ICC. The United States was tarnishing its reputation for supporting human rights.

93. Birdsall, supra note 73, at 465.
96. Id.
97. Id. at 4.
98. Id. at 2; Birdsall, supra note 73, at 463.
100. US efforts to evade Geneva Convention rules for humane treatment of detainees from Iraq and Afghanistan and for the prohibition of torture added to international reassessment of US attitudes toward human rights.
When the Obama administration came to office in 2009, it moved far beyond its predecessor’s reluctant decision to abstain rather than to veto the work of the ICC. Secretary of State Hillary Clinton explained, “We will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways to promote US interests by bringing war criminals to justice.”

Stephen J. Rapp, US Ambassador-at-Large for War Crimes Issues, reported, “Our government has now made the decision that Americans will return to engagement with the ICC.” Harold H. Koh, Legal Adviser of the Department of State, said “After 12 years . . . we have reset the default on the US relationship with the court from hostility to positive engagement . . . Principled engagement [at the recent conferences] worked to protect our interest . . . and to bring us renewed international goodwill.” Ambassador Rapp explained that, although the United States was not ready to ratify the Rome Statute, “we recognize that this institution is . . . where justice will be delivered if it can’t be delivered at the national or the regional level.”

Susan Rice, the US representative to the United Nations, indicated that the ICC “looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur.”

Harold Koh advanced an even broader rationale for US policy toward the ICC—one that supports legalization processes without explicitly saying so. In an address to the American Society of International Law, he said that “an emerging Obama-Clinton Doctrine” is based on commitments to: principled engagement, smart power, strategic multilateralism, and “living our values by respecting the rule of law.” Both President Obama and Secretary Clinton are lawyers, he noted, and they “understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action.” As a result, in Stephen Rapp’s words, “it’s in our

104. Id.
107. Id. at 3–4.
108. Id. at 4.
interest to support... [ICC] prosecutions—not at this time as a member of the ICC, but in kind with assistance as long as it's consistent with our law."

US officials stopped punishing states that had ratified the Rome Statute and refused to sign bilateral immunity agreements with the United States. State Department officials offered to help the ICC by offering intelligence on those under indictment in Sudan, by supporting prosecution of members of the Lord’s Resistance Army in Uganda, and by aiding the ICC’s investigations underway in other states. The Obama administration broke from the US refusal, in play since 2001, to participate in diplomatic meetings of the ICC.

In another major departure from the Bush administration stances, the Obama administration acknowledged in its National Security Strategy paper of 2010 the prudential as well as the moral importance of international justice: “the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs.” The United States will “support institutions and prosecutions that advance this important interest” because those “who intentionally target innocent civilians must be held accountable.” Although the United States “is not at present a party to the Rome Statute, ... [it is] engaging with State Parties to the Rome Statute on issues of concern and [is] supporting the ICC’s prosecution of those cases that advance US interests and values.” The Obama administration supported and voted in favor of a Security Council referral of Libyan violence to the ICC for an investigation of possible war crimes and crimes against humanity in February 2011.

In the span of little more than a decade, US scores on the NDI varied from -9 in the Clinton administration, to -15 in the first Bush administration, and -14 in the late Bush administration. In the Obama administration, the United States still has no plans to ratify the treaty, even though officials acknowledge that the ICC can serve US interests and that they should not actively undermine the ICC (-3 on consent). US officials are not exactly promoting ratification of the treaty, but they are endorsing a positive human rights role for the Rome Statute and asking other states to comply with it, especially when the Security Council engages the ICC (3 on promotion). It is not complying with the treaty in the sense that it fails to apply treaty enforcement procedures to itself, although officials now endorse the substan-

110. Birdsall, supra note 73, at 464.
112. Id.
113. Id.
tive content of many of the norms in general (-3 on compliance). The US composite NDI score of -3 is not higher because of US refusal to ratify and implement the treaty and its continued acquiescence in the legal constraints on cooperation with the ICC that are imposed by the American Service-Members' Protection Act.115

V. CONCLUSIONS

Placing the behavior of the five states examined here within the framework of normative indicators and reflecting on what is known about the contexts for their behavior enables us to draw the following conclusions.

First, this study demonstrates that a calibrated scale can indeed enable analysts to see more precisely and examine various differences in the normative disposition of governments on a significant legal question, thereby enabling more systematic recognition of and reward for contributions to processes of legalization, whether or not ratification of specific treaties or membership in particular institutions may have occurred. This is highly significant due to the possibility that large numbers of people possessing a more accurate, comprehensive understanding of states' normative conduct may create conditions likely to influence that conduct. An analogous influence occurred in changed economic development policies that were encouraged when economists moved away from indicators such as the gross national product per capita to employ a human development index.

Although the indicators developed here have been used to measure conduct related to one particular treaty, it would be possible to apply this kind of analysis, with additional and perhaps more refined indicators, to all the main human rights treaties in order to assess states' commitments to a more general set of human rights norms. Indeed, one could combine indicators on any number of treaties to gauge states' disposition toward different types of norms or issue areas.

Second, if the cases examined here reflect broader international trends, then the process of legalization for the International Criminal Court and the norms it aims to enforce appears to be progressing despite some criticisms of the ICC that are not examined in this article. This limited sample, which of course includes two great powers, demonstrates that states may provide significant support for key norms even without ratification of the related treaty. Legalization is occurring in all three dimensions: the obligations that ICC members take on are demanding, legally binding, and increasing as

115. Birdsall, supra note 73, at 453.
states implement domestic legislation to give effect to the treaty. The norms are \textit{precise} and the \textit{delegation} of authority is historically unprecedented, enabling an international body to indict sitting heads of governments and call for their arrest and trial, at times even with the blessing of the Security Council, in which case such action is almost beyond legal question.

It is precisely because the obligation, the precision, and the delegation, when combined, add up to highly significant legitimacy and normative strength that the major powers, two of which are studied here, have found it difficult to accept the delegation required if they would ratify the Rome Statute. Of course major powers in general are unaccustomed to delegating authority to others over their own conduct. Remarkably, Britain and France accepted the delegation accompanying the ratification of the treaty. However, they are the smallest of the five great powers with vetoes in the UN Security Council. As such, they constitute “the exception that proves the rule.” Yet even on this indicator, China and the United States generally accept the delegation of authority to the ICC for the enforcement of the law on other states. Now, after the normative shift in US officials’ disposition, it is only for the prosecution of their own nationals that they do not accept international enforcement by the ICC. In any case, it is unfair and inaccurate to say that China and the United States are totally against any delegation of enforcement to an international judicial institution, because they both have supported the investigations of the ICC in Sudan, Libya, and elsewhere.

Third, basic human rights norms do seem to influence state behavior in some circumstances. The United States, against its original intentions and perceptions of self-interest, conceded that it would not veto Security Council referral of Sudanese atrocities to the ICC, largely because of the embarrassing gap that such a vote would dramatize, a gap between the cool US disposition toward international enforcement of human rights and the robustly positive disposition of many other states toward the ICC. Washington needed—but could not attain—the support of those other states to succeed in handling international trials in its preferred way. As a result, a measurable change occurred in US policy. US officials, after working several years to prevent the ICC from successfully establishing itself, moved closer to those who established and supported the ICC. Despite continued caution, Washington began to support the ICC in both rhetorical and material ways.

Movement toward accepting international enforcement of laws prohibiting genocide, war crimes, and crimes against humanity—the norm represented by an NDI score of 15—seems to be encouraged by the power and legitimacy of the human rights norms and the logic of being a lawful citizen of the world community. This does not mean that progress is inevitable, of course, but it does mean that some processes akin to learning and
international normative assimilation seem to be at work and influencing those who shape state conduct.\textsuperscript{116}

Fourth, the NDI offer additional information to enable policymakers and activists to focus educational, monitoring, and diplomatic efforts to encourage a strengthening of the partial support already offered by governments for ICC norms, even though they have not ratified the ICC treaty. Such efforts may help prevent normative backsliding and provide a conscious normative foundation on which future gains could be constructed. Moreover, to prevent backsliding by both those who have ratified and those who have not, foreign ministers and human rights organizations could use these indicators to track a state’s disposition toward the norm and, by extension, its willingness to bind itself to the law. Explicit acceptance of this principle by some states adds pressure to other states and publics reluctant to accept it for themselves. Few openly deny the legal and moral logic underpinning this equality before the law.\textsuperscript{117}

The future effects of legalization are likely to depend on whether exponents will be able to continue developing widespread support rooted in compelling normative content, as seems to have occurred in the brief period and the few cases examined here. If obligation is strong because the norms are precise and they enjoy sufficient legitimacy and enough widespread support that no one wants publicly to violate them, then willingness to delegate authority over the impartial implementation of these norms is likely to grow. Similarly, consent to these treaty norms would be likely to spread to those now dragging their feet because of perceived benefits for many actors, because promotion will be seriously pursued by those already supportive, and because compliance with the law will be prudent (as well as ethical), despite the pain that occasionally will be felt when applying robust standards to one’s own conduct. Even accepting some pain and cost could be justified by those seeking to advance the legalization process for these norms. Developing and applying clear normative indicators can help us understand what is happening and why.

\textsuperscript{116} Kim & Sikkink, supra note 2, at 957, have found that international judicial proceedings to enforce human rights norms have a deterring impact in reducing human rights violations, lessening repression in transitional societies, and appear to have a constructive influence on other states’ “learning” as well.

\textsuperscript{117} In addition, increased globalization often makes “denser legal and institutional relationships” more valuable for states. See Jeffrey L. Dunoff and Joel P. Trachtman, \textit{A Functional Approach to International Constitutionalization, in Ruling the World? Constitutionalism, International Law, and Global Governance} 3, 6 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).