

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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

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.

TABLE 24.1. *Establishing Human Rights Regimes: Theories, Causal Mechanisms, and Predictions*

	Realism	Ideational theory	Republican liberalism
<i>Motivations and tactics</i>	Great powers employ coercion or inducement to unilaterally extend national ideals derived from national pride or geopolitical self-interest. Smaller states defend their sovereignty.	Altruistic governments and democracies seek to extend perceived universal norms. Less-democratic states are socialized or persuaded through existing transnational networks (the "logic of appropriateness").	Governments seek to prevent domestic oppression and international conflict through international symbols, standards, and procedures that secure domestic democracy. They are constrained by fear that domestic laws might be struck down. International agreement reflects convergent interests.
<i>Predicted national preferences on compulsory commitments</i>	Supporters are led by democratic great powers. The weaker the state, the less support we observe.	Supporters are led by societal groups and governments in the most democratic states. The less established the democracy, the less support we observe.	Supporters are led by newly established democracies. Established democracies accept only optional or rhetorical commitments. Nondemocracies oppose.
<i>Predicted variation in cooperation</i>	Greater concentration of power in the hands of great power democracies. More cost-effective coercion or inducement More cooperation.	More attractive norms, more salient, more legitimate exemplars, and the more established the transnational networks. More powerful socialization effects. More cooperation.	More immediate threats to democracy. Greater desire to enhance domestic stability. More cooperation.

REPUBLICAN LIBERALISM: DEMOCRATIC PEACE AND
DOMESTIC COMMITMENT

If realist and ideational explanations view the motivations for establishing human rights regimes as involving international coercion or persuasion, a “republican liberal” explanation views them as resulting from instrumental calculations about domestic politics.³⁰ In general, republican liberal theories stress the impact of varying domestic political institutions – in particular, the scope and bias of political representation – on foreign policy. The most prominent among such theories include institutional explanations of the “democratic peace,” yet the family of republican liberal theories offers a far wider range of potential explanations, subsuming theories of the role of cartelized elites and independent militaries in provoking war, and of interest group capture (or the countervailing delegation of authority to strong executives) in foreign economic policy.³¹ In contrast to the idealist theories considered earlier, which assume that social actors are responsive to external socialization and often altruistically motivated, republican liberal theories assume that states are self-interested and rational in their pursuit of (varying) underlying national interests, which reflect in turn variation in the nature of domestic social pressures and representative institutions.³²

³⁰ Liberal international relations theory focuses on state behavior driven by variation in the economic interests and conceptions of public goods provision on the part of societal groups, as well as by the nature of domestic political institutions. The republican liberal label is appropriate to international relations theory debates, though the concern about promoting democracy also has elements of ideational liberalism – the strand of liberal theory based on the tendency to promote domestic provision of public goods (national identity, political institutions, and legitimate economic redistribution) preferred by domestic actors. (This differs from idealist theory in the minimal role it accords altruism or transnational socialization.) On the ideational strand of liberal theory, see Moravcsik 1997; and Van Evera 1990. In American or comparative politics, such an explanation might be thought of as drawing on public-choice theory, institutionalist theory, constitutional theory, the theory of delegation, or theories of nested games.

³¹ For a discussion on the full range of potential liberal explanations, see Moravcsik 1997.

³² Liberal international relations theories assume that states behave as rational, unitary actors in the pursuit of their underlying preferences, though not in the definition of those preferences. Their theoretical distinctiveness lies in their consistent focus on variation in national preferences resulting from social pressures for particular material and ideational interests, as well as the way such interests are represented by state institutions. In this regard, institutional variants of democratic peace theory and theories of legislative-executive relations share common liberal theoretical assumptions. For an elaboration, see Moravcsik 1997; Doyle 1986; Russett 1993; Snyder 1991; Bailey, Goldstein, and Weingast 1997; Van Evera 1999; and Legro and Moravcsik 1999.

A useful republican liberal starting point for the problem at hand is to assume that international institutional commitments, like domestic institutional commitments, are self-interested means of “locking in” particular preferred domestic policies – at home and abroad – in the face of future political uncertainty. This presumption, which is not only consistent with republican liberalism but also draws on theories widely employed to explain domestic delegation to courts and regulatory authorities in American and comparative politics, treats domestic politics as a game in which politicians compete to exercise public authority.³³ Terry Moe observes that “most political institutions . . . arise out of a politics of structural choice in which the winners use their temporary hold on public authority to design new structures and impose them on the polity as a whole [Institutions are] weapons of coercion and redistribution . . . the structural means by which political winners pursue their own interests, often at the great expense of political losers.”³⁴ Governments establish courts, administrative agencies, central banks, and other independent bodies as means by which the winners of political conflict seek to commit the polity to preferred policies. From this perspective, a rational decision to delegate to an independent body requires that a sitting government weigh two crosscutting considerations: *restricting government discretion* and *reducing domestic political uncertainty*.

Consider first the surrender of national discretion, which in the international context might be termed the *sovereignty cost* of delegation to an international authority. All other things equal, governments in power prefer to maintain short-term discretion to shape collective behavior or redistribute wealth as they see fit. They are therefore inherently skeptical of delegation to independent judges or officials, since there is always some “agency cost” to the operation of central banks, administrative agencies, courts, and other quasi-independent political authorities. Judges, in particular, may seek to negate government actions by nullifying them outright or by failing to enforce them effectively. ***

In the international realm, the defense of governmental discretion translates into the defense of national sovereignty. All other things equal, the “sovereignty cost” of delegating to an international judge is likely to be even greater than that of delegating to a domestic judge. One reason is that cross-national variation in the precise nature, scope, application, and enforcement of human rights is likely to be greater than domestic variation.

³³ Moe 1990.

³⁴ Ibid., 222, 213. ***

*** Particularly for nations without a constitutional court – again, Britain is a striking example – the procedure marks a significant innovation.³⁵ *** From this perspective, the defense of “national sovereignty” is, in part, a legitimate defense of national ideals, political culture, and even democratic practices – a problem of which the framers of post-World War II human rights documents (and their academic advisers) were quite aware.³⁶

Why would a national government, democratic or not, ever accept such external normative and institutional constraints on its sovereignty? The answer lies in the second major consideration that enters into a government’s decision whether to delegate to an independent political body: reducing political uncertainty. In the republican liberal view, politicians delegate power to human rights regimes, such as domestic courts and administrative agencies, to constrain the behavior of future national governments. As Moe explains, a politician must always calculate that “while the right to exercise public authority happens to be theirs today, other political actors with different and perhaps opposing interests may gain that right tomorrow.”³⁷ To limit the consequences of this eventuality, government authorities may thus seek to “lock in” favored policies in such a way, thereby insulating them from the actions of future governments.

From this perspective, human rights norms are expressions of the self-interest of democratic governments in “locking in” democratic rule through the enforcement of human rights. By placing interpretation in the hands of independent authorities managed in part by foreign governments – in other words, by alienating sovereignty to an international body – governments seek to establish reliable judicial constraints on future nondemocratic governments or on democratically elected governments that may seek (as in interwar Italy and Germany) to subvert democracy from within. In the language of international relations theory, this “two-level” commitment “ties the hands” of future governments, thereby enhancing the credibility of current domestic policies and institutions.³⁸ Salient and symbolic international constraints serve as signals to trigger domestic, and perhaps also transnational and international, opposition to any breach of the democratic order. Thus

³⁵ Drzemczewski 1983, 11.

³⁶ McKeon 1949.

³⁷ Moe 1990, 227.

³⁸ Evans, Putnam, and Jacobson 1993.

democratic regimes seek to prevent political retrogression or “backsliding” into tyranny.

The decision of any individual government whether to support a binding international human rights enforcement regime depends, in this view, on the relative importance of these two basic factors: Sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favor of it. If we assume that the inconvenience governments face is constant (or randomly distributed), it follows that a country is most likely to support a human rights regime when its government is firmly committed to democratic governance but faces strong internal challenges that may threaten it in the future. Its willingness to tolerate *sovereignty costs* increases insofar as the costs are outweighed by the benefits of reducing *domestic political uncertainty*.

If the republican liberal view is correct, *the strongest support for binding human rights regimes should come not from established democracies but from recently established and potentially unstable democracies.* ***

*** Less obvious and in striking contrast to realist and idealist accounts *** is the prediction that dictatorships will be joined in opposition to binding commitments by well-established liberal democracies. By accepting binding obligations, governments in established democracies incur an increased, if modest, risk of de facto nullification of domestic laws without a corresponding increase in the expected stability of domestic democracy, since the latter is already high. Such governments have good reason – indeed, a democratically legitimate reason – to reject any reciprocal imposition of international adjudication and enforcement of human rights claims.

This is not to say that established democracies never have an incentive to support international human rights instruments. According to republican liberal theory, established democracies have an incentive to promote such arrangements for others – which may involve some small risk of future pressure on established democracies to deepen their commitment – in order to bolster the “democratic peace” by fostering democracy in neighboring countries.³⁹ This is most likely to occur when democratization is expected to pacify a potentially threatening neighbor or solidify opposition to a common nondemocratic enemy. In such cases, established democracies can be expected to support rhetorical declarations in favor

³⁹ Russett 1993. This argument is liberal rather than realist, since for realists the domestic governance of states should make no difference in the perception of threat, whereas for democratic peace theorists, it does.

of human rights and regimes with optional enforcement that bind newly established democracies but exempt themselves. Yet there is little reason to believe that this concern will outweigh domestic interests; thus they are likely to remain opposed to reciprocally enforceable rules.⁴⁰ Further observable implications concerning national tactics and confidential discussions are developed in the next section.

TESTING THE THEORIES: THE NEGOTIATION OF THE ECHR

What light does the negotiating history of the ECHR cast on the power of these three competing theories? The negotiation of the ECHR took place between 1949 and 1953 under the auspices of the Council of Europe. At the first session of the Council of Europe's Consultative Assembly in September 1949, its legal committee under the chairmanship of the Frenchman Pierre-Henri Teitgen recommended that an organization be created to ensure adherence to human rights in Europe. ***

Realist, ideational, and liberal institutional theories all offer *prima facie* explanations for the general form and timing of the ECHR's establishment. For realists, this period marked the dawning of an "American century" and a moment in which the West became embroiled in a bipolar conflict with the Soviet Union. For ideational theorists, it immediately followed the Holocaust, a salient historical event of considerable moral force, and occurred immediately after the rise to salient Western leadership of two long-established democratic exemplars, the United States and the United Kingdom.⁴¹ During the immediate postwar period, republican liberals might observe, a wave of new liberal democracies emerged (or reemerged) across Western Europe. Nondemocratic institutions were widely viewed as a source of both World War II and the Cold War, and, accordingly, the democratization of Germany, Italy, and other West European nations was seen as a guarantee against both a revival of fascism and the spread of communism.

To assess the relative importance of these three plausible theories, we therefore require more fine-grained evidence than a simple coincidence of timing or the existence of occasional public rhetorical justification.

⁴⁰ In theory, one might argue that the incomplete adherence of established democracies could be expected to undermine the international regime, which could in turn destabilize newly established democracies and thereby create threats to established democracies. Yet in practice the signaling function of international norms in any given country does not appear to depend on the adherence by others to enforcement clauses; certainly this conjecture seems to have played an unimportant role in British or European deliberations.

⁴¹ For a more solidly grounded view, see Helfer and Slaughter 1997, 331–35.

I consider three types of evidence: the cross-national pattern of national positions, the process of international negotiation, and the direct documentary record of national motivations. ***

Cross-National Variation in National Preferences

* * *

We can measure the willingness of governments to accept binding obligations by examining their position on two related elements of the institutional design of the ECHR – both essential to the future effectiveness of the regime.

- *Compulsory jurisdiction*: Should the regime mandate that member states recognize the jurisdiction of an independent international court, as opposed to a body of foreign ministers?
- *Individual petition*: Should the regime mandate that member states grant private individuals and groups standing to file cases?

Since both mandatory binding jurisdiction *and* individual petition are required to render a system of international human rights adjudication effective, a vote for both is defined as support for a reciprocally binding regime, whereas a vote against either marks opposition.⁴² ***

To investigate the relationship between democratic governance and support for binding regimes, we also require a measure of how stable a democracy is expected to be.⁴³ European political systems involved in the negotiations can be divided into three categories. The first category, “established democracies,” contains those systems that had been continuously under democratic rule since before 1920 and remained so thereafter: Belgium, Denmark, Luxembourg, Netherlands, Norway, Sweden, Netherlands, and the United Kingdom. (Occupation is not coded

⁴² Sikkink suggests a less satisfactory coding, one which conflates the domestic and external concerns of governments in such a way as to greatly exaggerate the relative importance of the latter. Sikkink 1993. In fact only a miniscule set of ECHR cases have been brought by one state against another. [Council of Europe 1975, IV/248–52, also 132ff, 242–96, also I/xxiv, 10–24, 296ff; passim, and V/68–70. By the time the member states negotiated individual petition, underlying positions were harder to make out, since it was becoming increasingly clear that such provisions will be optional.]

⁴³ Conventional political science measures of “democracy” are inappropriate, since such measures assess institutions’ levels of democracy, not future expectations of democratic stability. The length of continuous democratic rule is a conventional measure in the literature on the democratic peace and elsewhere for the depth of commitment to democracy. See, for example, Russett 1993. ***

as a suspension of domestic democracy, but the establishment of a non-democratic domestic regime is – for example, Vichy France) The second category, “new democracies,” contains those that were firmly established during the negotiations and remained so thereafter, but only since a point between 1920 and 1950: Austria, France, Italy, Iceland, Ireland, and West Germany. The third category, “semidemocracies and dictatorships,” contains the two governments that were not fully democratic by 1950, because of civil war or internal repression (and did not remain so thereafter), namely Greece and Turkey. Spain and Portugal, though not involved in the negotiations, also belong in this category.⁴⁴

Turning to the findings, we see little evidence of the positive correlation between support for binding regimes and power or length of democratic rule predicted by realist and idealist theory. Instead, we observe the inverse-U-shaped relationship between the stability of democracy and support for binding human rights commitments predicted by republican liberal theory. Table 24.2 summarizes the findings. [New democracies] support binding human rights guarantees. In contrast, six of the seven established democracies join the four transitional governments and non-democracies in opposing one or both such guarantees (or, in the case of Luxembourg, abstaining). *** The correlation is so strong that even recategorization of borderline cases – France and Turkey, say – would not undermine the striking relationship.

A number of ad hoc conjectures suggested by historians, legal academics, and common intuition about postwar European politics also fall by the wayside. Opposition appears to be uncorrelated with the possession of colonies.⁴⁵ ***

Opposition is similarly uncorrelated with the existence of a strong domestic tradition of parliamentary sovereignty, as some analysts of Britain conjecture. Many strong supporters – France, Belgium, Italy, Germany, Austria, Iceland, and Ireland – shared an equally deep tradition of parliamentary sovereignty. Any imputation of causality from the correlation between *postwar* support for domestic judicial review and international enforcement of human rights (say, in the cases of Italy, Germany, and Austria), furthermore, is very likely to be spurious. *** It is far more plausible that these countries adopted both domestic *and* international judicial review because of a strong desire to bolster the democratic order ***. *** [The] establishment of domestic constitutional

⁴⁴ For a further discussion of this coding, see the notes to Table 24.2.

⁴⁵ This is the factor most often mentioned in the secondary literature.

TABLE 24.2. *Stability of Democratic Governance and National Positions on the European Convention on Human Rights*

	Unstable or nondemocracies (stable democracy not yet clearly established by 1950)	New democracies (continuous democracy only since a date between 1920 and 1950)	Established democracies (continuous democracy since a date before 1920)
<i>Supports enforcement</i> (individual petition and compulsory jurisdiction mandatory)	—	Austria, France, Italy, Iceland, Ireland, Germany ^b	Belgium ^c
<i>Opposes enforcement</i> (individual petition and/or compulsory jurisdiction optional or absent)	Greece, ^a Turkey ^a (Portugal, ^d Spain ^d)	—	Denmark, Sweden, Netherlands, Norway, United Kingdom, Luxembourg ^e

^a Greece and Turkey are characterized as unstable, whereas Austria, France, Italy, Iceland, Ireland, and Germany are characterized as new, because (1) it had been less than a year after conclusion of the bloody Greek civil war, and extra-legal measures were still in force; and (2) Greek and Turkish democracy were widely viewed as limited by the role of the military and incomplete judicial autonomy. It is also worth noting that both governments would subsequently slip back into dictatorship.

^b Germany, not yet a member of the Council of Europe, did not have voting rights, but participated actively in the negotiations.

^c Belgium initially hesitated, supporting the convention only with optional clauses, but then came to favor mandatory enforcement.

^d Spain and Portugal, both dictatorships, were not members of the Council of Europe. Yet, in striking contrast to Germany (also not a member), they showed little independent interest in participating informally, nor were they invited to do so.

^e In some the cases, Luxembourg abstained on, rather than opposed enforcement measures. Subsequent data reanalysis revealed that Belgium should have been coded as "opposed" and Turkey as "democratic." This removes one anomaly but creates another. AMM [2005].

review, like the establishment of international human rights guarantees, is a postauthoritarian phenomenon. * * *

Republican liberal theory also seems to offer the most accurate account of the instrumental attitude governments adopted toward more detailed provisions of the ECHR. Should the convention create, governments asked themselves, an independent court, a quasi-judicial body of

government representatives, or no central institution at all? Cleavages around this issue were similar to those around compulsory jurisdiction and individual petition, with opponents of effective enforcement opposing the court.⁴⁶ Governments favorable to binding human rights adjudication proposed that the members of the intermediary Commission on Human Rights be nominated by the court – a clear effort to render international institutions more independent – whereas more skeptical governments favored granting power of nomination to the intergovernmental Committee of Ministers.⁴⁷

* * *

The Domestic and International Decision-Making Process

Realism, ideational theory, and republican liberalism also generate distinctive predictions about the tactics likely to be most salient in interstate negotiations. Realist theory, with its stress on interstate power and deep conflicts of interest, leads us to expect to observe attempts by great powers to coerce or bribe weaker states to change their policies. Ideational theory, by contrast, leads us to expect to observe attempts by governments or transnational groups in civil society to engage in transnational persuasion. Such persuasion may suffice in itself or may be a prelude to subsequent coercive tactics. For liberal theorists, by contrast, there is little reason to expect governments to alter their views on fundamental issues such as the nature of constitutional adjudication in light of threats, promises, or normative persuasion by other democratic governments. * * *

Published documents contain very little direct confirmation of either the realist or ideational predictions. No great power or long-standing democracy appears to have made threats or offered inducements to secure stronger commitments. The most important powers engaged in Western Europe at the time, the United States and the United Kingdom, were respectively absent or opposed. Ideational theorists might point out that the “European Movement,” working through the Assembly of the Council of Europe, was engaged in transnational discussion and mobilization. Certainly many leading advocates of the convention were European federalists and viewed the ECHR as a step toward European integration.⁴⁸ Yet there is

⁴⁶ Council of Europe 1975, IV/248–50.

⁴⁷ Council of Europe 1975, III/268–70.

⁴⁸ Some Jewish parliamentarians and law professors were also prominent and may have been influenced by their experiences and beliefs.