

SECURITY AND HUMAN RIGHTS

OONA A. HATHAWAY

While recent events have fanned the flames of concern about the role and effectiveness of international law and the United Nations, the issue of what role international law can play in regulating international relations is far from new. Indeed, it has bedeviled the world community for decades. After the Second World War, even as the world pressed ahead with the United Nations and other new international institutions, widespread dismay over the failure of earlier institutions to prevent the collapse of order prompted a wave of attacks on the Wilsonian ideal of an international system founded on global legal order. As long as there was no sovereign power to manage enforcement, critics argued, international law was meaningless. Regarding it otherwise was not just unrealistic but dangerous.

Nowhere is the challenge of creating effective international law more daunting than in the area of human rights. Human rights treaties, after all, are almost entirely unenforced, carrying as they do very few if any formal sanctions. As a consequence, although advancement of human rights has enjoyed formal recognition as a legitimate global concern for decades, protection of human rights has often taken a back seat to states' concerns about security and stability. When faced with threats to security or stability, policymakers are often all too willing to put aside human rights protections that they see as hindering their ability to respond to those threats. They are able to do so in part because the international legal protections for human rights—while extensive—are weak.

In considering how best to strengthen the adequacy and effectiveness of the instruments of the United Nations to meet the challenges of the modern era, this panel should bear in mind the following: *First*, while there may be a tradeoff between human rights and security in the short term, in the long term the two are inextricably intertwined. *Second*, the UN's current human rights protections are broad but shallow, and enable states that wish to ignore them to do so all too readily. *Finally*, there are three critical ways in which the UN can improve the effectiveness of its human rights agreements and other provisions of international law, thereby increasing confidence in the international system and its ability to address the shared problems of states: (1) provide support for domestic rule of law institutions, (2) recognize and address the tradeoff between effectiveness of an international legal regime and countries' willingness to participate in it, and (3) use non-legal incentives to foster behavior that is consistent with international law.

I. Promoting Human Rights Promotes Security and Promoting Security Promotes Human Rights

In the wake of September 11 and the war in Iraq, we have increasingly heard the claim that vigorous and unbending protection of human rights is a luxury the world community can no longer afford. Exceptions to human rights protections must be made, many argue,

when necessary to ensure the greater security of society as a whole. But what these arguments fail to recognize is that while such exceptions might on occasion increase security in the short term, human rights violations inevitably breed hatred, desire for revenge, and disregard for the good of society that weakens, rather than strengthens, long-term security. Once this vicious cycle begins, it is near to impossible to halt.

This is not to say that vigorous law enforcement should be shunned. Quite the contrary; but it should be pursued in a way that does not derogate well-established human rights protections. Indeed, security is not only important in and of itself. Security is also essential to the broad protection of human rights. My empirical research has shown that no factor better predicts rampant human rights violations than the ultimate breakdown of state security—the presence of civil war. Moreover, as we have seen all too clearly in Iraq, the right to be secure in one’s person and possessions can be and often is violated by those acting on their own behalf or on behalf of a non-state entity. Security in those cases is itself a basic human right. In sum, human rights and security are deeply intertwined: protecting one is necessary to protecting the other.

II. Successes and Shortcomings of the UN’s Current Human Rights Protections

In practice, however, the UN’s human rights instruments have not been as effective at achieving their goals as hoped. While the current UN human rights regime has contributed to a revolution in the conception of state responsibility to its own citizens over the last half-century, the legal protections it offers remain fundamentally weak. Though states no can longer shield their actions against their own citizens from international scrutiny, the international community acts to enforce human rights protections only rarely. Hence, the current UN human rights regime is extensive but the UN is often unable to respond to violations of that regime.

Consider, for example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Regularly (and rightfully) celebrated as one of the most successful international human rights treaties in existence, its adoption by the United Nations in 1984 culminated an effort to outlaw torture that began in the aftermath of atrocities of the Second World War. Today, with a membership of over 130 countries, the Convention stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege.

Yet while the Convention is indisputably a remarkable achievement, events of the post-September 11 era have given reason for pause. Torture, we have learned, is not only a practice of the past. No one denies that torture was regularly used by the regimes that governed Afghanistan and Iraq. But even more troubling, it has gradually become apparent that nations thought of as having generally laudable human rights practices have made increasing use of what had previously been seen as unthinkable practices. Indeed, the United States has acknowledged using “stress and duress” techniques that skirt—and

some think cross—the line dividing legal interrogation procedures from torture. And this failure is not limited to the Torture Convention. In my study of the effect of four UN human rights treaties on over 160 countries during the course of 40 years, I found no evidence that countries that ratified the treaties had better human rights practices as a result.

These revelations pose a challenge to those who believe in the power of international legal institutions to bring global order. Many of the nations suspected of practicing torture or other human rights abuses have made an international legal commitment not to do so, yet they face no threat of sanction for violating their commitments. Recent events thus leave exposed the fundamental dilemmas of the existing international legal human rights regime.

III. *What the UN Can Do to More Effectively Improve Human Rights and Security*

What then can be done to improve the effectiveness of international human rights law and hence our shared long-term security? Three lessons in particular flow from my work on treaty effectiveness:

A. There is a tradeoff between effectiveness of an international legal regime and countries' willingness to participate in it—a tradeoff that must be recognized and overcome.

While enforcement of international law by international actors is not absolutely essential to effective international law, it is far from irrelevant. Where international legal rules are accompanied by sanctions for their violation, there are several predictable results. Perhaps most obvious, where penalties for noncompliance with a treaty are significant, those states that ratify the treaty are more likely to comply with its requirements. The cost of this success, however, is that states not already in compliance with the treaty are less likely to commit to the treaty in the first place—particularly if, as with the UN's human rights treaties, treaty membership does not promise any material benefits. In other words, there is often a tradeoff between effectiveness of a treaty and countries' willingness to commit to it.

This tradeoff is not, however, the same everywhere and always. And it can be made less severe. There are two ways that the international community could more effectively mediate the conflict between participation and effectiveness.

1. Provide Incentives and Assistance.

The first is to find ways to make membership in challenging regimes less costly and more beneficial to states. Thus human rights treaties might include benefits that help offset the costs that they impose (trade treaties already do this: they offer lower barriers to a state's exports in return for its acceptance of lower barriers to imports). Similarly, the UN might seek to provide states with assistance that can make them more willing to commit and comply. This might include, for example, financial incentives for membership or technical assistance to aid states in bringing their institutions into compliance.

2. Pursue Incremental Reform.

A second method for overcoming the inherent conflict between participation and effectiveness is to move states incrementally down the path toward stronger international rules. Rather than confront states immediately with a legal regime that couples challenging goals with strong sanctions for failure to meet them, states can be gradually led toward that goal. This calls for starting with relatively weak international rules backed by little or no sanctions, but then gradually pushing states to accept successively stronger and more challenging requirements. The danger of this approach, however, is that it can stall at any point in the cycle. The creation of weak international rules may frequently serve to offset pressure for stronger rules that would be more effective. Hence this incrementalist strategy must be embarked upon with caution. In fact, if incrementalism is to be successful, it may be necessary to require participants in the regime to make successive steps toward stronger and more enforceable rules. A single treaty that has tiered levels of membership and allows states set periods of time to move from one level to another will likely be more successful at producing positive change than the current strategy of layering successively more challenging treaties upon existing less-challenging treaties without requiring states to move from one to the other.

B. Effective domestic enforcement of international legal commitments is essential to the success of international law.

Strong domestic institutions are essential not only to domestic rule of law, but also to international rule of law. In particular, where international bodies are less active in enforcing treaty commitments—as in the area of human rights—it falls to domestic institutions to fill the gap. Domestic courts, media, political parties, and other domestic actors and institutions can thus play an important role in international law, ensuring that governments abide by their international legal commitments even where no significant international sanctions are threatened. In states where these actors and institutions are robust, international law is more likely to be followed whether or not international sanctions for violations exist.

The lesson is obvious. Because so much of international law relies so heavily on domestic rule of law institutions, strengthening those institutions could have a profound effect on compliance with international law. This is especially true where violation of an international legal obligation is unlikely to lead to any significant international sanctions. Of course, strengthening rule of law institutions may lead states to be less willing to commit to treaties in the first place, as states with stronger rule of law institutions will face more robust domestic enforcement of their treaty commitments. Yet, while this is undoubtedly a concern, evidence from the human rights arena indicates that as rule of law institutions gain strength, there is countervailing pressure on the government to participate more heavily in international legal agreements.

C. International law can and should take better advantage of states' regard for non-legal incentives to foster behavior that is consistent with the law.

Last but not least, non-legal incentives can play an important role in state decisions to participate in and comply with international law. Countries' concern for their reputations and for aid, trade, and other benefits that are sometimes linked to treaty commitment and compliance can be used more effectively than they currently are to strengthen the influence of international law.

At the very least, states that wish to join treaties that confer a boost to their reputation (such as human rights treaties), should be subject to stronger monitoring of their practices than is currently the case. This would prevent states from using treaty membership to shore up their human rights reputations and thereby shield themselves from pressure to make real changes in their practices. Even more promising, however, is a strategy of linking treaty membership and compliance to various benefits of membership in the international community. Promises of foreign aid, foreign investment, and trade could be more frequently and effectively used to attract states into joining and complying with treaties. The European Union, for example, currently conditions membership in the Union on membership in the European Convention on Human Rights and acceptance of the compulsory jurisdiction of the European Court. It is no coincidence, then, that the Convention enjoys unparalleled participation and compliance. Individual states, too, have made similar attempts to link treaty commitment and compliance to various benefits.

All these provide promising models for using the benefits provided by the international community to strengthen the laws that govern it. In pursuing this and the other lessons discussed in this brief paper, the UN can begin to more effectively harness the real but limited power of international institutions to address the shared challenges of a new era.