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An Escape from the Perceived Rationalist-Constructivist Binary:  
A Look into Derogable International Human Rights Agreements

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## **SECTION I: INTRODUCTION**

*“The ability to shed interesting light on concrete problems of world politics must ultimately be the test of a method’s worth” (Wendt 4).*

To promote advantageous relations and international success, states must collaborate and cooperate with one another. The possibility for individual countries to flourish unilaterally seems ever more remote as the success and growth of one state, or its failure, is closely related to its ties with multiple others. Because countries’ experiences, both positive and negative, are so dependent on the actions of and realities in other countries, cooperation is extremely important. To avoid as much cooperative uncertainty as possible, states try to codify much of their relationships in treaties. If one state does not fulfill its expected international obligations, the repercussions may be felt by several other states. International agreements are created to help mitigate cooperative uncertainty. The legally binding contracts between two or more states aim to increase the likelihood that promises will be kept, international collaboration will succeed, or if nothing else, that the cooperating states’ behavior will become more predictable.

International agreements are found in every realm of inter-state relations, from economics to security, and human rights. Human rights agreements are unique, and the attempts to describe them are special. Unlike economic, environmental, or security treaties, human rights agreements lack an obvious motivation for self-interested member states to forge and sign. There is no obvious material benefit, no promise of support in the event of war, etc. Because human rights agreements sometimes incur costs<sup>1</sup> to countries and are simultaneously difficult to enforce, their existence is a curiosity. International relations scholars study these agreements extensively, seeking to better

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<sup>1</sup> In the human rights issue area; in particular, the treaties are relatively costless to ratify. Countries may incur costs when actually implementing changes. The costs are assumed weaker for Western democracies, which are generally regarded as having better human rights conditions (Hathaway 2002).

understand the reasoning and impact of the cooperation in this issue area. Much is known and has been theorized to explain these agreements from the point of conception to when the treaty is in force. This thesis studies what motivates the creation of these documents in the specific forms they take.

Some believe a rational choice framework, which purports that states use international institutions to advance strategic goals, can explain any type of treaty, including human rights (Koremenos, *forthcoming*). Because agreements are designed to promote state interests, scholars infer that tactical bargaining overwhelms the drafting process. In other words, institutions must be “incentive compatible,” that is, states must gain something from them (Koremenos, Lipson, Snidal 768). This conceptualization runs into difficulty, however, when applying this logic to human rights treaties, which have little material benefit. Do states view the abstract payoff, elevated international human rights standards, as a benefit worth cooperation? To some superficial extent at least, the answer is *yes*; the three agreements with which this thesis is concerned have widespread membership. Beyond this, however, the question becomes more difficult to answer. To comprehend the complexities surrounding the topic, I argue, it is necessary to elucidate the motivations of cooperation from the point of conception to the impact of the treaty after it has entered into force. This thesis focuses on two prominent and, often considered contrasting<sup>2</sup> analytical frameworks to explain motivations: social constructivism and rationalism. Alexander Wendt’s (1999) interpretation of social constructivism, Thomas Risse’s theory of argumentative rationality, as well as the rational choice interpretations of Barbara Koremenos, Charles Lipson, and Duncan Snidal (2001) and Koremenos (*forthcoming*) assume prominence in this thesis. The

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<sup>2</sup> See, for example, the Oxford Public International Law Max Plank Encyclopedia. It defines rationalism as constructivism’s counterpart (Slaughter and Hale).

empirical findings of Emily Hafner-Burton, Laurence Helfer and Christopher Fariss (2011) and Eric Neumayer (2012) are also useful.

Although the analytical modes may seem to be at odds, the inherent value of human rights agreements alongside the inevitable interplay of state interests allows both philosophies to manifest. Due to the fundamental differences that set these ideas apart, many fail to consider the possibility that the ideas are actually quite compatible. James Fearon, a rationalist, and Alexander Wendt, a constructivist, forward a similar understanding. The differences between rationalism and constructivism are not so dramatic that they can only exist in a bubble. Instead, both are better used as “analytical tools” rather than “empirical descriptions of the world” (3). This thesis addresses this by separating the treaty conception, negotiation, and implementation and operational process into several distinct phases. Social constructivism and argumentation dominate the conceptualization and ideational stage, while rational choice guides the discussions in most all subsequent phases. This pattern is not absolute, as the ensuing sections highlight.

In its entirety, the treaty process hosts both idealistically and strategically motivated actors or modes of action. Because such study covers hundreds of hours of preparatory work, numerous states and other actors, and endures several decades, this thesis focuses its work around the evolution of the treaty relating to the permission of derogation. Also known as an escape clause, the derogation article allows states to temporarily break from their treaty obligations during times of domestic emergency. In addition to supporting dominance of either rationalism or constructivism, the study of derogation allows me to partake in the contentious debate regarding whether or not escape clauses have a particularly corrosive effect on the *raison d'être* of human rights agreements. The European Convention of Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights

(ACHR) pioneered the international human rights framework. They can be thought of as *umbrella* agreements, protecting a broad category of rights compared to later agreements that focus exclusively on torture, rights of the child or migrants, for example.

I proceed as follows. Section II provides a brief review of constructivism and rationalism. Section III follows with explanation of derogation clauses and why they are particularly salient and Section IV outlines the various phases of the treaty process. The European Convention on Human Rights, particularly derogation, is studied alongside the principal frameworks in Section V. Section VI and VII do the same with the International Convention on Civil and Political Rights and the American Convention on Human Rights, respectively. I conclude with a discussion, as informed by my analysis of these three agreements, of the similarities and implications for the broader international human rights regime. “In hope of gaining more compelling answers and a better picture of reality,” this thesis “combine[s] insights,” in order to “synthesiz[e] specific arguments” in a way that is yet to be attempted by others (Fearon, Wendt 68).

## **SECTION II: ANALYTICAL FRAMEWORKS**

Section II begins with a review of rational choice and constructivist frameworks. Both rationalism and constructivism are broad; this thesis focuses only on those aspects which are most relevant to determine how these two modes of interaction might characterize international relations. This section goes on to recount Thomas Risse’s attempt at mediating the rational choice versus constructivist debate. His work misunderstands certain key elements, however, which results in an inaccurate assessment of which mode of interaction dominates international

negotiations. In Section II I clarify Risse's argumentative rationality and redefine its role in international relations.

### ***Rationalism***

Rational choice supposes that actors are instrumental; thus, decision-making is dependent on a favorable cost-benefit analysis of a given action. "Actions are," moreover, "valued and chosen not for themselves, but as more or less efficient means to a further end" (Elster 22). As such, some scholars have determined rationalism to be ruled by a "logic of expected consequences," meaning that actors only engage negotiations in "circumstances in which there may be gains to coordinated action" (March & Olsen, "Institutional Dynamics" 949). Put simply, actors anticipate (and desire) a certain consequence to their action. Risse terms this a "logic of consequentialism" (Risse, "Let's Argue!" 3). For the sake of brevity and consistency, henceforth, I will refer to this concept exclusively as "logic of consequentialism."

In international negotiations, state actors continuously determine which plan of action is most sensible for their respective state. In other words, the plan of action that most closely aligns with a state's negotiation aims. Between states these goals are frequently at odds; what certain actors consider an optimal solution to a collective action problem is not necessarily the preferred outcome of others. Neither egoistic nor altruistic goals are exempt from conflict. A state's claim of national sovereignty may serve as a useful example to support rationalism. International agreements hold states accountable to other states or the international community at large. When negotiating these agreements, rational states will attempt to alter the agreement in their favor so as to not infringe upon their right of sovereignty to make unilateral decisions. Understanding these "underlying cooperation problems...and [the] characteristics of those [involved] actors are fundamental to understanding international institutional design," (Koremenos, *forthcoming*). The

COIL framework is built on the premise that international agreements are rationally constructed documents and the framers' best attempt at mitigating conflicting preferences. Therefore, the preference-dependent decision-making that takes place when international agreements are constructed does not exist in a vacuum. Collective bargaining is deeply connected to "factors ranging from historical relations to the institutional context...under which the international agreement is being negotiated," (Koremenos, *forthcoming*). The intrusion of strategic and political motivations are, furthermore, inherent and inevitable in the international relations game.

### ***Constructivism***

Constructivism is not a theory; rather, it is an extremely expansive framework, a compendium of assumptions about the world that are used to explain social interaction. Constructivist philosophy is made further diverse by the various theories and interpretations that have emerged from it.<sup>3</sup> It would be remiss for this thesis to attempt to explain the entire ontology or narrow it down to one set of beliefs. Still, there are two fundamental presumptions which form (more or less) the basis of all types of constructivism. These are: 1) institutions are generally determined by collective ideas and not material factors; and 2) these shared ideas are essential forces in defining actors' identities and interests (Wendt 1). Mutually held ideas are so important to constructivism because these interpretations eventually develop into norms or rules that actors are expected to follow. Similar to the fluidity of constructivism itself, perceptions are also subject to transformation ("Logic of Appropriateness" 5). It is important to note that understandings of Self, Other and the interests of both, are also in constant process (Wendt 36).

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<sup>3</sup> Some prominent constructivists theories are: The English School which studies the international system as one regulated by collective norms; The World Society, which places great importance on the role of global culture in the formation of states; Postmodernists are contemporary social constructivists who contribute to international relations (main critics of rationalism); and, Feminist theory, which contends that state identities rely on gendered, often misogynistic, international and national institutions (Wendt 31).



When applying this logic to international relations, the social constructivist perspective, in particular, is most useful. To avoid committing the error I have just critiqued, I will only compare rationalism with social constructivism. Hereinafter, constructivism and social constructivism will be used interchangeably. Social constructivism is distinguished from other modes of thinking because of the significant emphasis on social interaction and how the ideas humans hold impact the way in which we interact with others (Wendt 1999). In the context of negotiating an international human rights agreement, social constructivists would consider the decision-making processes of state actors to be governed by shared ideas about a given situation or actor. These ideas are internalized as norms that provide actors with guidelines of how to act accordingly. State sovereignty, for example, is undoubtedly influential. To contrast with rationalism's stance on sovereignty, constructivists view it as a deeply internalized and, hence, respected norm. It has effectively created "a predisposition for non-interference that precedes any cost-benefit analysis states may undertake" (Slaughter and Hale). In other words, the idea of state sovereignty weighs so heavily that actors do not even consider instrumental realities; state sovereignty preferences are assumed. This thesis will evince how this contentious norm is particularly salient in the human rights issue area. Whereas rationalism follows a "logic of consequentialism," constructivism implies a "logic of appropriateness."<sup>4</sup> I understand this to mean that actors behave according to "the institutionalized practices of a collectivity, based on mutual, and often tacit understandings of what is true, reasonable, natural, right, and good" (March and Olsen, "The Logic of Appropriateness" 2).

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<sup>4</sup> See March and Olsen 1998, 2008; Risse 2000.

## *Argumentative Rationality*

International relations scholarship has focused heavily on the rationalist versus constructivist debate. According to Risse, this debate is void of consideration for a third mode of social interaction, argumentative rationality or “logic of arguing” (Risse 2000). In an attempt at moderating between rationalism and social constructivism, Risse explains argumentative rationality as a mode of social interaction whereby actors engage in genuine discourse. To solve the collective action problems that brought them to the negotiating table in the first place, actors must first establish a governing veracity. This is an idea or collection of ideas on which most actors consent. International negotiations reach mutual consensus once those involved establish: 1) that their perceptions of the world are correct, or 2) the normative guidelines that will apply (only if those norms are reasonable and correct) (Risse, “Let’s Argue!” 7).

To successfully answer these questions, it is imperative that actors challenge each other. In doing so, they forego material forces and the geopolitical power hierarchies that typically hinder international cooperation. Unbound by these constraints, actors confirm the “truth claims inherent in identities and perceived interests” (Risse, “International Norms” 530). According to argumentative rationality, states agree to convene so that they can devise strategies to improve the condition of a situation this implies the dissolution of egoistic concerns by the need to clear up misconceptions in order to agree on solutions to a commonly defined problem. If forwarding self-interested goals were the primary motivator during debate, Risse contends, negotiations would be futile and distrust an insurmountable obstacle to cooperation.

Still, even if actors are genuine truth seekers, how do they know to which truth they are aiming, and, if that version of the truth is legitimate? Risse offers insight into this question, relying heavily on the work of Jürgen Habermas. Habermas defines true reasoning as actors pursuing

“individual goals under the condition that they can coordinate their action plans on the basis of shared definitions of the situation” and are “not primarily oriented toward their own success in communicative action,” (qtd. in Risse, “International Norms” 533) Risse interprets Habermas’ communicative action to mean actors are prepared to change their views of the world or even their interests in light of the better argument (Risse, “Let’s Argue!” 7). This mode of thinking governs his analysis of international negotiations and leads him to strongly assert that the best argument, the one rooted in fact and principle, wins.

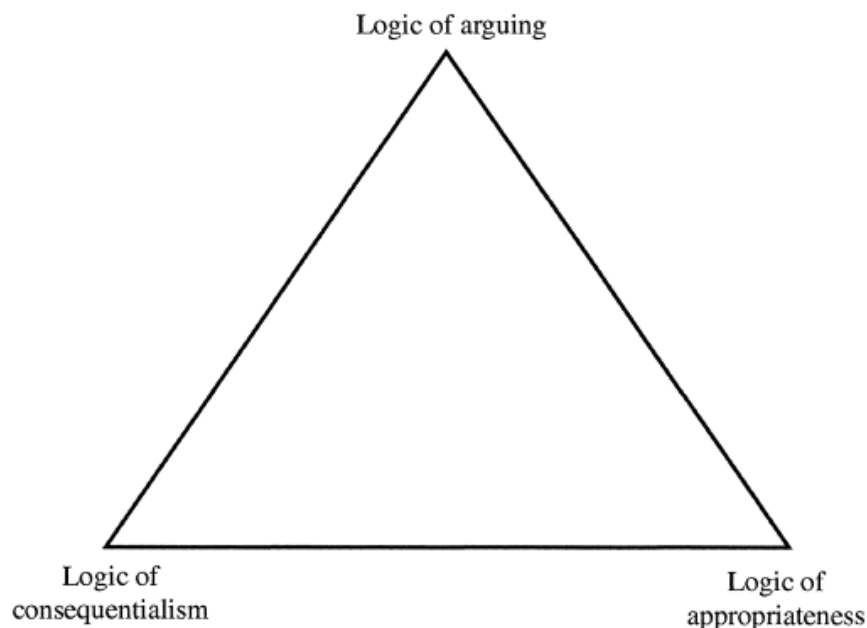
### ***The Frameworks Interact***

Figure 2-1 is taken from “Let’s Argue!: Communicative Action in World Politics” (Risse 2000). Whereas social constructivists represent the logic of appropriateness and rationalists embody a logic of consequentialism, argumentative rationality symbolizes a logic of arguing. Figure 2-1 shows how Risse conceptualizes the three logics to interact. Even though the logics make up a single figure, each is its own point to denote that it is a separate entity. The similarities between argumentative rationality and social constructivism are so similar, however, that it is difficult to perceive them as distinct. Furthermore, in one instance Risse asserts, “Social constructivism encompasses not only the logic of appropriateness but also what we could call a logic of truth seeking or arguing” (Risse, “Let’s Argue!” 6). Still, Figure 2-1, Risse (1999) and Risse (2000), overwhelmingly treat argumentative rationality as distinct from social constructivism. This lack of clarity is what caused the contradiction above and resulted in Risse’s incorrect classification of international social interaction.

While it is unclear if Risse identifies as a constructivist, argumentative rationality does in fact provide us with a mature understanding of the framework. I argue that argumentative rationality is not its own mode of social interaction at all; instead, it is synonymous with social

constructivism. In fact, Fearon and Wendt acknowledge that “the debate over the nature of knowledge and truth claims is very much alive *within* constructivist international relations” (56). Whereas previous constructivists have asked, “what difference do ideas make in social life?”, argumentative rationality helps us to determine how those ideas, that will govern social life, are constructed (Wendt 23). While I appreciate his elaboration of social constructivism, I believe his claim to rectify rationalist versus constructivist contention is unsubstantiated.

**Figure 2-1** *Three Logics of Social Action*



Relying on argumentative rationality as a social constructivist theory, I proceed with the theoretical question posed by Fearon and Wendt (2002) and engage the rational choice versus constructivist debate. Reality, as rational choice purports, leaves minimal room for truth seeking behavior. Instead of acting according to the right thing to do (constructivists), rational actors act according to the useful thing to do (Fearon, Wendt 61). This may leave the impression that international negotiations are pointless. If they are not trying to figure out the legitimacy of arguments in order to improve the condition of a given situation, what are they doing? It is not

that rational choice proponents believe actors exclusively lie or neglect total transparency, to increase their benefit, but that establishing principled guidelines to negotiation is not the actors' ultimate consideration.

Usually actors engage in discussion for several reasons that can be ordered in hierarchy. If there are economic advantages associated with international cooperation, for example, they will inevitably be more important than understanding some undefined truth. Human rights agreements, though, are not generally associated with material benefit to the state. In the case of states with historically poor human rights conditions, the treaties are potentially costly to ratify and implement. Thus, international human rights may in fact, "exhibit some features that make it suitable to serve as a plausibility probe for the role or arguing in international relations" (Risse, "International Norms" 537) Still, rationalists would contend that if actors must decide to base actions on following norms or self-interested advantages, then any rational state actor would side with the selfish gains and support institutional design that reflected these preferences. Moreover, determining a normative framework would be difficult (if not impossible) since diverse states hold divergent opinions on many issues.

When met with criticism Risse defends argumentative rationality: "Searching for the truth is motivated by the desire to change the situation in such a way as to solve or at least mitigate social dilemmas," ("Let's Argue!" 12). So, even if actors hail from varied backgrounds they are able to cooperate because they want to improve, if only slightly, the condition of a given situation. Human rights agreements may especially be described in this manner. According to the "logic of appropriateness," social constructivists would argue that what is appropriate to do in an economic or security treaty, for example, does not necessarily reflect the presiding behavior-governing norm of human rights agreements.

Each side raises valid points to the common critiques of skeptics. Instead of interpreting these hypothetical situations in a way that continues to differentiate rational choice and argumentative rationality (social constructivism), I argue it blurs the line. Rational choice does not necessarily profess that actors who genuinely engage in debate to promote some common good are absent; these philosophies must indeed be present because they are still cooperating for some reason. There would not be widespread participation if negotiations were void of a concomitant collective benefit. As Koremenos clarifies, “the assumption of rational, self-interested states does not imply states cannot have as one of their goals the realization of human rights abroad or other such nonmaterial interests,” (*forthcoming*). In other words, states can be righteously calculating. Constructivism is similarly compromising. “Biased or self-interested communicators are far less persuasive than those who are perceived to be neutral or motivated by moral values,” (Risse, “International Norms” 536). Argumentative rationality acknowledges that instrumental actors do exist, but does not agree that they overwhelm the interactions. However, the nature of social constructivism, as the formation of guiding ideals, does make it difficult to reconcile cooperation on the basis of instrumental principles. Nevertheless, my intention is “not to show that ‘structure’ has more explanatory power than ‘agents,’ as if the two were separate, but to show how agents are differently structured by the system so as to produce different effects” (Wendt 12).

### **SECTION III: DEROGATION**

*“Every man, by reason of his origin, his nature and his destiny, has certain indefensible rights, against which no reason of State may prevail.”*

*-Mr. P.H. Teitgen, France (Collected Edition Vol.138).*

In order to determine the balance between rationalism and constructivism, this thesis focuses on escape clauses of the ECHR, ICCPR and ACHR, the only broad-scoped human rights agreements that allow derogation during national emergency. Derogation is an example of adaptive flexibility that stipulates during certain exceptional circumstances member states can temporarily and legally break from their obligations to protect rights.<sup>5</sup> The only permissible limitations, though, are those which can be reasonably defended as required in order to appropriately handle the precarious situation. As soon as the national emergency has passed, states must end restrictions. Because officially invoking derogation garners domestic and international attention on derogating parties, covertly reneging on the commitment has its advantages. Sincere member parties, therefore, use derogation as a way to maintain transparency and affirm commitment to the human rights agreement. Therefore, thorough study of derogation clauses does not only provide this thesis with evidence for the rational choice versus constructivist debate, but simultaneously helps to evaluate the utility of derogation and for whom. This type of analysis is especially pertinent considering public emergencies are among the most critical human rights situations, typically characterized by severe human rights violations.

\_\_\_\_ According to rational choice, states view a certain level of flexibility in the design of agreements as advantageous. Flexibility allows state parties the freedom to respond to unforeseen

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<sup>5</sup> Throughout this thesis, I use the terms “derogation,” “derogable,” “escape clause(s),” “escape,” and any variation of these expressions more or less interchangeably. Each refers to a state parties’ legal right to temporarily break from obligations to all rights of the treaty, except for those rights enshrined in the second paragraph of Article 15 (ECHR), Article 4 (ICCPR) and Article 27 (ACHR). See Section V, VI, and VII, respectively, for full text of the derogation articles.

shocks or special domestic situations while maintaining existing institutional arrangements (Koremenos, Lipson, Snidal 793) Tested and supported by Koremenos, Lipson, and Snidal, Conjecture F1: flexibility increases with uncertainty about the state of the world describes the need for derogation clauses in treaties. States want to preserve their sovereignty and adjust agreements if shocks so necessitate. The flexibility allows states the ability to gain from cooperation without locking themselves to an arrangement that could become disadvantageous as the situation evolves (Koremenos, Lipson, Snidal 793).

Table 3-1, below, is taken from *Continent of International Law Complete Manuscript* by Barbara Koremenos (*forthcoming*). It shows that after economic agreements, human rights treaties contain the highest instance of escape clauses; this percentage is significantly higher than security and environmental agreements. The frequency of which derogation occurs supports that the rational choice based COIL framework explains design provisions in all issue areas. Despite constructivists that argue human rights are governed by a “logic of appropriateness” or “logic of arguing,” and thus would not incorporate instrumental clauses like those for escape, the work of Koremenos, Lipson and Snidal (2001) indicates otherwise.

**Table 3-1**    Escape Clause by Issue Area (percentage of each issue area)

Issue Area	No Escape Clause (%) (1)	Escape Clause (%) (2)	Total (%) (3)
Economics	69	31	100
Environment	95	5	100
<b>Human Rights</b>	<b>83</b>	<b>17</b>	<b>100</b>
Security	94	6	100
Total	81	19	100
Pearson chi2 (3) = 20.62 p = 0.000			



Still, it is unclear what constitutes the effect of escape. Does the inclusion of derogation encourage states to renege and damage the integrity of the agreement? Or would exclusion make it unlikely that states would be willing to pledge to certain agreements? Derogation is contrasted with another form of treaty flexibility, reservations. Reservations are essentially a permanent escape from specific articles.<sup>6</sup> I focus on derogation in particular, though, because derogation elucidates the existence of an important balance of power, and reaches more broadly than most reservations. “Any corrosive effect on the integrity of the human rights system is likely to be much stronger for derogations than for reservations,” (Neumayer 3). This is because, as others argue, “the response of a State to a public emergency is an acid test of its commitment to the effective implementation of human rights,” (McGoldrick 301).

In one sense derogation articles appear a victory for human rights. The non-derogable rights listed in the second paragraph of these articles represent the freedoms a treaty body considers inalienable and requiring heightened protection from state overreach. Even in times of crisis certain rights must remain protected; states will never find legal justification for violations of this category of non-derogable rights. One might conclude that the more non-derogable rights a treaty has, the more that treaty values human rights—if non-derogables are interpreted as a victory for the individual over the state. In another sense, though, derogation clauses are a win for state sovereignty at the expense of greater human rights protection. Even if some rights are forever

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<sup>6</sup> Reservations allow states to modify their legal obligations to a treaty as long as the reservations do not diminish the treaty’s principal purpose. I say that they are a sort of permanent escape because a state is expected to adhere to all other rules of the treaty except for those provisions on which there is a reservation. Furthermore, reservations are commonly tacked onto treaties in defense of state sovereignty. An example is Argentina’s reservation to Article 21 of the ACHR. “The Argentine Government establishes that questions relating to the Government’s economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of ‘public utility’ and ‘social interest’, nor anything they may understand to be ‘fair compensation’” (“ACHR Signatories and Ratifications”).

protected, the government is endowed with the legal recourse to suspend its obligations to many, if not most, of the protected rights. Without any option of escape, though, states facing public emergency may be much more likely to repress all types of rights. So, if permitting derogation is a necessary evil in human rights agreements, at what point does that evil overwhelm the value inherent in human rights accords?

Rosendorff and Milner (2001) base answers to this question on a sophisticated model. If the agreement allows relatively simple and cheap derogation then the inclusion of escape will imperil the overall agreement. If the costs are excessive, then derogation clauses will be meaningless since few states are likely to sign on. If treaties exist in a sort of middle ground and the costs are high without being restrictive, then derogation works to support the agreement's survival and rights-protecting regime during domestic shocks. This means that the state wishing to invoke derogation must incur some costs to do so. If there were no costs, or the costs too low, states would too frequently break from their commitments. "We anticipate that the architects of international agreements will design such agreements so that the costs of the escape clauses that they most desire are balanced by the benefits of future cooperation," (Rosendorff, Milner 6). According to Koremenos, however, the human rights issue area does not feature costly escape (*forthcoming*). In all three agreements states can legally derogate according to their sole discretion and are only required to inform the Secretary General of the Council of Europe, the United Nations or the Organization of the American States, respectively. The oversight bodies may disagree with the necessity or appropriateness of derogation, but by that point they are virtually powerless to influence state behavior and instead assume the role of scolding elder.

In this regard, the cost is that notification of derogation submits a state to heightened international scrutiny; derogation alerts international governmental and non-governmental

organizations to watch the human rights condition more closely. Lack of resources allocated to monitoring compliance of the treaty stipulations virtually forces these oversight bodies to overlook non-derogating violators.<sup>7</sup> It is taken for granted that when derogation is not in effect, the treaty's stipulations are upheld. This is the paradox of derogation. Without it the treaty would be too inflexible for widespread ratification, but even with the escape option, certain state parties intentionally refrain from invoking its protections to avoid heightened inspection of its human rights condition, preferring to renege. Non-democracies, for example, routinely break human rights agreements, but "have little need to escape from the treaties because they are unlikely to be held accountable for violating them," (Hafner-Burton, Helfer, Fariss 675).

Regarded as close to perfect as possible by each of the drafting committees, the derogation clauses of the ECHR, ICCPR and ACHR<sup>8</sup> are the result of meticulous examination and evolution. Derogation clauses generally follow the same three-subparagraph pattern. The first describes the conditions under which derogation is permissible; the second outlines the non-derogable rights, and the third outlines requirements of notification in case of derogation. It is interesting to note how similar the articles are, but also to what extent they differ. Since these seemingly trivial differences were discussed at considerable length, it can be inferred that the drafters did in fact identify even slight nuances as important. Notice the differences in the non-derogable rights (paragraph two) from treaty to treaty. These differences are peculiar and resist constructivism while supporting the influence of rational choice during drafting. If we should expect genuine truth

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<sup>7</sup> "Without question, the single greatest obstacle to the effective functioning of the [Inter-American] Commission and [Inter-American] Court [on Human Rights] is the lack of adequate human and financial resources" (Goldman 882).

<sup>8</sup> See Article 15 in Section V (ECHR); Article 4 in Section VI (ICCPR), and Article 27 in Section VII (ACHR).

seeking at all, meaning there would be agreement on the normative principles of derogation (what is derogable or non-derogable), we would expect it in the human rights issue area.

The above quote from Teitgen, the French delegate to the ECHR negotiations, professes that humans hold fundamental rights. States should find no justification, he believes, in escaping from their obligations to protect these essential rights. Teitgen's assessment seems sensible; should not derogation clauses protect this very category of absolute rights? Also known as inalienable, enjoyment of rights within this category can never be denied a person. Simmons, moreover, understands the intended mission of international human rights agreements to be "the development of a legal framework by which certain rights become understood as 'fundamental'" and requiring of a heightened protection from governmental encroachment (6). It appears such rationale is absent, however, since there are drastic differences in what each treaty deems non-derogable.<sup>9</sup> For example, despite each agreement including protections for the family, the ACHR is the only agreement that lists Rights of the Family (Article 17) as non-derogable. Article 8 of the ECHR (Right to Respect for Private and Family Life) was proposed as non-derogable, but was later rejected.<sup>10</sup> Still, the family protections outlined in Article 23 of the ICCPR were never considered a candidate for non-derogable status. Another inconsistency is the derogation status of Prohibition on Imprisonment for Inability to Fulfill Contract in the ECHR, ICCPR, and ACHR. The framers of both the ICCPR and the ACHR recommended that Article 11 and Article 7.7, respectively, be non-derogable; it was only adopted as such in the ICCPR. The evolution of this right in the ECHR is unique. The original 1950 version of the Convention included no such article and was only added

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<sup>9</sup> See Table 5-1, 6-1, 7-1 for a complete comparison of what each treaty proposed and then later adopted (or rejected) as non-derogable.

<sup>10</sup> See *Strasbourg Convention: Preparatory Work on Article 15 of the European Convention on Human Rights*.

to the European human rights regime in 1963 with the adoption of Protocol Number Four, Article 1 (*Convention for the Protection of HR 34*). Nevertheless, this protection is derogable.<sup>11</sup>

\_\_\_\_\_The importance of analyzing negotiations of derogation clauses in particular cannot be exaggerated. They reveal crucial aspects about the document's motivation. Because interpretation of escape clauses depends heavily on the gaze of the observer, it is difficult to label this delicate balance as either a friend or a foe of human rights. The objective facts within the "*Travaux préparatoires*," though, help mitigate uncertainty and offer an unbiased view of what forces were at play when these clauses were constructed. The richness of information contained in the preparatory documents makes them the first line of inquiry. Proposals, drafts and voting patterns of the different actors are essential for determining what was non-derogable in drafts of the treaty, which delegate proposed those rights to be exempt from limitation and why the final versions of the escape clause differ from previous conceptualizations. The key statements and outcomes of the discussions relating to non-derogable rights help when hypothesizing about the true motivations behind cooperation. In order to characterize which framework captures the debate, I must distinguish between the phase of negotiations and, to a lesser extent, the actors involved.

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<sup>11</sup> Non-derogable status is not only reserved for rights enshrined in the 1950 version of the treaty. See Section V, Footnote 28 for a complete explanation.

## **SECTION IV: PHASES**

It is important to discern distinct phases for several reasons. Firstly, the negotiations take place over several months or years during which time the issue evolves. Goals are modified, state representatives change, and the overall geopolitical climate adjusts; it would be unwise to omit consideration of these variations and how they influence the final agreement. It is worth noting, however, that even if the same delegate is represented in various stages of the treaty process, their actions are dependent on the phase in which they work. In other words, the same actor may take on various roles or “change hats” throughout the treaty process. Both rationalists and constructivists would agree with this affirmation. Risse explicitly states, “When actors engage in truth seeking discourse, they must be prepared to change...sometimes even their identities” (“Let’s Argue!” 2). Rationalists affirm that state actors’ interests—determinants of their role within the negotiations—are entangled with political realities, historical interactions and the international institutional context; hence, they are subject to change (Koremenos, *forthcoming*). Moreover, within each phase, some characteristics are more prominent than others; every change impacts how tight of a grip each factor holds on the final treaty design. I separate the process into three distinct stages: the conceptual phase, the drafting phase, and the implementation and operational phase. While this thesis distinguishes distinct phases within the process, in order to highlight the differences, one must keep in mind that they are still interdependent parts of a whole, a series of often-reactionary phases.

## *Conceptual Phase*

The aim of the conceptual phase is to reach consensus on the need to create a human rights agreement. This phase includes all interactions up to the point of actually drafting the treaty text or the moment at which a majority of states acknowledge the need to construct a treaty. States are encouraged to the negotiating table with the use of impassioned, morally driven prose. Once actors reach consensus, they propose general ideas for the purpose and design of the agreement. As one would hope when discussing human rights issues, the rhetoric should be genuine and should be deeply rooted in idealistic aspirations for the future. During this phase, the visionary language is nonspecific; the actors are merely conceptualizing the work to be carried out by others in the future. Furthermore, during this phase, one would expect argumentative rationality to thrive; this logic maintains that argumentative communication is driven by “the desire to find out the ‘truth’ with regard to facts in the world or to figure out “the right thing to do” in a “commonly defined situation,” (“Let’s Argue!” 12). The “logic of arguing” and “logic of appropriateness” largely depend on the situation first being able to be defined by Habermasian principles, namely, those of a common lifeworld, and of insignificant power hierarchies.<sup>12</sup>

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<sup>12</sup> A third Habermasian precondition Risse asserts is the ability of the actors to empathize. This thesis does not address this because there is no way to determine a person’s (let alone a state’s) ability to empathize. One can assume, however, that most human actors have the capacity to empathize; the extent that this ability is able to infiltrate a person’s professional role, though, is unknowable. Even Risse avoids elaboration and consideration of this point (“International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area” 534). Similarly, the existence of a public arena in which these discourses take place is a precondition that this thesis will not discuss. Relative to secret negotiations of bilateral agreements, for example, the ECHR, ICCPR and ACHR are all far-reaching and inclusive treaties. As discussed later in the thesis, negotiations of these agreements were open to all who were potential member states (at the time of the conceptualization) and are therefore public.

## **Common Lifeworld**

This is a collective interpretation of the world and of the state's place within the world system, which consists of a common system of norms and rules perceived as legitimate. Common lifeworld is synonymous with social constructivists notion that ideas of Self and Other impact interactions. According to Risse, "it provides arguing actors with a repertoire of collective understandings to which they can refer when making truth claims," ("Let's Argue!" 10, 11). It is quite obvious that groups of countries will not always share the same language, history and culture. As such, Risse offers a nuanced interpretation of Habermas' claim. Anarchy, he contends, could itself be a shared lifeworld in international affairs since it does constitute a collective perception of the world; however, since a "shared interpretation of the world as 'dog eat dog' is not particularly conducive to a reasonable dialogue, actors may find mutual understanding in a more abstract sense (Risse, "Let's Argue!" 15). Common experiences of war, then, satisfy the need for trust and shared experience amongst negotiators. Moreover, Risse defends the existence of common ground when there is "a high degree of international institutionalization," (Risse, "Let's Argue!" 15). Being member to a coordinated international system provides the framework needed for cooperation among state parties.

## **Power Hierarchies**

All interested parties must be able to participate in the argumentative discourse, and must have equal ability to make an argument or challenge the statements of others; the infusion of equal standing into discourse, according to constructivists, redefines preexisting relationships of power and social hierarchy as insignificant (Risse, "Let's Argue!" 11). To evaluate the validity of the claim that power relationships are insignificant in the conceptualization of the ECHR, ICCPR, and



the ACHR, I will review three main components. First, each actor must have equal access to the discourse, meaning that whoever would like to contribute or refute an idea has the power to do so. Second, such discourse must be open to other participants, as not only are official state representatives allowed a collaborative presence in talks, but non-governmental organizations, for example, are also allowed to act in a similar capacity. Thirdly, the negotiations must be public. It's curious why Habermas included this final point; it is extremely rare that any official international negotiations or state business, generally, are public. The "*Travaux préparatoires*" of the human rights agreements about which this paper is concerned remained private until decades later. Risse qualifies, however, that "these audiences do not necessarily consist of the larger public, but can also be other state actors in an international setting," (Risse, "Let's Argue!" 22). For the purposes of this paper, I will defer to Risse's interpretation of "public." Regardless, Risse acknowledges, "the real issue is not whether power relations are absent in a discourse, but to what extent they can explain argumentative outcome," (Risse, "Let's Argue!" 18).

### ***Drafting phase***

*"Because human rights claims are no less susceptible to capture by self-interested groups and institutions, and because when transposed from their lofty ideals to practical implementation they serve multifaceted goals that are rarely, if ever, altruistic"(Chibundu 1073).*

The drafting phase refers to when the treaty text is crafted, including what rights should be included and how said rights should be defined. Hence, the goal of this phase is to draw up, debate, modify and ultimately finalize the treaty text. Once the agreement is finalized, it is open for signature. This task brings with it an inherent distribution problem. "When there are multiple cooperative solutions possible and the actors have different preferences among them" a

distribution problem exists (*forthcoming*). In the human rights issues area, for example, when states disagree about the definition of rights, what rights to include in the treaty and what rights should be non-derogable, a distribution problem exists. The disparities between rights proposed as non-derogable versus those finalized as non-derogable (see Table 5-1, 6-1, 7-1) are strong examples of a distribution problem in the ECHR, ICCPR and ACHR.

As such, distribution problems are common in international human rights agreements. Since they determine how sovereign states should treat their own citizens, it is unsurprising that delegates have a difficult time compromising cultural norms, ideologies, etc. Social constructivism does not account for these concomitant realities regarding distribution problems, and leave the obvious question of how diverse states reconcile mixed expectations to create governing norms, unanswered. Despite discriminating the pre-negotiation phase from the negotiating phase or, for the purposes of this thesis, the conceptual and drafting phases, Risse affirms that argumentative rationality does indeed occur in both. The goal of the drafting phase, he insists, is to reach “an optimal rather than a lowest common denominator solution to a collective action problem,” (Risse 20, 21). Envisioning this as the goal, social constructivists would contend that actors’ arguments are geared toward a reasoned consensus based on agreements about principles, norms and rules. On the contrary, rational choice theorists would say that the absence of constructivist truth seeking comes as no surprise; states are strategic, and commonly self-interested, actors, so their chief concern cannot possibly be to uncover any given truth at their own expense. Instead, they aim to maximize payoff while minimizing cost of cooperation.

I study the drafting of the derogation clauses alongside social constructivism and rational choice philosophy. A major problem with argumentative rationality, in particular, is that it does not sufficiently account for the changes that occur from the conceptual to the drafting phase, all of

which impact discussion. Instead of categorizing the entire lengthy process as argumentation, as I discern the two phases, I also appreciate that the presence (or absence) of normative motivators might be similarly different. Risse does not distinguish phases in quite the way that I do, and as such, may lay critique on my analysis. Regardless, he would say, it is part of the treaty development; therefore, the broader treaty process can be classified as such. I would disagree with this sentiment. Even though comprising parts of a whole, the stages are distinct because they interact with and have an impact on the overall treaty process in different ways.

The goal of the conceptual phase is to encourage continued progress towards human rights realization internationally; its success is judged on whether a drafting committee convenes and produces a treaty. The success of the drafting stage, however, is dependent on many more challenging factors. The framers must not only agree on text, but also create a document which will be widely accepted and pass into the implementation and operational phase. At the Sixth Sitting of the First Session of the Consultative Assembly M. Yetkin (Turkey) mirrors this sentiment, “If we do not pass from the stage of thought to the stage of action, if we do not, by common decision, arrive at practical results, our efforts will only meet with failure (*Collected Edition* 126). It is imperative to understand this delicate balance of power as it suggests that, the actors at this stage have no choice but to acknowledge and accommodate the geopolitical realities that could impede its ultimate aim, leaving months and years of work futile. With this logic in mind, I expect the drafters to be guided by a “logic of consequentialism.”

## ***Implementation and Operational Phase***

After finalizing agreement text the treaty process moves onto the implementation phase, as noted earlier, the implementation and drafting phases are intrinsically linked. While the goal of the drafting phase is to reach consensus on wording so that states will ratify, the implementation phase aims to minimize the time between the adoption of the agreement, and when it enters into force. Until that happens, the document is neither legally binding nor enforceable. The implementation phase is arguably the most important to the existence of the treaty. If the agreement, as constructed by the framers, is unable to garner enough support for ratification, then the agreement becomes yet another toothless declaration. Such an outcome is wholly unacceptable, especially in the cases of the International Covenant on Civil and Political Rights and the American Convention on Human Rights. Having already been preceded by the Universal Declaration and the American Declaration, respectively, these agreements were the necessary next steps in codifying rights, thus armoring the human rights regime.

After the treaty has been ratified by a certain number of states, the entire agreement becomes legally binding for those who ratified. This point marks the transition into the operational phase. Risse contends that states “only ratify international agreements...if and when they are getting serious” (Risse, “International Norms” 553). From this perspective he labels the operational phase, “prescriptive status,” when governments ratify human rights conventions and “change communicative behavior accordingly” (Risse, “International Norms” 538). This is a major misjudgment on his behalf. At this point, states do not necessarily change anything about their behavior. Of course they are encouraged to do so, and their membership to the treaty is supposed to imply such a commitment, but as the ensuing discussion of the ECHR, ICCPR and ACHR highlights, this is not the case in many instances. Defection from derogation principles, in

particular, is more likely the result of internalization of the “logic of consequentialism,” since defectors frequently go unpunished.

Examining derogation in force (how and why escape clauses are used by states) also helps determine whether or not derogation has damaging effects on the treaty. Derogation could have a detrimental effect if it is invoked in protection of the state, and not for protecting the life of the nation. These terms are similar yet distinct. Derogation to protect the life of the nation restricts some individual rights, but only those rights that will protect the majority of individuals, and will guarantee a peaceful existence for the entire country. It is when derogation concedes provisional and proportional limitations in order to safeguard other rights. An example of derogation to protect the life of the nation could be restricting the right of peaceful assembly during very violent riots that appear to be evolving into a full-fledged conflict. During such a situation, a state could reasonably argue that the restriction was warranted to prevent the injury or death of large amounts of people. Many might not have anticipated that their exercise of the right to peaceful assembly would place them in danger. Derogation invoked to protect the state restricts rights in order to (surreptitiously) guarantee a secure position for the ruling government, and under the guise of concern for the people’s welfare. This is not necessarily the intended use of the escape powers, although for many instrumental actors of the drafting phase, I am certain it was. An example is the Republic of Ireland’s declared national emergency in 1961. It resulted in the prolonged detainment, without trial, of Mr. Lawless, who was suspected of involvement in the Irish Republican Army. The matter was taken to court. Although the European Court on Human Rights ruled in favor of the Government of Ireland, the decision has since been heavily criticized,<sup>13</sup> predominantly for its state-centric analysis of derogation permissions.

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<sup>13</sup> See Section V, “Implementation and Operational Phase,” for a comprehensive analysis of *Lawless v Ireland*.

Understanding the differences between these terms may also serve the constructivist versus rationalist debate. If states are socially constructed actors that intend to adhere to the expected norm of international cooperation, then they will likely abide by derogation stipulations (and derogate only to protect the life of the nation). Derogation, then, may not have a corrosive effect and the “logic of appropriateness” would be supported. Rationalists would argue, however, that even if states do conform to derogation provisions, they do so only because they have already designed the agreement in their favor. States will of course abide by derogation rules because the drafting phase successfully captured state preferences, which are reflected in the escape clause. If, on the other hand, the “logic of consequentialism” takes over and states derogate to protect the state, derogation is likely a destructive feature. In these cases, even if all of a state’s preferences were not captured, states will simply abide by the most accommodating interpretation. As Koremenos, Lipson and Snidal affirm, “individual states have incentives to free ride on an agreement by developing self-serving interpretations of escape clauses that are broader than intended (794).<sup>14</sup> However, if countries overwhelmingly defect from derogation stipulations altogether, derogation provisions are meaningless and should be seriously reconsidered.

Classifying actors is particularly essential in the implementation and operational phase. Since all previous phases are non-binding, the stakes are lower. Drafters know that even though they make decisions on behalf of their government, the state is not bound by those resolutions. Once the treaty assumes place in international law, however, one can better assess the situation. Observing actual patterns of derogation elucidates how closely states adhere to derogation principles, and whether certain types of states are associated with better records. Some affirm that different types of governments do indeed react differently to human rights treaties (Neumayer:

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<sup>14</sup> *Lawless v Ireland* is, again, a useful example; the contention behind the decision highlights disconnect between rational choice and constructivist truth seeking frameworks.

2012; Hafner-Burton, Helfer, Fariss: 2011). Discriminating between democracies and non-democracies is the most useful way to study these patterns, so I focus on comparing the behavior of democracies versus non-democracies in the ICCPR, as well as the impact of Latin American political instability on the ACHR member states. Such analysis is not as useful in the European case, since most are historically democratic. The agent responsible for monitoring derogation patterns and general treaty adherence is also crucial to analyze. These actors serve as oversight bodies. They are important because since they are third-party monitors, one may assume that they do not necessarily operate under the same political constraints as sovereign states.<sup>15</sup>

## **SECTION V: EUROPEAN CONVENTION ON HUMAN RIGHTS**

Opened for signature in Rome on November 1, 1950 to members of the Council of Europe, the European Convention on Human Rights, also known as the European Convention for the Protection of Human Rights and Fundamental Freedoms, came into force September 3, 1953. It was the first instrument to make legally binding some of the rights stated in the Universal Declaration of Human Rights. Despite this progressive status, however, the document stands out for its numerically small protection of non-derogable rights. Compared to the ICCPR and the ACHR, the ECHR protects the fewest. Thirteen<sup>16</sup> of the fifty-nine articles concern rights, while

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<sup>15</sup> The Continent of International Law (COIL) framework collects and analyzes data from 234 treaties. From that, 134 agreements call for some sort of mechanism to monitor compliance. Between 58.5% and 59.5% of human rights agreements create a system of compliance monitoring. Because compliance can be monitored by more than one body, the following percentages will not total 100%. Member states regulate compliance 88% of the time, an internal body in 54% of cases, an international governmental organization 63% of the time, and a non-governmental organization monitors 13% of the cases. The work of this thesis falls within the 54% of the time that a body internal to the agreement oversees compliance. See Chapter 9, Monitoring Provisions of Koremenos (*forthcoming*).

<sup>16</sup> See Article 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

only four are non-derogable. As of July 2, 2015, every Council of Europe member (47 countries) had ratified the agreement (*The Council of Europe Treaty Office*). Below is Article 15, the derogation clause:

*Derogation in time of emergency*

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.<sup>17</sup>
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

## ***Conceptual Phase***

The Preparatory Commission, Committee of Ministers, and Consultative Assembly of the Council of Europe directed the work during the conceptual phase. The Preparatory Commission's contribution is very limited; it met a few times and is responsible for placing "maintenance and further realization of human rights and fundamental freedoms" on the draft agenda for the Committee of Ministers (*Collected Edition Vol.1 6*). The Foreign Affairs Ministers of all of the member states (or, if they so choose, a permanent diplomatic representative) comprise the Committee of Ministers ("About the Committee").<sup>18</sup> Among its most relevant roles, the Committee is charged with "political dialogue" and finalizing conventions and other agreements ("About the

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<sup>17</sup> Article 2 corresponds to Right to Life, Article 3 to Prohibition of Torture; Article 4 (paragraph 1) to Prohibition of Slavery and Forced Labor, and Article 7 to No Punishment without Law. Article 7 stipulates that no one can be found guilty of committing a crime, if at the time of the offense the act was not considered illegal by either national or international law. Moreover, only the penalty that applied at the time of the offense may be imposed on the guilty party.

<sup>18</sup> This information was on the Council of Europe website since the "*Travaux préparatoires*" do not mention the responsibility nor the authority granted to the Committee. Furthermore, the Council of Europe Statute (Article 15(a)) states that the Committee of Ministers "shall consider the action required to the further aim of the Council of Europe, including the conclusion of conventions and agreements" ("Statute of the Council")



Committee”). Throughout the entire treaty process, the final decision rests with this body.<sup>19</sup> Hence, although the Preparatory Commission believed it necessary for the Committee to engage the topic of human rights, the Committee of Ministers initially rejected this idea at the Second Meeting of the First Session of the Committee of Ministers (August 8-13, 1949). Upon review of the draft agenda, M. Lange (Norway) “did not see any necessity for developing this problem at great length as it had already been extensively discussed within the United Nations Organization,” (*Collected Edition Vol.1* 10). He shared the opinion of the majority; defining and developing human rights and fundamental liberties was, therefore, rejected<sup>20</sup> (*Collected Edition Vol.1* 12).

The draft agenda was then sent from the Committee to the Consultative Assembly. As their title suggests, the Assembly’s role was to serve as consultants to the Committee of Ministers. Article 25(a) of the Statute of the Council of Europe requires that members of the Consultative Assembly are members of parliament from their respective member state. Members of the Assembly can either be elected or appointed by the parliament from which they originate (“Statute of the Council”).<sup>21</sup> The Assembly deliberates and presents recommendations to the Committee. The Assembly prepared drafts of documents but, again, their decisions were not absolute and rested with the final authority of the Committee of Ministers. Still, their role was not without value. Upon examination of the draft agenda, the Consultative Assembly thought it negligent to omit consideration for human rights. At the First Session of the Consultative Assembly, M. Mollet

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<sup>19</sup> When the text of any treaty is adopted by the Committee of Ministers, it is finalized. The Committee also determines on what date the treaty will open for signature (“About the Committee”).

<sup>20</sup> The Chairman asked if there were objections to adding this item to the agenda and at least one representative confirmed that there were. The matter was then put to a vote. Four delegates voted to retain the item on the agenda; seven voted against, and one abstained. A two-thirds majority was necessary, so the item was withdrawn from the agenda. There is no documentation of the voting records of the individual representatives.

<sup>21</sup> The number of member countries allowed to submit is unequal and has been amended over a dozen times. The Statute does not specify a system to determine this, and is subject to change, contingent on the Committee. It appears membership proportional by some measure (“Statute of the Council”).

(France) perceived inclusion of human rights on the agenda to be “necessary to give...the Council of Europe some moral basis” (*Collected Edition Vol.1* 16). At this point most delegates acknowledged that international human rights norms are necessary, but disagreed as to whether or not the Council of Europe should take on the matter or defer to the existing work by the United Nations. The Fifth Meeting of the First Session of the Committee of Ministers (August 13, 1949) reacted to the Assembly’s prompt. M. Rasmusen (Denmark) pointed out that although human rights had been discussed at great length by the United Nations, the Universal Declaration lacked precision and international justiciability. “It would be a very different matter if the question was reconsidered on a purely Western European basis, in which case a text might be elaborated which would be binding in the legal sense,” (*Collected Edition Vol.1* 24). This, however, was not yet the ruling opinion; while the Committee approved inclusion of human rights on the agenda, it charged the Assembly with contemplating how those rights should be defined (*Collected Edition Vol. 1* 24).

From this point, the delegates in the Consultative Assembly began genuine discussion. At the Fifth Sitting of the First Session, Lord Layton (United Kingdom) proposed that the Council of Europe should be aimed at producing a legally enforceable Convention. “Purely paper declarations...are rightly discredited,” instead, he proposed “the adoption of a Charter of Human Rights, coupled with a definite method of enforcement” (*Collected Edition Vol.1* 30). Then, at the Eight Sitting (August 19, 1949), the Assembly declared to the Committee, that a legally binding convention “can and must conclude immediately” (*Collected Edition Vol.1* 38).<sup>22</sup> As the Assembly

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<sup>22</sup> Signed: Teitgen, Maxwell-Fyfe, Akan, Azara, Bastid, Benvenuti, Bidault, Boggiano-Pico, Bolifraud, Bonnefous, Boothby, Cappi, Cassimatis, Diop-Socé, Drossos, Düsünzel, Cingolani, Eccles, de Longchambon, Macmillan, de Menthon, Mollet, Montini, Motz, de Moustier, Moutet, Odyak, Philip, Reynaud, Ross, Rozakis, Schumann, Senghor, Serrarens, Smitt-Ingebretsen, Wistrand, Wolter, Bodson, Korthals (*Collected Edition Vol.1* 38).

deliberated, Mr. Teitgen (France) pressured the others to think critically about the impact they envision the Convention to have. He encourages the Assembly (and Committee) to think critically and honestly about the structural impediments that may hinder one's access to their rights, even if a European Convention is in force:

“It is true that the freedoms are written in to the laws; they exist on paper for them as for the others, the privileged ones but those poverty-stricken creatures lack the means to exercise them and to benefit by them day by day...We must have the courage to recognize that freedom of money, of competition and of profit has sometimes threatened to destroy the freedom of men...I recall the saying of Lacordaire, that it is freedom which enslaves and law which liberates” (*Collected Edition Vol.1 42*).

Understanding Teitgen's instinct to highlight these realities early on in the process is easily facilitated by social constructivism. He intended to imbue in the Assembly a clear sense that their work should come with a grain of salt. Not in the sense that the Convention would be futile, but so that they could attempt to implant mechanisms into the treaty to account for these obstacles; in a sense, arguing with the status quo. Admitting reality should be the guiding normative framework upon which the framers from all bodies of the treaty process rely. In addressing legitimate barriers to full enjoyment of the ECHR, Teitgen's comment attempts to establish a “logic of appropriateness.”

Still more, despite the presence of a patently political decision-making body, the features unique to the conceptual phase pave way for argumentative rationality. The Committee of Ministers was indeed persuaded by the Consultative Assembly, even after outright rejecting the mere inclusion of the item on its agenda. Furthermore, because the Committee was swayed by what is structurally a lesser authority, as will be thoroughly discussed later, this highlights that power hierarchies were in fact insignificant and the better argument, victorious. The conceptual phase lends the “logic of appropriateness” and the “logic of arguing” to even the, by definition, politically constrained actors who were able to assume sincerity. Regardless of their affiliation,

during the conceptual phase, the Committee of Ministers is not yet in a position where its decisions legally-bind sovereign states. Recall the conceptual phase aims to reach consensus that a convention is even necessary. The above statement by M. Rasmussen (Denmark) is a clear example of how actors can “change hats;” note that in the subsequent drafting phase, these logics disappear.<sup>23</sup>

To be sure, the actors in the conceptual phase understood their role as different from actors in subsequent phases. M. Fayat (Belgium) is among the many to express this sentiment, “The Committee...will not undertake [drafting the Convention] on a theoretical basis...It must take into account...the political and legal safeguards by which these freedoms must be protected, in order that they may find actual expression in everyday life,” (*Collected Edition Vol.1* 88). It is true that taking political and legal safeguards into account is a signal that interests must be acknowledged and incorporated, but it also shows that Fayat appreciates this to be distinct from his role in the conceptual phase. Still, M. Fayat continues to say, “We [the Assembly] must establish an exact and precise definition of those fundamental freedoms, which we shall agree to acknowledge as our common heritage” (*Collected Edition Vol.1* 88). And, “the Committee must, above all, take as its starting point the facts as they exist” (*Collected Edition Vol.1* 90). To further elucidate that the conceptual phase of the ECHR fully accords with argumentative rationality, the situation must align with the Habermasian preconditions of common lifeworld and insignificant power hierarchies, as Risse contends.

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<sup>23</sup> Even once the treaty process matures into the drafting phase and actors change into rational hats, as Koremenos (*forthcoming*) affirms, this does not imply that actors reject the realization of human rights internationally as one of their goals. This is because even with the goal of human rights, when the drafting of the text ensues, the same political representatives are now charged with influencing the agreement in a way that most favors their government (and, hence, ratification by the state).

## Common Lifeworld

At the Eighth Sitting of the Consultative Assembly, held August 19, 1949, Mr. Foster (United Kingdom) says that the delegates to the ECHR are at an advantage, being of the “European family” (*Collected Edition Vol.1* 96). In affirming his support for the ECHR, he continues to reference a collective European experience, especially in relation to the UDHR. “We have had totalitarian dictatorships only too recently in Europe which have...disregarded...those rights which we have in the Declaration” (*Collected Edition Vol.1* 96). The Preamble,<sup>24</sup> in addition to the sentiments of Mr. Foster and others,<sup>25</sup> explicitly reveal that Habermas’ common lifeworld concept was indeed present for the ECHR conceptualization. The relationship between the Council of Europe and the ECHR provides further support. The Council of Europe, which was founded in 1949 by Winston Churchill (GB), Konrad Adenauer (DE), Robert Schuman (FR), Paul Henri-Spaak (BE), Alcide de Gaspari (IT), Ernest Bevin (GB), sponsored the European Convention, (“Founding Fathers”). Therefore, even if some persist with skepticism that a European identity constitutes a common lifeworld, the international institutionalization of the Council of Europe fulfills the criteria. Similar to the United Nations, the Council emerged out of the Second World War to promote European cooperation and avoid further conflict. “The turning point for the development of the rights regime was [indeed] World War II” (Simmons 39). Shortly after the Council’s

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<sup>24</sup>The Preamble of the ECHR professes, “as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,” (European Convention on Human Rights). Despite some arguing that all preambles are characterized by a façade of unity and that the embellished language is nothing more than rhetorical cheap talk, the European case holds numerous examples that a collective identity was, indeed, a coalescing factor. In this case, then, scholars should not be so quick to critique the ECHR preamble as such. However, the non-binding nature of preambles, paired with their role to embody the spirit of the document, makes this likely true for many other agreements.

<sup>25</sup> See *Collected Edition of the “Travaux préparatoires” Vol.1* and, for example, the remarks of M. Fayat (Belgium) page 86, M. Kraft (Denmark) page 64, and Mr. Norton (Ireland) page 128.

establishment, a committee of governmental experts met in February and March of 1950 to prepare a draft European Convention. Although the ICCPR was not the first treaty to take effect, it was the first to begin drafting and was the inspiration and model for the ECHR. The delegates relied heavily on the work already done by the United Nations in this arena. In fact, the Committee of Ministers instructed drafting bodies to pay due attention “to the progress achieved in this matter by the competent organs of the United Nations,” (*Collected Edition* xxvi). Moreover, since the devastation of WWII was most heavily felt in Europe, preventing future horrors and human rights abuses was undoubtedly a unifying sentiment. In this sense, the agreements share a similar anti-war motivation. In summation, with the ECHR being adopted so shortly after the Council of Europe was created, and the Council of Europe being a response to WWII, it is clear that war was the coalescing factor.

## **Power Hierarchies**

The members of the Council of Europe, all Western European countries, were present during negotiations. At a very basic level, the two-thirds majority voting process<sup>26</sup> eliminated any power hierarchies. Furthermore, it appears that each actor was allowed to speak and for as long as they desired.<sup>27</sup> The comments ranged from relatively short remarks of several paragraphs to multi-page historical and ideological accounts. The comments of many of the representatives, like the following from M. Teitgen (France) highlight European solidarity. “The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and

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<sup>26</sup> See *The Collected Edition of the “Travaux Préparatoires” Vol.1* (12).

<sup>27</sup> See, for example, M. Yetkin’s (Turkey) remark at the Sixth Sitting of the Consultative Assembly (August 17, 1949), “I had no intentions of speaking today, but after listening to one or two of my colleagues I put my name down to speak,” (*Collected Edition Vol.1* 124).

realizing the ideals and principles which are their common heritage” (*Collected Edition Vol.1* 38). M.Wistrand of Sweden embodies a similar sentiment when he says “Is not the belief in the existence of human rights the real greatness of the western civilization, of European culture?” (*Collected Edition Vol.1* 82).

Statements like this help to illustrate that egalitarian conceptions of a single Western Europe dominated the discussions. It would be contrary to the spirit of the meetings if power hierarchies ruled this phase of negotiations. The only possible point of contention that the Habermasian preconditions are satisfied is the fact that non-governmental organizations were absent from this initial stage. Regardless, since most of the conditions, access to speech and being public in nature, are satisfied, I affirm that this Habermasian precondition is similarly satisfied. Varied and dynamic, real-world situations will never fit nicely into any confines one hundred percent of the time. In this instance, it is sufficient to say that the more closely the situation resembles the criteria, the more we can expect argumentation.

## Drafting Phase

**Table 5-1** *Rights proposed versus adopted as non-derogable in the ECHR<sup>28</sup>*

EUROPEAN CONVENTION ON HUMAN RIGHTS	
<i>Proposed as non-derogable</i>	<i>Adopted as non-derogable</i>
Right to Life (Art. 2)	Right to Life (Art. 2)
Prohibition of Torture (Art. 3)	Prohibition of Torture (Art. 3)
Prohibition of Slavery and Forced Labor (Art. 4, paragraph 1)	Prohibition of Slavery and Forced Labor (Art. 4, paragraph 1)
No Punishment without Law (Art. 7)	No Punishment without Law (Art. 7)
Right to Respect for Private and Family Life (Art. 8)	

The drafting of the derogation clauses did not commence along with the overall drafting process; the Consultative Assembly’s initial recommendation (preliminary draft of convention) to the Committee of Ministers (September 8, 1949) contained no derogation article. Instead, it only hinted at the idea, “no limitation shall be imposed except those established by the law” (Secretariat of the European Commission 2). An escape clause in the European system was considered “to be unnecessary, having regard to [the] General principles of law recognized by civilized nations,” (Secretariat of the European Commission 4). Guided by the opinion that a separate clause would be superfluous considering modern states already operated within the confines of broad legal principles, the majority of representatives agreed. At this point in the negotiations, we can safely say that the drafters were not operating with a principled rationale in mind since there was no

<sup>28</sup> Subsequent Protocols to the Convention have extended non-derogable status to the abolition of the death penalty and the right to only be tried and punished once. Protocol 6 and Protocol 13 concern the abolition of the death penalty. They are virtually the same except that while Protocol 6 permits states to warrant the death penalty for crimes committed during war or during times of imminent threat of war, Protocol 13 prohibits the death penalty in any case. Also, Article 4 (Right Not to be Tried or Punished Twice) of Protocol 7 is now non-derogable under Article 15 of the ECHR. (Convention for the Protection of HR 38; 44; 52; )



consensus on inclusion of an escape clause. Instead, since an escape clause was widely regarded as redundant in the European system, the “logic of consequentialism” ruled. In other words, if a derogation article would not have an impact on the human rights condition any more so than existing measures, the act of including it would not bring with it any results.

Later, the Committee of Ministers, in deference of the United Nations, thought it useful to study the draft ICCPR and ICESCR. Since the ICCPR draft did contain an escape clause, the Committee tentatively adopted a similar text. The Committee then submitted to the Committee of Experts the ICCPR draft and the preliminary work done by the Assembly, to compare and provide suggestions. The Committee of Experts comprises a representative from each member state after being appointed by the Committee of Ministers (“European Charter”).<sup>29</sup> The Experts are to be selected from “a list of individuals of the highest integrity and recognized competence in the matters dealt with” and must act independent of any government (“European Charter”). In this sense, then, the Experts are expected to embody the “logic of appropriateness.”

At its First Session, after comparing the Assembly’s and ICCPR drafts, the Experts produced a draft that did not include any mention of escape (Secretariat 5). It was not until the British Government forward to the Committee, an amendment that the Experts began to seriously contemplate derogation (Second Session held March 6-10, 1950).<sup>30</sup> “Considering that the matter

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<sup>29</sup> This definition of the Committee of Experts is taken from the Council of Europe website in relation to the European Charter for Regional or Minority Languages. There is not a clear explanation of the exact role of the experts or how they are selected in any of the preparatory or other work. It appears, however, that they Committee of Experts active in the drafting of the ECHR functions very similarly to that of the current Committee of Experts. I will infer that they are and proceed.

<sup>30</sup> Professional role and citizenship of experts in attendance: Member of the Senate (Belgium), Ministry of Foreign Affairs (Denmark), Director of the Institute of Political Science at Nancy (France), *Absent* (Greece), Attorney-General of Ireland (Ireland), Member of the Permanent Court of Arbitration, Head of the Legal Department of the Ministry of Foreign Affairs (Italy), State Attorney-General (Luxembourg), Professor of Law, Member of the Upper House of Parliament; Legal Expert, Ministry of Foreign Affairs (Netherlands), Barrister of the Supreme Court (Norway), Judge, Revisionary Division, Supreme Court; former Judge of the Mixed Tribunals of Egypt (Sweden), Chief Adviser to the Ministry of Foreign Affairs; Doctor of Law, Lecturer in International Law, University of Ankara (Turkey), former Legal Adviser to the

was of a political nature,” however, the Committee of Experts refrained from making a decision and handed the question over to the Ministers to decide (Secretariat of the European Commission 6). The Committee of Ministers then convened a meeting of senior officials who would work closely with their home governments to prepare materials for the Ministers so that they could reach a decision from a “political point of view,” (Secretariat of the European Commission 8). The Conference of Senior Officials held at Strasbourg (8-17 June 1950) reconciled the differences between the proposed versions. The principal problem was “of incompatibility with the internal constitutions of the member states” (*Collected Edition Vol.IV* 170). The most relevant part of the escape clause is paragraph two, which lists the non-derogable rights:

Alternative A: Committee of Experts Draft  
*No mention of derogation.*

Alternative B: British Amendment

2. No derogation from Articles 4, except in respect of deaths resulting from lawful acts of war, 5, 6 (paragraph 1) or 9 can be made under this provision. (Secretariat 6).

Conference of Senior Officials recommendation to the Committee of Ministers

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, 3, 4 (paragraph 1) or 7 can be made under this provision (Secretariat 8).

The Secretariat of the Commission’s annotations point out that Articles 4, 5, 6(1) and 9 correspond to Articles 2, 3, 4(1) and 7 respectively (Secretariat of the European Commission 6). The Senior Officials were split four and four between alternative A and B. France, Ireland, Italy, and Turkey preferred Alternative A, while Greece, Norway, the Netherlands, and the United Kingdom preferred Alternative B. Belgium and Luxembourg said that they would support the British amendment if a Court was established (*Collected Edition Vol. IV* 210). Being that a Court is established, the Senior Officials determined the vote of Belgium and Luxembourg to favor

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Home Office; Member of the Economic and Social Department of the United Nations Foreign Office (United Kingdom). See *Collected Edition Vol.III* 278;280 for surnames.

Alternative B. The Conference of Senior Officials reported this to the Committee of Ministers and it was adopted as such in the final version of the treaty.

The evolution of the derogation clause demonstrates that strategic considerations ultimately prevail. When it came time to decide on derogation the Committee of Experts considered political issues most heavily, abandoned the debate and handed it over to government officials (Conference of Senior Officials). In order to produce a document that will ever become legally binding, the framers recognized that the goals of individual states cannot be abandoned and must be reflected in the final agreement. Here we find strong evidence in favor of rationalism and against constructivist “logic of appropriateness.” As the debate is overtaken by only these details, there is a striking omission of deliberation regarding definition of non-derogable rights. Not once do the delegates convene a meeting to determine, collectively, which rights should be non-derogable. The British interpretation is simply accepted as legitimate.

Among the few times derogation is seriously debated is in the text of the non-derogable articles. The evolution of Article 3, Freedom from Torture, of the ECHR is one example. Mr. Cooks (United Kingdom) was at the forefront of debate regarding torture; his powerful speech forwarded labeling freedom from torture as non-derogable. “I say that if a State, in order to survive, must be built upon a torture chamber, then that State should perish,” (Secretariat of the Commission 5). Although this sentiment was common among the delegates, the Assembly immediately splits once Mr. Cooks expresses his revulsion for forced sterilization and expects that it, too, will be non-derogable.<sup>31</sup> This provides us with a real-world example of Koremenos’ *Distribution without Coordination* problem (*forthcoming*). Mr. Cooks did not anticipate his

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<sup>31</sup> “The Assembly records its abhorrence at the subjection of any person to any form of mutilation or sterilization or beating,” (Secretariat 11)

position to be met with such division, believing his opinion would be popular, especially considering sterilization's role in the Nazi strategy.

The primary reason for the split was the existence of conflicting laws within several of the negotiating countries, among which Denmark, Sweden and Norway voiced special interest.<sup>32</sup> M. Kristensen (Denmark) led the argument. "I do not think we can proceed without the admission of sterilization and I do not think it is the business of the Council of Europe to prohibit individual countries from having such acts," (Secretariat of the Commission 9). Here lies the persistent tension between individual rights and state sovereignty. His statement reveals, rather explicitly, a weakening of morally driven motives in light of politic concerns. "It seems to me," said the President of the European Commission of Human Rights, "that the question is more delicate than we originally thought," (Secretariat of the Commission 14). Domestic hesitations must inevitably be treated very seriously. Contrary to Risse's assessment, that "biased or self-interested communicators are far less persuasive than those who are perceived to be neutral or motivated by moral values," the countries promoting state sovereignty were victorious (Risse, "International Norms" 536). After all, international agreements require individual countries' ratification before they can enter into force, and hope for any sort of impact on the human rights condition. The uncertain future of the document, paired with several objections to the threat it posed on state sovereignty, facilitated the exclusion of sterilization in Article 3. It currently reads, "No one shall be subjected to torture or to inhuman and degrading treatment or punishment," (*Convention for the Protection of HR and FF*).

Several problematic situations may have arisen had the framers not considered the political realities and sterilization remained non-derogable. One, the hesitant countries may have never

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<sup>32</sup> See Statements by M. Wistrand (Sweden) and M. Smitt-Ingebretsen (Norway) (Secretariat 12).

ratified the agreement, considering it would expressly be in contradiction with domestic laws. Or, the article could have remained in effect, but been classified derogable. The delegate from Sweden, M. Wistrand, did in fact say that his country employed sterilizations on “sexual criminals in the interests of public security,” (Secretariat of the Commission 12). But, public security and the existence of a national emergency are not quite synonymous and so sterilizing states would be met with much resistance. Another option would be to allow reservations to the article. The problem with these options, though is that in the first scenario the treaty’s membership would be reduced. The ultimate aim of actors in the drafting phase is to produce a document that garners the widest support possible in the implementation phase; hence, this option was unacceptable. If Article 3 or even a sub-paragraph dealing with sterilizations could be derogated from, the treaty could also end up with a pattern of repeat derogators (i.e. Sweden, Norway, Denmark). States might also choose not to report derogation and secretly renege on the agreement.

This risks undermining the entire agreement. If States could submit reservations to the prohibition of sterilizations this could also subject their governments to heightened international scrutiny. Despite this, reservations are persistently tacked onto agreements. This particular case, however, is unique. It would look very bad if States signed onto an agreement and then immediately decided to go against the international standard on rights protection, especially with sterilization’s gruesome association with the Holocaust. Moreover, Freedom from Torture would be listed as a non-derogable right, so reservations on this fundamental protection would send a costly signal to the international community that the reserving country was insincere in its commitment to human rights. States do not sign onto human rights agreements to be criticized, but in hopes that being party to such a treaty promotes a favorable image of the country. As such, “human rights norms not only protect citizens from state intervention but also (and increasingly)

define a “civilized state” in the modern world,” (Risse 5). Possibly unknowingly, Risse forwards a reason in line with rationalists thinking, of why a state might want to create and then sign onto an agreement.

These considerations in mind, it is unsurprising that the final version of Article 3 was narrower in scope, which easily allows it to be non-derogable. Social constructivism has little explaining power in this case. Even if the Scandinavian countries regarded state sovereignty as their guiding norm (as opposed to a tactical tool), their concerns were not shared by the majority; hence, state sovereignty was not internalized by the other delegates as a ruling idea. Instead, according to a “logic of consequentialism” the other delegates permitted this modification to appease the few and guarantee greater treaty membership.

### ***Implementation & Operational Phases***

It is worth noting the role of the European Convention on Human Rights as an unofficial prerequisite for entry to the European Union. While the Council of Europe sponsors the ECHR and is a distinct organization from the European Union (EU), no member country to the EU has joined the organization without first joining the Council of Europe (“Did You Know?”). According to the Copenhagen Criteria, which outlines eligibility for EU membership, only “able institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” can be considered for membership (“Conditions for Membership”). The first step in states proving their commitment to human rights is ratification of the ECHR before they are allowed membership into the exclusive club that is the European Union. This close relationship is explicitly revealed by the Legal Committee report on September 5, 1949. The ECHR would be an “establishment of a collective guarantee of essential freedoms and fundamental rights...[T]his guarantee would

demonstrate clearly the common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy,” (Secretariat of the European Commission 216; Janis, Kay, and Bradley 21).

Every country in the European Union is in fact a member of the European Convention. Being a party to the ECHR, then, has a potential lucrative payoff, unlike most other human rights agreements. Not only does a state show a dedication to human rights, but they are then more likely to be accepted into the EU and can reap the benefits of its geopolitical and economic strength. States are well aware of this dynamic, but this does not necessarily translate into greater and continued respect for those rights enshrined in the ECHR. Instead, strategic motivations become more important as state parties are perpetually operating according to cost-benefit analysis of cooperation. Dominance of rationalism becomes especially pronounced during self-identified emergency situations in which States must decide whether or not to derogate. The following section on the European Court provides an illustrative example of the state’s rational approach to derogation, and the either rationalist or constructivist reaction of the oversight body.

## **The European Court of Human Rights**

The Court was set up in 1959 as a mechanism to ensure treaty compliance. Between 1953 and 1983 only 18 States filed petitions with the Commission, compared to 10,709 private claims. And, of the 100 decisions by the Court from 1959 until 1985, 98 were cases with individuals as petitioners (Janis, Kay, and Bradley 70). The right of access to individual petitioners is considered a “revolutionary contribution” to the ECHR for its impact on enlivening the role of the Court (Gomien 12). All states ratifying the Convention must now accept the Court’s jurisdiction and the ability of individuals to bring suit. This accessibility greatly increases the caseload of the European

Court and makes it and the Convention even more so relevant. The Court's power falls short of being able to alter domestic laws and it refrains from suggesting any changes to the law. While it may rule against a state and the state is expected to adhere to the ruling, the Court cannot actually guarantee that its judgment will be respected; the state retains complete sovereignty in deciding whether or not to carry out the ruling. This balance of power has led to classifiable distinctions in the way the Court handles cases (Janis, Kay, and Bradley 71).

In 1961, with *Lawless v Republic of Ireland*, we see the Court "anxious to reassure its member states that it would be sensitive to their concerns and traditions," (Janis, Kay and Bradley 71). In *Lawless*, the Irish government detained Mr. Lawless, suspected of involvement in the Irish Republican Army (IRA) for five months without a trial. The Government of Ireland considered the IRA an unlawful terrorist organization and before actually detaining Mr. Lawless, the government invoked the emergency escape powers of Article 15 of the Convention. The Court ruled in favor of the state, finding Ireland justified in detaining Mr. Lawless and declaring that this organization (and his membership in it) constituted a public emergency, which threatened the life of the nation. This seems a very loose interpretation of what defines a public emergency. Decisions such a *Lawless* likely reassured states, but "did little to encourage individual petitions," and a true sense of human rights protection (Janis, Kay and Bradley 71).

It is possibly this reality that led the Court to develop a more austere relationship with state parties. It began to increasingly find states in violation of the Convention. The *Greek Case* of 1969 involved a petition brought against the country as a result of its suspension of human rights guarantees and a number of articles of the Greek Constitution, which were made in light of a coup d'état (Michaelson 292). Not only did the Court find Greece in violation of the Convention, the



Commission clarified the definition of public emergency and held that a public emergency must have the following elements (European Commission of Human Rights 70):

- It must be actual or imminent.
- Its effect must involve the whole nation.
- The continuance of the organized life of the community must be threatened.
- The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health and order, are plainly inadequate.

These four criteria, which make up the “Article 15 test,” are now looked to as a first measure in derogation examination. This jurisprudence tightens the understanding of derogation in a way that benefits the individual over the state and gives both the Court and the Commission another framework to explicitly challenge states.

These oversight bodies must remain semi-cautious in their approach, though, as the precarious likelihood exists that states can abandon the Court’s jurisdiction, or not abide by its rulings. Rationalism and constructivism operate almost simultaneously in the Court, which serves as an interpreter of the Convention. The Jurists’ aim of finding the true meaning of the document as the drafters intended or as the modern international climate requires is evidence in support of constructivism. This does not mean that they will act in any certain way. Just because the Court rules in favor of the state does not mean that the document is being undermined or the justice is not legitimate. In fact, ruled by a truth seeking norm should produce mixed results; sometimes the state is rightfully victorious and in other cases it is the individual or non-governmental organization. When patterns arise, so should suspicions of political interplay. As aforementioned, for a large portion of the Court’s initial existence the state was consistently judged victorious. The Court was likely insecure in its position relative to the state and hesitant to rule against a member party in fear of losing any of the power with which it was imbued.

The Jurists may have considered maintaining their role as watchdog more tactically important than justice, if that justice would bring about its complete demise. After all, member states could have simply rejected the Court's authority since the jurisdiction of the Court and the right of individual petition both first began as optional clauses. Article 34 provides for individual petitions and Article 32 provides for the Court's jurisdiction (Janis, Kay, and Bradley 86). "If the Court is perceived by a state as going 'too far,' then that state could decide not to renew its acceptance of the optional clauses," (Janis, Kay, and Bradley 71). The Court would not want to jeopardize its authority by imposing draconian rulings on States that could then reject its legitimacy all together. The history of international law has shown that it is not uncommon for a guilty party to outright deny the legitimacy of the body, which found it culpable. It was in the best interest of the Court to rule in favor of the power brokers in order to save its existence. Over time, however, the right of individual petition has become so entrenched that it is now mandatory rather than optional (Gomien 12). One reason for this switch could be the vitality and relevance individual petitions gave the Court. As mentioned earlier, individual claimants have greatly increased the caseload of the Court. One may find it interesting to compare the European Court to that of the International Court of Justice, which does not allow individual claimants and was described as "more or less static," (Janis, Kay, and Bradley 70). Once the jurisdiction of the court and individual petitions became mandatory, it appears that the Court also began to rule in favor of the individual more often. It was not until ten years into the Court's existence that there was a switch to more varied decisions. *Neumeister v Austria* initiated this transition; in 1968 it became the first decision ever ruled against a state party (Janis, Kay, and Bradley 71). So, the Court can be considered to be guided by what it determines the right thing to do, which accords with social constructivism, as

long as the truth does not threaten the Court's jurisdiction, in line with Koremenos and other rationalists.

## **SECTION VI: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

The ICCPR is part of the United Nations sponsored International Bill of Human Rights along with the Universal Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). The ICCPR was adopted on December 16, 1966 and entered into force March 23, 1976, the purpose of which was to put to effect certain rights enshrined in the Universal Declaration. As of February 6, 2015 the treaty is in force for 168 states; only 22 countries have neither signed nor ratified (Status of Ratification Interactive Dashboard). Out of a total of twenty-one<sup>33</sup> articles related to rights, seven are non-derogable. Below is the derogation clause, Article 4:

### *Derogation in time of emergency*

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.<sup>34</sup>
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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<sup>33</sup> See Article 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27.

<sup>34</sup> Article 6 corresponds to Right to Life, Article 7 to Prohibition of Torture, Article 8 (paragraphs 1 and 2) to Freedom from Slavery and Forced Labor, Article 11 to Prohibition on Imprisonment for Inability to Fulfill Contract, Article 15 to Prohibition on Retrospective Criminal Laws, Article 16 to Right to Recognition as a Person Before the Law, Article 18 to Freedom of Thought, Conscience and Religion.

## ***Conceptual Phase***

The same day that the General Assembly adopted the UDHR on December 10, 1948, it requested that the Human Rights Commission begin drafting affiliated covenants. Then, at the Commission of Human Rights, Second Session<sup>35</sup> (2-17 December 1947), Commission members decided to create an enforceable and legally binding agreement. The Covenant would serve to complement the Universal Declaration of Human Rights. As the Commission began conceptualizing what this Covenant would look like, a new question emerged: Should economic, social and cultural rights be included in the same justiciable covenant as civil and political rights? (Secretary-General 6; 13). Some were concerned that problems might arise if a single covenant embodied two distinct categories of rights and pressed the General Assembly to consider creating two separate, but complementary agreements. One hesitation concerned problems with implementation (Secretary-General 13). To be effective, some believed the different categories of rights would also require different reporting and complaint machinery. Opponents of separate agreements felt that two treaties would prevent effective implementation of economic, social and cultural rights, which standing-alone might be ignored. This position ultimately failed. Critics argue that incorporating both sets of rights, in a single agreement, “would have resulted in a Covenant within a Covenant,” (McGoldrick 11). The sets of rights, requiring disparate implementation measures, were determined to be too distinctive to house within a single agreement, and now make up the ICCPR and the ICESCR.

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<sup>35</sup> Members present at the second session: Eleanor Roosevelt (USA), W.R. Hodgson (Australia), F. Dehousse (Belgium), A.S. Stepanenko (Byelorussian S.S.R.), Nan-Ju Wu (China), O. Loufti (Egypt), R. Cassin (France), Hansa Mehta (India), A.G. Pourevaly (Iran), C. Malik (Lebanon), M. Amado (Panama), C.P. Romulo (Philippine Republic), M. Klekovin (Ukrainian S.S.R.), *illegible* (USSR), Dukeston (UK) (*Summ. Rec. 29<sup>th</sup> 1*).

Although the persons charged with determining the best plan of action, the Human Rights Commission, was comprised of mostly diplomats and judges, and considered experts in international human rights. Apart from the diplomats, it appears that some of the members of the Commission held careers that were separate from the political world. Hansa Jirva Mehta (India), for example, is known as an activist and educator (“Hansa Mehta”). Either way, suspicions as to instrumental maneuvering are raised since members of the Commission were selected in secret meetings (Human Rights Council). Non-governmental organizations and specialized international agencies were also in attendance and functioned as consultants. The Consultative Council of Jewish Organizations, International Council of Women, and the American Federation of Labor were among those in represented at the Second Session (*Summ. Rec. 29<sup>th</sup> 2*).

Still, there is evidence that Cold War ideologies played a significant role in this decision (Koremenos, *forthcoming*). The West, led by the US; and the East, led by the USSR, each wanted to promote a sub-category of rights. Unlike in the ECHR and ACHR, in the conceptual phase of the ICCPR, it appears there was interplay of rationally motivated behavior. “While the West sought to promote civil and political rights, such as freedom of speech and expression, the Soviet bloc instead focused on economic and social rights such as the right to organize, health care, and housing,” (Koremenos, *forthcoming*). This decision is of paramount importance when interpreting the ICCPR. If the East/West divide did not exist, it is likely the agreement would be whole and this thesis would be analyzing a different agreement altogether. It is further interesting to note that the International Covenant on Economic, Social and Cultural Rights permits no derogation. If only one treaty was created would the delegates in the subsequent drafting phase have conceptualized derogation differently? In the ICCPR, appraising the groups of rights as too dissimilar to include

in a single agreement had far-reaching consequences on the subsequent phases of the treaty process.

Even so, the existence of instrumental realities does not discount the possibility that the Human Rights Commission may have been motivated by a “logic of appropriateness.” At the same time that the East/West divide may have resulted in implications for the treaty, according to rational perspectives, social constructivism also holds a certain amount of explanatory power. Indeed, the East and West each regarded their political ideology as the norm. These customs particularly shaped the USSR and the USA, domestically as well as internationally. From a social constructivist perspective, each side doggedly maintained their convictions because, from their perspective, it was the right thing to do. With this in mind, I will continue to study the ICCPR in order to determine if Habermasian preconditions are satisfied.

## **Common Lifeworld**

Amid the Second World War, 26 nations pledged allegiance to each other to continue fighting against the Axis Powers in what was termed the “United Nations” by United States president, Franklin D. Roosevelt (“History of the United Nations”). Then, in 1945, the United Nations Charter was created and signed by 51 countries.<sup>36</sup> The organization officially began on October 24, 1945 when China, France, the Soviet Union, the United Kingdom, the United States and other signatories ratified the Charter, (“History of the United Nations”). It was not until after the Second World War that countries were even concerned with the human rights condition of those outside of its borders (Bederman 97). It was a response to the gross atrocities of WWII that

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<sup>36</sup> The Charter was originally signed on June 26, 1945 by 50 members; Poland was unable to attend but signed it later and became one of the original 51 members.

had “shaken the moral, legal, and political foundations of the world community,” (McGoldrick 3). It is, therefore, unsurprising that in a firm affirmation of their crucial importance, the UN Charter refers to human rights in its Preamble and in six articles. Formally addressing human rights globally was a logical next step of the recently created new world order. The Human Rights Commission of the UN decided at its Second Session, late 1947, to create a legally binding convention along with the Universal Declaration (McGoldrick 4). The close timing of the initiation of negotiations with the creation of the UN as a response to WWII evinces the reactionary nature of the ICCPR as itself response to the Second World War. It is likely that the ICCPR nor the United Nations would have been formed if it were not for the war. Furthermore, the end of the Second World War “marked the ultimate transition of international law...to one also devoted to the protection of human dignity,” (Bederman 99). At face value this dependent status reveals that the drafters, during the conceptual stage, were at least brought to the negotiating table with the goal to create some sort of agreement that would make repetition of the horrors of WWII internationally detestable and legally prohibited. Their intention was to import a new leading norm on the international stage.

## **Power Hierarchies**

Similar to the ECHR, the conceptual phase of the ICCPR treaty process is predominantly non-hierarchical. The negotiations were open to UN member states and non-members alike. At its Sixth Session, the General Assembly requested that the Secretary-General ask member states and appropriate specialized agencies to submit drafts or other documents containing their views on whether there should be one or two Covenants (*Preparation of Two Draft Covenants* 36). The Commission on Human Rights would consider the collection of views when making its decision.

Throughout the drafting process, many non-governmental organizations were invited to forward ideas and played an important role for their numerous positive contributions. “Their representatives served to keep the pressure on governmental representatives to produce the most comprehensive provisions to protect rights and the most effective international measures of implementation possible,” (McGoldrick 10). Even if the state representatives, at times, strayed from argumentative rationality, the NGO representatives served to bring them back to the goal of fleshing out the legitimate human right’s needs. Despite being public in nature and having open access, all decisions at this phase were not necessarily based on a simple majority vote. Certain decisions were relegated to specific branches of the United Nations. The above scenario highlights that the decision to separate protected rights into two Covenants was ultimately left up to the judgment and expertise of the Human Rights Commission. Power dynamics still do not have a serious impact on the conceptualization phase since most of the egalitarian qualities are present and strong.



## Drafting Phase

“It must be acknowledged that it was much more difficult to agree on the text of a Covenant containing binding legal obligations and limited measures of international implementation than it has been to agree upon the statement of political principles in the Universal Declaration in 1948,” (McGoldrick 14).

**Table 6-1** *Rights proposed versus adopted as non-derogable in the ICCPR*

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS	
<i>Proposed as non-derogable</i>	<i>Adopted as non-derogable</i>
Right to Life (Art. 6)	Right to Life (Art. 6)
Prohibition of Torture (Art. 7)	Prohibition on Torture (Art. 7)
Freedom from Slavery and Forced Labor (Art. 8, paragraphs 1 and 2)	Freedom from Slavery and Forced Labor (Art. 8, paragraphs 1 and 2)
Freedom from Arbitrary Arrest and Detention (Art. 9)	
Prohibition on Imprisonment for Inability to Fulfill Contract (Art. 11)	Prohibition on Imprisonment for Inability to Fulfill Contract (Art. 11)
Freedom of Movement (Art. 12)	
Freedom from Expulsion of Aliens (Art. 13)	
Right to Fair Trial and Fair Hearing (Art. 14)	
Prohibition on Retrospective Criminal Laws (Art. 15)	Prohibition on Retrospective Criminal Laws (Art. 15)
Right to Recognition as a Person Before the Law (16)	Right to Recognition as a Person Before the Law (16)
Freedom of Thought, Conscience, Religion (Art. 18)	Freedom of Thought, Conscience, Religion (Art. 18)
Freedom of Expression (Art. 19)	
Right to Peaceful Assembly (Art. 21)	Right to Peaceful Assembly (Art. 21)
Freedom of Association (Art. 22)	Freedom of Association (Art. 22)

The “*Travaux préparatoires*” of the ICCPR must now be analyzed alongside social constructivism affirmation that actors operate according to normative frameworks, and Risse’s position that actors give grounds for the norms that motivate their decisions. The drafters of the ICCPR were members of the Commission on Human Rights. Those members present at the Fifth

Session<sup>37</sup> of the Commission held at Lake Success, New York (June 14, 1949), the Sixth Session<sup>38</sup> (March 29, 1950), and the Eighth Session<sup>39</sup> (1952) were responsible for determining limitations on derogation (Article 4, paragraph 2).

Unlike the discussion by the European Covenant on Human Rights, a handful of the drafters of the ICCPR actually use the word “principle” when contemplating derogation. It is critical to note whether or not these mentions of a guiding norm actually radiate throughout the negotiations and impact the final text of the derogation clauses in a particular manner. Taken from the Fifth Session of the Commission on Human Rights, June 1949, Miss Bowie (United Kingdom) said that one of the principles advanced by her government was that even in times of emergency certain rights must be enumerated and exempt from suspension (*Summ. Rec. 126<sup>th</sup> 7*). This is nothing more than a declaration that there should be a derogation clause, but falls short of explaining why certain rights are ultimately adopted as non-derogable.

For constructivists to find support in the drafting of the ICCPR, the drafters must acknowledge or exhibit that they are motivated by some conception of what makes a derogable versus non-derogable right. There must be at least minimal evidence of a guiding norm. The statement by the Chilean representative, Mr. Sagues, verifies this to be highly improbable. He did

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<sup>37</sup> Chairman: Mr. Chang (China); Rapporteur: Mr. Malik (Lebanon); Members: Mr. Shann (Australia), Mr. Steyaert (Belgium), Mr. Sagues (Chile), Mr. Soerensen (Denmark), Mr. Loutfi (Egypt), Mr. Cassin (FR), Mr. Garcia Bauer (Guatemala), Mrs. Mehta (India), Mr. Entezam (Iran), Mr. Ingles (Philippines), Mr. Kovalenko (Ukrainian Soviet Socialist Republic), Mr. Pavlov (USSR), Miss Bowie (UK), Mr. Simsarian (USA), Mr. Mora (Uruguay), Mr. Vilfan (Yugoslavia). (*See UN Doc. No. E/CN.4/SR.126*).

<sup>38</sup> Chairman: Mrs. F. D. Roosevelt (USA); Members: Mr. Whitman (AUS), Mr. Steyaert (Belgium), Mr. Santa Cruz (Chile), Mr. Chang (China), Mrs. Wright (Denmark), Mr. Ramandan (Egypt), Mr. Ordonneau (FR), Mr. Kyrou (Greece), Mrs. Mehta (India), Mr. Azkoul (Lebanon), Mr. Mendez (Philippines), Mr. Hoare (UK of GB & Northern Ireland), Mr. Rodriguez Fabregat (Uruguay), Mr. Jevremovic (Yugoslavia). (*See UN Doc. No. E/CN.4/SR.138*).

<sup>39</sup> See UN. Doc. No. E/CN.4/SR.308, 331, 333. These numbers are provided by the United Nations, but upon searching the UN database and exhausting all other possible remedies, I was unable to locate the original document. I have run into this problem before, after which X amount of time the documents were again available through UN Document Search.

not respect any notion of absolute freedom or absolute rights and said all “freedom must be subject to certain limitations,” (*Summ. Rec. 126<sup>th</sup>* 9). He deliberately forwards this perspective to promote the fewest limitations to state sovereignty. At this point, some members of the delegation are acting under the influence of diametrically opposed perspectives of derogation; there was not a single standard under which the framers could operate.

Still, most states agreed that some rights must remain unimpaired, while lacking agreement on how those rights should be determined. Some suggested that it would be necessary to conduct a systematic study of the articles that allowed of no derogation, (Secretary-General 68). To the best of my knowledge, no such study was ever conducted. In this lack of cohesion, the delegates were unable to reach a reasoned consensus and most maintained their divergent perspectives. This was largely due to the fact that almost every government interpreted escape differently and many persisted in questioning if the treaty should allow derogation at all. Mr. Pavlov (Union of Soviet Socialist Republics) preferred the least possible limitation. “The Commission should not become a champion of limitations of human rights,” he contended, while it is easy to constrain rights, it is “difficult to do so without destroying them,” (*Summ. Rec. 126<sup>th</sup>* 6). Mr. Pavlov appears to interpret derogation as harmful to the agreement’s *raison d’être*.

Even in perspectives that favor greater protection of rights, tactical undertones exist. The Soviet Union continues to be a useful example. If derogation were allowed, Mr. Pavlov proposed that the words “directed against the interests of the people” should be inserted, (*Summ. Rec. 126<sup>th</sup>* 6). It is unclear, though, what exactly “interests of the people” means. A red flag is immediately raised when a collectivist country leads the discussion on individual rights. Collectivism is a political theory closely intertwined with communism and promotes the prioritization of the societal good over the welfare of an individual person (“Collectivism”). Communism is a form of

government with a very powerful state that, in its paternalistic nature, assumes the state knows what is best for its citizens. In this system, the state has the authority to unilaterally determine what is in the people's interest. The USSR delegate may have purposefully advanced this vague concept to make the agreement favorable to his communist government, not necessarily in the interest of human rights. Although taken at face value, the USSR statement seems progressive and having the genuine purpose to protect individuals against state abuse, other factors make this almost impossible. Instead, the insertion of this phrase would afford the state the prerogative to violate virtually any right as long as it defended its actions as required to protect the people's welfare. Risse's argumentation neither accounts for these potentially calculated moves nor the egoistic realities that close study of the "*Travaux préparatoires*" paired with knowledge of the political climate reveal. This understanding may explain the omission of the USSR-proposed phrase from the final document.

Without coming any closer to a standard of derogation, the most agreeable impetus for the creation of a derogation clause, as revealed by annotations of the draft Covenant prepared by the United Nations Secretary-General, was that under certain circumstances states are "...compelled to impose limitations upon certain human rights," (Secretary-General 37). If states are compelled to limit rights this means that no other options exist; in order to protect the state, it is required that certain human rights are compromised. Keeping this in mind, the framers draft a derogation article that applies this delicate balance of respect for rights versus respect for state sovereignty. In an ideal situation, the scales would tip in favor of respect for rights. If the treaty is truly aimed at protecting human rights, then the list of non-derogable articles should be more exhaustive than the list of derogable rights. This does not appear to be the reality of the ICCPR. The list of derogable rights is double that of non-derogable rights. The discrepancy might arise because the framers are

not only charged with finalizing treaty text, but also with doing it in such a way that will guarantee enough states will ratify to make the treaty legally binding. And states, highly rational, heavily consider the domestic political factors before agreeing to abide by any international standard to which they will be legally bound. Mr. Kovalenko (Ukrainian Soviet Socialist Republic) questioned whether countries already “limiting human freedoms, on grounds of political or other considerations, desired to find [legal] justification for their actions,” (*Summ. Rec. 126<sup>th</sup> 10*). Mr. Kovalenko appears genuine, expressing doubts concerning the veracity of others’ intentions. With him, constructivists have an explicit example that some actors do embody constructivism’s truth obsession. Still, this philosophy was unable to capture the debate; although legitimacy concerns were raised, they were not acted upon. Even though Mr. Kovalenko raised issue, absent clear determinants of escape, the creation of the derogation clause continued just the same and may still be critiqued as a hasty passage of a list of exceptions, (*Summ. Rec. 126<sup>th</sup> 10*).

### ***Implementation & Operational Phases***

Until the treaty process progressed to the implementation phase, “all members of the Drafting Committee understood that nothing said by any of them during the session was to be considered binding upon their governments,” (*Report of the Drafting Committee 5*). Not only does this quote, taken from the First Session of the Drafting Committee report, 9-25 June, 1947 show that the discussions were at the drafting phase, but that it depended on the subsequent, implementation stage for approval. Moreover, the ratifying actors are completely separate from the framers; drafters are not responsible for their respective country’s adoption of the treaty and operate under divergent constraints and motivations than do the implementers. The United States interaction with the treaty evinces this relationship. Even with the strong effort of Eleanor

Roosevelt, beginning in 1948, it appeared that the US Senate would reject any human rights treaty. “Concerted domestic opposition and concern over the constitutional implications of ratification of international human rights treaties culminated” when the US continued drafting participation with “decidedly less vigor,” (McGoldrick 17). Because it appeared the treaty would not enter into force in the United States, the work of the delegates seemed futile. Since ratification in 1992, the United States has not fully respected its treaty obligations to derogation. After 9/11, the United States began detention and interrogation of suspected terrorists without a proper trial. The country defended such actions by employing “rhetoric of a state of a ‘public emergency which threatens the life of the nation,’” (Neumayer 28). Although this is just as specified by Article 4.1 of the ICCPR, the United States did not officially acknowledge it was escaping from the ICCPR, nor has the country notified the Secretary-General of the existence of a public emergency. In this example, the US is acting actually quite similarly to how many non-democracies are expected to behave. See discussion below.

Analyzing the ICCPR in the implementation and operational phases is particularly important, since it is unique from the ECHR and the ACHR in the types of governments that are able to ratify the agreement. Whereas the ECHR and ACHR are open to members of the Council of Europe and the Organization of American States,<sup>40</sup> the ICCPR does not restrict membership. Democracies and non-democracies alike can ratify the International Covenant. The hope is that being party to the human rights treaty will encourage and pressure improvement of the human rights condition in member countries. For the purposes of this thesis, the distinction between forms of government is only salient once the treaty is in force. Democracies and non-democracies both

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<sup>40</sup> The ACHR case is further made distinct as a result of the resurgence of military dictatorships in the late seventies and eighties, after those countries had already ratified the Convention. See complete discussion in Section VII.

behave according to rational choice theories, but the type of government determines how those tactical strategies manifest. As Neumayer (2012) points out, “political regime type is both theoretically conceptualized and empirically known to have a strong effect on human rights violations,” (6). As the following sub-sections indicate, both regime types act differently, but always according to what is most sensible for the particular regime type.

## **Stable Democracies**

Stable democracies are those states in which democracy has endured, even if crises arise. Countries defined as such have secured democracy as the only regime type able to garner significant support in the country. According to Hafner-Burton, Helfer, and Fariss, democracies and countries where domestic courts are able to exercise strong oversight of the executive are more likely to derogate than other regimes (675). The most frequent derogators, they argue, are a special subset of democracies and countries that derogate once are far more likely to derogate again. Instead of separating democracies into several small categories, I will group the diverse compendium as one. I choose not to make the same distinction as Hafner-Burton, Helfer, and Fariss, considering the research of Neumayer (2012). His results suggest that during derogation periods, states with a court imbued with power to rule on executive acts do not differ systematically from countries without such a court (23). Instead, his study finds evidence that political regime type is the salient element; competitive multi party elections improve the human rights condition most noticeably (23). However, the studies are in agreement that democracies take their commitment more seriously than other types when they invoke escape and other flexibility provisions (Neumayer 7).<sup>41</sup>

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<sup>41</sup> See also Hafner-Burton, Helfer, Fariss 680.

Because democracies must consider the reaction of their domestic constituents and other oversight bodies, “derogations are a rational response to this uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties,” (Hafner-Burton, Helfer, Fariss 680). It is advantageous for democracies to invoke derogation since transparency earns the State more respect than surreptitious violations. This transparency translates into the overall appearance that the derogation must be required by the situation and the state is upholding its obligation to international law. Moreover, since it is derogation, as opposed to a reservation or an outright break from the treaty, domestic audiences understand the measure to be temporary. Considering these things, non-governmental organizations and others able to pressure the state “are more likely to refrain, in the near term, from challenging rights-restrictive policies than if the government had adopted those same policies without derogating,” (Hafner-Burton, Helfer, Fariss 680).

## **Non-democracies**

Non-democracies include both authoritarian regimes and unstable democracies. “Such states join and routinely breach human rights agreements,” since the impetus for derogation, as present in democracies, is absent (Hafner-Burton, Helfer, Fariss 682). Non-democracies have weak courts and it is unlikely that discontented constituents will be able to remove the ruling elite from governance. Without any checks to its authority, it is in the state’s best interest to completely avoid derogation.<sup>42</sup> Transparency is pointless since the government is unlikely to be held accountable for its actions. In fact, derogation could be more burdensome for non-democracies than reneging on its commitment. Derogation implies that the state has notified the Secretary-General that a state of

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<sup>42</sup> See Neumayer (2012) or discussion in next footnote.



emergency exists and that the escape is directly proportional to the need of the situation. Officially invoking derogation thus submits the derogating state to international scrutiny on several levels.

The Human Rights Committee will monitor compliance with Article 4 and is more likely to criticize the government's actions when they are notified that a state of emergency exists. As noted earlier, during times of public emergency, human rights are under the greatest threat of abuse, so the Committee knows to keep a close eye on the situation in that particular derogating country. Due to limited resources, the Committee cannot perpetually or even consistently monitor the human rights condition of each member party. It makes sense that the oversight body will focus on areas in which it is certain a public emergency exists or at least the government says one does. According to Neumayer, the distinction between regime types is especially important since non-democracies increase violation of both derogable and non-derogable rights during times of emergency (8). This finding suggests "the main general international human rights treaty fails to achieve its objective of shielding certain rights from derogation where, as in [non-democracies], a constraining effect would be needed most (Neumayer 3).

## **Human Rights Committee**

The Human Rights Committee is the judicial body of the ICCPR. Independent experts, "of high moral character" fill its ranks and are charged with monitoring compliance ("Human Rights Committee"). Its case law on derogation is very limited. Still, in *Weinberger v Uruguay (1980)*,

*Landinelli v Uruguay (1981)*<sup>43</sup> and others, the Committee ruled against the governments after unable to substantiate claims that derogation was lawful and required. In *Weinberger*, Mr. Weinberger was arrested and detained for 10 months for engaging in political activities after the government invoked emergency powers to suspend all political rights for a period of 15 years (Institutional Act No. Four) (*Report of the HR Committee 119*). The Committee ruled against the government, stating that Article 4 of the Covenant only permits derogation in narrowly defined circumstances. In its decision, “the Government,” said the Committee, “has not made any submissions of fact or law to justify such derogation,” (*Report of the HR Committee 119*). Moreover, some of the facts referred to above raised concern that Uruguay had been violating non-derogable rights. This was among the first times the Committee reveals its power to challenge the actions of sovereign states; although, similar to the European Court, the permanence of its jurisdiction remains uncertain. Here, argumentative rationality reemerges. In this instance the Committee presses both the plaintiff and the defendant to provide truthful testimony and rejects any justification that falls short of doing so. The Committee assumes the role of the truth seeker, pressing both sides to act according to the facts of the world and rejects any testimony that fails to do so.

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<sup>43</sup> From 1973 to 1984 Uruguay was ruled by a terrible military regime, infamous for the widespread use of torture and systematic imprisonment of political dissidents (Weissbrodt et al. 492). So, during the time the government filed derogation in *Weinberger* and *Landinelli* it was actually engaged in widespread human rights violations. It seems counterintuitive that a state currently engaging in rights abuses would encourage the heightened international scrutiny that filing derogation brings with it. However, Uruguay serves as example of claims by Neumayer (2012). Notification of escape increases “the potential costs of stepping up violation of human rights, particularly the non-derogable ones. But this is exactly what they wish for in order to signal to their domestic audience their commitment to use whatever force and violence required to make it through the state of emergency and stay in power” (Neumayer 8). Apparently this was the military regime’s strategy; it seems to have been effective, considering the oppressive rule lasted until 1984, years after filing derogation and being found guilty by the IACHR.

In *Landinelli v Uruguay*, Jorge Landinelli Silva and others were candidates for elective office until Institutional Act Number Four deprived them of the right to engage in any activity of a political nature, including the right to vote for a term of 15 years (*Report of the HR Committee* 130). The Government claimed it was able to temporarily suspend these rights under the derogation article of the ICCPR and that it informed the Secretary-General of the United Nations. In addition to the fact that 15 years hardly seems temporary, the government's attempt at transparency and its claim that the escape measure was enacted to "ensure the real, effective and lasting defense of human rights," was rejected by the HRC (*Report of the HR Committee* 132). "The Government of Uruguay has failed to show that the interdiction of *any kind* of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom," (*Report of the HR Committee* 133). Not only does the HRC demand the authenticity of litigants' claims, but also that emergency acts are enacted only so far as is needed to remedy the precarious domestic situation.

These cases demonstrate that the burden of proof lies with the state to provide "full and comprehensive information to the HRC," "a definite warning that, in default of justification, the respondent State's derogations will not be accepted as legitimate," (McGoldrick 313). The Committee is steadfast in its protection of individual rights in the face of state abuse. Moreover, being party to a human rights agreement brings with it a certain level of prestige; the act of ratification implies a country respects the normative frameworks underlying the agreements. Thus, in addition to monitoring cooperation in a legal sense, the HRC monitors compliance to protect the integrity of the overall document, so that a handful of defectors do not spoil the spirit of the ICCPR. It engages in argumentative rationality with defendants to attempt to reveal and penalize those members in which noncompliance has become the norm.

Lacking authority to actually change the human rights situation in sovereign states, and the resources to adequately monitor compliance in every member state, the HRC is strategic in maintaining its unwavering judicial attitude in the face of derogation. In *Landinelli*, the HRC demonstrates a conservative interpretation of the escape clause. Despite uncertainty regarding whether derogation is mostly corrosive or supportive of the ICCPR, rulings like this provide us with evidence that the HRC's authority, willing to check governments and be an unbiased third-party watchdog, tips the scales in favor of the interpretation that derogation is beneficial, or at least does not undermine the very reason the treaty exists. The HRC is established as a respected protector of individual rights and is able to "influence world opinion by its objectivity," (McGoldrick 317). Still, the HRC does not offer state parties any conclusive interpretation of Article 4, nor can a comprehensive jurisprudence offer much insight. These shortcomings make it more challenging for states to follow the guidelines, a clear threat to human rights.

Perhaps a reaction to the repeated attempts by states to suspend rights under the guise of derogation, a group of 31 international experts convened by the International Commission of Jurists, the Urban Morgan Institute of Human rights, and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Italy in 1984 to create a list of principles relating to derogation and other limitations (*Status of ICCPR 2*). The event, which was sponsored by the non-governmental organizations, was recommended to be "circulated as an official document" through the Human Rights Committee (*Status of ICCPR 2*). It has not yet been adopted as an official standard against which derogation is evaluated. The following text, taken from Principles 39-41 highlights the uncertainty that remains in Article 4 and the need to reiterate conclusively the definition of "public emergency:"

39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to article 4 (hereinafter called "derogation

measures”) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that (*Status of ICCPR* 7):

(a) Affects the whole of the population and either the whole or part of the territory of the State, and

(b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under article 4.

41. Economic difficulties per se cannot justify derogation measures.

In theory, these principles increase “the possibility for meaningful and robust oversight and accountability by law over claims of “public emergency,” but until they are adopted as an official standard against which to test derogation, their existence is rather futile. The Committee’s lack of clarity continues to threaten the existence of a single, coherent interpretation of the ICCPR in a way that offers meaningful protection to the individual. Even such efforts, to clarify and tighten the scope of derogation, by the HRC receive little traction in the international community. The Human Rights Committee has attempted to extend the list of non-derogable rights in its General Comment Number 29, adopted in 2001. The Committee favors an interpretation whereby an infringement of other rights not explicitly listed in Art. 4.2 might offend a state party’s other obligations under customary or general international law or jus cogens law (law inviolable in any circumstance). Derogations from certain rights, argues the Committee, could disproportionately infringe other non-derogable and derogable rights, which is in violation of Article 4.1. Deference for non-derogable rights cannot be achieved without respecting some legally derogable rights (Neumayer 4). For example, although the right that all persons should be treated with humanity, prescribed in Article 10, is not included in the list of non-derogable rights in Article 4.2, “the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation,” (*CCPR General Comment* 5). Still, these interpretations are highly

controversial and have yet to be consistently considered as official standards of adherence by state parties.

## **SECTION VII: AMERICAN CONVENTION ON HUMAN RIGHTS**

The American Convention on Human Rights, also known as the “Pact of San Jose, Costa Rica,” is a regional multilateral treaty sponsored by the Organization of American States (OAS). It was born out of the Inter-American human rights system, which began upon adoption of the American Declaration on the Rights And Duties of Man in 1948 (“Basic Documents in the I-A System”). It was not until July 18, 1978 that the treaty entered into force. As of February 7, 2015 twenty-five states ratified the agreement with nineteen signatories. The ACHR is distinct from the other two agreements because of its apparent heightened respect for rights. Out twenty-four<sup>44</sup> articles that protect human rights, eleven are non-derogable—four more non-derogable rights than the ICCPR and seven more than the ECHR. Below is Article 27 on escape:

### Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogation from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.
- 4.

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<sup>44</sup> See Articles 3-26.

## *Conceptual Phase*

The theoretical impetus for the ACHR began decades before the Special Inter-American Conference on Human Rights convened in November of 1969 to draft the text of the agreement. The conceptual phase of this treaty is the longest of the three agreements. Numerous meetings, summits, statements, and public documents discussed the topic of human rights in the Americas at great length. These include, but are not limited to, the 1945 Chapultepec Conference on war and peace, the 1954 “Declaration of Caracas,” and the 1959 “Declaration of Santiago,” (Inter-American Commission 1-3). Each of these produced a greater sense of unity among the American states and the need to further collaborate for the sake and promotion of human dignity. The Chapultepec Conference is seen as the precursor to the 1948 American Declaration on the Duties and Rights of Man. It was at this conference that the states of the American hemisphere asserted their commitment to the principles established by international law for preservation of the essential rights of man (Inter-American Commission 1). The “Declaration of Caracas” renewed conviction that “one of the most effective means of strengthening their democratic institutions is to increase respect for the individual and social rights of man,” (Inter-American Commission 2). The idealistic rhetoric continued with the “Declaration of Santiago:”

Harmony among the American republics can be effective only insofar as human rights and fundamental freedoms...are a reality within each one of them, since experience has demonstrated that the lack of respect for such principles is a source of widespread disturbance (General Secretariat of OAS 5).

Each of these statements highlights the dominance of principled discourse during this phase. These, and similar declarations, are noteworthy because they elicit strong sentiments that further inclusion of human rights in the American system is fundamental and required. Even though the delegates at the drafting of the documents in the conceptual phase were mostly all Ministers of Foreign Affairs, in the conceptual phase they did not necessarily act according to what is typically

expected of partisan actors.<sup>45</sup> Because it was more than a decade after the “Declaration of Santiago” that the drafting committee of the ACHR first gathered to produce the legally-binding and politically-constrained agreement, the Ministers were aware that acting according to what was reasonable for human rights, would not force action upon their state. There was indeed a conceptual, non-binding phase that was concerned with establishing knowledge of each other and a basis for thinking about human rights in the Americas.

## **Common Lifeworld**

Unlike the ICCPR and the ECHR, the actors of the ACHR did not share a common history of war. Or, at least not to the extent that was experienced in Europe after the Second World War. Still, the ACHR satisfies the common lifeworld requirement; if common experiences of war are not met, Risse contends that a high degree of international institutionalization may also provide this common ground. The Organization of the American States has a long history that predates the conception of the ACHR over two decades. The Ninth International Conference of American States, meeting in Bogotá, Colombia, in 1948, with the participation of 21 States, adopted the Charter of the Organization of American States and was the result of a long process of negotiation that began in 1945 (“Our History”). The American Declaration on the Rights and Duties of Man was also crafted during this time, but since it is not legally binding it is nothing more than ideology. The legally binding version, however was not created until over twenty years had passed, making the ACHR less reactionary than the ICCPR and the ECHR. Institutionalization can only act as a

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<sup>45</sup> Drafting of Declaration of Santiago. Fifth Meeting of the Consultation of Ministers of Foreign Affairs: Brazil, Guatemala, Mexico (Secretary of Foreign Affairs), Cuba (Minister of State), Bolivia (Minister FA & Worship), Haiti (Secretary of State for FA & Worship), Dominican Republic (Secretary of FA), Nicaragua, Colombia, Panama, Costa Rica, Peru, Venezuela, Honduras, El Salvador, Ecuador, Uruguay, Paraguay, United States of America (Secretary of State), Argentina (& Worship), and Chile. (Organization of American States 1,2).



shared world, though, if it is nonhierarchical and allows many informal interactions among members. So, whereas this could not apply to the United Nations since the Security Council is patently hierarchical, the design of the Organization of the American states is more or less egalitarian. The General Assembly is the supreme organ of the Organization of American States and comprises the delegations of each member state. All member states have the right to one vote (“Our Structure”). Even though the ACHR differs from the type of common lifeworld shared by the ICCPR and the ECHR, it still satisfies the necessary Habermasian precondition to argumentation.

### **Power Hierarchies**

Since the conceptualization phase of the American Convention on Human Rights is fragmented and extensive, it is difficult to classify according to the three prongs Risse outlines. Still, as mentioned in the previous sub-section, the overall character of the OAS is rather non-hierarchical. Because the organization prides itself on this structure, I will assume that a similar egalitarian culture existed within the various meetings of the organization. Each member state to the OAS was invited to collaborate in all meetings of the treaty conceptualization. Moreover, the focal point is that during the conceptual phase, geopolitical power dynamics are mostly irrelevant. This phase is unconcerned with the production of text for the legally binding agreement and merely aims to propagate human rights and human dignity philosophies.

## Drafting Phase

**Table 7-1** *Rights proposed versus adopted as non-derogable in the ACHR*

AMERICAN CONVENTION ON HUMAN RIGHTS	
<i>Proposed as non-derogable</i>	<i>Adopted as non-derogable</i>
Right to Juridical Personality (Art. 3)	Right to Juridical Personality (Art. 3)
Right to Life (Art. 4)	Right to Life (Art. 4)
Right to Humane Treatment (Art. 5)	Right to Humane Treatment (Art. 5)
Freedom from Slavery (Art. 6)	Freedom from Slavery (Art. 6)
Freedom from Arbitrary Detention (Art. 7.6)	
Prohibition on Imprisonment for Inability to Fulfill Contract (Art. 7.7)	
Right to Due Process of Law (Art. 8)	
Freedom from Ex Post Facto Laws (Art. 9)	Freedom from Ex Post Facto Laws (Art. 9)
Freedom of Conscience and Religion (Art. 12)	Freedom of Conscience and Religion (Art. 12)
Freedom of Thought and Expression (Art. 13)	
Rights of the Family (Art. 17)	Rights of the Family (Art. 17)
Right to a Name (Art. 18)	Right to a Name (Art. 18)
Rights of the Child (Art. 19)	Rights of the Child (Art. 19)
Right to Nationality (Art. 20)	Right to Nationality (Art. 20)
Right to Participate in Government (Art. 23)	Right to Participate in Government (Art. 23)

The Inter-American Commission on Human Rights credits the expansive conceptual phase as instilling in OAS member states the idea that “human rights were born along with man himself” (Inter-American Commission 1). The youngest of the three agreements, the ACHR does stand out for its apparent heightened protection of rights. It is unclear, however, if this heightened protection of rights correlates with understanding of why these rights are enumerated. Moreover, it does not appear that the socially constructed ideas and values, professed during the conceptual phase,

maintained prominence for the treaty architects. While some states strongly supported a long list of non-derogable rights, this sentiment is completely lost for others. Despite the conceptual phase placing human rights on an unassailable basis, states still fought against an escape clause for the possible hindrance non-derogable rights could cause independent countries. The norms of the conceptual phase are at a loss for those especially instrumental states during the drafting phase. Whereas the Foreign Ministers of the previous phase were free to act on human rights protection idealistically, the delegates at this phase were not so unobstructed. The framers at this stage consisted of mostly Foreign Ministers; some delegations also had legal advisors present. Governments not member to the Organization of American States and select non-governmental organizations were allowed to attend, but could not contribute to the debate (Conferencia Especializada 525-534).

Mexico embodies the transition from a “logic of appropriateness” to “logic of consequentialism.” The delegate considered any escape clause that prohibits derogation from certain articles, to be in conflict with the Mexican Constitution. He preferred a complete elimination of the clause. Translated from Spanish the statement reads, “the Government of Mexico has always used, with extreme prudence, the faculty to declare this suspension and cannot admit the restrictions that are imposed by [Article 27],” (Conferencia Especializada 100; 101). Rather than making its commitment legally binding, Mexico insisted that other states simply trust that Mexico, and others, would not abuse the sovereign power to suspend rights, and would only do so when legitimate. The Mexican delegation contends that it is a fundamental Mexican law to be able to suspend any and all rights that hinder the government’s ability to effectively deal with an emergency situation. The Governments of Ecuador and Costa Rica voice parallel concerns (Conferencia Especializada 105). The Mexican, Ecuadorian and Costa Rican governments are

instrumentally motivated to protect their government's sovereignty even if it is at the expense of individual rights. Mexico proclaims that it has never illegally violated rights, but it could not be certain that other states shared similar records or could be trusted to cooperate in the future. Neither could Ecuador or Costa Rica. Domestic political concerns weigh much more heavily than protection of individual rights; these considerations ruled much of the beginning of discussion.

If social constructivism had much explanatory power in this case, the norm of state sovereignty would be internalized in most, if not all, of the negotiating countries. Instead, Mexico, Ecuador and Costa Rica are in the minority. In order to satisfy their wishes, these governments proposed creation of an article that used vague and general terms, a form of treaty flexibility (Conferencia Especializada 264). Koremenos, Lipson, and Snidal label this Conjecture F2: flexibility increases with the severity of the distribution problem (794). The more that states prefer different outcomes to cooperation, the greater the distribution problem. One way accommodate these disparities and encourage cooperation is to incorporate design features that allow for flexible interpretations of treaty stipulations. Because these realities are classifiable according to rational choice interpretations, they evince that the delegates were deeply instrumental.

Vague language<sup>46</sup> has potential corrosive effects on treaty implementation if it is so vague that the treaty is virtually left open to interpretation by the state. This could result in states being able to distinguish themselves as sincere members, despite only abiding by an interpretation so far removed from the original document that it threatens to undermine the treaty's *raison d'être*. This may have influenced Richard Kearney (US) to outright reject this proposal. He stressed the need for a specific derogation clause. Translated from Spanish, he continues to support derogation,

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<sup>46</sup> Vague language is a flexibility mechanism commonly employed in human rights agreements. Koremenos (forthcoming) provides that only 2% of the economics agreements used in *Continent of International Law Manuscript* are characterized by very or somewhat vague language, while around 40% of the human rights is labeled as such.

explaining, "...it is easy to defend human rights when everything is going well, but very difficult when everything is going wrong and one realizes the constitutional problems faced by the American countries," (Conferencia Especializada 265). He is referring to domestic laws that loosely define emergency situations and permit derogation on that basis. Kearney suggested that the drafters create a working group to determine exactly what articles should be considered non-derogable. The President of the conference appointed delegates from the United States, Brazil, Chile, El Salvador and Ecuador to the group (Conferencia Especializada 266). Notes from this group would contain evidence whether or not the delegates based reconciliation of rights proposed versus adopted as non-derogable (Table 4-3) on a given framework.

This group, however, was regrettably unprofessional, despite producing a draft of the derogation clause that is virtually identical to the final article.<sup>47</sup> The working group met for only fifteen minutes and neglected to record discussions during the brief encounter. The entire negotiation process is well documented, so it is suspicious that this critical drafting encounter was excluded. Furthermore, it seems that the task would require an exponentially longer amount of time and broader state participation. If the drafters appreciated the great importance that derogation clauses play in a whether a treaty acts as a protector of rights or a protector of states, and if the actors were motivated by truth seeking constructivism, they would similarly appreciate a lengthy and open discussion of why certain articles are enumerated as non-derogable. During this perfunctory meeting, only a handful of state representatives participated, so the ACHR falls outside satisfactory boundaries for argumentative rationality.

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<sup>47</sup> It differs from the final version only in that it does not protect the rights of children as a separate non-derogable article. After revision by the Style Commission, the subsequent and final draft of the Covenant's derogation clause does distinguish rights of the child from other articles.

Even after the final version was accepted, the Mexican government attempted to work around these constraints. It declared a reservation to paragraph two of Article 27 (Conferencia Especializada 520). According to Article 75 of the ACHR, reservations are only permitted if they accord with the Vienna Convention on the Law of Treaties (1969). Article 19, Section C of this Convention states that reservations that are incompatible with the “...object and purpose of the treaty” are prohibited (*Vienna Convention on the Law of Treaties* 337). This reservation, however, does not show up in any of the current documents on reservations. It is likely that the Government of Mexico was unable to legally declare this reservation after all. Contemplating, inter alia, this reservation rejection, I am able to say that while political calculations infiltrated the negotiations, they were unsuccessful in overwhelming the motivations of the delegates. Argumentative rationality, though, did not completely capture the mode of debate either. Without ideologies mitigating the proposed from adopted rights it is impossible for the actors to know towards what “truth” they were ultimately aimed. During the drafting stage, this thesis was able to show the absence of a normative framework and the existence of politically motivated actors. The thesis falls short, however, in proving that the politically motivated actors impacted discussions in a way that influenced enumeration of non-derogable rights. Documentation of conversations held while the working group convened would have helped provide a more complete interpretation of the ruling motivations.

### ***Implementation & Operational Phases***

Implementation of the ACHR was difficult for many in the region; it imposed a high standard of rights protection on a set of countries where abuses were the norm. It would be a new standard to which burgeoning democracies could aspire. Reality, though, was bleak; for many of the years following the treaty’s entry into force, the requirements laid out in the Convention were

simply ignored. Instead of creation of new and maturation of existing democracies, this period marked a time riddled with violent military regimes. The lack of a solid democratic framework plagued many governments' adherence to the agreement; its impact on the operational phase of the treaty cannot be overstated. Due to the changes to regime type, it is best to refrain from categorizing types of states in distinct sections. The actions of the actors, rather than regime type, offer a helpful understanding.

## **State Parties**

The case of the ACHR member states is peculiar. When the American Convention was being negotiated in the 60s, most of the Organization of American States' member nations were democratic; by the time the Convention entered into force in 1978, many freely elected governments had been overthrown by military regimes (Goldman 871). Argentina, Brazil, Bolivia, Chile, Peru, Uruguay and several Central American states faced this reality. As is typical of non-democracies, Bolivia and Peru,<sup>48</sup> intentionally neglected to file derogation and defected from both derogable and non-derogable rights (ACHR Signatories and Ratifications). To international and domestic critics, the state defended rights violations as being necessary for the protection of national security. Systematic murder, torture, disappearances, prohibition of political parties, unions, and student groups, and censorship of the media, were most commonly employed. This state-sponsored terrorism was employed all in the name of the so-called "Third World War" against communism (Goldman 872).

It is not a coincidence that the Cold War was in full-fledge during this the rise of abusive military regimes and that state sponsored human rights abuses became synonymous with the

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<sup>48</sup> Bolivia ratified the ACHR June 20, 1979. Peru ratified the Convention July 12, 1978.

governments' defense plan. During much of this time the United States was a key co-conspirator, funding and propping up these regimes to gain anti-communist allies around the world. The United States condemned communist Cuba for its human rights track record while sending huge sums of money to military regimes where even greater atrocities were underway.<sup>49</sup> This relationship resulted in many in the hemisphere coming to identify the ACHR as nothing more than "a tool of US foreign policy," "selectively and often inconsistently applied," (Goldman 872).

The tumultuous political history of Latin America limits this thesis' ability to classify the majority of member states to the ACHR as (stable) democracies. The reign on authoritarian military regimes ended in the not-so-distant past, so it comes as little surprise that un-democratic tendencies linger. Despite having similar institutional design, the European states of the ECHR function as a foil to the American states of the ACHR. While authoritarian and militaristic regimes were at one point the virtual standard in Latin America, similar regime types were never able to gain significant and lasting traction amongst the countries in the Council of Europe. The ECHR was, in fact, created in almost direct response to WWII as a way to prevent this very outcome. Steiner and Alston point out that in the ECHR, "cases involving states of emergency have been relatively few," (869). The European Commission and Court have not had to struggle with totally apathetic governments in countries with "deep structural problems" that allowed systematic rights violations (Steiner and Alston 869). In Latin America, however, states of emergency have been common. Many Latin American countries have been criticized for this reason in both the Inter-American and United Nations' systems.

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<sup>49</sup> It is worth noting that, although President Carter signed the Convention in 1978, the United States has not ratified the Convention and shows no signs of doing so. Among the most common and, in fact, the only legitimate legal barrier is the issue of states' rights. Ratifying the Convention would mean that it becomes the "supreme law of the land" (see Article VI, US Constitution) and would require some states to modify current criminal codes (Diab 328).



By the early 1990s, all but Cuba's communist government had been dissolved and all other OAS member states had freely elected governments (Goldman 874). A number of states emerging from years of authoritarian rule took certain symbolic and important steps to break from the past. Argentina, Chile, El Salvador, and Guatemala all established truth commissions. Among the first acts of the newly elected governments of Argentina, Chile, and Uruguay was to ratify the American Convention and accept the Court's controversial jurisdiction. By the mid 1990s, the governments of Mexico and Brazil invited the Commission to carry out on site visits to evaluate the human rights situation. In 1998, both accepted the jurisdiction of the Court (Goldman 875). Accepting its authority, however, does not necessarily mean that states will adhere to the Court's orders. Many of the OAS governments actually react quite ambivalently toward the Inter-American Commission and Court. After being found guilty by the Court, numerous violators carry on without punishment by the state. Being that impunity runs high, potential violators are aware that they will likely go unpunished for defection. The transition to democracy from authoritarian rule has been correlated with an increase in member party compliance (Goldman 884). Maintenance of stable democracy, though, is consistently a challenge in Latin America; progress towards goals in the political and social arenas are heavily constrained by poor economies. In turn, balancing social and political aspirations proves frustrating (Daly Hayes).

During this time it appears all states acted rationally. As the "logic of consequentialism" professes, when defection becomes advantageous, states defect; when cooperation is strategically appropriate, states cooperate. Authoritarian and military regimes continuing human rights commitments. There was, instead, a critical benefit to defection; with impunity, the systematic murder of political dissidents guaranteed the abusive state more time in power. When the violators were exposed, though, and the regimes began to crumble under domestic and international

pressures, it became advantageous to implement more acceptable human rights practices. The transition to democracy and the need to become re-incorporated into the good graces of the international community, led to further improvements.

## **Inter-American Commission on Human Rights**

The Inter-American Commission is the principal monitoring body of the Inter-American system. Its work involves three main pillars: 1) hearing individual petitions; 2) monitoring human rights condition of member states; and 3) paying special attention to priority issues (“What is the IACHR?”). Accounting for the political instability in the Americas in the early 1970s, the Commission foreshadowed that until countries began to identify and combat the “root causes” of the problem, international legal human rights protection would be ineffective, (Goldman 871). Mounting hurdles to implementation continue to undermine the efficacy and legitimacy of the Inter-American human rights system, but if saving lives and securing amends to victims are appropriate efficacy measures of an oversight body, “then arguably no other system has been more successful than the Inter-American system,” (Goldman 857). Before human rights battles were won by the Commission, it first began to make the connection between democracy and human rights deference. Although political realities entered the framework of this truth seeking body, the principle that guided the work of the Commission was that with democracy comes greater protection of individual human rights. No matter what emergency situation states fabricated, the Commission clearly and consistently interpreted the situations in many abusive Latin American countries as unnecessarily oppressive to human dignity. The Commission’s 1979 visit to Argentina, in the midst of the Dirty War, was its most successful. It sought out testimonies of thousands of people, including relatives of the disappeared and other victims. Its 1980 report

uncovered the systematic terrorism being perpetrated by the state (“Case 2735 David Horacio Varsavsky”). The report impacted both Argentina and the greater international community. It brought to light truths that likely led to a decrease in the state’s use of disappearances as well as provided material upon which other countries could rely when framing policies toward the country.

As the Inter-American Commission increasingly equated democracy with favorable human rights conditions, it was just a matter of time before Cold War mentality overtook the issue and communists became primary targets. Certainly human rights abuses were underway in communist Cuba, so action on behalf of the Commission was partly justifiable. Considering the research of Hafner-Burton, Helfer, and Fariss that suggests with democracy comes a more serious commitment to human rights, the Commission not only operated under their own principled interpretations of the world, but empirical evidence has since supported this interpretation as truth. Constructivists would say that this shows the Commission acted according to truth seeking philosophies. Rationalists would object. If it were not for the Cold War and the US dominance of the OAS, it is unlikely Cuba would have been such an immediate priority. Since the United States largely orchestrated the Commission’s behavior during this time, and only became heavily involved in human rights scrutiny of Cuba after strategically analyzing the costs and benefits of doing so, then the Commission, they would say, was dominated by rational choice philosophies. Even President Johnson later admitted the true US intentions of strong intervention in the Inter-American system were to assist with blocking the formation of another communist government (United States 747). In a White House press release, dated May 2, 1965, Johnson says, “Our goal, in keeping with the principles of the Inter-American system, is to help prevent another Communist state in this hemisphere (747). The thralls of the Cold War confuse the constructivist—rationalist

debate in the Commission. I argue that both motivations operated simultaneously in the Commission.

## **Inter-American Court of Human Rights**

The Inter-American Court is the judicial enforcement body of the Inter-American system. It hears the cases that have been forwarded by the Commission. The Commission is empowered to refer cases to the Court that are directed against member parties to the American Convention that have accepted the Court's jurisdiction. The Court recognizes the right of individuals, non-governmental organizations and states to make claims regarding violations of human rights (Goldman 866). Moreover, the American Convention and its judicial oversight body, the Inter-American Court, can be distinguished from the ECHR and ICCPR. Whereas the Human Rights Committee attempted to expand the understanding of non-derogable rights but received insignificant recognition of these changes, the Inter-American Court did the same and the changes are now enforceable. The derogation article (Article 27) of the ACHR still reads as originally intended, but because the Court has adopted a nuanced interpretation of the Convention, when states are brought before it, they will be judged according to the updated understanding of derogation. In its Advisory Opinion OC-8/87 (January, 1987) and OC-9/87, the Court considered extending non-derogable status to the writ of habeas corpus. The guarantee of habeas corpus is enshrined in articles 7.6 and 25.1 below:

### Article 7. Right to Personal Liberty

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek those remedies.

### Article 25. Right to Judicial Protection

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

The Commission, believing the writ of habeas corpus becomes most essential in emergency situations, where the life of the nation is at risk, first brought the issue before the Court. In fact, the aim of the writ is to bring the detainee before a judge so that he or she is able to ascertain if the conditions of holding are in line with international law and if torture or other abuse was inflicted on the prisoner. The importance of this remedy, argued the Commission, cannot be overstated since the right to be treated humanely (Article 5) is non-derogable. The Court sided with the Commission and determined that habeas corpus may not be suspended in any circumstance as a result of being very intimately intertwined with other non-derogable guarantees. The Court highlighted the recent events in the Americas, relating to disappearances, murders and torture perpetrated or supported by the state.<sup>50</sup> “This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended” (*IACHR Advisory Opinion OC-8/87* 44). After this Opinion, habeas corpus now holds status as a fundamental (and non-derogable) right.

Advisory Opinion OC-9/87 from October 1987, submitted by the Government of Uruguay, dealt with the judicial guarantees in states of emergency (Article 27.2). The Court examined its relationship between Article 25.1 (above) and 8.1 of the American Convention. Article 8 recognizes the concept of “due process of law:”

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

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<sup>50</sup> ICCPR cases, *Weinberger v. Uruguay* (1980), *Landinelli v. Uruguay* (1981) and *Salgar de Montego v. Colombia* (1982) are appropriate examples of such occurrences in the Americas.

The role and power of this Court, as compared to others, is highlighted when it was stated that the Court's "jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion," (IACHR *Advisory Opinion OC-87 29*). The Court says definitively that it offers its advisory opinion because it matters and has legitimate implications for subsequent interpretations of the Convention. With Advisory Opinion OC-8/87 in mind, the Court establishes that along with Article 7.6, 25 and 27.2, the principles of due process of law cannot be suspended in states of emergency because they are necessary conditions to be considered judicial guarantees. Furthermore, the Court held that Article 29.C,<sup>51</sup> which included judicial guarantees inherent to representative democracy, was also non-derogable along with Article 8.

The Inter-American Court does not appear to be ruled by strategic, self-interested motivations that align with rational choice theorists. Instead, the truth seeking genuine motivations are more likely to govern the behavior of this Court when engaged in judicial debate with defendants and petitioners. The Court is direct and unwavering in its commitment to protecting human rights and it is upfront about the particular importance of doing so in the Americas. During the 1970s and 1980s its role was especially paramount since the continent suffered at the hands of military dictatorships, civil wars and other internal strife (Magendzo 1). Many countries were abusive and disrespected their commitment to the American Convention anyway, so the Court had little reason to tip toe around the issue. Unlike the Human Rights Committee, for example, the

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<sup>51</sup> Article 29.C (Restrictions Regarding Interpretation): No provision of this Convention shall be interpreted as: precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government

Court did not have to fear that its decisions would cause States to reject its jurisdiction. Many states had already begun to defect from their human rights commitments, so the Court might as well hand down genuine, rights-protecting decisions. The Court is ruled by socially constructed conceptions of the right thing to do in situations of abuse. When a state has violated its commitment to abide by human rights norms, the Commission and the Court hold them accountable.

### SECTION VIII: GENERAL DISCUSSION

**Table 8-1** *Dominating rationalities dependent on stage and actor*

	<b>Conceptual Phase</b>	<b>Drafting Phase</b>	<b>Implementation &amp; Operational Phase</b>
<b>ECHR</b>	Social Constructivism (argumentative rationality)	Instrumental rationality	- <i>State Parties</i> - Instrumental rationality - <i>European Court</i> - Instrumental rationality > Social Constructivism
<b>ICCPR</b>	Social Constructivism (argumentative rationality)	Instrumental rationality	- <i>State Parties</i> - Instrumental rationality - <i>HRC</i> - Social Constructivism
<b>ACHR</b>	Social Constructivism (argumentative rationality)	Instrumental rationality/ Social Constructivism (argumentative rationality)	- <i>State Parties</i> - Instrumental rationality - <i>I-A Commission, Court</i> – Social Constructivism

This thesis has shown that both theories—rationalism and constructivism—motivate actors throughout the treaty process. Breaking the treaty process into phases provides a useful framework and analytical method. It helps us to study the theories more closely, resulting in more accurate understandings of how rationalism and constructivism manifest in the real world. At times, they add explanatory power simultaneously for different actors. The obvious benefit to studying umbrella agreements is that they provide an all-encompassing framework that can be applied to the international community more easily than say studying topic-specific agreements (i.e. Convention Against Torture, Convention on the Elimination of All Forms of Violence Against Women, etc.). As such, this thesis can be applied to the human rights regime broadly. Analysis of the derogation clauses similarly suggests far-reaching conclusions.

## Conceptual Phase

With Habermasian preconditions—common lifeworld and insignificant power hierarchies—satisfied, social constructivism overwhelms each agreement’s conception and paves way for argumentative rationality. Unlike much of the rest of the treaty process, the actors of the conceptual phase are not bound by political exigencies. Even if the actors are politically bound, the conceptual phase lends itself to the “logic of appropriateness” since the goal of this stage is not to devise legally binding material. The conceptual phase actors are more likely to appear to embody the heart of human rights agreements. Delegates spend extensive amounts of time delivering eloquent speeches regarding the necessity for a human rights treaty; agreements, they describe, are imperative protections against potentially abusive state power.

Especially in the case of the European Convention and the International Covenant, the Holocaust and Second World War were catastrophes that could never again be permitted. Moreover, in the conceptual phase (and subsequent phases, although with less frequency), delegates make reference to the work being done by others in the field. The ECHR draws from the conceptual work of the ICCPR as well as the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man. The ACHR gains inspiration from the ECHR and ICCPR, both of which preceded it. In all three agreements, this early stage is unique in its ability to detach from traditional political motivations and the cost-benefit analysis that typically inhibits international negotiations. Overall, the point is that there is in fact a conceptual phase, which is distinct from subsequent phases; and, that in this phase, I find support for social constructivism, including the theory of argumentative rationality.



## *Drafting Phase*

Constructivist dominance ends when drafting begins. The magnanimous speech largely disappears and is replaced with calculated legalese and substantial influence of political concerns. Uncovering this transformation, I defer to a common critique of Risse. “In light of the tough bargaining problems at hand,” statements concerned with doing the right thing should be dismissed “as sheer rhetoric,” (Risse 15). Recall Mr. Kovalenko, an ICCPR framer from the Ukrainian Soviet Socialist Republic. While he voiced concern about others’ disingenuous motivations, he made no real attempt to protect the document from instrumentalists’ powerful persuasion. Idealism is drowned as normal geopolitical dissimilarities resume. Actors discontinue recall of shared interpretations of the world and powerful states assume prominent roles in discussion. For success in the drafting phase, framers must abandon their socially constructed idea of what the treaty should look like, put on their instrumental hat, and begin to architect a politically feasible agreement. Even if the actors themselves do not change, when the goals of the phase changes, so must the considerations and requirements of the actor. The Cold War inflated these changes. Moreover, while invited to participate during treaty conceptualization, non-governmental organizations and observer states<sup>52</sup> were shut out of ECHR, construction. The ICCPR and ACHR, however, allowed non-governmental organizations to observe (and potentially informally advise specific governments) throughout. Still, they were unable to comment directly, since their interests were undermined by others’ calculations of success. I reached these conclusions upon examination

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<sup>52</sup> Observers are states that attend the negotiations, but exist outside of the treaty’s jurisdiction and are not granted a vote. Germany, Belgium, France, Italy, Israel and Portugal are all observers to the American Convention on Human Rights (Doc. 22 Rev. 2).

of construction of the derogation clause, specifically the debates regarding enumeration of non-derogable rights.

There is a manifestly problematic absence of guiding derogation principles in the ECHR, ICCPR, and ACHR; this omission results in disconnect between what each treaty considers non-derogable. The inclusion of such a working knowledge would have facilitated understanding of the differences in rights shown between Table 5-1, Table 6-1 and Table 7-1. Out of a total of twenty-two non-derogable articles, only four of these are non-derogable in all three agreements. If the negotiations were guided by an accepted norm, one would expect a single truth as relates to human rights; or, at least a bit more overlap given that different regions may have different truths. That is, if international negotiations aim to reach consensus on an “innovative and optimal” solution for human rights protection (Risse 21).

I am confident that instrumental motivators conquered the decision-making processes of the treaties’ architects. I argue that there is no underlying guiding philosophy because the issue is better handled on a case-by-case basis; each action was analyzed according to the costs and benefits of cooperation. Domestic political concerns, the likelihood that states will adhere to the treaty, and the possibility of non-ratification factored into the calculations. Rational choice neatly explains the fact that the ECHR protects the fewest non-derogable rights, followed by the ICCPR and then the ACHR. The Right to Life, Freedom from Torture, Freedom from Slavery or Servitude, and Freedom from Ex Post Facto Laws<sup>53</sup> make up the conspicuous lowest common denominator: the only four rights for which the ECHR enumerates non-derogable. The framers intended the document to be easily agreeable to all of the Council of Europe members; the ECHR codified what had, more or less, already existed as norms. It is true that the escape clause of the ECHR started

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<sup>53</sup> See ECHR, Article 2, 3, 4 (paragraph 1) and 7, respectively; ICCPR, Article 6, 7, 8 and 15, respectively; ACHR, Article 4, 5, 6 and 9, respectively.

out very similar to the ICCPR, but “the two clauses no doubt soon began to differ from each other” as the ICCPR drafters regarded more rights as non-derogable (Secretariat of the European Commission 10). The fact that Foreign Ministers were the ultimate decision-makers in the ECHR, compared to the ICCPR drafters who were respected as human rights experts, definitely accounts for some of these disparities.

Furthermore, the main transformative goal of the ECHR was to prevent future rise of authoritarianism, not necessarily raise the human rights standard. Implementation would, therefore, be relatively costless. An extensive list of non-derogable rights would likely have raised serious objections by states who were unwilling to compromise sovereignty. Understanding that within the Council of Europe, “military and other authoritarian governments ha[d] been rare and short-lived;” and, the fact that Europe’s total devastation was caused by such regimes (and would likely dissuade their future resurgence) caused the treaty’s architects to side with fewer restrictions (Steiner and Alston 869). Moreover, the Committee of Ministers, made up of the Foreign Ministers of the member states was the decision-making body throughout. Even though other bodies’ represented their wants and concerns, they only directed their comments to the Committee of Ministers to make the final decisions. The Foreign Ministers, technically employees of their respective governments, would not readily accept completely the apolitical suggestions of other bodies; they were charged with contributing to a document that their government could accept. It was their responsibility to make sure preferences were represented, so the Ministers were agreeable to a very limited interpretation of what constitutes non-derogable rights. Even though emergency situations usually bring with them instances of state abuse, t sided with the most efficient and least contentious way to address escape, even though

The ICCPR embodies intermediate derogation, feasible for both democracies and non-democracies to ratify. Stable democracies are frequently associated with greater respect for human rights (Goldman 2009; Neumayer 2012), while non-democracies may be associated with worse conditions. On the one hand, the ICCPR had to make rights protections great enough to influence positive change in the states with little history of human rights respect. On the other hand, they had to do so in a way that would not be so progressive (i.e. exhaustive list of non-derogables) that the states in which most of these standards already existed would decide not to ratify. McGoldrick, an expert on the United Nations Human Rights Commission, contends this conservatism permeates the entire document. “The rights enshrined within [the ICCPR] represent the basic minimum set of civil and political rights recognized by the world community,” (20). With extremely diverse membership, the ICCPR is a useful example of Koremenos’ (*forthcoming*) distribution without coordination problem. The democracies, for example, want their norms to be codified and “exported to other states,” but if the treaty embodies this norm in a way that is unfavorable to the democracies, then they may not ratify (Koremenos *forthcoming*). They would be in no worse of a position than they were before the treaty existed.

In comparison to the ECHR and the ICCPR, the ACHR enumerates the greatest number of rights as non-derogable. Again, this is because the framers had to consider the unique position of the OAS member states and the needs of the region. The costs and benefits of creating a treaty, and in the form it took, were undoubtedly contemplated. Many of the rights enshrined in the ACHR already existed as domestic laws in many OAS member states. Upon the drafting of the treaty, however, even these domestic laws were not respected by the governments; so, codifying laws in an international agreement would not succeed in their becoming regarded as the norm (Goldman 866). The framers had an interesting challenge. Surely cognizant of the improbability that states

would rapidly conform to the Convention's standards, the architects decided on a solution that could, in time, transform the regional conscience. Particularly in Latin American, the principles enshrined in the ACHR, including general respect for the law, were only loose ideals. If the framers wanted to improve the human rights condition at all, they could not defer to the history of the practice of human rights. Instead, the American Convention "essentially prescribed maximum, not minimum, human rights," (Goldman 867). The long list of non-derogable rights may have contributed to the United States' decision not to ratify the treaty. Even so, the mere existence of a high standard of protection may give human rights organizations, the international community and the Inter-American Commission grounds to "push nations to make gradual, if grudging, improvements down the road," (Hathaway 1941).

Once rationalism first assumes prominence in the drafting phase, actors behave as not only architects of the international human rights regime, but also as representatives of their respective governments. This is an obvious point, but nonetheless important to emphasize. They become spokespersons for their home countries and attempt to best underscore an acceptable treaty from their state's perspective, meaning self-interested considerations must assume a central role. This should not be interpreted to mean that altruistic goals are completely absent, nor that they do not impact the final agreement in a meaningful way. The European Convention, International Covenant, and American Convention indeed produce results for a multitude of states –even if they were not represented during construction. Still, the framers are in a powerful position to impose self-interested standards on a future international agreement, so before delegates can consider acting out of selfless motivations, they are certainly required to consider the impact such acts may have on their home country.

As such, the involved actors are not ultimately concerned with operating according to an agreed upon norm. This is true for the treaties individually and collectively. The drastic differences in what are non-derogable versus derogable is largely the result of each set of actors working to secure a cooperative outcome with those members alone. It is not necessarily about procuring a document that the international community will use to elevate the status of rights everywhere. This suggests that state parties agreed that governments should hold the right to derogate under specific circumstances as their “sovereign right to defend legitimate interests” or that allowing for derogations was a requirement to garner widespread support for the treaty,” both of which accord to the “logic of consequentialism” (Neumayer 4). If the drafting phase of human rights agreements can be explained by social constructivism, then actors acting in similar capacity (ECHR, ICCPR, and ACHR framers) should also act according to a similar normative guidelines. This would have produced more parallel agreements and a clearer sense of what it means to respect human rights in contemporary society. With instrumental actors, unconcerned with overarching and principled reason for their decisions, constructing the standards of protection, it is no surprise that what we are left with is a fragmented and contradictory international human rights system.

### ***Implementation and Operational Phase***

I uncovered the interplay of constructivism and rational choice with examples from the European Convention, International Covenant and American Convention. This dynamism is unsurprising, since this phase is indefinite and reactionary. My findings are contradictory to Risse’s assessment of the implementation and operational stage, as he terms, “prescriptive status.” Upon ratification of agreements, argumentative rationality contends that “oppressive governments are forced to accept the validity of human rights norms and to justify their behavior in front of

international and domestic audiences” (Risse, “International Norms” 539). This is simply not the case. Ratifying states do not necessarily adopt or internalize the human rights norms to which they have agreed. And, even if they do, politically turmoil frequently proves an obstacle to cooperation. Furthermore, instrumental frameworks have historically infiltrated the European Court, for example. When this happened, states were only required to loosely justify derogations. Nevertheless, social constructivism is not absent from this stage. The oversight bodies overwhelmingly required defectors to engage a “logic of arguing,” accept that they are wrong and change their views and behavior towards human rights.

Table 8-1 is taken from the work of Hafner-Burton, Helfer, and Fariss (2011). It shows derogation, by state, from 1976-2007. The term “country-years” includes years in which a state party filed derogation or a previously filed derogation remained in effect (Hafner-Burton, Helfer, Fariss 678). The table is mostly included to numerically illustrate the frequency of derogation. Among others, it is worth noting that the United States is missing from this list, despite the declared state of emergency following the 2001 terrorist attacks; that notwithstanding the fact that Uruguay was defendant in numerous cases of abuse of derogation, the country has only officially filed a single derogation; and, that the United Kingdom, a stable democracy, is a frequent derogator with 52 filed derogations in 31 years (Hafner-Burton, Helfer, Fariss 2011).

**Table 8-1** *All derogations from the ECHR, ICCPR and ACHR (1976-2007)*

<i>State</i>	<i>Number of derogations</i>	<i>Number of country-years</i>
<b>Albania</b>	1	1
<b>Algeria</b>	18	17
<b>Argentina</b>	6	3
<b>Azerbaijan</b>	9	3
<b>Bolivia</b>	5	4
<b>Chile</b>	15	13
<b>Colombia</b>	30	15
<b>Ecuador</b>	21	11
<b>El Salvador</b>	5	5
<b>France</b>	1	1
<b>Georgia</b>	4	2
<b>Guatemala</b>	1	1
<b>Ireland</b>	5	5
<b>Israel</b>	17	17
<b>Jamaica</b>	2	2
<b>Namibia</b>	1	1
<b>Nepal</b>	1	1
<b>Nicaragua</b>	16	8
<b>Panama</b>	1	1
<b>Paraguay</b>	2	1
<b>Peru</b>	264	21
<b>Poland</b>	4	2
<b>Russia (Soviet Union)</b>	18	5
<b>Sri Lanka (Ceylon)</b>	14	13
<b>Sudan</b>	14	14
<b>Surinam</b>	4	4
<b>Trinidad and Tobago</b>	2	2
<b>Tunisia</b>	7	7
<b>Turkey</b>	34	13
<b>United Kingdom</b>	52	28
<b>Uruguay</b>	1	1
<b>Venezuela</b>	10	9
<b>Yugoslavia</b>	1	1
<b>Total</b>	586	232

*Notes:* 33 states in list. 1. Peru is a striking outlier, The country has filed more derogations than any other state by a large order of magnitude. Peru has also filed multiple derogations in each year that is derogates. The derogations spike in the early 1990s, a time of significant domestic unrest following the election of President Alberto Fujimori that resulted, on 5 April 1992, in the autogolphe (or self-coup) in which Fujimori, with the support of the military suspended the constitution, shut down the Congress, and purged the judiciary. We do not treat Peru as an outlier in our statistical analysis, however, because our dependent variable is binary, that is, a state either derogates a particular year or it does not.”



## **State Parties**

This thesis supports that states act rationally when applying human rights standards domestically, and interacting with the international community. In democratic states, with better human rights conditions, implementation of these agreements requires fewer costs. It is likely they will not have to implement as many changes to their countries to fulfill treaty obligations. The reason reaching consensus amongst the framers is difficult is because they represent multiple governments. These divergent perspectives correspond to mixed interpretations of the world and diverse interests. Reaching agreement during the implementation phase proves difficult as each government is structured differently and the framers have to sell the treaty to the government officials who have to sell it to the public or legislative bodies. This relationship is probably stronger for democracies that may then have the longest lag time between treaty creation and entry into force. Non-democracies will likely ratify sooner since it may be an almost unilateral decision of the ruler. But, as Hafner-Burton, Helfer, and Fariss (2011) and Neumayer (2012) show, this does not translate into greater respect for rights. Opting to defect instead of officially derogate during times of emergency is characteristic of these typically less embedded states. Since the costs of cooperation are higher for this regime type, unless human rights law becomes considered customary norm, human rights abuses and defection will continue.

## **Oversight Bodies**

The monitoring and compliance overseers are expected to act as legal experts, apart from their affiliation to any government. As such, John Rawls, in *Political Liberalism*, offers an interpretation of a supreme court that similarly applies to the European Court, the Human Rights Committee and the Inter-American Commission and Court. Rawls speaks to a supreme court of a

democracy, of which the international human rights regime is not; still, these oversight bodies, if not governing all democracies (like the ECHR), patently aim for total democracy (ACHR), or are dominated by democracies (ICCPR). In the international human rights regime, the legally enforceable agreements are analogous with domestic constitutions and the oversight bodies with a supreme court. Rawls provides roles of judicial review that correspond to constructivist principles. First, the Court functions to protect constitutional freedoms and guarantees (Rawls 233). In international law, the treaty is the constitution and the rights enshrined in the document, the basic liberties. Where it is adopted, “public reason provide[s] the Court’s basis for interpretations” (Rawls 234). The second role of judicial review is to serve as a model of public thought. The Court has an “educative role of public reason,” functioning to publicize its interpretation (Rawls 236). The Inter-American Commission’s work chronically and uncovering systematic abuses during Argentina’s “Dirty War” had such an effect. The Commission publicized the abuses and resulted in a significant drop in the number of abuses. Furthermore, according to Freeman, a court “refin[es] constitutional essentials in publicly acceptable terms,” (208). The expansion of non-derogation by the Human Rights Commission and the Inter-American Court represent an evolution in the conceptualization of derogation.

The analysis of the oversight bodies is most interesting; considering the inherent tension of their identity, examining these institutions of the ECHR, ICCPR and ACHR reveals, perhaps, unexpected attributes. The Inter-American system does not appear to have been under the same political constraints as has, at times, been the Human Rights Commission and the European Court. Its progressive interpretation of human rights law makes it a more obvious protector of rights. Constructivism dominates its motives. Both strategic interests and genuine principles have historically motivated the European Court and the Human Rights Committee; because they operate

according to geopolitical realities, they too, become enthralled in the strategic games. The presence of instrumental motivators was explained in each of the treaty-specific sections, but to reiterate: because oversight bodies' existence and impact depends on both the states' agreement and finances, these bodies have to make decisions that will not undermine their own authority. This relationship was stronger during the first decade or so of the treaty's entry into force, until the bodies' authority was internalized and accepted as norm.

## **SECTION IX: CONCLUSION**

This thesis took seriously the theoretical suggestion posed by Fearon and Wendt; by studying the conceptualization to the implementation and operational phases, particularly the evolution of derogation, this thesis shows that constructivism and rationalism are not necessarily conflicting theories. I classify both the "logic of appropriateness" and the "logic of arguing" as social constructivism and the "logic of consequentialism" as rationalism. I, then, identified "conditions under which each hypothesis holds, rather than showing that one is always right or wrong" (Fearon and Wendt 61). Rational choice motivates certain actors in particular phases while social constructivism explains the motivations of others. They each describe certain things that the other cannot; and, without both it is difficult to interpret real-world complexities.

I first began unpacking this dilemma upon close study of the "*Travaux préparatoires*." Verbatim remarks bring undeniable clarity to each individual actor's motivations and how these individual incentives contribute to the overall style of debate. The very presence of derogation is

the first indicator that the framers designed the agreements rationally.<sup>54</sup> While escape clauses with few non-derogable rights are clear manifestations of instrumental decision-making, a greater number of non-derogable rights suggests some constructivist interaction. The question then becomes, “whether one logic leads to a better society than the other” (March and Olsen, “Institutional Dynamics” 949). With this in mind, this thesis’ review of derogation throughout the ECHR, ICCPR, and ACHR treaty processes is useful for understanding the impact derogation has on state behavior; and, therefore, on international human rights law broadly. While escape is designed into agreements to encourage wider membership, it does not appear that broad treaty membership necessarily corresponds to better human rights conditions. Hathaway goes so far as to assert that “human rights treaties may sometimes lead to poorer human rights practices within the countries that ratify them,” (1940).

This does not matter much for democracies, who typically have better human rights conditions even without a treaty. It is significant, however, for non-democracies, which corresponds to others’ findings regarding derogation. These regime types most require a constraining effect, but derogation clauses fail to implement such restraint (Neumayer 2012). Non-democracies are infrequent derogators, preferring to renege on their commitment to human rights law and violate both derogable and non-derogable rights (Hafner-Burton, Helfer, Fariss 2011). Cognizant of this, the international human rights community should less readily accept derogation as tool to increase treaty membership; broad participation is invaluable if it is not paired with an

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<sup>54</sup> Both Conjecture F1: Flexibility increases with uncertainty about the state of the world (793); and, Conjecture F2: Flexibility increases with the severity of the distribution problem are satisfied (794). They come from Koremenos, Lipson, and Snidal (2011) and demonstrate that international institutions are instrumentally designed; actors weigh costs and benefits of cooperation alongside self-interested concerns (781).

improvement in human rights practices. In this sense derogation clauses become irrelevant, highlighting the need to rethink derogation clauses altogether.

### ***Meaningful Membership***

Now that general human rights agreements exist in most all areas, I hope a new trend will emerge: the creation of mini treaties—bilateral or small multilateral human rights agreements between sincere states. Democracies with commendable human rights practices should begin to design these treaties, which will come to represent a mark of excellence in human rights practice that others will aim to achieve. Treaties between exclusively sincere states might, over time, influence international norms so that treaty membership actually means something. As a current strategy, open membership does not have the intended result of purporting norms in areas where they do not already exist; it allows many insincere states to be party to human rights agreements. These states ratify in order to quell the pressures to conform; and, maintain only a façade of decency, as they do not take the costly measures to advance human rights practice (Hathaway 1941). Instead, restrictive membership would help mitigate the underlying enforcement problem to cooperation (Koremenos, Lipson, Snidal 783). Smaller membership<sup>55</sup> would, moreover, make monitoring compliance and punishing defectors more manageable. Compliance overseers in only 13% of human rights agreements, Koremenos (*forthcoming*) highlights NGOs as an untapped resource. Mini treaties could enlist the support of international and domestic human rights organizations that have defined themselves as prominent policing and reporting institutions, to

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<sup>55</sup> See Koremenos, Lipson, and Snidal (2001). Conjecture M1: restrictive membership increases with the severity of the enforcement problem (783). An enforcement problem explains actors' incentives to renege on an agreement; whether or not cheating or cooperation gives the greatest payoff. Conjecture M2: restrictive membership increases with uncertainty about [other actors'] preferences (784). Conjecture M3: inclusive membership increases with the severity of the distribution problem (784).

serve as official or quasi-official monitoring bodies. A further difficult hurdle would be determining jurisdiction in the event of dispute. One possibility is for these treaties to grant authority to the International Court of Justice. At present, only states are allowed to appear before the ICJ, sharply contrasted to the European Court and the Inter-American Court (“Practical Information”). Considering the success of these two Courts, if only in the case of member states to the mini treaties, it may be in the best interest of the ICJ to reconsider its position on individual petitioners. These treaties are intended to promote transparency and accountability in a way that prior treaties have been unable to, so they will have to be radical in many ways. In turn, the ICJ may be able to awaken from its critiqued stagnation.

The successes and failures of the ECHR, ICCPR, and ACHR, particularly pertaining to derogation, should be used for reference. In these mini treaties, escape clauses will either become obsolete or their derogation principles clearly defined. Actors should remain rational when designing these treaties; I am not advocating the creation of unreasonable law. But, because they will be between very small numbers of exclusively sincere states, there is undoubtedly space for principled, truth seeking argumentation to occupy. After all, if constructivism is to flourish in any arena, human rights is the obvious choice. Still, even my simplified alternative, to the current regime, brings with it a new set of concomitant problems, for which I will look to future scholarship and practice to resolve. Despite its imperfections, as I have learned from the ECHR, ICCPR, and ACHR, an idealistic vision of the future is always an honorable starting point.

## BIBLIOGRAPHY

- “About the Committee of Ministers.” *The Council of Europe*. N.d. Web 30 Mar. 2015.
- “Absolute Rights.” *Australian Government: Attorney-General’s Department*. n.d. Web. 20 Sep. 2014.
- American Convention on Human Rights ‘Pact of San Jose, Costa Rica.’* San Jose: Organization of American States, 1969. Web. 1 Aug. 2014.
- “American Convention on Human Rights Signatories and Ratifications.” *Organization of American States*. Washington: Department of International Law, n.d. Web. 1 Sept. 2014.
- “Basic Documents in the Inter-American System.” *Organization of American States*. Inter-American Commission on Human Rights, n.d. Web. 20 Sep. 2014.
- Bederman, David. *International Law Frameworks*. New York: Foundation Press, 2010. Print.
- Bossuyt, Marc J. *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*. Dordrecht: Martinus Nijhoff Publishers, 1987. Print.
- “Case 2735 David Horacio Varsavsky.” Organization of American States. Inter-American Commission on Human Rights., n.d. Web. 1 Mar. 2015.
- Chibundu, M.O. “Making Customary International Law Through Municipal Adjudication: A Structural Inquiry.” *Virginia Journal of International Law*. 39.4 (1999): 1069-1150. Web. 25 Mar 2015.
- Collected Edition Volume I of the “Travaux Préparatoires.”* Vol. 1. The Hague: Martinus Nijhoff Publishers, 1975. Print.
- *Volume II. I of the “Travaux Préparatoires.”* Vol. 1. The Hague: Martinus Nijhoff Publishers, 1975. Print.
- *Volume III. I of the “Travaux Préparatoires.”* Vol. 1. The Hague: Martinus Nijhoff Publishers, 1975. Print.
- *Volume IV. I of the “Travaux Préparatoires.”* Vol. 1. The Hague: Martinus Nijhoff Publishers, 1975. Print.
- “Collectivism.” *Vocabulary.com*. 2015. Web. 14 Feb. 2015.
- “Conditions for Membership.” *European Commission*, 19 Nov. 2014. Web. 14 Nov. 2014.
- Conferencia Especializada Interamericana Sobre Derechos Humanos San Jose, Costa Rica 7-22 de noviembre de 1969*. Washington: Secretaria General-Organización de los Estados Americanos. Web. 10 Sep. 2014.<sup>56</sup>
- Convention for the Protection of Human Rights and Fundamental Freedoms*. Rome: Council of Europe, 1950. Web. 1 Aug. 2014.
- Daly Hayes, Margaret. “The U.S. and Latin America: A Lost Decade?” *Foreign Affairs*. Council on Foreign Relations, 1988. Web. 1 Mar. 2015.
- Diab, Joseph. “United States Ratification of the American Convention on Human Rights.” *Duke Journal of Comparative and International Law* 2.2 (1992): 323-344. Print.
- “Did You Know?” *Council of Europe.*, n.d. Web. 1 Nov. 2014.
- “Drafting of the Universal Declaration of Human Rights.” *Dag Hammarskjöld Library Research Guides*. n.d. Web. 28 Mar. 2015.
- Elster, Jon. *Nuts and Bolts for the Social Sciences*. New York: Cambridge University Press, 1989. Print.

---

<sup>56</sup> OAS Doc. No. OEA/Ser.K/XVI/1.2

- “European Charter for Regional or Minority Languages.” The Council of Europe. n.d. Web. 28 Mar. 2015.
- European Commission of Human Rights. *The Greek Case: Report of the Sub-Commission*. Strasbourg: Council of Europe, 1969. Web. 1 Feb. 2014.
- Fearon, James, and Alexander Wendt. “Rationalism v. Constructivism: A Skeptical View.” *Handbook of International Relations* Ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons. 1<sup>st</sup> ed. London: SAGE Publications, 2002. 52-73. SAGE Knowledge. Web. 7 Mar. 2015
- Organization of American States. *Fifth Meeting of Consultation of Ministers of Foreign Affairs held in Santiago, Chile, 12-18 Aug. 1959*. Pan American Union: Washington D.C. 1960. Web. 16 Feb. 2015.<sup>57</sup>
- “Founding Fathers.” *Council of Europe.*, n.d. Web. 1 Nov. 2014.
- Freeman, Samuel. “Political Liberalism and the Possibility of a Just Democratic Constitution.” *Justice and the Social Contract :Essays on Rawlsian Political Philosophy*. Ed. Stephen F. Goldstone. New York: Oxford University Press, 2007. 175-213. Print.
- General Secretariat of the Organization of American States. *Fifth Meeting of Consultation of Ministers of Foreign Affairs*. Santiago, 1960. Web. 20 Dec. 2014.
- Goldman, Robert K. “History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights.” *Human Rights Quarterly* 31 (2009): 856-887. Web. 27 Feb. 2014.
- Gomien, Donna. *Short Guide to the European Convention on Human Rights*. 3rd ed. Strasbourg: Council of Europe Publishing, 2000. Print.
- Hafner-Burton, Emilie A., Laurence R. Helfer, and Christopher J. Fariss. “Emergency and Escape: Explaining Derogations from Human Rights Treaties.” *International Organization* 65.4 (2011): 673-707. Cambridge Journals. Web. 1 Nov. 2014.
- “Hansa Mehta, Indian Freedom Fighter.” *IndiaNetzone*. Jupiter Infomedia Ltd. 1 Jan. 2009. Web. 31 Mar. 2015.
- Hathaway, Oona A., “Do Human Rights Treaties Make a Difference?” Faculty Scholarship Series 111 (2002): 1935-2042. *Yale Law School Legal Scholarship Repository*. Web. 1 Mar. 2015.
- “History of the United Nations.” *United Nations.*, n.d. Web. 14 Nov. 2014.
- “Human Rights Committee.” *United Nations Office of the High Commissioner for Human Rights*. n.d. Web, 10 Mar. 2015.
- “Human Rights Council.” *United Nations Human Rights Council.*, 2006. Web. 31 Mar. 2015.
- Inter-American Commission on Human Rights. *25 Years of Struggle for Human Rights in the Americas*. Washington DC: Organization of American States, 1984. Print.
- Inter-American Court of Human Rights. *Advisory Opinion OC-8/87 of January 30, 1987 Habeas Corpus in Emergency Situations*. San Jose: Organization of American States, 1987. Print.
- Inter-American Court of Human Rights. *Advisory Opinion OC-9/87 of October 6, 1987 Judicial Guarantees in States of Emergency*. San Jose: Organization of American States, 1987. Print.
- International Covenant on Civil and Political Rights*. New York: United Nations, 1966. Web. 1 Aug. 2014.

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<sup>57</sup> OAS Doc. No. OEA/Ser.C/11.5



- Janis, Mark W., Richard S. Kay, and Anthony W. Bradley. *European Human Rights Law*. Oxford: Clarendon Press, 1995. Print.
- Koremenos, Barbara. *Continent of International Law Complete Manuscript*. Cambridge: Cambridge University Press, Forthcoming. Print.
- Koremenos, Barbara, Charles Lipson, and Duncan Snidal. "The Rational Design of International Institutions." *International Organization* 55.4 (2001): 761-99. JSTOR. The MIT Press. Web. 1 Nov. 2014.
- Magendzo, Abraham. "Pedagogy of human rights education: a Latin American perspective." *Intercultural Education* 16.2 (2005): 137-143. Web. 1 Mar. 2015.
- March, James G., and Johan P. Olsen. "The Institutional Dynamics of International Political Orders." *International Organization* 52.4 (1998): 943-969. Cambridge Journals. Web. 28 Mar. 2015.
- . "The Logic of Appropriateness." *The Oxford Handbook of Public Policy*. Ed. Goodwin, Robert E., Michael Moran, and Martin Rein. New York: Oxford University Press, 2008. 690-705. Print.
- McGoldrick, Dominic. *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*. Oxford: Clarendon Press, 1991. Print.
- Michaelson, Christopher. "Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?" *Post 9/11 and the State of Permanent Legal Emergency*. Vol. 14. n.p.: Springer, 2012. 287-314. Print.
- Neumayer, Eric. "Do governments mean business when they derogate? Human rights violations during notified states of emergency." *Review of International Organizations* 8.1 (2012): 1-31. Springer. Web. 1 Nov. 2014.
- "Our History." *Organization of American States*, n.d. Web. 1 Nov. 2014.
- "Our Structure." *Organization of American States*, n.d. Web. 1 Nov. 2014.
- "Practical Information." *International Court of Justice*, n.d. Web 30 Mar. 2015.
- Rawls, John. *Political Liberalism*. Expanded ed. New York: Columbia University Press, 2005. Print.
- Risse, Thomas. "'Let's Argue!': Communicative Action in World Politics." *International Organization* 55.1 (2000): 1-39. JSTOR. The MIT Press. Web. 3 Nov. 2014.
- . "International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area." *Politics and Society* 27.4 (1999): 529-559. Sage Publications, Inc. Web. Mar. 28. 2015.
- Rosendorff, Peter B., and Helen V. Milner. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." *International Organization* 55.4 (2001): 829-857. Web. 1 Oct. 2014.
- Secretariat of the Commission. *Preparatory Work on Article 3 of the European Convention on Human Rights*. Strasbourg: Council of Europe, 22 May 1956. Print.<sup>58</sup>
- Secretariat of the European Commission of Human Rights. *Strasbourg Convention: Preparatory Work on Article 15 of the European Convention on Human Rights*. Strasbourg: Council of Europe, 22 May 1956. Print.<sup>59</sup>

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<sup>58</sup> Council of Europe Doc. No. DH(56)5

<sup>59</sup> Council of Europe Doc. No. DH(56)4

Secretary-General. United Nations. General Assembly. *Annotation of Draft International Covenants on Human Rights*. 10<sup>th</sup> sess. n.p. 1955. Web. 1 Sep. 2014.<sup>60</sup>

Simmons, Beth. *Mobilizing for Human Rights: International Law in Domestic Politics*. New York: Cambridge University Press, 2009. Print.

Slaughter, Anne-Marie and Thomas Hale. "International Relations, Principal Theories." Max Plank Encyclopedia of Public International Law (2013): Oxford Public International Law. Web. 27 Mar. 2015.

"Status of Ratification Interactive Dashboard." United Nations Office of High Commissioner for Human Rights, 2014. Web. 14 Nov. 2014.

"Statute of the Council of Europe." The Council of Europe. n.d. Web. 30 Mar. 2015

Steiner, Henry J., and Philip Alston. *International Human Rights in Context: Law, Politics, Morals*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000. Print.

*Summary Record of the Twenty-ninth Meeting held at the Palais des Nations, Geneva, on 4 Dec. 1947*. United Nations Economic and Social Council: Commission on Human Rights Second Session, 4 Dec. 1947. Web. 25 Mar. 2015.

*Summary Record of the One Hundred and Twenty Sixth Meeting held at Lake Success, New York on 14 Jun. 1949*. United Nations Economic and Social Council: Commission on Human Rights Fifth Session, 17 Jun. 1949. Web. 20 Dec. 2014.<sup>61</sup>

*Summary Record of the One Hundred and Thirty Eighth Meeting held at Lake Success, New York on 29 Mar. 1950*. United Nations Economic and Social Council: Commission on Human Rights Sixth Session, 29 Mar. 1950. Web. 20 Dec. 2014.<sup>62</sup>

*The Council of Europe Treaty Office*. The Council of Europe, 16 Mar. 2015. Web. 1 Nov. 2014.

United Nations. Economic and Social Council. *Report of the Drafting Committee to the Commission on Human Rights*. 1 Jul. 1947. Web. 10 Oct. 2014.<sup>63</sup>

---. Economic and Social Council. Commission on Human Rights. *Status of International Covenant on Civil and Political Rights*. 41<sup>st</sup> sess. n.p. 28 September 1984. Web. 1 Mar. 2015.<sup>64</sup>

---. General Assembly. *Report of the Human Rights Committee*. 36<sup>th</sup> sess. New York: 1991. Web. 1 Nov. 2014.<sup>65</sup>

---. General Assembly. *Preparation of Two Draft Covenants on Human Rights*. 375<sup>th</sup> Plenary Meeting., 6<sup>th</sup> sess. n.p., 1952. Web. 1 Feb. 2014.

---. Office of the High Commissioner for Human Rights. *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*. 72<sup>nd</sup> sess. UN Human Rights Committee, 2001. Web. 16 Feb. 2015.

---. Treaty Series. *Vienna Convention on the Law of Treaties (with annex) Concluded at Vienna on 23 May 1969*. n.p. 27 Jan. 1980. Web. 16 Feb. 2015.

United States. Department of State. *Department of State Bulletin*. Vol. 52 No. 1345. Washington: GPO, 1965. Print.

Weissbrodt, David, Fionnuala Ní Aoláin, Joan Fitzpatrick, and Frank Newman. *International Human Rights: Law, Policy, and Process*. LexisNexis, 2009. Web.

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<sup>60</sup> UN Doc. No. A/2929

<sup>61</sup> UN Doc. No. E/CN.4/SR.126

<sup>62</sup> UN Doc. No. E/CN.4/SR.138

<sup>63</sup> UN Doc. No. E/CN.4/21

<sup>64</sup> UN Doc. No. E/CN.4/1985/4

<sup>65</sup> UN Doc. Supplement No. 40 (A/36/40)

Wendt, Alexander. *Social Theory of International Politics*. Cambridge: Cambridge University Press, 1999. Print.

“What is the IACHR?” *Inter-American Commission on Human Rights*. Organization of American States. n.d. Web. 24 Mar. 2015.