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RATIONAL CHOICE, REPUTATION, AND HUMAN RIGHTS TREATIES

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HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY. By *Andrew T. Guzman*. Oxford and New York: Oxford University Press. 2007. Pp. vi, 247. $35.

INTRODUCTION

Scholars have long considered the linked questions of whether and why states obey international law. Contemporary contributions to this inquiry include schools of thought that aver the bearing of transnational legal process on state socialization,[1] the impact of acculturation on state behavior,[2] the sway of a state's desire to be held in esteem by other international actors,[3] and the influence of a given state's belief in the rule of law.[4] Common to each of these approaches is the notion that external norms have some effect on state action.

A second group of scholars takes an atomistic, instrumentalist approach. Skeptical of normative pressure, they envision states as rational actors seeking to maximize stable and preexisting preferences.[5] The most recent contribution to this approach is *How International Law Works: A Rational*

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1. *See, e.g.*, Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975 (2005) [hereinafter Koh, *Internalization*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review) [hereinafter Koh, *Why Do Nations Obey*].

2. *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005).

3. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007).

4. *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

5. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115 (2002).

Choice Theory by Andrew T. Guzman.[6] The book is an ambitious attempt to generate "a comprehensive and coherent theory"—based on the assumption that states are rational, self-interested actors—that can explain how international law "works across its full spectrum" (pp. 8–9).

By endeavoring to comprehensively explain international law within a rational choice framework, *Rational Choice* makes a valuable contribution to the developing body of international law scholarship. Guzman's efforts to more fully describe the reputational aspects of international law within a rational choice framework are especially significant.[7] It is relatively easy to understand how direct economic or material benefits (or detriments) can motivate states to enter into or comply with international agreements. However, the influence of more indistinct reputational forces on the behavior of states has been a fertile source of contention between various schools of thought in this field.

Guzman does an admirable job describing the nexus between a state's rational self-interest and concern over its reputation among other states. It is, however, the limited role played by reputation in the theory as a whole that raises serious concerns regarding the book's claim to comprehensiveness. The book's focus on cooperation and coordination as the exclusive bases for treaty formation relegates reputational forces to playing a role only in treaty compliance, not treaty formation. Yet the formation of a considerable component of international law comprised by human rights treaties cannot be explained solely through the game-theoretic lens of cooperation and coordination. Because cooperation and coordination games cannot account for the formation of human rights treaties—leaving us instead to consider the reputational force behind treaty creation—we are required to reconsider *Rational Choice*'s claim that it is a comprehensive theory applicable "to all international agreements" (p. 121). If, as we suggest, reputation plays a role in treaty formation, a more robust theory of reputation is necessary for any rational-choice-based explanation of international law to succeed. We can project that some of the strengths and weaknesses revealed by our examination of human rights treaty formation and compliance carry over into other parts of Guzman's theory.

Part I of this Review sets forth Guzman's general theory of international law with specific consideration of the way reputation influences state behavior. Part II then tests Guzman's overarching thesis by applying it to human rights treaties and concludes that explaining states' entry into human rights treaties requires a broader conception of reputation than *Rational Choice* allows.

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7. Of the book's three forces of compliance—retaliation, reciprocity, and reputation—only reputation receives in-depth explication in a separate chapter devoted to the subject. For an earlier attempt at synthesizing disparate views on international law, see Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533 (2006) (book review).

I. RATIONAL CHOICE THEORY AND INTERNATIONAL LAW

As with many rational choice accounts of group behavior, Guzman starts with cooperation and coordination games to describe how international law develops and, ultimately, why states choose to obey their obligations. According to his view, international law reflects the agreements of self-interested states that cooperate to maximize their individual utility (p. 12); more trenchantly, he argues that states "will only enter into agreements" if doing so makes them "better off" (p. 121).

Rational Choice makes its analytical baseline assumptions abundantly clear at the outset. The book assumes that states are "rational, self-interested, and able to identify and pursue their interests," which it presumes are "exogenous and fixed," aimed at maximizing "their own gains or payoffs," and not concerned with the welfare of other nations (p. 17). As a result of this existential view, states "have no innate preference for complying with international law, they are unaffected by the 'legitimacy' of a rule of law," and "there is no assumption that decision-makers have internalized a norm of compliance with international law" (p. 17). Rather, as self-interested actors, states only enter into agreements that become the embodiment of international norms when the subsequent cooperative benefit engenders a greater gain than the cost of those obligations.

Rational Choice begins its analysis by distinguishing "easy" games from "hard" games as a means of identifying those situations when international law has significant influence on state behavior. Easy games are games where international law becomes "superfluous" and does little work to create state obligations or to ensure that states comply with them (p. 29). These easy games generally take the form of coordination games where the main role of international law is to provide a focal point around which states can coordinate their behavior (p. 28). One instance is the Warsaw Convention governing international air travel, which establishes such things as air-traffic routes so that airlines can ensure their planes will not crash in mid-air (pp. 26–27).

By contrast, hard games are generally defined as situations where states have a need not to coordinate behavior but to cooperate in order to maximize their aggregate benefits (pp. 29–30). The classic example of this sort of cooperation game is the prisoner's dilemma, which posits two rational, self-interested individuals who must choose between alternate strategies. Under the conditions of this game, pursuit of self-interest leads to worse results for each side than if it had cooperated with the other.[8] Guzman believes such games are prevalent in international relations and therefore focuses on them (pp. 121–29).

Much of Guzman's analysis takes place in the form of applications or explanations. For example, to discuss how states rely on international law to their benefit in hard cases, *Rational Choice* turns to the 1972 Anti-Ballistic

8. *See* David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 373–74 (2001).

Missile Treaty between the United States and the Soviet Union. The treaty was aimed at solving a problem within the broad area of arms control: the states were engaged in a race to the bottom in an almost-unrestrained acquisition of weapons and technology that significantly drained their respective resources. Both states wanted to maintain an edge in their nuclear strike capabilities, but doing so required the creation of more and better nuclear weapons than the other. Moreover, efforts to develop a defensive system by one state would create significant incentives for the other to upgrade their weapons in order to penetrate these defenses (pp. 30–31).

While both states would benefit from mutual cooperation whereby they could limit the resources dedicated to arms production, the dominant strategy for each state was to cheat because of the "potentially enormous payoff that would come to whichever side developed the ability to wipe out the other's second strike capability" (pp. 30–31). Such a conundrum, of course, takes the form of a prisoner's dilemma, and Guzman diagrams the payoffs of each strategy as follows[9]:

THE ABM TREATY PRISONER'S DILEMMA

		Soviet Union	
		Comply	*Violate*
United States	Comply	(100, 100)	(-50, 200)
	Violate	(200, -50)	(80, 80)

In such a case, "when doing so makes them (or, at least, their policymakers) better off" (p. 121), the United States and the Soviet Union might enter an enforceable agreement. According to Guzman, "states enter into treaties for the same basic reasons that individuals enter into contracts," namely, that these instruments "allow them to resolve problems of cooperation, to commit to a particular course of conduct, and to gain assurances regarding what other states will do in the future" (p. 121). This contract model underlies *Rational Choice*'s explanation of all treaty formation.

Of course the willingness to enter into treaties is itself dependent on a state's belief that other states will comply with their treaty obligations. Guzman turns to the iterated nature of relations between states to describe how compliance with treaty terms may arise. He concludes that certain forces that arise when games are continuously played can lead states to abide by their cooperative agreements. Guzman calls these forces of compliance the "three R's," and it is the three Rs—retaliation, reciprocity, and reputation—that are responsible for states' compliance with their international obligations (p. 33). Since this theory forms the core of *Rational Choice*, it is worth quoting Guzman's description at length:

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9. P. 32 tbl.1. Note that the problem takes the form of a prisoner's dilemma. Both parties are better off if they cooperate (100 + 100 = 200), yet the dominant strategy is always to defect. For example, if the Soviet Union complies, the United States' payoffs would be 100 for complying or 200 for defecting. If the Soviet Union defects, the United States' payoffs would be -50 for complying or 80 for defecting.

> The repeated nature of the interactions between the United States and the Soviet Union allowed cooperation to take place. Each country valued cooperation not only in contemporary terms, but also in the future. This gave the parties at least three reasons to comply with the treaty. First, and perhaps most important, is reciprocity. A violation by one side would likely provoke a violation by the other side. The one to violate initially would enjoy a one-period gain, but thereafter the treaty might collapse, in which case both parties would return to the noncooperative outcome. Second, both parties wanted to be able to make credible commitments in the future. By complying with its promises, each country enhanced its reputation as a state that honors its commitments and, therefore, its ability to make future promises. Third, a violation had the potential to trigger some form of retaliatory action, which might further increase the cost of breach. (p. 32)

Guzman's general theory of treaty formation and compliance between rational, self-interested actors can therefore be summarized as follows. Treaties are formed when the pursuit of a state's preferences leads that state to desire cooperation from others, but cooperation is hard to attain because the payoffs from cooperating are generally lower than the payoffs from defecting. The payoff structure, however, changes when the game is an iterated one. Failure to comply with an agreement can lead to one of three undesired outcomes: the other states may choose (1) to reciprocate by not complying, (2) to retaliate in some other fashion, or (3) not to cooperate with the defecting state in future endeavors because of the defecting state's reputation for noncooperation. For Guzman, it is these calculations—and neither an existing preference for compliance nor a sense of obligation to comply with international law—that leads states to honor their obligations (p. 194).

Rational Choice applies a similar dynamic to explain, respectively, compliance with international agreements and customary international law. Guzman maintains his firm allegiance to game theory in *Rational Choice*'s relatively brief discussion of customary international law at the book's end. According to his view, "[i]n a repeated game, customary rules can affect behavior in much the same way international agreements do." Accordingly, noncompliance with an accepted norm "signals a willingness to ignore international legal obligations and thus makes future cooperation more difficult" (p. 191). Thus, in the area of customary international law, reputational concerns again appear alongside retaliation and reciprocity as a force of compliance, and neither an internalized sense of obligation to comply with international law nor a preference for compliance with international law plays a role in affecting state behavior. Rather, "[t]o the extent that state behavior is influenced at all, it is as a result of a change in payoffs" (p. 194).

Rational Choice explains further that the power of customary law depends on how states determine which international norms are actually legal obligations (p. 195). Only if other states believe that a customary international law rule exists will contrary actions "generate a reputational cost" (p. 194). As Guzman recognizes, "if more states have a belief that a legal obligation exists, the cost of violation will be larger" (p. 195). Thus, the more

widely held a belief equating a norm with a legal obligation, the more powerful that obligation becomes as a motivator of compliance.

Rational Choice thus provides us with a simple and elegant theory of international law that maintains unyielding allegiance to game-theoretic explanations of state behavior. To Guzman, all international law can be explained through the lens of rational, self-interested actors working together in cases where cooperation or coordination will increase their individual welfare. Guzman himself recognizes that his theory is parsimonious, but he nevertheless makes claims to its universality (pp. 120–21). One way to test the ecumenical reach of such a theory is to apply it to a particular area of international law to determine if it can indeed live up to its claims. We do so in the next Part.

II. RATIONAL CHOICE THEORY, HUMAN RIGHTS TREATIES, AND REPUTATION

Human rights treaties are an especially rich area in which to assess Guzman's rational choice theory of international law. This is because, as Harold Koh has recognized, it is not easy to explain such treaties through traditional rational choice mechanisms.[10] In particular, and as we will discuss shortly, it is difficult to describe human rights treaty formation within the game-theoretic construct of cooperation or coordination. Similarly, compliance with human rights treaties is difficult to explain using only mechanisms of retaliation or retribution.[11]

International human rights treaties mainly impact states' conduct toward their own citizens.[12] Put simply, it is highly unlikely a state will use sanctions against another state to force the latter's compliance with the terms of a mutually signed human rights treaty, even if states do use sanctions to enforce more general human rights norms.[13] It is equally unlikely that one state

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10. *See* Koh, *Internalization*, *supra* note 1, at 979 ("[C]ompliance with international human rights rules cannot easily be explained as reciprocity or by reference to a larger cooperation or coordination game.").

11. One could argue that positive network externalities, even to the extent of financial advantage, can be generated by human rights treaty compliance. That impact, however, is not immediate since it requires time to accrete. Moreover, to the extent that monetary advantage is immediate—for example, one state reworking its trade relationship with another in return for the latter ratifying a given treaty—that influence is coercive. *See generally* Geisinger & Stein, *supra* note 3, at 114–16 (distinguishing persuasion from coercion).

12. *See, e.g.*, Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1823 (2003) (explaining that parties to human rights treaties "receive only promises from other nations to refrain from harming their own citizens"). A notable exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

13. Typical examples are United Nations sanctions directed against apartheid-era South Africa—and contemporary Sudan—that attempt to force the state to treat its own population more humanely. *See, e.g.*, Warren Hoge, *U.N. Council Imposes Sanctions on 4 Men in Darfur War Crimes*, N.Y. TIMES, Apr. 26, 2006, at A10; *U.N. Passes Measures to Combat Apartheid*, N.Y. TIMES, Nov. 21, 1987, at 6. *But see* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 662 (2d ed. 2000) ("Although human rights advocates have often proposed the imposition

will choose to mistreat its own citizens because another state has failed to live up to its treaty obligations under a common instrument.

If game theory cannot readily explain human rights treaty formation and compliance, then legal scholars must turn to other processes to explain their existence. *Rational Choice* explicitly rejects the idea that mechanisms such as an internalized desire to comply with international law can influence state behavior.[14] We are thus left with reputation as the force by which human rights treaty formation must be explained. Accordingly, we examine the salience of Guzman's rational-actor framework as applied to human rights agreements as a means of isolating the effects and understanding the limits of the reputational mechanism.

In Section II.A, we apply *Rational Choice*'s game-theoretic framework to the problem of human rights and discuss the framework's limitations. In Section II.B, we argue that Guzman's theory of reputation fails to account for states' entry into human rights treaties and for state esteem-seeking behavior. Finally, in Section II.C, we provide some thoughts on the need for a more robust theory of reputation in international law.

A. *Human Rights Treaty Formation*

There has been a virtual explosion of human rights treaties since the creation of the United Nations after World War II. Guzman explains this increase by suggesting that state preferences have evolved since that time to include a preference for the provision of human rights to the citizens of other states (p. 20). Such a suggestion fits well within *Rational Choice*'s game-theoretic framework. As states develop preferences to provide human rights to citizens of other states, the treaties they enter will reflect the satisfaction of these preferences.

On closer examination, however, Guzman's explanation fails to account for the extent of participation in human rights regimes that has been a hallmark of the era. Put bluntly, why would the "other" states—the ones Guzman suggests do not have human rights practices the majority of states desire—join an international regime targeting and condoning those same disfavored practices? Why, for example, would a state that prefers using child labor enter into an international treaty prohibiting that practice as abusive?[15] Such an instrument does not provide the type of cooperative or coordinated benefits that Guzman requires as a condition for treaty formation, and compliance with the treaty would entail significant costs to that state.[16]

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of sanctions against governments that are violating human rights, increasing doubts have been raised in recent years about both their effectiveness and their appropriateness.").

14. *See supra* Part I.

15. *See, e.g.*, Convention on the Rights of the Child, G.A. Res. 44/25, art. 32, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

16. It is possible, as Oona Hathaway has argued, that a state would enter a treaty without intending to comply. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002). *Rational Choice*, however, would require that the benefit of entry into

For either coordination or cooperation to occur within the realm of rational-actor theory, the payoffs of cooperation must be greater than the costs. If we assume that a state would not want to undertake such protection, the benefit must come from another source.[17] Perhaps foreign aid or other specific benefits from the international community are held out as conditions for entry into the treaty. That motivation seemingly animates the actions of some states aspiring to European Union membership.[18] However, such coercion (even when sugarcoated) is atypical for international human rights treaty formation or ratification.[19] If direct material or economic benefits are not the reasons states sign on to human rights treaties, then only indirect influences such as reputation can explain why states enter into these instruments to begin with. We must therefore turn to *Rational Choice*'s description of reputation and consider whether it provides for the kind of influence that can lead to the creation of human rights treaties.

B. *How Reputation Influences State Behavior: The* Rational Choice *View*

Rational Choice provides a thoughtful analysis of how reputation influences state behavior. As Guzman points out, he is not the first person to consider this phenomenon;[20] however, the effort to develop a comprehensive reputation model separates his work from others.[21] The principles presented

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such a treaty outweigh the reputational loss that comes with failing to comply. As we discuss, *Rational Choice* makes no room for states entering treaties in the absence of such benefit. *See infra* notes 18–20 and accompanying text.

17. The general notion of a preference for altruism is troubling to rational actor theories. Goldsmith and Posner, for example, suggest that a preference for benefiting others, as a matter of historical probability, is more likely to be based on shared religion, ethnicity, or citizenship than altruistic cosmopolitanism. *See* GOLDSMITH & POSNER, *supra* note 5, at 109–10. Thus, even with the increased altruistic impulse individuals experience toward those sharing a common bond (citizenship, for example), state coercion is still necessary for in-state welfare transfers due to the relatively weak altruistic impulse. Accordingly, "[g]iven this relatively weak altruism toward compatriots, we should not expect individual altruism to extend to people who are physically and culturally more distant." *Id.* at 212.

18. For example, in response to a report from Mental Disability Rights International detailing Turkey's routine use of unanesthetized electroshock "therapy" on children with intellectual disabilities, the Council of Europe conditioned its future favorable view to Turkey's ascension to the European Union on compliance with Turkey's existing international obligations to refrain from torture. *See* MENTAL DISABILITY RIGHTS INT'L, BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN THE PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS OF TURKEY (2005), http://www.mdri.org/projects/turkey/turkey%20final%209-26-05.pdf; Press Release, Mental Disability Rights Int'l, European Union Calls on Turkey to Improve Rights of People with Mental Disabilities (Nov. 9, 2005), http://www.mdri.org/projects/turkey/MDRI_EU_PressRelease.pdf; Press Release, Mental Disability Rights Int'l, Human Rights Group Accuses Turkey of Torture Against Children and Adults with Mental Disabilities (Sept. 28, 2005), http://www.mdri.org/projects/turkey/TurkeyPressRelease.pdf. For updated information on the European Union's activities, including ascension decisions, see European Union, EUROPA–Gateway to the European Union, http://europa.eu/index_en.htm (last visited Jan. 12, 2008).

19. *See infra* text accompanying notes 40–42 (noting that no direct benefits were conditioned on acceptance of the United Nations Convention on the Rights of Persons with Disabilities).

20. P. 72. For a representative catalogue of recent scholarship, see p. 115.

21. *See, e.g.*, SLAUGHTER, *supra* note 4, at 170 (2004) ("network norms"); Koh, *Why Do Nations Obey*, *supra* note 1, at 2613 (transnational legal process theory).

in *Rational Choice* are at once simple and far reaching. Guzman defines a state's reputation for international legal compliance as its "past response to international legal obligations used to predict future compliance with such obligations" (p. 73). In other words, he suggests that prior conformity informs the probability of future acquiescence. States value their reputation as conformers with international agreements because that characterization enhances the likelihood that other states will be willing to cooperate with them in the future (p. 34). In essence, the better a complier a state has been in the past, the more cooperative benefit that state will gain in the future.

The book embeds its straightforward observation regarding reputation as an indicator of future compliance in a much more complex analysis. *Rational Choice* recognizes that measuring *only* past compliance by a state inadequately predicts the future willingness of that state to enter into and comply with international agreements (p. 73–74). Rather, it is the context in which a state chooses to honor or breach its obligations that informs these determinations (pp. 74–76).

Guzman identifies three factors that influence whether a particular action will affect a state's reputation. These are "(1) the nonreputational payoffs a state is facing; (2) the state's existing reputation at the time of the action; and (3) the importance of the obligations to other states" (p. 77). He also carefully analyzes the role uncertainty plays in divining a state's reputation for compliance from its behavior. For example, the more uncertain a performance standard is, the less clear that a state's behavior is violating tbat standard. Hence, a state's action when assessed in light of ambiguous circumstances will be less likely to affect its reputation as a complier than if the act were a clear violation of an agreement (p. 97). Guzman thus paints an elegant picture of states complying with international agreements in order to actively advance their reputation as compliers. At the same time, he recognizes that the signals sent by compliance are themselves qualified by a number of contextual and other factors.

Despite its insights, Guzman's overarching theory falls short of providing a full account of reputation in international law. At the core of this limitation is the fact that reputational forces become relevant only after a state's legal obligations exist. That is, because a state's reputation is influenced only by its compliance with legal obligations, reputational harm can only occur if a legal obligation already exists. Put a different way, failure to join a treaty would have no reputational consequences within the *Rational Choice* framework. Consequently, Guzman's rational choice analysis leaves us with a conundrum: it cannot explain the formation of human rights treaties without relying on something akin to reputational benefits, yet the reputational mechanism that it develops does not sufficiently account for the process of treaty formation.

C. *The Need for a More Robust Reputational Mechanism*

Guzman's choice to limit the role of reputation to its influence on future compliance does not adequately explain current compliance with human

rights treaties, nor does it explain state decisions to enter into such treaties. To the extent these shortcomings arise in the human rights context, they are similarly applicable to other areas of international law addressed by Guzman's framework.[22]

We focus here on the limitations of the type of parsimonious rational-actor theory proposed in *Rational Choice*.[23] To the extent a rational-actor model is used to explain state behavior, we would suggest that it start from the baseline proposition that cooperation with other states is beneficial. As we have argued elsewhere, regular cooperation with other states leads to a desire for esteem from the other states with which a state cooperates.[24] Pursuant to this preference-for-esteem model, reputational concerns can influence a state to enter into a treaty: a state will do so when the esteem benefits it receives from entry outweigh the costs of entry and compliance.[25] This is a model in which cooperation influences a state to enter into treaties, but not from any perceived direct benefit.[26] This esteem-seeking motivation, instead, is an artifact of cooperation. Nor is it limited to a reputation for compliance; instead, it is compliance with the treaty norm that generates the reputational benefits. This sort of motivation, however, is not accounted for in *Rational Choice*'s theory of reputation.

Generations of scholars beginning with Grotius have noted that states seek esteem from the broader global community.[27] The "pull of international

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22. Skepticism regarding such accounts of reputation has already been voiced, even by rational-choice advocates such as Posner and Goldsmith. While recognizing that the rational-choice school is broadly compatible with reputation-based theories of compliance, Posner and Goldsmith caution that reputational costs of noncompliance only marginally impact state decision making. The impact of reputational costs may be reduced by multiple, compartmentalized state reputations across different subject areas or overridden by other reputational concerns (such as that of resolve) depending on the context. The reputational sanctions attaching to noncompliance with certain categories of treaties—for instance, those that were poorly negotiated, entered into under compulsion, or reflect outmoded international systems—are also suspect. *See* GOLDSMITH & POSNER, *supra* note 5, at 100–04.

23. We do not seek here to engage an existing debate concerning why individuals signal their cooperativeness to others and whether such signaling is rational. For a rational-choice account of signaling, see ERIC A. POSNER, LAW AND SOCIAL NORMS (2000). For arguments that norms cannot be explained fully by rational actor models, see STEVEN A. HETCHER, NORMS IN A WIRED WORLD (2002), and Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605 (2004).

24. *See* Geisinger & Stein, *supra* note 3, at 93–96.

25. *Id.* at 120–25.

26. Oona Hathaway's scholarship posits this as a central motivation for entering into human rights treaties and raises a further concern that ratification may lead to increased human rights violations. *See* Hathaway, *supra* note 16, at 2002–03, 2007. Her thesis is rebutted on both empirical and normative grounds by Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003). Both sides in this debate raise important issues, and neither side conclusively resolves the quandary. For our argument to this effect, see Geisinger & Stein, *supra* note 3, at 79–81. *Rational Choice* does not engage this scholarship.

27. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., Liberty Fund 2005) (1626); *see also* CHAYES & CHAYES, *supra* note 3, at 27–28 (arguing that compliance derives from the need to maintain one's status within a highly interrelated community of states); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD.

society" is an external force that affects state behavior only to the extent that a state is concerned about the regard it receives from other states to which it is attracted. Thus, the more a state conforms to perceived group norms, the more likely other states perceive it to be strongly attracted to their group and approve of that state. The willingness of a state to abide by international norms therefore reflects its deep value of acceptance by the global community.

An esteem-seeking mechanism demonstrates how rational self-interest leads to an independent desire to maintain relations with other states. It describes the desire to be members of international society as resulting from the benefits states receive through cooperation. That desire, however, exists separately from other preferences that rational-actor theorists identify. It is a preference for esteem—and not a preference for direct material or economic benefit—that serves as a powerful influence on the willingness of states to conform to international law. Further, it is a state's rational assessment of garnering global esteem, rather than an evaluation of other states' past compliance with treaties, that compels it to enter into treaties in the first place.

This esteem-seeking mechanism is far removed from Guzman's theory that reputation is concerned only with a state's past compliance, or lack of compliance, with its international legal obligations. Consequently, the framework set forth in *Rational Choice* cannot adequately account for the phenomenon of increased human rights treaties over the last half century.[28] Moreover, limiting discussion of reputation to a simple mechanism, such as *Rational Choice*'s straightforward notion that "[w]hen a state fails to comply in one period, other states ... draw negative inferences about the likelihood of future compliance," is unnecessarily reductionist (pp. 39–40).

Reputation can be a much more complex construct than this simple calculus suggests. Indeed, Guzman seems to veer from his own univocal theory when explaining instances of reputation. Take, for example, his discussion of South Africa's willingness to dismantle and publicly renounce its successfully completed nuclear-arms program. Guzman notes that by the time South Africa repudiated nuclear weapons under the Nuclear Non-Proliferation Treaty,[29] political circumstances had lessened their instrumental value (pp. 80). At the same time, he explains that South Africa was truly motivated by a desire "to reform its image as a global pariah" and that "reputational considerations ... dictated that it bring itself into compliance with international norms" (p. 80).

S95, S95 (2002) ("International relations theorists and international lawyers have long argued that reputational concerns help ensure that states maintain their agreements.").

28. We note that this limited view of reputation is a general problem associated with all rational-choice theories that rely solely on game theory to describe treaty creation. These theories only consider reputational factors to play a role in compliance. Failure to consider how a state's concern for its reputation affects its willingness to enter into any treaty—not just human rights treaties—and also the many ways in which reputational concerns other than a reputation for compliance may influence behavior simply ignores much of existing international lawmaking.

29. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

This account diverges from the book's general reputational theory that historical compliance provides information on willingness to act in accordance with new future obligations. For nowhere does *Rational Choice* suggest that compliance signals a state's concern about its reputation as a pariah, a very different reputational concern than being viewed as a complier.[30] Nor does *Rational Choice* suggest that compliance signals a general willingness to follow international norms. Indeed, if such a desire exists, it is hard to understand why that desire would not also lead states to undertake other measures in international society, such as ratifying treaties that embody international norms in the first place. Thus, discussing behavior of states in these terms requires a much broader theory of reputation than *Rational Choice* allows.[31]

The mechanism of human rights treaty creation is more subtle than that envisioned by *Rational Choice*. The decision to enter into human rights treaties may be based, as Guzman surmises, on a reasoned-action model of decision making. However, in order for a rational-actor framework to be comprehensive as well as predictive, it must initially assume that states have a general desire to be part of global society.[32]

To illustrate how the reasoned-actor model used by states in determining whether or not to enter into and comply with international law contains a broader reputational measure than the elegant but truncated construct proffered by *Rational Choice*, consider the negotiations leading to the United Nations Convention on the Rights of Persons with Disabilities ("CRPD").[33] Under consideration since 2001,[34] the CRPD was deliberated through eight Ad Hoc Committee sessions and adopted at a ninth session after technical revisions. The treaty was then adopted by general consensus by the General

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30. A pariah is generally defined as an outcast, an actor that is despised and avoided. We note that such a definition—particularly to the extent it connotes something that is despised—fits much better within a framework of esteem loss than compliance signaling.

31. Interestingly, one can glean some of these broader arguments in Guzman's earlier scholarship. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1835–36 (2002) (arguing that nations internalize norms to participate in the transnational legal process).

32. *See* Geisinger & Stein, *supra* note 3, at 97–109.

33. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 46 I.L.M. 443, *available at* http://untreaty.un.org/English/notpubl/IV_15_english.pdf [hereinafter CRPD].

34. In December 2001, the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human rights instrument. United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/168 (Dec. 19, 2001). For a detailed description of the political process behind the decision to go forward with a convention, see National Council on Disability, UN Disability Convention–Topics at a Glance: History of the Process, http://www.ncd.gov/newsroom/publications/2003/history_process.htm (last visited Jan. 12, 2008). For more background details, including the varying position papers submitted by governments and nongovernmental organizations, see United Nations, Human Rights and Persons with Disabilities, http://www.un.org/esa/socdev/enable/rights/humanrights.htm (last visited Jan. 12, 2008), and Disabled Peoples International, Topics–Convention, http://v1.dpi.org/lang-en/resources/topics_list?topic=4 (last visited Jan. 12, 2008).

Assembly on December 13, 2006,[35] and was opened for signatures and ratifications by states parties on March 30, 2007.[36]

According to Guzman's reasoned-actor approach, the decision by any individual state whether to enter into the CRPD is predicated on that state's rational cost-benefit analysis: "[S]tates must experience some gain as a result of their engagement with the international legal system, and that gain must be larger than what they invest" (p. 12). At the time of the CRPD negotiations, approximately eighty percent of disabled individuals lived in developing countries and were subject to material deprivation and social exclusion,[37] accounting for twenty percent of the world's poorest individuals.[38] Nevertheless, only about forty of the United Nations' 192 member states had domestic disability laws, and the most progressive of those laws originated from developed states.[39]

For that reason, there are few external indicia of a prenegotiation preference among developing states to provide protections to their respective disabled populations. Moreover, although the CRPD requires states parties to engage in international cooperation, it does not obligate developed states to assume developing states' compliance costs.[40] There also were no unrelated benefits, such as loans or aid, conditioned on acceptance of the CRPD. In sum, it is highly implausible to conceive of the CRPD's formulation, and particularly the participation of the developing nations (among which Mexico was especially prominent), as a consequence of cooperation or coordination among rational actors in the manner that Guzman posits.

Instead, the formation of and entry into the first human rights treaty of the twenty-first century is better explained as a by-product of states wishing to be part of a global community that came to be overwhelmingly in favor of recognizing the human rights of persons with disabilities. For despite the extensive rights acknowledged by the CRPD,[41] the instrument was adopted

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35. *U.N. treaty focuses on protecting disabled: Convention tells nations to ensure rights of world's largest minority*, HOUS. CHRON., Dec. 14, 2006, at A25.

36. For the number of signatories to the CRPD and its Optional Protocol, as well as general background information and media announcements pertinent to the CRPD, see United Nations, Rights and Dignity of Persons with Disabilities, http://www.un.org/disabilities (last visited Jan. 26, 2008).

37. *See* U.S. AGENCY FOR INT'L DEV., THE SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF THE USAID DISABILITY POLICY 1 (2000). For a sense of the varying levels of disability reported from country to country, see United Nations Statistics Division, Human functioning and disability, http://unstats.un.org/unsd/demographic/sconcerns/disability/disab2.asp (last visited Jan. 12, 2008).

38. *See* U.S. AGENCY FOR INT'L DEV., *supra* note 37, at 1.

39. *See* Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, *in* DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 3 (Mary Lou Breslin & Sylvia Yee eds., 2002) (providing a catalogue of relevant legislation).

40. *See* CRPD, *supra* note 33, art. 32.

41. *See* Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 83–85 (2007).

by consensus, is the fastest-ever negotiated and adopted human rights treaty, and continues to be entered into at a similar pace.[42]

More trenchantly, rhetoric surrounding the negotiations and subsequent entries into the treaty indicate that states were motivated by a desire to act in step with fellow members of the global community. Discussion at the first two Ad Hoc Committee sessions focused on whether a separate treaty that would clarify rights already contained in existing United Nations instruments was necessary.[43] Once consensus was achieved on that central issue and a draft set of articles was developed by a Working Group comprising states and NGOs, the remaining negotiation sessions were devoted to the parameters of a forthcoming convention, with states cooperating towards that goal. Notably, developing countries such as China, Costa Rica, and Mexico played a key role in the negotiations, each expressing the view that a human rights treaty for disabled persons was a positive and necessary function of an informed and progressive global society. Perhaps of greatest significance is that as of this writing, fourteen of the fifteen states to ratify the CRPD are from the developing world.[44]

Thus Guzman's rational choice, cost-benefit analysis of international law cannot explain the development and entry into of the United Nations' most recent human rights treaty.

CONCLUSION

Rational Choice contributes to the evolving scholarly debate on why states comply with international law by attempting a thorough rational choice framework. At the same time, by limiting its explanation of treaty formation to cooperation and coordination effects, *Rational Choice* cannot fully explain the influence that reputational forces have on state conduct in this area. Consequently, the book falls short of its own laudable ambition—to set forth a comprehensive theory of rational-actor-based international law—even as its efforts meaningfully advance the scholarly debate.

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42. *See* United Nations, *supra* note 36.

43. These observations of the treaty-making process are based on Professor Stein's five years of experience as a participant in the CRPD negotiations.

44. The countries that have ratified the treaty as of February 9, 2008, are Bangladesh, Croatia, Cuba, El Salvador, Gabon, Hungary, India, Jamaica, Mexico, Namibia, Nicaragua, Panama, Peru, South Africa, and Spain.