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HUMAN RIGHTS: AN ANALYSIS OF IMPACT OF TREATIES ON THE NATIONAL LEVEL LEGISLATION

Muhammad Ahsan Iqbal Hashmi[1], Muhammad Amjad Tabassam[2], Nazar Hussain[3], Kashif Javed[4], Aatir Rizvi[5]

[1]Assistant Professor of Law, Bahauddin Zakaria University sub campus Vehari, Punjab, Pakistan

[2]LLM Candidate at UGLC Bahauddin Zakaria University, Multan, Punjab, Pakistan Email: Ph.D. (Law) scholar

[3]Department of Law, Times Institute Multan

[4]Ph.D. Scholar (International Law) Zhengzhou University, Henan China

[5]LLM (Cambridge, UK) MPhil (International Relations-PU)

Email: [1]ahsan267@hotmail.com [2]attorneyamjadjutt@gmail.com [3]advnazar770@gmail.com [4]Kashif.javed@leads.edu.pk [5]aatir.rizvi@gmail.com

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Abstract

There is no mechanism for reciprocity in human rights treaties, which sets them apart from other international organizations. Other states suffer adverse consequences when they breach their commitments through established international institutions, such as trade agreements. They have the option of retaliating by increasing duties on imports from the offending country. They have the option of retaliating by increasing duties on imports from the offending country. As a result, these treaties raise several intriguing questions about why governments agree to and follow them. Human rights literature has gone a long way toward

explaining governments' human rights behavior about human rights institutions. However, here we approach the problem from a fresh perspective of strategic network relationships. The intersection of networks and human rights is only just starting to be examined qualitatively in the human rights literature, so this research aims to contribute to this burgeoning area of research. With that aim in mind, we examine the effect of IGO, trade, and alliance dependence on human rights treaty ratification and compliance. We argue that such dependence on states that respect human rights creates significant ties that states will not want to risk having severed. As a result, those states will join and comply with the same human rights treaties that the states they depend upon have joined and complied with. That said, we argue that this dynamic will only hold for states that depend highly on others, not for states that others depend highly upon. The thinking here is that if dependence runs in both directions, the punishing state will not be willing to sacrifice its benefits from the relationship to make a point about respecting human rights

INTRODUCTION

Human rights treaties present a somewhat exciting conundrum. Unlike most other international agreements, human rights treaties provide no mode of reciprocation. If one state abuses its citizens' human rights, no other state is negatively affected. As a result, "states...do not tend to have reciprocal interests in enforcing the terms of the treaty against one another" (Hathaway2007, 592). Indeed, the idea of a state abusing its citizens as punishment for another state's human rights violations is absurd. However, these are precisely the sorts of actions that are taken with other international agreements. If one state reneges on its trade commitments, other states are negatively impacted, and they will likely retaliate by raising their tariffs on the offending state. The fact that human rights treaties do not function in the same way makes them somewhat puzzling. Why commit to a human rights treaty if it does not provide any reciprocal benefits if all it serves to do is place constraints on state sovereignty?

Years of human rights scholarship have gone a long way to understanding the puzzling nature of human rights treaty commitment. For example, we know that norms and reputation costs play a significant role in a state's decision to join a human rights treaty (Finnemore and Sikkink 1998; Keck and Sikkink 1998; Goodman and Jinks 2004). States join these treaties to signal to the international community that they support respecting human rights. This is a valuable thing to do since human rights have become such a widely accepted norm over the past 60 years (HafnerBurton and Tsustui 2005). Such signaling is in response to a concern for what Oona Hathaway (2007) terms "collateral consequences": the "expected reactions of individuals, states, and organizations to a state's decision" to join, and then comply with, a human rights treaty.

The compliance aspect of human rights treaties presents yet another puzzle, however. While it is relatively easy and low cost for states to join a human rights treaty, complying with that treaty is often much more costly, usually involving changes to laws and extensive government spending. Moreover, since these treaties have no actual enforcement mechanisms, the incentive to comply is minimal. So while one might assume (with good reason, even) that membership in a human rights treaty implies having a better human rights

record, that assumption would be somewhat naive. Because of the costs associated with compliance and the lack of enforcement mechanisms, a reasonably significant disconnect exists between human rights treaty membership and human rights practice. Just because a state has joined a human rights treaty - or several - does not necessarily mean it will have a solid human rights record. Take the case of China. It has ratified five of the seven major international human rights treaties, yet it continues to carry out a whole host of human rights abuses against its citizens.

People are thrown in jail for reading the Bible, and churches are bulldozed without cause. Despite the Chinese constitution guaranteeing free speech, anyone who is critical of the government risks arrest. These are just a few of the multitude of human rights abuses China has been accused of and are in direct violation of the human rights treaties it has joined. Moreover, it is not as though these abuses are not well known, either. Events like the Beijing Olympics in 2008 and China's public fight with Google over internet censorship have made China's human rights violations quite well known. However, they continue to be overlooked. Indeed, the United States has actively pursued a stronger trade relationship with China while choosing to completely ignore its wide-ranging human rights abuses (Edwards 1999)

Thus, human rights treaties are puzzling because they offer no reciprocal benefits to incentivize states to join them and because they have no enforcement mechanism, leading many states to join them but not comply with them. This disconnect between joining and complying leaves one wondering several things. Why have these treaties at all if states do not need to comply with them? Why do any states comply if they can get away with not complying? Why do states join if they have no intention of complying? Again, the current human rights literature has gone a long way to understanding these puzzles. First, research has shown there are benefits to having human rights treaties. While the evidence is mixed that membership in a human rights treaty positively influences a state's human rights behavior (Hafner-Burton and Tsutsui 2005; Simmons 2009), the mere presence of human rights institutions has reinforced the norm of protecting human rights, which has improved states' human rights practices (Hafner-Burton and Tsutsui 2005). Further, we know that states often join human rights treaties because they are already in compliance with them (Downs, Rocke, and Barsoom 1996; Von Stein 2005), meaning there is virtually no cost associated with joining and complying with the treaty. Moreover, finally, as previously mentioned, states join these treaties knowing they will not comply with them because it sends a relatively cheap signal of respecting human rights, which Hafner-Burton and Tsutsui (2005) call an act of "window dressing."

All of this is to say that human rights treaties are puzzling in several ways in their rather unique lack of reciprocity. From a rational choice perspective, state behavior concerning human rights treaties does not make much sense. Moreover, while the extant human rights literature has gone a long way towards making sense of his puzzling behavior, it seems safe to say that more remains to be understood. This project aims to explore the possibility of a state's strategic network ties influencing - and thus helping to explain - its

human rights behavior. In many ways, such a possibility falls in line with the current thinking on human rights behavior. We already know that states consider the reactions of others - and the resultant “collateral consequences” when deciding whether to join and comply with a human rights treaty. It is a natural extension of that thinking that states’ network ties would play into that calculus. Perhaps it is not surprising, then, that such topics are starting to be explored by others. Last year, a study was published on the effect of IGO, trade, and alliance dependence networks on membership in the International Criminal Court (Goodliffe, Hawkins, Horne, and Nielson 2012). While it may still be too early to know for sure, exploring networks and human rights may be a burgeoning area of study and the future of human rights scholarship. Scholars like Keck and Sikkink (1998) and Goodman and Jinks (2004) have already examined networks more theoretically and ideologically. Now might be the time when scholars start examining such networks in a more empirical and methodological sense. Moreover, in doing so, perhaps they will shed light on some of the more puzzling aspects of human rights institutions.

HUMAN RIGHTS TREATY FORMATION

Compared to some of the other areas of research regarding human rights treaties, the process of these treaties’ establishment has received relatively limited attention. Although a fair amount has been done to understand what motivates the formation of human rights treaties, the actual process of establishing these treaties is not well understood. Which states participate in this process? When is institution formation successful? When does it fail? Here, by examining the establishment - or lack thereof of three different human rights treaties, we hope to at least begin answering these questions. We will begin by reviewing the existing literature on this topic and then provide a brief recap of our theory. From there, we will delve into each of the three case studies, starting with the First Geneva Convention, followed by the Convention against Torture, and ending with ASEAN’s attempts to form a regional human rights treaty.

Institutionalization of Human Rights

While little research has been done on the actual process of establishing human rights treaties, a fair amount is known about the motivation behind the formation of these institutions. This work can be seen as an extension of Keohane’s (1982) work on the demand for regimes, but specific to human rights treaties. Perhaps not surprisingly, this body of literature focuses largely on human rights norms, examining how the idea that human rights are worth protecting in the international community came about and then spread state-to-state. The general argument seems to run that some exogenous shock - in the case of human rights, the Holocaust - is needed to prompt a shifting of ideas (Donnelly 1998; Goldstein and Keohane 1993). This helps explain how it came to be agreed upon in the international community that human rights institutions were needed to help ensure states protected the rights of their citizens. Then, according to Sikkink (1993), once a consensus about human rights emerges at the international level, norms begin to shift at the domestic level (assuming the conditions within a state are appropriate at the time for such a shift). This effect is further bolstered, Beth Simmons (2009) argues, by

the increasing number of democracies in the international system, which makes states more accepting of the idea of enforced human rights.

Moving beyond norms to examine the issue from a slightly different angle, Moravcsik (2000) tackles the puzzle of why states would be willing to sacrifice some of their sovereignty to establish a human rights treaty. Challenging both the realist and idealist perspectives, he argues that new democracies form human rights institutions as a way of “locking in” their political preferences. By establishing an international regime, they are provided more excellent protection should their domestic laws change in the future. Further, according to Moravcsik, established democratic states will likely go along with this process but are apt to accept only optional or rhetorical commitments. Noting that “historians have conducted almost no detailed case studies of the formation of international human rights regimes” (219), Moravcsik tests his theory by conducting an in-depth examination of the negotiations to establish the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1949–50. Analysis of this case lends support to his theory.

This body of work on the origin of human rights regimes undoubtedly provides valuable insight into why these institutions came about. It helps us to understand how critical international events led states to believe human rights institutions were necessary. It also helps us see how ideas about human rights - including the belief that human rights institutions need to be formed spread throughout the international community. Furthermore, perhaps most interestingly, research on this topic helps us understand why states would even want to establish a human rights treaty in the first place, knowing that it will place limitations on their sovereignty. Nevertheless, what happens once the decision is made to form a human rights treaty? What does the process of formation that follows look like? While the existing literature provides a clear narrative about how states came to agree that human rights were something worth addressing in a formal, institutionalized manner as well as why states would be willing to give up some of their sovereignty to do so we still lack an understanding of the actual process of human rights treaty formation.

Theory of Human Rights Institution Formation

Before delving into each of these cases, we will briefly recap our theory from the previous discussion, as we have a few expectations about what we are likely to see in these three case studies. First, we expect the formation of the Geneva Convention, which represents a treaty motivated by states’ interests, to exhibit some differences from the formation of the Convention against Torture, which represents a treaty motivated by more ideational interests. More specifically, we expect the formation of the Geneva Convention to follow a one-shot game in which states are focused solely on getting their interests met, in line with Keohane’s (1982) theory of regime formation. By contrast, we expect the Convention against Torture to follow a two-shot game in which states first aim to address the concerns of activist groups before then seeking to address their interests (with some natural tension existing between the two). The first phase would fall in line with Keck and Sikkink’s (1998)

theory of Transnational Activist Networks, while the second phase, as with the Geneva Convention, would align with Keohane's theory.

In addition to these predictions, the broader regime formation literature also provides some guidance regarding what might be found in these three cases. For example, based on Bearce, Floros, and McKibben's (2009) research, states with ties to each other should be more likely to participate in the formation process due to sharing a long shadow of the future. And, according to Blaydes (2004), states that are more willing to defect in the enforcement stage should be the ones holding out for a better deal at the bargaining stage. In other words, those states that care less about respecting human rights - and thus are willing to defect on such a treaty - are apt to hold up the bargaining process of hammering out the treaty's details. Finally, and once again drawing on Keohane's (1982) theory of regime formation, we expect to find that states will only want to form and join a human rights treaty if the benefits of doing so outweigh the sovereignty costs associated with such a venture. This expectation, in particular, should help inform when human rights treaty formation is successful or not.

Drawing on these expectations should help to provide some guidance in the evaluation of these three cases. That said, it is worth reiterating that these case studies are intended to be largely exploratory and theory-forming in nature. Thus, while starting from some baseline expectations is applicable, we intend to come at these cases with an open mind. Our goal is to discern basic patterns without letting these expectations influence our conclusions. Nonetheless, if findings align with these expectations, we will frame them to make clear the parallel.

The Geneva Convention

The Convention for the Amelioration of the Condition of the Wounded in Armies in Field of 1864, known more commonly as the First Geneva Convention, represents the first international legal agreement regulating warfare (Moorehead 1998, 45). It also represents one of the first international treaties aimed at protecting human rights - the rights of soldiers injured in battle. Since nearly all of today's human rights treaties were put in place after WWII, the Geneva Convention, established more than 80 years earlier, provides an essential point of comparison to these later human rights treaties. For example, due to it not coming about within the milieu of the post-Holocaust human rights fervor (although the three then-existing Geneva Conventions were revised and a fourth one added at this time), one could argue that the motivation for the establishment of the first Geneva Convention lacks the image-conscious, cheap-talk aspect that these later human rights treaties must overcome. Regardless of whether that is true or not, though, one cannot deny that the first Geneva Convention came about in a very different time than most of the international human rights treaties we have today. As a result, this treaty provides a valuable counterpoint to the other two cases we will be examining. And, in doing so, it also serves as a valuable contribution to the goal of this research to develop a better understanding of the factors that contribute to an international human rights treaty being successfully

established. By looking at the development of international human rights treaties during two very different times - first, when such treaties were virtually unheard of and then, when such treaties were already well-established in the international community, we can gain a better sense of the more fundamental aspects of a treaty's establishment that contribute to its success.

DISCUSSION AND CONCLUSIONS

However, how did the members of the Geneva committee even make it to those early successes? In some ways, the initial establishment of the ICRC and the Geneva Conventions is much more impressive than their longevity. Austria, Britain, and the United States - and many other states -eventually joined the Geneva Convention because they saw it was successful. They did not have to take it on faith. Indeed, they were not willing to take it on faith.

Nevertheless, faith was just about all that the people behind the initial founding of the Geneva Convention had - faith, plus hope, plus a certain amount of idealism. Without any evidence demonstrating that what they were trying to achieve would work, it was a much more challenging task to try to convince states to take part in their mission. Nevertheless, Dunant and the other four committee members did just that. So what explains their success? How were they able to take Dunant's initial idea from A Memory of Solferino and turn it into a reality? It seems that a few key factors contributed to the successful establishment of the Geneva Convention.

A Political Entrepreneur. It probably goes without saying that without Henri Dunant, the Geneva Convention would never have come into being. Not only did he come up with the idea for the establishment of an international society to care for the wounded in battle and a constituent international treaty, but he was dedicated to bringing that idea to fruition. He was so dedicated to this cause that his business affairs suffered tremendously during that time (Boissier 1985). In addition to this dedication, though, he was also well connected.

Along with all four of the other committee members, Dunant was a man of means from an established Genevan family. As a result, he met with foreign dignitaries and championed his cause with much greater ease. Thus, Dunant himself his ideas, passion, dedication, and influence - is perhaps the single most crucial explanation for the Geneva Convention's successful establishment.

An Instigating Event. That said, had Dunant not happened upon the battle of Solferino, none of the leadership he provided would have mattered because he would not have been inspired to take action. Before a problem can be resolved, it has to be identified, and in the case of international law, that event typically needs to be rather shocking. Not only were the events at Solferino shocking, but Dunant was able to convey very effectively just how shocking they were when he wrote and published A Memory of Soldering. That publication was another critical component of the Geneva Convention's success. It also helped foment the third critical element, public support.

Convention Against Torture

The establishment of the Convention against Torture (CAT) does not have quite the same storied history as the Geneva Convention. Unlike the latter, the CAT was not the doing of an intrepid idealist set on remaking the norms of interstate behavior in war, in the face of many believing his goal to be too bold, too ambitious, and, ultimately, unrealizable. No, the establishment of the CAT took what could be described as a more conventional trajectory - that of following the procedural steps necessary to create a United Nations (UN) treaty.

Part of the reason the story of the establishment of the CAT is not quite as captivating as that of the first Geneva Convention is when it was established. Whereas the first Geneva Convention was somewhat revolutionary for its time, by the time the CAT came about nearly 120 years later, the idea of establishing international standards and treaties to protect human rights had become all but universally accepted as appropriate. Indeed, even before the CAT was implemented, several other international laws prohibiting torture already existed (Burgers and Danelius 1988, 11). Thus, in contrast to the ground-breaking nature of the Geneva Convention, the framers of the CAT were not trying to do something new and different. They wanted to improve on what was currently in place by reinforcing and strengthening the existing laws against torture.

Beyond creating disparate narratives, though, the separation in time creates a critical difference between these two treaties. What is so unique about the Geneva Convention - and a large part of the reason its history is so fascinating - is that it was ahead of its time in many ways. At its core, it is a human rights treaty. It aims to regulate the conduct of war to ensure the proper treatment of wounded soldiers, thus protecting what the treaty implicitly establishes as their right to adequate medical care. However, this treaty came about 80 years before the post-WWII human rights movement. Before that time, the idea of taking steps to protect the rights of people in other countries - possibly violating the sacred norm of sovereignty in the process was unheard of. However, that is precisely what the Geneva Convention did. Put another way, and the Geneva Convention protected human rights before it was the “cool” thing to do.

DISCUSSION AND CONCLUSIONS

So what does this case tell us about the process of forming a human rights treaty? Despite entering into force over 100 years after the Geneva Convention and being formulated in an entirely different international setting - one where norms about both human rights behavior and international institutions had changed dramatically - the Convention against Torture demonstrates many of the same essential characteristics as the Geneva Convention.

A Political Entrepreneur. Perhaps the one significant difference between the formation of the Geneva Convention and the formation of the CAT is a clear political entrepreneur. Whereas credit for the Geneva Convention could arguably go to one man, Henri Dunant, the same cannot be said for the CAT.

One might be able to claim that the delegation from Sweden took a leadership role - from the very beginning, it took an active role in the Declaration against Torture and the CAT, it was one of only eight states to attend every meeting related to the drafting of the CAT,its draft convention was selected as the basis for future discussions - but ultimately it does not amount to the same level of leadership possessed by Mr. Dunant. Indeed, in terms of starting the process of creating a treaty aimed solely at strengthening international laws against torture, Amnesty International probably deserves the most credit. After it, that organization's campaign against torture put the issue on the UN's radar. So while the CAT did indeed have some essential leaders, countries, and organizations that took particularly active roles in creating the CAT - it still lacked a singular individual who championed the cause and can be given the bulk of the credit for the treaty ever being created. Perhaps this means that such a singular entrepreneur is not necessary for a human rights treaty to be successfully formed. Or, perhaps it was necessary back when the Geneva Convention was being formed - when norms of human rights behavior and international law were much more nascent, and doubts about whether such a treaty could even be created (let alone be successful) were much more common but not today.

Instigating event. While the Geneva Convention and the CAT do not share the presence of a solid individual political entrepreneur, they do share the presence of an instigating event. Back in 1859, it was the Battle of Solferino. In the 1970s, the presence of military regimes in Latin America were carrying out widespread acts of torture. Although torture has a long history, and this was in no way the first instance of governments torturing their citizens, the violence occurring in Latin America was different - it drew the attention of people around the world. Once Amnesty International heard about the atrocities being committed there, it quickly launched a global campaign against torture.

Moreover, once people around the world heard about what was going on, they demanded action. The UN was compelled to act. Obviously, this course of events is not precisely the same as what happened after Dunant witnessed the carnage at Solferino. However, the effect of these two "instigating" events is essentially the same. Were it not for these events; people would not have been catalyzed into action. That said, the absence of these events would not necessarily mean the absence of these treaties - it would just be a matter of time before some other instigating event occurred, eventually stirring people into action just the same. However, the point remains: without some catalyzing event that captures people's attention and pushes organizations to take action, it is doubtful that a human rights treaty can be formed.

CONCLUSION

The cases examined here offer an excellent starting point for future exploration and a better understanding of the process of human rights treaty formation. Through these cases, several factors have been identified as influencing the success of this process. First is the existence of a political entrepreneur. In the case of the First Geneva Convention, the entrepreneur came in the form of a person, Henri Dunant, and played a significant role in

establishing that treaty. Indeed, were it not for Dunant's initiative and unwavering resolve to see his dream implemented, the Geneva Convention would not have been established at all. That said, such a leader is not necessarily imperative to this process. In the case of the CAT, the political entrepreneur came in the form of an NGO (Amnesty International) and a state (Sweden), not a single individual championing his cause. Thus, it seems that the role of a political entrepreneur can take a variety of forms. No matter what form it takes, though, what is essential is that some entity is pushing for the implementation of the treaty. As seen in the ASEAN case, without a central leader to head up and motivate the formation process, an initiative to reach an agreement is apt to lag.

Finally, the purpose of this analysis was to provide some insight into the human rights treaty formation process. While a great deal is known about this process for international institutions in general, much less is known for human rights treaties in particular. And because human rights treaties are so distinct from most other international agreements because they offer no reciprocal benefits to member states, it is reasonable to expect that the formation process for human rights treaties will not be the same as for other international institutions. Indeed, some of the broader regimes literature does not seem applicable to human rights treaties because of their unique characteristics. Arguments about states wanting outs to help offset concerns about uncertainty (Rosendorff and Milner 2001; Kormenos 2005; and Rosendorff 2005) are ill-suited to human rights treaties because human rights treaties are not common lack enforcement mechanisms. Thus, states do not need to worry about the uncertainty of other states' complying because their compliance does not affect them. They do not need to worry about escape clauses because they face no punishment for defecting. That said, while these critical differences exist, there are some similarities as well. As was seen with Keohane's (1982), Blaydes' (2004), and Kormenos et al.'s (2001) theories, they presented some clear parallels with the treaties examined here. The point remains, though, that human rights treaties are in a class of their own as international institutions, so understanding how the process of their formation differs from other international regimes is worth exploring. The ideas presented here hopefully provide an excellent starting point for such an understanding.

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