

How Has the Human Rights Regime Been Affected by 9/11 and the 'War on Terror'?

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VILDE SKORPEN WIKAN, AUG 30 2015

In What Ways Has the Human Rights Regime Been Affected by 9/11 and the Subsequent 'War on Terror'?

This essay will compare and contrast how constructivist and realist international relations theory explain the apparent U.S. disregard for human rights (HR) in the 'War on Terror' and analyze what effect this has had on the HR regime in general. The essay argues that although there is evidence that states will prioritize security interests over adherence to international norms, there is no evidence that this has weakened the underlying HR norms or disrupted the institutions of the HR regime. Section one provides an introduction to the regime and theory and outlines how the 'War on Terror' has conflicted with its norms and legislation. The second part of this essay will consider U.S. unilateral action by drawing examples from Guantanamo Bay and assess how the U.S. government has attempted to reconcile their practices with international law (IL). Part three will consider to what extent the U.S. and the 'War on Terror' has affected the international HR regime. This section argues that HRs have been challenged since 9/11 but that HR abuses are lower than they were during the Cold War. Secondly, there is little evidence to support the notion that HR norms have been undermined or that institutions dedicated to the protection of HR have been weakened.

The HR regime consists of international treaties that make up the official body of international HR law (Carey, Gibney and Poe 2010:8-9). This regime has emerged largely due to the efforts of the Western countries working through the U.N (Evans 1996:8). In addition, customary law as well as international norms shaped by state practices and advocated by non-governmental organizations (NGOs) is considered an important part of the regime (Hicks and McClintock 2004:ii). The terrorist attacks in New York led to a renewed international military conflicts, most notably by the U.S. led 2001 and 2003 invasions of Afghanistan and Iraq. In combating terrorism, the U.S. has adopted practices that conflict with IL and human right norms. Notably, these include torture and the detainment of prisoners without due trial at Guantanamo Bay (Birdsall 2010:680). Internationally, other states have also undertaken counterterrorism measures that conflict with the HR regime and occurrences of HR violations have increased post-9/11 (Donnelly 2011: 15-9). Nevertheless, the regime itself prevails, with new treaties and legislation being produced (Harrelson-Stephens and Callaway 2009:432).

In analyzing these developments, realists would argue that U.S. behavior in the 'War on Terror' exemplifies that states prioritize material over normative interests. This essay will not differentiate between the various strands of realism as the theories hold the same views concerning norms as a constraint on state behavior (Feng and Ruizhuang 2006). For realists, human rights concerns will always be second rank, as states are assumed to prioritize harder material and security interests (Wagner 2014: 106-7; Krasner 1993). Constructivists, on the other hand, argue that states' interests and identities are fluid and shaped by norms for what constitutes acceptable behavior (Jackson 2011:391). In attempting to explain the disregard for IL by the U.S., constructivists would thus examine what aspects of U.S. national identity that caused this behavior and consider how, and to what extent human right norms still influenced the country's behavior (Dunne 2007:274). Internationally, the overall disjuncture of the HR regime from genuine state interest would lead realists to predict that U.S. behavior would not have a considerable effect on the regime as it is seen to operate regardless of state policies. Contrasting this view, constructivists would be alarmed by the U.S.'s hypocrisy and be wary of its possible undermining effect on the legitimacy of the HR regime. This is both because they would predict a possible re-legitimization of HR violations, and because the HR regime is associated

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with the U.S. and other western states. In case the regime is to prevail, this would demonstrate that HR norms have reached a high degree of international legitimacy.

At the U.S. detention centre on Guantanamo Bay, prisoners have, amongst other, been subjected to torture, denial of 'Prisoner of War' (POW) status, as well as the right to fair trials. The U.S. practices at Guantanamo Bay are widely considered to be serious and systematic breaches of IL and 'peremptory' norms (Foot 2006:132). Nevertheless, the behavior of the Bush administration showed evidence of sensitivity for HR norms when it defined 'torture' out of existence, claimed that the detainees were 'unlawful combatants' and thus not under the protection of the Geneva Convention, and established tribunals to determine guilt (although these were blatantly partial) (Greenberg 2009:5-9; Robertson 2006:532-45).

Realists would explain this behavior by arguing that the U.S. values the protection of national security and the prevention of new terrorist attacks more highly than adhering to IL and norms. Thus, in more peaceful times, the U.S. can advocate HRs but will not consider them indivisible. On the other hand, the attempt by the Bush administration to avoid scrutiny through processes of secrecy and the effort made by the administration's lawyers to prove the legality of their actions at Guantanamo Bay indicates that IL and norms must at least have affected the decision making process within the administration. Nevertheless, realists can point out that these were low-cost efforts that had no tangible effect on the consequences of the administration's policies. Thus, international morality only influenced the semantics of the process rather than the actual outcome.

Initially then, it would seem that U.S. behavior supports realist predictions in that states will discount adherence to international standards in favour of material interests. However, constructivists have linked this behavior to the existence of 'American Exemptionalism'. This is the idea that the U.S. is situated above the international community and IL. Exemptionalism is thought to be a constitutive part of U.S. national identity and a driver behind foreign policy (Esch 2010:366-9; Dunne 2007:279). As such, it seems that IL and human right norms have not been sufficiently internalized to rival exemptionalism. The presence of exemptionalism challenges realism in that it leads to irrational behavior. Breaches of IL have for example been associated with increased radicalization and support for international terrorism (Cockburn and Sengupta 2007), and torture as a method of interrogation is a notoriously unreliable. However, the realization of the counterproductive effects of U.S. policy against terrorist suspects might then be conceived as a contributing factor to why the Obama Administration has chosen to revert from such policies. However, whether or not this is due to international norms or as a rational calculating move is difficult to determine. Nevertheless, the presence of exemptionalism lends credence to the notion that national interests are not developed by strictly adhering to rational cost-benefit calculations and that a country's identity-based politics can be detrimental to its national security.

In general, HR abuses have also increased on a global level post-9/11 (Mertus and Saiiad 2008:8-13). Amongst other, Britain and other European countries have adopted policies, such as the possibility of detaining suspects indefinitely, that limit individual's legal protection (Michaelsen 2005:133). NGOs are also reporting increased abuse and pressures to conform to the U.S. agenda (Landman 2006:124). However, there is little to no proof for causality between anti-terrorism legislation and abuse of HR. Additionally, according to recent data, HR violations continue to be distinctly lower than pre-Cold War levels (Donnelly 2011: 17-8; Schmitz 2011:215; Landman 2006:125, 143). Multilaterally, counterterrorism resolutions have been passed in the U.N. General Assembly and Security Council (Dunér 2005:89). However, these agreements show emphasizes balancing counterterrorism measures with IL and HRs. Similarly, the HR regime continues to function more or less similarly to what it did before the 9/11 with new HR treaties and legislation being passed and NGOs continuing their operations (White 2013:185-6; Donnelly 2011:13-4).

Realists would emphasize that this illustrates a widespread practice of a disjuncture between state rhetoric and action. As such, realists would interpret states' post-9/11 behavior as a continuation of states prioritizing material gains over normative commitments. Constructivists, on the other hand, could be concerned that the HR regime has been significantly weakened. Amongst others, Dunne (2007:284) has argued that the trend towards increased HR violations can be seen as a norms 'cascade' where HR violations are increasingly considered acceptable (Winston 2011:35). Nevertheless, the fact that HR violations are lower than pre-Cold War levels, and that the U.N. and other states continue to emphasized observance to these rights, can be interpreted as a continuous recognition for the

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regime. This would also challenge the realist perspective in that even in the 'War on Terror' efforts continue to be directed towards fusing counterterrorism strategies with adherence to HR. As such, post-9/11 behavior can be considered a 'set back' in HR adherence, but not one that has led to a significant decline in the general respect of HR. Nevertheless, states' disregard for HRs does indicate that HR norms are still considered somewhat secondary to states' core security interests.

Turning to the HR regime, the continuous participation of states that have infringed on HRs can be seen as supporting the realist notion that participation in this regime is primarily an exercise in lip service. However, realists would not expect this behavior to undermine the regime as they consider it to be built on a foundation of hypocrisy (Neumayer 2005:926-7). In support of this argument, realists can point out how the U.S. has a history of supporting governments that undertake human right abuses and orchestrating covert CIA-led missions (Apodaca and Stohl 1999:195-6; Canon 1980:201). In this way, the practices since 9/11 could be considered 'business as usual'. However, a more commonly held view is that these double standards will undermine the legitimacy of the HR regime. A core reason for this is that the regime is considered a western construct and that non-western states could become weary that the regime is an instrument for western states to exert power internationally (Osiatynski 2009:303; Mertus and Saiiad 2008:11). Similarly, some argue that U.S. practices in the 'War on Terror' have contributing to 'Anti-Americanism' and that this sentiment could lead to an overall rejection of the underlying philosophy of the regime (Osiatynski 2009:303-4). Evidence for a tendency of skepticism towards the regime by non-Western states is evident with countries legitimizing HR violations by reference to cultural particularism. However, this trend arose long before the 'War on Terror' (Donnelly 2007:282). As such, the 'War on Terror' has not led to an increase in states' rejections of the regime nor its underlying philosophy. Secondly, the criticism voiced against U.S. behavior towards terrorist suspects, indicate that the country's actions are widely considered illegitimate. This lends credence to the notion that rather than undermining the HR regime, it is in fact the U.S.'s position as a normative global power that is being weakened (Carter 2012; Winston 2011:30-2, 38, 42).

In summary, states' disregard for IL can be interpreted as supporting the realist argument that states primarily prioritize security interests. However, from a constructivist perspective, this behavior can be rooted in how states come to identify their priorities rather than it being a 'fixed' aspect of their identity. As such, this essay has illustrated how realism and constructivism can predict the same outcome despite the theories' different ontological underpinning. In relation to the HR regime, post-9/11 policies have not had any substantially detrimental or undermining effects on the legitimacy nor the functioning of the various institutions of the regime. This could be due to an underlying 'hollowness' of the regime, in that its function is not associated with states' policies, but evidence suggests that states' adherence to HR norms and IL continues to be comparatively high if viewed in a long-term perspective. In addition, the international and scholarly criticism of U.S. practices at Guantanamo, as well as HR abuses in general, supports the notion that HRs are widely recognized. The essay thus concludes by arguing that the 'War on Terror' illustrates how realist theories explain how states' discounts adherence to norms, but that constructivism can offer a richer understanding for the underlying causes and effects of such behavior.

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