**Soft Law at Work: International Standards and the Design of National Human Rights Institutions**

Scholarly paper proposal for the inaugural ASIL Research Forum – November 2011

Katerina Linos (Berkeley Law School) and Thomas Pegram (NYU School of Law)

Human rights treaties articulate ambitious international standards, but in many parts of the world, domestic practices lag far behind. To bridge the gulf between international law and domestic practice, the United Nations promoted a novel idea in the mid-1990s: all countries were to adopt National Human Rights Institutions (NHRIs), national agencies specifically designed to protect and promote human rights.[[1]](#footnote-1) The United Nations did not invent NHRIs. The emergence of the NHRI concept can be traced back possibly as far as 1946, with significant exemplar models appearing in the 1970s and 1980s (Pohjolainen 2006: 30). However, it is their codification in the Paris Principles and subsequent endorsement by State Parties in the UN General Assembly in 1993 that precipitated a norm cascade on a global scale.[[2]](#footnote-2) NHRIs spread very rapidly across diverse political systems, from an estimated twenty NHRIs in 1990 to approximately 108 active NHRIs in 2011.[[3]](#footnote-3) This transformation is significant because governments committed major institutional resources to the protection of human rights. And even more remarkably, governments around the world built institutions explicitly designed to monitor and fight *governmental* inefficiencies and abuses.

This paper examines how the international community contributed to this norm cascade. We study how the Paris Principles influenced the development of NHRIs through a new, original dataset with information on how all 108 national institutions are designed.[[4]](#footnote-4) This inquiry allows us to contribute to major debates on how international law should be structured, and on the tradeoffs involved in departing from the classical model of legally binding agreements with precisely articulated obligations (Abbott et al. 2000; Goodman & Jinks 2004). Contrary to much of the conventional wisdom that prioritizes treaties, we illustrate that a non-binding instrument – the Paris Principles – can have very significant effects on state behavior. In so doing, we add new empirical evidence to a growing literature that questions the priority international law scholars have traditionally placed on legally binding instruments.[[5]](#footnote-5) We also investigate empirically whether legal precision matters. Prominent international law theorists have long argued precision is critical in triggering compliance, but international relations scholars have contested this.[[6]](#footnote-6) To date, we have little empirical data on this debate. The paper gets us started on this task by setting out an innovative three-fold categorization of design features contained within the Paris Principles. This categorization distinguishes strongly recommended features from weakly and vaguely recommended features and from features omitted from the final text of the Paris Principles. We note a significant increase in the prevalence of strongly recommended design principles among those NHRIs created post-1993, but see no similar increase in design features that were weakly recommended or not recommended at all. In a political context of competing NHRI models, the official validation of certain design features contributes to their diffusion. In contrast, debates resolved through vague and weak recommendations do little to contribute to NHRI institutional design. Thus, our contribution to the legalization literature is twofold: we suggest that non-binding agreements can have important effects, and that legal precision matters even in non-binding agreements.

While the Paris Principles contributed to the worldwide adoption and design of NHRIs, these diffusion effects are not uniform across the globe. In fact, we find that there is significant variation of NHRI structures according to regions. This is consistent with social science scholarship that suggests regional diffusion may play an important independent role in state compliance with international norms (Simmons 2002; Pevehouse 2005). Our findings suggest that transmission of NHRI norms may also occur through highly organized regional human rights networks. Where a strong regional NHRI model exists, States may borrow design features from similarly constituted states within regional referent groups to supplement the Paris Principles’ prescriptions. We also find some more unusual lines of pan-regional influence across NHRI models and the incremental development of design features in response to learning and emulation processes. Regional diffusion effects on NHRI design may have significant consequences for the performance of resulting institutions, with the potential to enhance NHRI formal autonomy and powers above or beyond the baseline offered by the Paris Principles. This raises a crucial question, namely, has pressure from the UN led to the creation of effective NHRIs or rather promoted sub-optimal NHRI models? Successful regional models combined with country-to-country diffusion may be an important additive to international pressure in realizing effective NHRIs.[[7]](#footnote-7)

We also examine how States’ integration within the international human rights system influences the type of NHRI they build. NHRIs are increasingly embedded within UN processes. Recent innovations in human rights treaties assign an explicit role in treaty implementation to such national-level institutions (Carver 2010). Growing interaction is occurring within UN and regional intergovernmental organizations with NHRIs viewed ideally as an independent, if governmental, human rights authority. Our initial results suggest that the Paris Principles influenced both countries strongly integrated in the human rights treaty system, and countries at the periphery of this system.

**Bibliography**

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Mare Slaughter, & Duncan Snidal, “The Concept of Legalization,” *International Organization* 54 (2000), 401-419

Burdekin, Brian, with Jason Naum, *National Human Rights Institutions in the Asia-Pacific Region* (The Netherlands: Martinus Nijhoff Publishers, 2007)

Carver, Richard, “A new answer to an old question: national human rights institutions and the domestication of international law,” *Human Rights Law Review* 10 (2010), 1-32

Abram Chayes & Antonia Handler Chayes, “On Compliance,” *International Organization* 47 (1993), 175-205

Di Robilant, Anna, “Genealogies of Soft Law,” *The American Journal of Comparative Law* 54 (2006), 499-554

Franck, Thomas M., *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990)

Gersen, Jacob E. & Eric Posner, “Soft Law: Lessons from Congressional Practice,” *Stanford Law Review* 61 (2008), 573-628

Goodman, Ryan and Thomas Pegram (eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (New York: Cambridge University Press, forthcoming 2011)

Goodman, Ryan and Derek Jinks, “How to Influence States: Socialization and International Human Rights Law,” *Duke Law Journal* 54 (2004), 621-703

Guzman, Andrew T. and Timothy L. Meyer, “International Soft Law” *Journal of Legal Analysis* (2010). http://works.bepress.com/timothy\_meyer/5

Linos, Katerina, “Diffusion through Democracy,” *American Journal of Political Science* (forthcoming 2011)

Mertus, Julie, *Human Rights Matters: Local Politics and National Human Rights Institution* (Stanford: Stanford University Press, 2009)

Pegram, Thomas, “Accountability in Hostile Times; the Case of the Peruvian Human Rights Ombudsman 1996-2001,” *Journal of Latin American Studies* 40 (2008) 51-82

Pevehouse, John C., *Democracy From Above: Regional Organizations and Democratization* (Wisconsin: University of Wisconsin, 2005)

Pohjolainen, Anna-Elina, *The Evolution of National Human Rights Institutions: The Role of the United Nations* (Copenhagen: Danish Institute for Human Rights, 2006)

Downs, George, David M. Rocke and Peter N. Barsoom, “Is the Good News about Compliance Good News about Cooperation?” *International Organization* 50 (1996), 379-406

Shelton, Dinah (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

Simmons, Beth, “Why Commit? Explaining State Acceptance of International Human Rights,” Weatherhead Center for International Affairs, Harvard University, 28 (2002). http://www.wcfia.harvard.edu/node/693.

Uggla, Fredrik, “The Ombudsman in Latin America,” *Journal of Latin American Studies* 36 (2004), 423-450

United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (New York: UN, 1995)

1. The NHRI has been (loosely) defined as “a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights.” See UN (1995: 4). [↑](#footnote-ref-1)
2. Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN General Assembly, Res. 48/134, 20 December 1993. [↑](#footnote-ref-2)
3. We base these numbers on our own comprehensive dataset of NHRIs. [↑](#footnote-ref-3)
4. This dataset was developed in collaboration with Ryan Goodman and Derek Jinks, and with significant research assistance from David Zionts. [↑](#footnote-ref-4)
5. For discussions of soft law, see, among others, Linos (forthcoming, 2011); Shelton (2000); Gersen & Posner (2008); Guzman & Meyer (2010); and Di Robilant (2006). [↑](#footnote-ref-5)
6. Compare, for example, Franck (1990) and Chayes & Chayes (1993), with Downs et al. (1996). [↑](#footnote-ref-6)
7. An incipient body of research has begun to make inroads into explaining why certain NHRI are more effective than others in fulfilling a rights mandate (Uggla 2004; Burdekin with Naum 2007; Pegram 2008; Mertus 2009; Goodman & Pegram, forthcoming 2011). [↑](#footnote-ref-7)