

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Edited by **Beth A. Simmons**
and **Richard H. Steinberg**

curative measure taken by the state to break this historical cycle. However, the effectiveness of such a strategy is contingent on detaining high-level perpetrators and, presumably, giving amnesty to those at lower levels (perhaps in return for admitting guilt, fully disclosing events, and testifying at trials of political and military leaders, as has occurred in truth and reconciliation proceedings elsewhere). Yet early precedent set by the tribunals runs an opposite course.

* * *

Decollectivizing guilt also does not provide a means of promoting tolerance by shaping ethnic and national identities. Social constructivists argue that ethnic identities are malleable and shaped by continually changing social contexts, yet none of the currently debated elements of ethnic conflict management incorporate a mechanism for “re-imagining” the sociopolitical community.¹¹¹ It would seem that some mechanism of social education should accompany decollectivization of guilt if the atrocities regime is to succeed within these more expansive agendas.

* * *

CONCLUSION

What lessons can be drawn from these initial developments in the atrocities regime? Realist factors have dominated the politics of war crimes adjudication, but the atrocities regime is in its infancy. To dismiss the efficacy of the atrocities regime at this stage is premature, and the evidence here suggests that its development is proceeding rapidly. From an institutionalist perspective, we can ask how the regime can be strengthened, and what lessons can be learned from the existing ad hoc tribunal system. IL analysts suggest that the strength of legal regimes centers on consistency (precedent) and legitimacy, on hard law.¹¹² Conversely, regime analysts, most notably in the field of international political economy, suggest that flexibility, rather than rigidity, increases regime strength.¹¹³ Robert Keohane argues that “Institutions based on substantive rules have proven to be fragile entities,” adding “flexibility and openness . . . may increase the usefulness of an international institution.”¹¹⁴ Flexibility is also important when the long-term impacts of

¹¹¹ Anderson 1983.

¹¹² See Franck 1990; Jackson 1984; and Trimble 1990.

¹¹³ Krasner 1983.

¹¹⁴ Kahler 1995, 137. See also Goldstein et al. 2000, 392.

the institution are uncertain, especially when state sovereignty and/or national security are involved.¹¹⁵ The key to establishing an effective regime lies in squaring the circle between hard legalization and political flexibility and locating the regime within a comprehensive program of ethnic conflict management. On the first point, examining the cases as part of a dynamic political development suggests that steps are being taken to “soften” the legalization process – at least in the short run – in order to attain flexibility and minimize concerns about sovereignty and security. On the second point, the regime must be linked with other policy tools applicable to ethnic violence, including preventive diplomacy, foreign aid, international intervention, spatial separation and reconfiguring political spaces, and social education programs.¹¹⁶

War crimes adjudication also presents analytical challenges. A purely legalistic (IL) view cannot accurately explain many of the political dimensions involved in forming an atrocities regime nor can the highly macroscopic, analytical view of IR. The issues presented here suggest the need for a war crimes vocabulary and more mid-level theories for understanding war crimes tribunals and their use in establishing justice and promoting peace.¹¹⁷ Clearly, to understand and inform the development of the atrocities regime, we need research that incorporates the overlap between IL and IR.¹¹⁸ While researchers remain at the forefront of this agenda, promoting peace and ameliorating human suffering provide strong incentives for further analysis.

¹¹⁵ Abbott and Snidal 2000.

¹¹⁶ See Jentleson 1998; Kaufmann 1996; Lake and Rothchild 1998b; and Walter and Snyder 1999.

¹¹⁷ I owe this important insight to an anonymous *IO* reviewer.

¹¹⁸ See Goldstein et al. 2000; Keohane 1997; and Slaughter 1993.

The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe

Andrew Moravcsik

The fiftieth anniversary of the UN Universal Declaration on Human Rights marks an appropriate moment to reconsider the reasons why governments construct international regimes to adjudicate and enforce human rights. Such regimes include those established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Inter-American Convention on Human Rights, and the UN Covenant on Civil and Political Rights.

These arrangements differ from most other forms of institutionalized international cooperation in both their ends and their means. Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities. In contrast to most international regimes, moreover, human rights regimes are not generally enforced by interstate action. Although most arrangements formally empower governments to challenge one another, such challenges almost never occur. The distinctiveness of such regimes lies instead in their empowerment of individual citizens to bring suit to challenge the domestic activities of their own government. Independent courts and commissions attached to such regimes often respond to such individual claims by judging that the application of domestic rules or legislation violates international commitments, even where such legislation has been enacted and enforced through fully democratic

*** For an earlier version of this article with more detailed documentation, see Moravcsik 1998b.

procedures consistent with the domestic rule of law. Arrangements to adjudicate human rights internationally thus pose a fundamental challenge not just to the Westphalian ideal of state sovereignty that underlies realist international relations theory and classical international law but also – though less-frequently noted – to liberal ideals of direct democratic legitimacy and self-determination. The postwar emergence of these arrangements has rightly been characterized as the most “radical development in the whole history of international law.”¹

Consider, for example, the ECHR, established under the auspices of the Council of Europe and based in Strasbourg, France. The ECHR system is widely accepted as the “most advanced and effective” international regime for formally enforcing human rights in the world today.² Since 1953, when the ECHR came into force, it has sought to define and protect an explicit set of civil and political rights for all persons within the jurisdiction of its member states, whether those individuals are aliens, refugees, stateless persons, or citizens. It initially established a Commission on Human Rights to review petitions.³ The Commission could investigate the case, seek to settle it, or forward it under certain circumstances to a court of human rights, whose decisions governments are legally bound to follow. Two optional clauses of the ECHR, Articles 25 and 46, were subsequently adopted by all member states; they permit individual and state-to-state petitions and recognize the compulsory jurisdiction of the court. Many European governments have subsequently incorporated the convention into domestic law, directly or indirectly. For these reasons, the ECHR Court is right to proclaim the convention “a constitutional document of European public order.”⁴

Over the last half-century, analysts agree, the legal commitments and enforcement mechanisms entered into under the ECHR have established “effective supranational adjudication” in Europe. Compliance is so consistent that ECHR judgments are now, in the words of two leading

¹ See Humphrey 1974, 205, 208–209; Krasner 1995; and Falk 1981, 4, 153–83.

² Petitions could be judged admissible if they meet several criteria, most importantly the prior exhaustion of domestic remedies. Henkin et al. 1999, 551. In this article I am not concerned with purely rhetorical human rights documents, such as the UN Universal Declaration, but solely with enforceable commitments. Rights imply remedies, without which the former are of little utility. Unsurprisingly, hypocrisy in signing declarations without mechanisms for direct enforcement appears to be without significant cost, regardless of a country’s domestic policies. ***

³ See Janis, Kay, and Bradley 1995; Robertson and Merrills 1993; and van Dijk and van Hoof 1998. ***

⁴ *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A, 1995), 27.

international legal scholars, “as effective as those of any domestic court.”⁵ In hundreds of cases where an explicit decision has been taken or a “friendly settlement” reached – including matters of criminal procedure, penal codes and the treatment of prisoners, vagrancy legislation, civil codes, systems of legal aid fees and civil legal advice, the rights of illegitimate children, military codes, expropriation policies, systems of awarding building permits, treatment of the mentally ill, reformatory centers, wiretapping, and censorship of the press – governments have amended legislation, granted administrative remedies, reopened judicial proceedings, or paid monetary damages to individuals whose treaty rights were violated.⁶ When the court recently ruled that exclusion of homosexuals from the British armed forces violated the ECHR, the British government immediately announced its intention to comply. ***⁷

There is a real theoretical puzzle here. Why would any government, democratic or dictatorial, favor establishing an effective independent international authority, the sole purpose of which is to constrain its domestic sovereignty in such an unprecedentedly invasive and overtly non-majoritarian manner?

To answer questions such as this, political scientists tend to espouse either a realist or an ideational explanation for the emergence and expansion of formal human rights regimes. Democratic governments and transnationally active members of democratic civil societies either coerce other governments to accept human rights norms (the realist view) or persuade other governments to do so (the ideational view). Some scholars espouse both positions at once, arguing that powerful democracies are persuaded for essentially idealistic reasons to coerce others to respect human rights norms.

Such realist and ideational conjectures, though popular among scholars, rest on a remarkably thin empirical foundation. *** Only the UN system – a notably weak regime – has been the subject of significant research, and this body of work focuses on rhetorical statements, such as the UN Declaration, rather than arrangements for adjudication and enforcement.⁸ Such analyses, moreover, tend to accept uncritically the *ex post* conjectures of practitioners and commentators.

⁵ Helfer and Slaughter 1997, 283, who draw on Shapiro 1981, 7, 26–36.

⁶ Carter and Trimble 1995, 309.

⁷ On domestic incorporation, see Polakiewicz and Jacob-Foltzer 1991; Drzemczewski 1983, 11–12; and Merrills 1993.

⁸ For the best of these, see Morsink 1999.

This article contains the first systematic empirical test of competing theories of the establishment of formal international human rights regimes. It does so by examining the negotiations to establish the ECHR in 1949–50. I argue that the primary proponents of binding international human rights commitments in postwar Europe were neither great powers, as realist theory would have it, nor governments and transnational groups based in long-established liberal democracies, as the ideational account would have it. Although established democracies supported certain human rights declarations, *they allied with dictatorships and transitional regimes in opposition to reciprocally binding human rights enforcement* – a seldom-noted tendency for which realists and ideational theorists have no explanation. The primary proponents of reciprocally binding human rights obligations were instead the governments of newly established democracies.

This curious pattern is explicable only if we adopt a different theoretical starting point: the domestic political self-interest of national governments. Establishing an international human rights regime is an act of political delegation akin to establishing a domestic court or administrative agency. From a “republican liberal” perspective – one related to institutional variants of “democratic peace” theory as well as to the analysis of “two-level games” and public-choice theories of delegation – creating a quasi-independent judicial body is a tactic used by governments to “lock in” and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats. In sum, governments turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives.

I argue that governments will resort to this tactic when the benefits of reducing future political uncertainty outweigh the “sovereignty costs” of membership. It follows that “self-binding” is of most use to *newly established democracies*, which have the greatest interest in further stabilizing the domestic political status quo against nondemocratic threats. We should therefore observe them leading the move to enforce human rights multilaterally, whereas established democracies have an incentive to offer lukewarm support at best. In the case of the ECHR, this theoretical approach best explains the cross-national pattern of support for binding norms, the tactics governments employed, and the archival record of public rhetoric and confidential domestic deliberations.

The implications of this approach go well beyond postwar European human rights. The logic of “locking in” credible domestic policies through

international commitments can be generalized to other human rights regimes – including the recent International Criminal Court – and unilateral human rights policies, not least the apparently anomalous behavior of the United States, as well as to other issue areas in world politics, regardless of whether their substantive content is “liberal.” The latter include the stabilization of autocratic regimes under the Concert of Europe and Comintern, and the coordination of monetary and trade policies.

EXISTING THEORIES OF INTERNATIONAL HUMAN RIGHTS COOPERATION

Existing scholarship seeking to explain why national governments establish and enforce formal international human rights norms focuses on two modes of interstate interaction: coercion and normative persuasion. Respectively, these define distinctive “realist” and “ideational” explanations for the emergence of human rights regimes. * * *

Interstate Power: “For Countries at the Top, This Is Predictable”

Realist theories of international relations, and thus of the origin of human rights regimes, stress the distribution of interstate bargaining power. Governments accept international obligations because they are compelled to do so by great powers, which externalize their ideology – a prediction that follows equally from hegemonic stability theory and conventional realist bargaining theory. * All governments seek to maintain full domestic sovereignty wherever possible. With governments uniformly skeptical of external constraints, the major limitation on cooperation is the cost of coercion or inducement, which is inversely proportional to the concentration of power. Establishment of a binding human rights regime requires, therefore, a hegemonic (“k”) group of great powers willing to coerce or induce recalcitrant states to accept, adjust to, and comply with international human rights norms. The greater the concentration of relative power capabilities, the greater the pressure on recalcitrant governments and the more likely is an international regime to form and prosper.

Precise formulations of the realist argument vary. E. H. Carr, Hans Morgenthau, and other classical realists maintain that governments employ liberal ideology, including support for human rights, to justify the pursuit of geopolitical interest.⁹ Jack Donnelly writes of the Inter-American

⁹ See Carr 1946; and Morgenthau 1960.

Convention on Human Rights that “much of the explanation [for] the Inter-American human rights regime . . . lies in power, particularly the dominant power of the United States . . . [It] is probably best understood in these terms. The United States . . . exercised its hegemonic power to ensure its creation and support its operation.”¹⁰ John Ruggie uncharacteristically takes a similar line when he conjectures that human rights regimes will be weaker than nuclear nonproliferation regimes, because the former are of less concern to the core superpower security interests.¹¹ Kenneth Waltz asserts that powerful nations invariably seek to impose their views on other nations: “Like some earlier great powers, we [the United States] can identify the presumed duty of the rich and powerful to help others with our own beliefs . . . England claimed to bear the white man’s burden; France had its *mission civilisatrice*. . . . For countries at the top, this is predictable behavior.”¹² Alison Brysk links acceptance of human rights norms to the pressure by international financial organizations such as the World Bank, backed by Western donor countries.¹³ ***

Normative Persuasion: “The Inescapable Ideological Appeal of Human Rights”

The most prominent ideational explanations for the emergence and enforcement of human rights regimes look to altruism and the persuasive power of principled ideas. Such explanations rest, to that extent, on what used to be termed “utopian” or “idealist” foundations. The essence of such explanations lies in the prominence of idealistic or altruistic motivations for spreading liberal values.¹⁴ Governments accept binding international human rights norms because they are swayed by the overpowering ideological and normative appeal of the values that underlie them. “The seemingly inescapable ideological appeal of human rights in the postwar world,” writes Donnelly, who espouses a wide range of theories, “is an important element in the rise of international human rights regimes.”¹⁵

Ideational arguments differ most fundamentally from realist arguments in their reliance on a distinctive conception of interstate interaction. They explicitly reject choice-theoretic foundations and instead stress

¹⁰ See Donnelly 1986, 625, also 637–38; and Ruggie 1983, 99.

¹¹ Ruggie 1983, 104.

¹² Waltz 1979, 200. See also Krasner 1992.

¹³ Brysk 1994, 51–56.

¹⁴ Keck and Sikkink 1998, chap. 1–3.

¹⁵ Donnelly 1986, 638. On soft power, see Nye 1990.

the transformative power of normative moral discourse itself. In this view, a critical characteristic of political action in this area is that it is “principled” – that is, the altruistic and moral motives of actors have persuasive power in themselves. Accordingly, the most fundamental motivating force behind human rights regimes is not rational adaptation, let alone coercion, but transnational socialization – the “logic of appropriateness.”¹⁶ Many such explanations assert that transformations in actor identities occur through the impact of “principled” nongovernmental organizations (NGOs) on domestic and transnational opinion.¹⁷ NGOs and publics within established democracies set up transnational networks, epistemic communities, and global discourses of human rights, dedicated to the advancement of a normative discourse of human rights. This in turn mobilizes domestic and transnational civil society at home and abroad, eventually socializing foreign and domestic leaders.¹⁸

Whence the ideological appeal of human rights? Some scholars look to human moral psychology, regional cultures, or salient historical events, but the most plausible explanation links support for international human rights protection to domestic democracy and commitment to the “rule of law.”¹⁹ In this view, which Thomas Risse terms “liberal constructivism,” established democratic governments seek to extend their domestic values abroad and recognize others who do so. The more democratic they are, the more likely their espousal of human rights values.²⁰ Charles Kupchan and Clifford Kupchan conjecture that “states willing to submit to the rule of law and civil society are more likely to submit to their analogues internationally.”²¹ Similarly, Kathryn Sikkink points to the leading role of established democracies in promoting human rights, such as linking Scandinavian support for human rights enforcement to the salience of social democratic values in their domestic politics.²² Thomas Franck asserts that compliance with international law is a function of the normative acceptance of international

¹⁶ See Finnemore and Sikkink 1998; and Donnelly 1986.

¹⁷ See Sikkink 1993; Risse-Kappen 1994; and Finnemore 1996.

¹⁸ See, for example, Keck and Sikkink 1998; and Ramirez, Soysal and Shanahan 1997.

¹⁹ Russett 1993. For alternative views, see Keck and Sikkink 1998; Sikkink 1993; Sieghart 1983, 26–27; and Ando 1992, 171–72. See also Donnelly 1986; Whitfield 1988, 31, also 28–31; and Drzemczewski 1983, 220.

²⁰ See Risse-Kappen 1996; and Moravcsik 1997. This view is related to the ideational variant of democratic peace theory, in which the democratic peace results from the tendency of liberal governments to externalize their domestic ideals. See Russett 1993.

²¹ Kupchan and Kupchan 1991, 115–16.

²² Sikkink 1993.

rules, which in turn reflects (among other things) their consistency with domestic values.²³ In sum, governments promote norms abroad because they are consistent with universal ideals to which they adhere; governments accept them at home because they are convinced doing so is “appropriate.”

The desire to conform to shared ideas and norms of state behavior (“collective expectations about proper behavior for a given identity”), in this view, does not simply regulate state behavior, but constitutes and reconstitutes state identities.²⁴ Such theories explicitly distance themselves from explanations that rely on instrumental calculations about the establishment of legitimate domestic governance.²⁵ Two leading ideational theorists explicitly reject, for example, the argument I shall introduce later – namely, that governments support human rights regimes to advance partisan and public interest in preventing domestic violence and interstate warfare. In a striking historical conjecture, these analysts assert that in the 1940s and 1950s governments could not possibly have sought human rights regimes to preserve the “democratic peace” because such founding moments “came well before the emergence of the new social knowledge” that undemocratic regimes undermine peace – a collective belief they date to research by liberal international relations theorists in the early 1980s, led by Michael Doyle.²⁶ As we shall soon see, this equation of “social knowledge” with academic political science misstates the true origins of human rights regimes because it underestimates the ability of nonacademics to generate a widely accepted, factually grounded – and ultimately accurate – consensus about world politics.

The “New Orthodoxy”: A Curious Convergence of Realism and Idealism

The study of human rights makes unlikely bedfellows. Although realist and ideational theories start from very different assumptions, their predictions about human rights tend to converge. Most existing analyses of human rights regimes rest on an uneasy synthesis of these two

²³ Franck 1988.

²⁴ Jepperson, Wendt, and Katzenstein 1996, 54.

²⁵ Finnemore and Sikkink 1998. Thomas Risse has sought to take this further by drawing on Habermasian normative theory as a basis for positive analysis. See Risse 2000.

²⁶ Keck and Sikkink 1998, 203. See also [fn. 53] and accompanying text in this article. Compare Helfer and Slaughter 1997, 331–35.

explanations. Realists cited earlier tend to argue that human rights norms are expressions of domestic values, not simply propagandists justifications for the pursuit of national security interests.²⁷ ***

Many in both schools adopt what Robert Keohane has elsewhere termed the realist “fall-back” position: Public interest groups with idealistic values, perhaps transnationally organized, shape the underlying preferences of democratic great powers, which then deploy their preponderant power to construct and enforce international human rights norms. Idealism explains the position of great powers; realism explains the spread of norms.²⁸ In generalizing about human rights regimes, for example, Margaret Keck and Kathryn Sikkink focus extensively on the transcultural attractiveness of ideas and the density of transnational organization (ideational factors) *and* the vulnerability of targets to sanctions (a realist factor). As we have seen, they explicitly contrast this explanation, however, with an explanation that focuses on domestic institutional and material preconditions, which they reject outright (on theoretical, not empirical grounds) as at most only secondary.²⁹

There is thus considerably more convergence in empirical predictions about the source of support for human rights regimes than broad theoretical labels might suggest (see Table 24.1). Most theories, whether realist or ideational, predict that governments, interest groups, and public opinion in established democratic states spearhead efforts to form and enforce international human rights regimes – and they induce, coerce, or persuade others to go join. Yet, as I discuss in more detail later, this is simply not the case. In postwar Europe, as in the UN during this period, established democracies consistently opposed reciprocally binding human rights obligations and neither coerced nor persuaded anyone else to accept them. Before moving on to the empirical analysis, it is therefore necessary to examine a third explanation for the formation of human rights regimes.

²⁷ Even if this were the case, the argument would not be entirely realist, since the claim that democratic governments are more likely to side with the West does not necessarily follow from realist theory. Even self-styled realists increasingly concede that societal preferences play an important, often determinant role in alliance formation. For a criticism of this type of realist degeneration, see Legro and Moravcsik 1999.

²⁸ Ruggie 1983, 98–99. On this sort of realist fall-back or two-step position more generally, see Legro 1996; Moravcsik 1997, 543; Keohane 1986, 183; and Legro and Moravcsik 1999.

²⁹ Keck and Sikkink 1998, 201–209.