INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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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]

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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

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[46] Council of Europe 1975, IV/248–50.
[47] Council of Europe 1975, 111/268–70.
[48] Some Jewish parliamentarians and law professors were also prominent and may have been influenced by their experiences and beliefs.

little evidence that a shared transnational discourse influenced the positions of parliamentary politicians in the assembly, let alone representatives of national governments. ***

Instead the preponderance of evidence concerning negotiating tactics confirms republican liberal predictions. Rather than seeking to coerce or persuade one another, or mobilizing groups in civil society, national governments conducted a classical international negotiation. Governments focused primarily on practical compromises that would assure that the system functioned to assure each state its preferred level of sovereign control. New institutions were modified to a compromise close to the lowest common denominator, with no government forced to accept immediate constraints on its own policies significantly greater than those it ideally sought. Where there was discord, optional clauses afforded governments flexibility. ***

Domestic Deliberation and Public Justification

The final type of evidence consists of the records of confidential deliberations and public justifications by national decision-makers, drawn from debates in the Parliamentary Assembly of the Council of Europe, negotiating sessions among the national governments, and the documentary record of confidential deliberations in one critical country where such documents are available, namely the United Kingdom. ***

*** Not a single piece of documentary evidence in the sources I have been able to consult supports the realist prediction that governments impose international human rights norms through threats of external coercion or inducement. At no point do we observe governments weighing the costs and benefits of coercion, concerning themselves with the distribution of power capabilities, or mentioning foreign or military aid.

There is slightly more evidence for the ideational view, but not enough to establish any confidence in its veracity. At most, NGOs and public opinion appear to have played a secondary, even insignificant, role.[49] The rhetoric of politicians in the European Assembly, as well as some interest groups, invoked moral considerations. Yet for the ideational theory to be confirmed, such statements must be designed to socialize or persuade national governments by appealing to respect for human rights as an end in itself, rather than as an instrument to promote

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[49] For a similar conclusion regarding the abolition of the slave trade, see Kaufman and Pape 1999.

concrete ends of enduring interest to member governments – the pre-
vention of tyranny, genocide, and aggression. There is no evidence of
this; positions, as we have seen, do not change. * * *

The overwhelming bulk of the documentary evidence confirms instead
the republican liberal account. By far the most consistent public justifica-
tion for the ECHR, to judge from debates in the Council of Europe Con-
stituent Assembly, was that it might help combat domestic threats from
the totalitarian right and left, thereby stabilizing domestic democracy
and preventing international aggression. (It is helpful to remember that
both Hitler and Mussolini came to power, at least initially, by constitu-
tional means.) Teitgen, the chief French advocate of the ECHR in the
assembly, considered "Fascism, Hitlerism, and Communism" as the major
postwar threats to democracy.[50] Governments, Teitgen argued, should
seek to "prevent – before it is too late – any new member who might be
threatened by a rebirth of totalitarianism from succumbing to the in-
fluence of evil, as has already happened in conditions of general apathy.
It is not enough to possess freedom; positive action must be taken to
defend it . . . . Would Fascism have triumphed in Italy if, after the
assassination of Matteoti, this crime had been subjected to an interna-
tional trial?"[51] Yet postwar human rights regimes were a response not
simply to the recent fascist past but also to the prospect of a Communist
future. The latter was mentioned just as often. In this period, we must
recall, the French Communist Party enjoyed plurality electoral sup-
port. Teitgen spoke of the "abominable temptation" to "exchange . . .
freedom for a little more bread."[52]

* * * This * * * refutes the conjecture – which, as we have seen, Sikkink
and Keck treat as an essential piece of evidence for ideational theory – that
few analysts before the 1980s could possibly have been aware of a link
between democracy and peace. In many ways the democratic peace
proposition, which dates from the eighteenth century, was a central tenet,
arguably *the* central tenet, of postwar Western planning, as it had been in
the thinking of Woodrow Wilson and other liberal statesmen a generation
before.[53]

Yet domestic self-interest dominated. The most explicit justifications
for the ECHR as a bulwark against future tyranny were advanced not

[50] Council of Europe 1975, I/40–42.
[51] Council of Europe 1975, I/192, 120, 64, also 60–64, for statements by others, I/66, 84,
120ff, 192–94, 276, 278–80, 292.
[52] Council of Europe 1975, I/40–42.
[53] Keck and Sikkink 1998, 203. Compare footnote 26. See Moravcsik 1992 and 1997.

by representatives from countries with the longest democratic heritage but, as republican liberal theory predicts, by those from newly established democracies. Among the most persistent advocates of this position were Italian and German representatives. *** A German representative went further, proposing a treaty obliging all member states to come to each other's aid, apparently with force, if domestic freedom were threatened.[54]

Yet the primary expectation was not that the regime would strengthen democracy by mobilizing intervention by foreign governments to enforce human rights norms, as realist and some ideational theory might lead us to expect. Nor did governments stress active transnational mobilization. Most participants appear to have felt that domestic politics would remain the primary site of enforcement – all members were to be democracies, at least formally – with international controls serving as an external signaling device to trigger an appropriate domestic response.[55] The ECHR was intended primarily to strengthen existing domestic institutions of judicial review, parliamentary legislation, and public action, not to supplant them. ***

*** The arrangement was primarily a means to prevent backsliding by new democracies. As Sir David Maxwell-Fyfe of the United Kingdom put it: "In answer to the criticism that, as signatories will be limited to democratic states the Convention is unnecessary . . . our plan has the advantage of being immediately practicable; it provides a system of collective security against tyranny and oppression."[56]

Unlike the UN system, the ECHR was designed to be enforceable – a goal, Maxwell-Fyfe argued, that was realistic only because all of its members already shared an essentially democratic political culture.[57]

[The United Kingdom is a critical case.] Opposition by the oldest and most firmly established democracy in Europe constitutes a particularly striking disconfirmation of realist and ideational theory.[58] The British, as we have seen, supported international declaratory norms but firmly

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[54] Ibid., V/328–30, 336–40.
[55] Lester 1994, 4–5. See also Teitgen 1988, 482.
[56] Council of Europe 1975, I/120.
[57] See ibid., I/50–52; and Teitgen 1988, 488.
[58] The UK position was also viewed as decisive. See, for example, Paul-Henri Spaak, cited in Teitgen 1988, 478. Britain is also a country for which we have a wealth of reliable archival documents and oral histories. I have restricted myself here to materials found in published sources.

opposed any attempt to establish binding legal obligations, centralized institutions, individual petition, or compulsory jurisdiction.[59] * * *

What issues were raised in confidential British deliberations? The secondary literature on British human rights policy makes much of two British concerns: the fear that residents of British colonies and dependencies might invoke the ECHR, and aversion to European federalism. To judge from confidential discussions, however, neither appears to have been a dominant concern. * * * [Overall] there is surprisingly little discussion of colonial implications in the deliberations – certainly far less than purely of domestic considerations. Colonial Office concerns appear to have been isolated and intermittent. In any case, a colonial clause in the ECHR would limit any such claims, and consideration of such a clause did not blunt British opposition.[60] * * *

Confidential domestic deliberations suggest instead that British opposition reflected what A. Maxwell, permanent secretary to the Home Office, described as "grave apprehension about what might happen at home."[61] When the issue finally reached the Cabinet, the attention of ministers – after brief mention of colonial and economic concerns – seems to have focused on domestic application. Precisely as republican liberal theory predicts, the primary concern was not the vulnerability of the overall British record on human rights. As Parliamentary Secretary for Foreign Affairs Hector McNeil observed in a 1947 memo to Prime Minister Clement Atlee, Britain had an "extremely good record." British decision-makers appear sincerely to have believed that Britain would be less inconvenienced by reciprocal commitment than other member governments. The definition of rights in the convention was, so the Foreign Office memo to the Cabinet in 1950 concluded, "consistent with our existing law in all but a small number of comparatively trivial cases."[62]

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[59] Marston 1993, 799–800.
[60] Marston 1993, 806–807, 809–10, 812, 816. In 1953 the British government voluntarily extended the Convention to the forty-two overseas territories for whose international relations they were responsible.
[61] Marston 1993, 813.
[62] Marston 1993, 811. With a lack of modesty about their domestic political institutions characteristic of this period, British officials and politicians also sometimes cited the need to set a good example for foreign countries as a reason for Britain to take an active role in the negotiations.

The specific issue cited most often by the government's legal authorities was the British policy toward political extremists. A ministerial brief referred to a "blank cheque" that would "allow the Governments to become the object of such potentially vague charges by individuals as to invite Communists, crooks, and cranks of every type to bring actions."[63] ***

Yet it would be misleading to argue that British institutional idiosyncrasy *caused* British opposition. Every established democracy, after all, has its treasured idiosyncrasies, and British leaders sincerely believed that, as the cradle of rule-of-law governance, they would suffer least.[64] *** For British decision-makers, the decisive point was not the nature of these concrete objections but *the utter absence in the British domestic context of any countervailing self-interested argument in favor of membership.*

The quaint scenarios of extremist threats raised by British officials demonstrate this. They arose not because extremist groups in Britain were particularly strong but because, in comparison with the Continent, they were so weak. Whereas French, German, and Italian officials viewed the ECHR as a check on the potential triumph of popular extremist parties, British officials saw it only as a hindrance to a defense of the political system against agitation by isolated individuals. British internal debates and external statements were utterly devoid of any recognition of the advantages of collective security against domestic extremists – advantages central to continental arguments for the ECHR. Whereas the French were concerned that the Communist Party might take power electorally and have to be checked by the ECHR, the British were concerned that isolated radicals might file suit under the ECHR. In this context, marginal inconveniences overridden elsewhere in the interest of bolstering democratic stability became fundamental obstacles to the acceptance of binding international human rights norms.

For these reasons, the British government long considered opposing the convention altogether. Yet, in the words of an internal Foreign

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[63] Marston 1993, 806.
[64] It is possible they were wrong. One intriguing conjecture is that the longer a democratic form of government is in place, the more attached to its idiosyncrasies citizens and elites are likely to grow, and the further from the norm of international constitutionalism its practices are likely to become. Hence we would expect countries such as Britain, the Netherlands, Sweden, and the United States to become particularly attached to their idiosyncratic national systems. If correct, this would mean that established democracies not only reap fewer benefits from international human rights enforcement but also bear greater costs.

Office paper, "The alternative, namely refusal to become a party to a Convention acceptable to nearly all the remaining States of the Council of Europe, would appear to be almost indefensible . . . . Political considerations, both domestic and foreign, compel us now to bring ourselves to accept" an (optional) right of individual petition.[65] What blunted British opposition to any postwar European human rights regime was, above all, the fear of resurgent totalitarianism abroad that might pose an eventual military threat to the United Kingdom – precisely as republican liberal theory predicts.[66] This fear reflected not just a concern with a resurgence of Fascism, but also a turnaround in British foreign policy in 1948 in response to the perceived rise of the Communist threat in Western Europe. The West, the government argued, needed not only to maintain the military balance but also to strengthen continental democracies.

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Having secured concessions, which essentially rendered the convention unenforceable in Britain, the cabinet unanimously accepted the desirability of signing it.

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GENERALIZING THE ARGUMENT: HUMAN RIGHTS AND BEYOND

We have seen that the origins of the ECHR, the most successful international human rights adjudication and enforcement regime in the world today, lies not in coercive power politics or socialization to idealistic norms, as contemporary international relations theories predict. Instead its origins lie in self-interested efforts by newly established (or reestablished) democracies to employ international commitments to consolidate democracy – "locking in" the domestic political status quo against their nondemocratic opponents. This empirical finding has three broader implications for future research on domestic politics and international relations.

The Origin and Evolution of Human Rights Regimes

The first implication of the theoretical argument is that the tendency of states to enhance the credibility of domestic policies by binding themselves

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[65] W. E. Beckett, Legal Advisor to the Foreign Office, April 1947 Foreign Office meeting, cited in Marston 1993, 798, 811, also 798–804.

[66] Note that this differs from the realist account in that the threat is not, in the first instance, a function of military power, but of political and ideological difference.

to international institutions may help explain the origins and evolution of human rights enforcement regimes more generally. In negotiations to create the Inter-American Convention on Human Rights, the UN Covenants, and the emergent African human rights system, we should expect to see a similar pattern of support from new democracies, suspicion from established democracies, and hostility from dictatorships.[67] In the following overview I highlight suggestive evidence and propose areas for future research.

The negotiation of the UN Covenant on Civil and Political Rights appears to illustrate the dynamics of democratic commitment. At the height of the Cold War, in the early 1950s, the most stable among modern democracies, including the United States and the United Kingdom, allied with authoritarian and totalitarian states like the Soviet Union, China, South Africa, and Iran, in opposition to the inclusion of compulsory, enforceable commitments. The alliance in favor of such commitments, as republican liberal theory predicts, included recently established democracies in continental Europe, Latin America, and Asia.

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The positions of the established democracies in recent years concerning the creation of war crimes tribunals offer at least partial confirmation of republican liberal theory. Established democracies had little difficulty accepting tribunals with jurisdiction over the former Yugoslavia and Rwanda, where their own policies would not be implicated. Yet where commitments were (de facto) reciprocally binding – namely, in open-ended institutional commitments involving countries that actually engage in foreign intervention – established democracies, confident that they maintain adequate domestic safeguards against domestic atrocities, hesitated to accept international constraints. In the recent International Criminal Court negotiations, three established democracies with a recent history of intervention abroad (the United States, France, and Israel) posed the greatest difficulties. After fighting to dilute the obligations of the treaty, the United States and Israel joined China and highly repressive Middle Eastern and North African states in opposition, while France was the very last major power to lend its support to the treaty.[68]

[67] For an overview, see Robertson and Merrills 1996.
[68] For a general treatment of war crimes tribunals demonstrating the unwillingness of established democracies to pay high costs, see Bass 1999.

What about the development of human rights regimes over time? An understanding of major human rights regimes does not end with their founding. We have seen that the ECHR, like other major human rights instruments, created a number of optional clauses on individual petition and compulsory jurisdiction of the court. In some cases, early opponents of an enforceable convention remained exceptionally recalcitrant.[69] Yet over the subsequent five decades, all West European governments progressively adopted such clauses and in many cases incorporated the ECHR into domestic law.

Much of this accords with republican liberal theory. We observe a strengthening of commitments during and immediately after "democratic waves" – as hit Latin America and Central Europe during the 1990s. Such efforts are strongly favored by new democracies.[70] In Europe, the most important reform in the history of the ECHR, for example, was launched in the early to mid-1990s. "Protocol 11," opened for signature in May 1994, permits the ECHR Court to assume the functions of the commission and compels all new signatories to accept compulsory jurisdiction and individual petition – practices already universal among the original members. Leading legal academics argue that the most important impetus for Protocol 11 was "the widening . . . to include [states] that have had little domestic, much less international, experience in the legal protection of human rights."[71] The first three countries to ratify Protocol 11 were three transitional democracies: Bulgaria, Slovakia, and Slovenia. The governments of some new democracies in Central and East Europe were similarly quick to accept minority rights obligations as a means of locking in domestic democracy.[72] In the Americas, acceptance of compulsory jurisdiction by the Inter-American Court has occurred over the past two decades – a period in which domestic constitutional review also became nearly universal. In contrast,

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[69] Sweden and the Netherlands are among the handful of countries that have been specifically ordered by the ECHR to allow more effective domestic judicial review of human rights claims; many have argued that Britain should be on the list as well. Lester 1994.

[70] Huntington 1991. Consider, however, former British colonies, which on gaining independence adopted explicit bills of rights and constitutional review – some on their own, some with the encouragement of the British government. Many were patterned after the European Convention, but the underlying impetus stems, republican liberal theory argues, from their status as emerging postauthoritarian democracies. Some of the most stable of these, such as those in the Caribbean, rejected international obligations.

[71] Janis, Kay, and Bradley 1995, 88–89, 113–18.

[72] See Manas 1996; and Wippman 1999.

human rights norms remain weak in those regions where new democracies are few, as in Africa or the Middle East.

Despite these important insights, however, the determinants of the evolution of human rights regimes are unlikely to be identical to the determinants of their founding and are therefore unlikely to be explained entirely by republican liberal theory. The ECHR deepened over a period during which European governments grew more confident about the stability of domestic democratic governance. Hence the theory advanced here cannot be the sole, or even the major, explanation for the subsequent deepening of the regime. A social process intervenes between original intent and ultimate evolution – a process, we have seen, of which governments were quite aware in 1950. British officials believed that the ECHR would alter domestic political arrangements so as to encourage the mobilization of new social demands for human rights enforcement. Republican liberal theory would suggest that such new demands reflect new opportunities for representation of social interests once a nation joins a regime; broader liberal theory would stress changes in social ideas and interests. Further research is required to clarify the precise dynamics of such long-term trends.[73]

Generalizing the Theory to Other Issue Areas

A second direction for future research is to extend the theory to co-operation in other issue areas. Despite the "republican liberal" label, the theoretical distinctiveness of the explanation advanced here is only incidentally connected to the liberal content of the philosophy embodied in human rights regimes. In other words, the argument is *theoretically* rather than substantively liberal.[74] Distinct to republican liberal theory is the decisive role of domestic political representation in world politics and, by extension, the possibility that international institutions, like their domestic counterparts, can enhance the credibility of domestic political commitments, thereby "locking in" current policies. Whether or not governments are "liberal," international institutions may "strengthen the state" domestically by expanding its domestic control over initiative, information, ideas, and institutions.[75] ***

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[73] Moravcsik 1995.
[74] Moravcsik 1997.
[75] Moravcsik 1994.

Under what general conditions should we expect to observe international commitments of this kind? Republican liberal theory suggests three conditions: (1) governments fear future domestic political uncertainty, (2) the position of the national government is supported by a consensus of foreign governments, and (3) international cooperation helps induce domestic actors to support the maintenance of current policies.

Where else in world politics might these three conditions be met? Two types of examples must suffice. Where nondemocratic governments cooperate to enhance their domestic credibility, a mirror image of human rights institutions may arise. Stephen David argues that "weak and illegitimate" leaders of developing countries often view internal enemies as more dangerous than external ones and are therefore likely to select international alliances that undermine domestic opponents.[76] The Holy Alliance is a nineteenth-century example of international cooperation designed to block the seemingly inevitable spread of domestic liberalism and nationalism – inside and outside its membership. ***

Further examples of efforts to use international regimes to bolster domestic policy credibility are found in international trade and monetary policy.[77] Mexico, for example, in exchange for its commitment to the North American Free Trade Area (NAFTA), gained relatively few economic concessions from the United States and Canada. This has led many analysts to argue that NAFTA should be seen less as a quid pro quo and more as a means of establishing the credibility of the Mexican commitment to trade and economic liberalization against the future potential of backsliding.[78] Mexican reform within NAFTA was just such a case where the three conditions were met: policy credibility was questionable, the consensus among foreign governments (the United States and Canada) was closer to the views of the domestic (Mexican) government than those of Mexican protectionists, and the costs of unilateral defection were perceived as large.

The process of European integration rested similarly on centralizing power in national executives, who consistently employed "foreign policy" decision-making institutions to handle issues traditionally decided in "domestic" forums.[79] *** In European monetary cooperation, weak-currency countries like France and Italy have been among the strongest

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[76] David 1991.
[77] Rodrik 1989.
[78] For example, Haggard 1997.
[79] See Moravcsik 1994; and Goldstein 1996.