

Human Rights Treaty Origins Travaux Project

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1	Introduction.....	1
2	Existing Literature	2
3	Data Collection Methodology.....	3
4	Data Analysis.....	4
4.1	A Theory of Preferences.....	4
4.1.1	Methodology.....	4
4.1.2	The Model.....	6
4.2	A Theory of Influence.....	7
4.2.1	Methodology.....	7
4.2.2	Hypotheses.....	9
5	References.....	12

1 Introduction

Over roughly the last fifteen years, an emerging literature has used empirical approaches to better understand the purpose, design, and impact of international human rights treaties. Political scientists and legal scholars have considered, for instance, why states ratify treaties, the factors that predict institutional features, and whether and how treaties impact human rights performance (Hafner-Burton 2014 (summarizing literature)). Despite this large body of literature, the questions of what actors, influences, and motivations shape treaty provisions—and the implications for international relations theory generally—has gone largely unexplored. That is, multilateral treaty-making has often been treated as a “black box,” with little attention to the often political origins of treaty provisions.

This study will attempt to partially open that black box by examining and quantifying the travaux preparatoires of many of the nine core UN human rights treaties.²

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² They include the following nine treaties: International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(d), Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of

Specifically, we hope to develop a theory state preferences and examine how they predict ratification and other official behavior, to determine what factors predict how states directly influence the substantive provisions of treaties, to explain the motivations for this influence, and to show why some types of states and organizations are more influential than others.

2 Existing Literature

A significant body of literature has considered why states ratify human rights treaties (e.g., Simmons 2009; Hathaway 2007),³ the factors associated with multi-lateral treaties' institutional features, including how those institutions facilitate cooperation (e.g., Axelrod and Keohane 1985; Koremenos et al. 2001; Martin and Simmons 1998); and to what extent human rights treaties impact de facto human rights performance (e.g., Camp-Keith 1999; Hathaway 2002; Neumayer 2005; Simmons 2009).⁴ In addition, a small body of legal scholarship has studied the drafting of particular human rights treaties qualitatively and/or historically (Cohen 1990; Cholewinski 1997; Waltz 2001).

The studies in each category come to different conclusions. For instance, some argue that states generally join treaties with good-faith intention of complying (Chayes and Chayes 1993), or that they do so to appease domestic competitors (Vreeland 2008). Regarding influence, Hathaway (2002), Camp-Keith (1999), and Smith-Cannoy (2012) find that treaty ratification does not meaningfully improve human rights performance. In contrast, Landman (2005), Simmons (2009), and Lupu (2013) find a positive association under certain conditions.

Regardless of their focus, methods, and findings, most of this literature treats treaties themselves as exogenous to international behavior. That is, they generally take the treaties' characteristics as a starting point; they do not focus on how states and international organizations' power, interests, and ideas have shaped the treaties' substantive provisions.⁵ No current scholarship involves a systematic study of how

Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities; International Convention for the Protection of All Persons from Enforced Disappearance; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

³ Selected scholarship explaining ratification patterns is listed in Appendix A.

⁴ Selected scholarship considering influence of treaties is listed in Appendix B.

⁵ Koremenos et al. (2001) argue that treaties are generally designed rationally, in response to a host of internal and external conditions. Their findings mostly characterize the actions of states generally; they do not study in depth the motivations or incentives of particular states in the drafting process. And some of the ratification and design literature studies, which inquire into the motivations and behavior of states before and during the acceptance of international obligations, partially touch on how politics shapes treaty content.

certain types of states and international organizations pursue their agendas in the treaty-making process generally.

To be sure, some have noticed that certain state features—including smallness, or economic or military weakness—can be important in international law agenda-setting. For instance, scholars have generally characterized small-state foreign policy as particularly inclined toward “employ[ing] diplomatic and economic foreign policy instruments, as opposed to military instruments,” “emphasiz[ing] internationalist principles, international law, and other ‘morally minded’ ideals,” and “secur[ing] multinational agreements . . . whenever possible” (Hey 2003, 5; see also Baillie 1998). With regard to human rights, Beth Simmons has written, “The coalition of smaller democracies, newly independent former colonies and increasingly legal activists were the prime movers in codifying most of the provisions of the UDHR over the course of the 1950s and 1960s” (Simmons 2009, 49; Waltz 2001).

These conclusions, however, are drawn almost entirely from case studies and other qualitative observations of certain state behavior. By methodically exploring the process of treaty-making itself, this project would occupy this gulf in the treaty literature. It will use large-n data and quantitative methods similar to much of the ratification, design, and influence studies, to test the conjectures of Hey, Simmons, and others about the disproportionately large role of small states in international-law creation.

3 Data Collection Methodology

As part of the treaty-drafting records, the various conventions’ working groups regularly issued detailed meeting reports and other documents that identify the content and sponsors of substantive proposals.⁶ Unfortunately, the travaux for most of the conventions is still mostly inaccessible to the public; there is no electronic central depository for most treaties, and many of the older records still exist only in microfiche or other physical formats where the treaties were concluded, such as New York and Geneva. But over the past two years, researchers at the University of Virginia Law School, led by the Law Library staff, have worked to acquire access to a database of meeting reports for these treaty-drafting deliberations.⁷ These efforts have enabled this

⁶ For example, a report from a drafting meeting for the Migrant Workers’ Convention notes, “The representative of Morocco, supported by the representatives of Jamaica, Algeria, India and the Philippines, suggested starting the article with a chapeau, recognizing, on the one hand, the right of migrant workers to dispose of their earnings and savings and, on the other hand, that States should facilitate the transfer of their earnings and savings” (A/C.3/38/1, ¶ 22).

⁷ Mila Versteeg, Alec Knight, and Kevin Cope have collaborated with a team of law librarians, who have worked to locate and assemble the near-complete travaux for the nine treaties. Alec Knight in particular traveled to travaux repositories in New York and Geneva to locate hard or microfiche copies. The researchers determined that the universe of documents for the nine treaties comprises approximately

project, which begins with reviewing each meeting report and other pertinent documents, and identifying all proposals relating to the substantive content of the treaty.

The current stage of the project, then, involves quantifying the information contained in the travaux documents. In coding the travaux, we will be interested in proposals for substantive provisions and procedural reforms and how those proposals were treated by the drafting committee, including to what extent the substantive provisions appeared in the final treaty.

Two coders will read each relevant document and identify all proposals relating to the treaty being drafted.⁸ We will find the progression of each proposal by comparing the proposal to the final version of the treaty.⁹ In doing so, we will take account of which states or other organizations made which sort of proposals, capturing and coding numerous attributes of each. Any discrepancies in the two coders' findings will be reconciled by the principal investigator.

4 Data Analysis

4.1 A Theory of Preferences

Based on these records, we will use spatial modeling to identify a series of one-dimensional spaces along which treaties can vary, and along which states can have preferences (Simmons 2009). This series of models will explain treaty ratification as a function of distance between a treaty's policy point and a state's ideal point.

4.1.1 Methodology

Using a Bayesian or NOMINATE program, the states' ideal points will be induced from the positions they take in the course of treaty negotiations. As with national and international legislative voting behavior (e.g., Voeten 2000), states will take positions on a variety of issues, and different groups of states will tend to cluster together on different classes of issues, producing spectrums of positions (ideal points) along number lines, one for each substantive treaty issue. These issues will likely include, for example, the broadness or narrowness of key terms (as the definition of cruel, inhuman, or degrading treatment or punishment under the Convention Against Torture), the degree of

2200 documents, or 44,000 pages. The team has nearly finished locating, assembling, sorting, and converting the bulk of these documents to text-searchable format. They are now located in a UVA Law Library secured electronic database.

⁸ Each working group meeting report contains many valid proposals, but it also contains explanations, opinions, objections, and other non-proposals. Proposals must involve recommend that the treaty be altered in some way. Thus, proposals commonly involve verbs like "proposed", "suggested", and "urged." By contrast, explanations and opinions often involve verbs like "expressed", "felt", or "stated."

⁹ available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

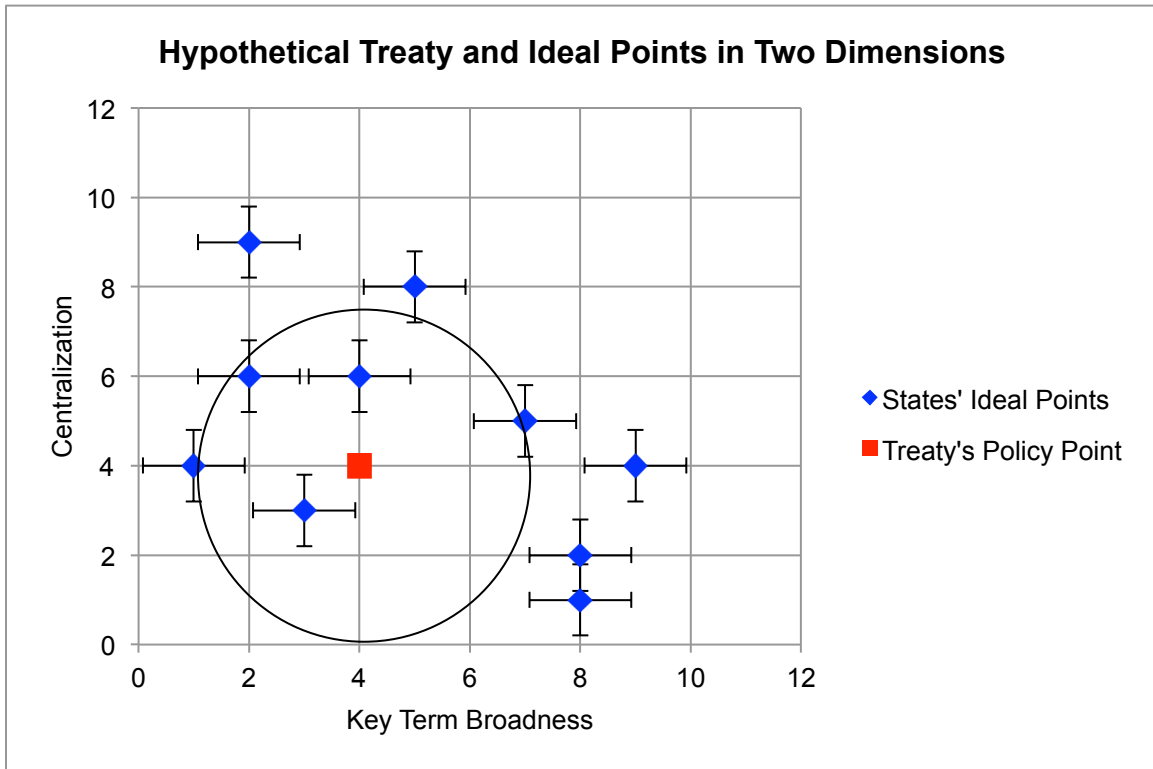
centralization of institution (e.g., whether compliance and other functions are managed by an IGO, or multilaterally by states), and the robustness of the treaty's enforcement mechanism (e.g., whether it includes a mandatory ICJ clause).

The states' ideal points will each lie a certain distance from some actual policy outcome, as determined by how the final text treats the subject. Several indexes currently exist that use set criteria to gauge relevant treaty traits, such as the extent to which the treaty delegates authority to an IGO (e.g., Blake and Payton 2014; Haftel and Thompson 2006). It is possible to use one or more of these measures to plot the treaties' policy position.

With the treaty's policy point and the states' ideal points plotted, each state's distance from the policy point can be calculated for each issue. From these series of models, a multi-dimensional model can be constructed that measures the total distance from any state's ideal point in n dimensions. Thus, we can characterize how close the treaty's aggregated policy dimensions are to any state's preferred version of that treaty.

From these data and records of treaty signing and/or ratification, we can begin to develop a formal model that projects the cutting line for ratification, which is the analogue of an affirmative vote in legislative spatial voting models. That is, we can make predictions about how close—in total, and in each dimension—a treaty must be to a state's ideal point such that we expect the state to express support by signing/ratifying it. Though the ideal point exists where the state's utility function (i.e., the utility, broadly defined, it derives from joining the treaty) is optimized, this cutting line exists where the state's expected net utility is zero; it will sign/ratify where the expected net utility is positive, and not do so where it is negative.¹⁰ In the figure below, this cutting line exists at the perimeter of the circle, such that states within the circle are expected to sign/ratify the treaty and states outside it are expected not to.

¹⁰ Behavior at the precise cutting line, the point of indifference, cannot be predicted.



Notably, identifying states’ ideal points based on treaty behavior is not unprecedented. Lupu (forthcoming 2014) has used ratification behavior to estimate states’ ideal points along a variety of dimensions. My approach will draw on fewer treaties, but will have the advantage of using far more nuanced indicators of preference. The ratification or nonratification of an entire treaty (which may comprise several substantive subjects) is a rather blunt signal of policy preference; in contrast, my approach uses thousands of express statements about very specific policy proposals.

4.1.2 The Model

Because states place different weight on different issues, the impact of the different issue dimensions will be different. The model predicting signing/ratification will therefore also assign different weights to the different factors. So a state will ratify where treaty’s ideal point is x Euclidean distance away from the weighted average of the treaty characteristics. The model below sets forth the expected utility of signing/ratification based on this approach:

$$\begin{aligned}
EU_a(R) &= \pi - d(\mathbf{t}, \mathbf{a}) = \pi - \sqrt{\beta_1(t_1 - a_1)^2 + \beta_2(t_2 - a_2)^2 + \dots + \beta_n(t_n - a_n)^2} \\
&= \pi - \sqrt{\sum_{i=1}^n \beta_i(t_i - a_i)^2}
\end{aligned}$$

where:

π is the utility to country a of ratifying, where the treaty's policy position perfectly matches each of country a 's ideal points;

t_i is the policy position of the treaty on issue i ;

a_i is the ideal point of country a for issue i ;

$EU_a(R)$ is the expected utility to country a of ratifying;

β_i is the coefficient denoting the weight attributed to issue i ,

so

$$\sqrt{\sum_{i=1}^n \beta_i(t_i - a_i)^2}$$

is the Euclidean policy distance from country a 's ideal points on all issues to the treaty's policy position.

In essence, we will develop a theory of state behavior implying that under a certain set of assumptions, states will develop expectations regarding the utility they will derive from treaty membership. Those beliefs will lead them to behave in certain ways, of most interest here, whether they bind themselves with international law by signing/ratifying treaties and how they do so (e.g., time elapsed since treaty's conclusion). That model can then be tested with other existing treaties, and it can be used to attempt to predict behavior for future treaties.

4.2 A Theory of Influence

We will also

4.2.1 Methodology

We will estimate a series of regression models. The models will tentatively include the following variables:

Independent Variables (IV) of Interest

State Size Variables

- 1) State Capabilities (Correlates of War, *Composite Index of National Capability* (CINC)– measures total population, urban population, iron and steel production, energy consumption, military personnel, and military expenditure). This is the preferred variable, but we will also experiment with alternative measure of state power (2-5 below)

- 2) Size of State Treaty Delegation (available from travaux records)
- 3) State Gross Domestic Product
- 4) State Total Annual Military Spending
- 5) Population Size

Norm Entrepreneur Variable

- 6) State Status as Norm-Entrepreneur (variable developed from Hafner-Burton's work)¹¹

Interest Based Variables

- 7) State Interest in the Subject of Treaty *i* Index. This might include, e.g.,:
 - Migration Flow Data (for Migrant Workers' Convention)
 - Racial Minority Data Demographic Data (for Convention on the Elimination of All Forms of Racial Discrimination)
 - Size of the Social Welfare State or Socialist Ideology (for the Covenant on Economic, Social and Cultural Rights)
 - For those treaties where there is no clear material interest at stake, we may expect that states will try to simply promote their own norms in the international system: states that do not resort to torture will try to influence the Convention Against Torture; states that have a strong rights record will push for the International Covenant on Civil and Political Rights, etc.

Dependent Variables (DV)

- 1) Total Number of Provisions Proposed by Country *i* That Appear in Treaty *j* (perhaps weighted by effect, magnitude, and/or substance)
- 2) Total Number of Proposals to Amend Proposed by Country *i* That are Reflected in Treaty *j* (captures, in addition to affirmative proposals (as in (1)), successful proposals to strike substantive provisions) (perhaps weighted by effect, magnitude, and/or substance)
- 3) Percentage of Provisions Proposed by Country *i* That Appear in Treaty *j* (perhaps weighted by effect, magnitude, and/or substance)

These variables and the hypotheses above lead to the following empirical predictions:

- Small-State Influence Hypothesis: DV is negatively correlated with IV 1-5
- Large-State Influence Hypothesis: DV is positively correlated with IV 1-5
- Interest-Based Influence Hypothesis: DV is negatively correlated with IV 7

¹¹ I am still exploring ways to develop this variable, which may be based on participation in the international regime generally (though that carries obvious risk of endogeneity).

- Norm-Entrepreneur Influence Hypothesis: Either no discernable correlation with IV 1-5, or DV is positively correlated with IV 6

In other words, the primary relationship of interest will likely be how state size/capability (as measured by the CINC)¹² is related to how successful that state is in having its proposals reflected in treaties' final versions (using DV 1 or 2). (Other Independent-Variable components of the CINC index, such as military spending, population, etc. might be used in alternate models.)

If the core hypothesis is not to be rejected, we would expect a significant, negative relationship between the CINC index and the success of state proposals. A positive relationship would lend support to the large-state influence hypothesis. A positive relationship between the Interest-Based Index and the CINC index would support the interest-based influence hypothesis. No discernable correlation might suggest that something else is at work, perhaps the norm diffusion implied by the norm-entrepreneur influence hypothesis. (Alternatively, we might develop and use a State Status as Norm-Entrepreneur variable (5).)

As mentioned above, it may be that the strongest relationship occurs where small states have an identifiable interest. To capture this phenomenon, we may create an interaction variable, which would tentatively multiply the CINC index by the interest-based index. That index would then be regressed on the key dependent variable.

A core hypothesis is: (1) that small states exert disproportionate impact on treaty-making. We will contrast this "small-state" hypothesis against three alternative theories: (2) a realist-type notion that large, powerful states use their clout to disproportionately influence treaty provisions; (3) the rational choice-oriented view that states pursue substantive provisions that align with their own international interests; (4) the more constructivist notion that the value of ideas matter most, such that "norm-entrepreneurs" are most influential in human rights treaty-making.

4.2.2 Hypotheses

4.2.2.1 Small State Influence

Under the small-state influence hypothesis, states that lack the clout to exert influence through economic or military means (as captured by the *Composite Index of National Capability*) attempt to influence other states through treaty-making instead.

¹² I am still attempting to determine how NGOs and IGOs will be coded; likely, they will be considered an entirely separate class of entity.

(This tactic has derisively been termed, “lawfare,” by its detractors.¹³) Small states are therefore disproportionately influential in the writing of human rights treaties and in the agenda-setting stage. Some initial anecdotes inform the small-state hypothesis. For example, Sweden was almost single-handedly responsible for the Convention Against Torture, Greece had a disproportionate role in the writing of the Children’s Rights Convention, and Mexico and Morocco were instrumental in the Migrant Workers’ Convention.

Larger states, in contrast, are relatively uninterested in norm creation; they believe they can realize international goals through other means and that they will be better able to defy able those norms with impunity. Small states seize on this opportunity and push their interest as part of agenda-setting.

Small states may believe that even when recalcitrant states refuse to join a treaty under the terms that the small states have sponsored (because the large states either enter reservations or decline to join altogether), the norms will eventually become customary international law, which will ultimately bind all states. Indeed, much of current international human rights law is now considered customary law (see Restatement of the Law, Third, The Foreign Relations Law of the United States).

4.2.2.2 *Large-State Influence*

An alternative hypothesis posits that powerful states are most influential in the writing of human rights treaties. Economic and military powers will use their clout away from the negotiating table to press for provisions that serve their interests, and their non-legal dominance will allow them disproportionate success (see, e.g., Posner and Sykes 2012). In a sense, then, this hypothesis is an adaptation of classical realist thought, as it suggests that power politics is a dominant explanation for state behavior (expanding the notion of “behavior” to include advocating for particular international legal rules).

Why would strong states care about shaping international human rights law? There are at least two plausible theories. First, consistent with a notion of a “human rights peace” (Sobek et al. 2006), states may believe that proliferation of strong human rights practices will promote democracy and reduce global conflict, thereby benefitting powerful and small states alike. Second, states may be unable or unwilling to comply with certain more demanding provisions, either because their government structure inhibits it (e.g., the United States’ federalist structure), or because their legal or cultural tradition opposes it (e.g., religious nations regarding access to abortion). Wanting to

¹³ See, e.g., Heather Robinson, “Dershowitz Versus Horton on Lawfare: Real Threat or Illusion?”, at Huffington Post, http://www.huffingtonpost.com/heather-robinson/dershowitz-versus-horton_b_779977.html (describing lawfare as the “alleged systematic use of law as a weapon of war against Western liberal democracies”).

cultivate or maintain a reputation for international law-compliance, such states will prefer that the provision not enter the treaty at all.

4.2.2.3 Interest-Based Influence

An alternative, intuitive hypothesis posits that the states most affected by a given provision are the most influential in its development. This hypothesis is partly inspired by several notable anecdotes. For instance, Mexico and Morocco, states with disproportionate numbers of citizens working abroad in low-paying jobs, reportedly championed the Migrant Workers Convention and were influential in its development. And the Republic of the Maldives, a country of small islands suffering the effects of rising sea levels, has been a leader in championing an environmental rights convention; it recently managed to secure the appointment of a special rapporteur for environmental rights.

Operationalizing this hypothesis may be challenging, as a definition of state interest can be elusive (Goldsmith and Posner 2005) and interests might be different for different segments of a society. Nonetheless, it may be possible to identify certain interests that correspond with treaty goals. For instance, countries with large numbers of migrant workers (a data point that is readily obtainable) might benefit most from the Migrant Workers' Convention.

It may be that the small-state and interest-based influence hypotheses have the most explanatory power when working together. That is, perhaps small states are particularly likely to push their interests in international law development. To see if this is the case, we would need to interact the interest-based variable (more about this in the Methodology section) with the small-state variable.

4.2.2.4 Norm-Entrepreneur Influence

Another alternative hypothesis is that all states and organizations, whether small or large, can be influential if they have persuasive ideas. This ideational notion is consistent with the constructivist view that in norm diffusion, the norm's author is relatively unimportant, and that worthwhile ideas can gain traction through their own merit. Some authors have used the term "norm entrepreneur" to describe states that are disproportionately responsible for generating norms that eventually permeate national borders (Finnemore and Sikkink 1998). These ideas may come from big and small states alike. Thus, if the norm entrepreneur hypothesis has explanatory power, we would expect influence not to correspond with big or small states,¹⁴ but rather with the states that are known for being norm-entrepreneurs.

¹⁴ To my knowledge, there is no relationship between state size and norm-entrepreneur status, but more research is needed.

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