

**The Legitimacy of American Human Rights Conduct in  
the War on Terror**

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## **Preface to the CADAIR Electronic Version**

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## Abstract

This thesis examines the effect American human rights conduct during the war on terror had on three international human rights norms: torture, *habeas corpus*, and rendition for the purposes of torture. It does so by analysing a large-n sample of public legitimization strategies of both the United States and other members of international society during the administration of President George W. Bush. The thesis asks three questions: First, has the defection of the United States from these human rights norms led to a “norm cascade” that delegitimized the norms? Second, did the United States run an exemptionalist argument for each, and was this successful? Third, did the material preponderance of the United States help it to legitimate its preferences in international society? The thesis argues that the United States was unsuccessful at overtly legitimating its preferences in the *habeas corpus* case study. In the torture case study the United States had some early success using a strategy of norm justification, but most international legitimization strategies were subsequently abandoned. It was relatively successful in the rendition case study where it pursued very few legitimization strategies, relying instead on secrecy and denial. Furthermore, there is no overt evidence that the United States either attempted or was successful in an exemptionalist strategy, though some of the conduct by the United States and other members of international society might imply that a covert strategy was in effect. Lastly, though the material preponderance of the United States allowed it to absorb the costs associated with its illegitimate behaviour, there was no evidence that it was useful in transforming international human rights norms.

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## Chapter 1: Introduction

The decade following the end of the Cold War saw a remarkable increase in the importance of human rights within international society. This increase was significant given that the entrenchment of human rights norms within international society had been relatively less successful in the forty years after the Second World War. Under the leadership of the sole superpower, the United States, former communist states embraced rights they formerly scorned and most members of international society made human rights part of foreign policy considerations. After the 1993 World Conference on Human Rights, appeals to cultural relativism to avoid core human rights commitments became increasingly illegitimate.<sup>1</sup> States and international organisations participated in conferences where they increasingly intertwined the language of international humanitarian law, the law that is applicable during wartime, with international human rights law, the law that is applicable during all other times.<sup>2</sup> In dramatic contrast to previous understandings of Westphalian order, human rights policy began to challenge the norm of sovereignty within international society through the advancement of humanitarian intervention.<sup>3</sup> An International Criminal Court was created and, for the first time, a former head of state, Augusto Pinochet, was arrested and put on trial. In another first, a sitting head of state, Slobodan Milosevic, was charged with war crimes in 1999 and brought to trial three years later.<sup>4</sup> In sum, this expansion in the role that human

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<sup>1</sup> Tim Dunne, "'The Rules of the Game Are Changing': Fundamental Human Rights in Crisis after 9/11," *International Politics* 44, no. 2-3 (2007): 272.

<sup>2</sup> Dan E Stigall, Christopher L Blakesley, and Chris Jenks, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict," *University of Pennsylvania Journal of International Law* 30, no. 4 (2009): 1379.

<sup>3</sup> Michael Ignatieff, "Human Rights, Sovereignty and Intervention," in *Human Rights, Human Wrongs, The Oxford Amnesty Lectures 2001* (Oxford: Oxford University Press, 2002), 55-56; Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

<sup>4</sup> D. Hawkins, "Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms," *International Studies Quarterly* 48, no. 4 (2004): 779.

rights played within international society was historically unprecedented. Tim Dunne argued that this change in international society came about because,

While structures of authority remained largely anchored in the inter-state realm, the normative standards which states were expected to uphold had become universal. It was no longer defensible for elites to claim the protection of non-intervention while they engaged in domestic policies based on racial, religious or gender-based forms of exclusion. The internal regimes of sovereign states were now exposed “to the legitimate appraisal of their peers.”<sup>5</sup>

The election of the Bush administration in early 2001 led to a deceleration if not reversal in this trend. George W. Bush initially ran for election on a platform that the US should not intervene in the human rights problems of other states where US interest was not at stake, a policy that was only magnified after the terrorist attacks of 9/11 and the subsequent declaration of a “war on terror.”<sup>6</sup> The new policies arising from this war on terror, which focused primarily on the threat of potential future terrorist attacks, were reflected in international organisations. Both the Security Council and the General Assembly of the United Nations passed resolutions calling on states to increase their counterterrorism measures.<sup>7</sup> States around the world began to curb civil liberties such as freedom from arbitrary arrest, freedom of movement and torture.<sup>8</sup> They created programmes to combat terrorism either through changing their criminal justice systems, where certain human rights protections were rolled back in an effort to address the new threat, or through military action

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<sup>5</sup> Dunne, "The Rules," 273.

<sup>6</sup> Lisa Hajjar, "From Nuremberg to Guantánamo: International Law and American Power Politics," *Middle East Report*, no. 229 (2003): 12.

<sup>7</sup> Christopher Michaelsen, "Derogating from International Human Rights Obligations in the 'War against Terrorism'? – a British-Australian Perspective," *Terrorism and Political Violence* 17, no. 1-2 (2005): 131; Bertil Dunér, "Disregard for Security: The Human Rights Movement and 9/11," *Terrorism and Political Violence* 17, no. 1-2 (2005): 89.

<sup>8</sup> Todd Landman, "Holding the Line: Human Rights Defenders in the Age of Terror," *British Journal of Politics and International Relations* 8, no. 2 (2006): 124.

and retaliatory strikes against terrorist and those states who harboured them.<sup>9</sup> This trend was certainly worrying to Mlada Bukavansky, who in 2007 wrote that,

The perceived shift in US hegemony from a multilateral to a unilateral and more muscular strategy in foreign policy has yielded further contestation and resistance [from both the left and the right], either to the liberal democratic values the US and its allies purport to uphold, or to the perceived hypocrisy and corruption of those values by such policies as the invasion of Iraq and the 'war on terror'. Moreover, the manner in which a number of European governments have chosen to fight terrorism, by curtailing civil liberties and cracking down on immigration, further renders contestable liberal states' normative superiority.<sup>10</sup>

This concern was echoed by Tim Dunne, who contended in the same year that,

The post-9/11 period has prompted many to ask whether human rights values and policies were as deeply entrenched as supporters of the regime had hoped. What marks the contemporary challenge out as being of particular concern is that its centre of gravity is inside the liberal western zone. This time the assault on the foundations of the regime is not from communist states who regard individual liberty as a bourgeois sham, or southern African states who want to exclude peoples on grounds of race, or even Asian states who believe community must precede liberty: the post-9/11 challenge is being led by western governments who openly question whether fundamental human rights commitments need to be changed or abandoned in the name of national security.<sup>11</sup>

Though many liberal democracies enacted counterterrorism laws that curtailed the rights of individuals, the degree to which the United States did this was particularly severe.<sup>12</sup>

Prison camps were opened at Guantanamo Bay to contain detainees who would have neither access to the US judicial system nor status as prisoners of war under the Geneva

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<sup>9</sup> Ibid.: 143.

<sup>10</sup> Mlada Bukavansky, "Liberal States, International Order, and Legitimacy: An Appeal for Persuasion over Prescription," *International Politics* 44, no. 2/3 (2007): 176.

<sup>11</sup> Dunne, "The Rules," 270.

<sup>12</sup> For purposes of comparison see these analyses of UK counterterrorism measures: Michaelsen, "Derogating.," Dunér, "Disregard," 95-96; Andrew Blick, Iain Byrne, and Stuart Weir, "Democratic Audit: Good Governance, Human Rights, War against Terror," *Parliamentary Affairs* 58, no. 2 (2005); Sikander A Shah, "Human Rights and Non-Discrimination in the 'War on Terror' [Review]," *American Journal of International Law* 103, no. 3 (2009): 637-38.

Convention.<sup>13</sup> The Bush administration instead claimed that these detainees were in a different category, labelling them “unlawful” or “enemy combatants.” US security agents and the military began to use “stress and duress” techniques in interrogations in Afghanistan and at Guantanamo Bay. The Central Intelligence Agency (CIA) used a controversial interrogation technique known as “waterboarding” against “high-value” al-Qaida operatives during their interrogations. Finally, the United States rendered other suspected al-Qaida members to states such as Egypt, Jordan and Syria for questioning, all of whom had histories of using torture during interrogations.

Though there were many types of alleged human rights abuses perpetrated by the Bush administration, this thesis argues that the denial of *habeas corpus*, torture and rendition for the purposes of torture were the most serious. The right of *habeas corpus*, or the right to appeal the legality of one’s detention before a judge, precedes all other institutions of judicial oversight and its removal can aid states in committing further human rights abuses. The ability of any state, either the United States or another state acting on behalf of the United States, to inflict grievous physical and psychological harm through torture is one of the most serious human rights violations that can be committed. The right not to be tortured is arguably a “fundamental” right, or a right with highly legalised norms in international society.<sup>14</sup> The severity of torture is well recognised in international law, where it is not only addressed by major human rights treaties as a right to which no exceptions can be made, but it also has an entire international convention devoted solely to its prohibition.<sup>15</sup>

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<sup>13</sup> Dunér, "Disregard," 94.

<sup>14</sup> Dunne, "The Rules," 270.

<sup>15</sup> United Nations General Assembly. "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." 1984

This thesis will examine the effects of US human rights conduct in the war on terror with respect to these three human rights violations, answering the central research question: Was the United States successful in legitimating its conduct for torture, rendition for the purposes of torture and *habeas corpus*? Through examining contestations over the legitimacy of these norms among the United States and other actors in international society, the latter being broadly defined as other states in the international system and their institutions, such as the United Nations (UN) and the Organization of American States (OAS), this thesis attempts to determine the effects that the US defection from the human rights norms had on the international human rights system. This analysis is necessary for three reasons. First, the defection of the United States from what is considered appropriate conduct within international society could lead to a change in international human rights norms, particularly if it openly advocated for such a change. Though many liberal democracies curtailed some rights in their counterterrorism efforts, the degree to which the United States enacted policies that ran counter to established human rights norms was unprecedented for liberal democracies at this time. This change is particularly important because, as Tony Evans argued in 1996, the United States played an important role in determining the scope of international human rights from World War II to the present.<sup>16</sup>

Some scholars have already voiced their concern that this might be the case with respect to torture. In 2007 Tim Dunne argued that American conduct could lead to a ‘norm cascade’ in which torture in the name of anti-terrorism became acceptable.<sup>17</sup> Other authors argued that the conduct of the United States could degrade the international human rights system in general. For instance, Joan Fitzpatrick argued in 2003 that:

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<sup>16</sup> Tony Evans, *US Hegemony and the Project of Universal Human Rights* (Houndmills, Basingstoke: Palgrave MacMillan, 1996), 8.

<sup>17</sup> Dunne, "The Rules," 284.

The human rights regime is menaced by potentially dramatic alterations in the rules on the use of force in international relations and in norms of humanitarian law. Human rights institutions have largely conducted business as usual in the aftermath of September 11, albeit with a sense of dread, defensiveness, and political polarization. For many years sceptical, stand-offish, and self-righteous, the United States now exercises its hegemony more corrosively than ever on the international human rights regime.<sup>18</sup>

Even as recently as 2009, Sigrun Skogly argued that there had been a reduction in the willingness of states to remain bound by international human rights law with respect to their counterterrorism strategies, representing a diminution in their commitment to protect human rights both domestically and, more importantly for the purposes of this thesis, internationally.<sup>19</sup> Similarly, Harrelson-Stephens and Callaway argued that since 9/11 the 'US commitment to international norms has been undermined to the extent that it now openly violates certain international as well as domestic human rights.'<sup>20</sup> Nevertheless, unlike the scholars above they contended that the effect of US conduct was not negative on the whole, contending that,

The September 11th attacks can be viewed as an exogenous shock that has had a serious but not necessarily terminal effect on international human rights. While this affected the domestic resolve of the United States in support of international human rights, it appears that the institutionalization of human rights norms in Europe, as well as widespread acceptance of human rights, thus far has been sufficient to uphold the regime absent the hegemon. Certainly, states that were repressing their citizens prior to 9/11 have used the war on terror and subsequent human rights violations by the United States as justification for continued repression. Nonetheless, other major powers remain strongly committed to human rights, and more importantly, continue to expand the regime today.<sup>21</sup>

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<sup>18</sup> Joan Fitzpatrick, "Speaking Law to Power: The War against Terrorism and Human Rights," *European Journal of International Law* 14, no. 2 (2003): 242.

<sup>19</sup> Sigrun I Skogly, "Global Responsibility for Human Rights," *Oxford Journal of Legal Studies* 29, no. 4 (2009): 830.

<sup>20</sup> Julie Harrelson-Stephens and Rhonda L Callaway, "'The Empire Strikes Back': The US Assault on the International Human Rights Regime," *Human Rights Review* 10, no. 3 (2009): 432.

<sup>21</sup> *Ibid.*: 450.



Given this disagreement among scholars as to the effects of US human rights conduct in the war on terror on human rights norms within international society, this thesis aims to provide an empirical analysis of whether the United States was successful in changing human rights norms over the course of the war on terror.

The second reason to study US human rights conduct in the war on terror is to determine whether the United States was interested in changing international human rights norms, or whether the United States was interested in changing the rules that it believes should apply to itself. As Michael Byers argued at the beginning of the war on terror,

The Bush administration also seems to be engaged in a parallel effort to remake – in favour of the US – the rules according to which international law is made, interpreted and changed ... As a result, international law as applied by the US increasingly bears little relationship to international law as understood elsewhere ... It is possible, however, that instead of seeking change in the existing rules, the US is in fact attempting to create new, exceptional rules for itself alone.<sup>22</sup>

David Rapkin referred to this strategy as ‘exemptionalism,’ whereby the United States recognises international values, but at the same time argues that these values need not be imposed on them. He claimed in 2005 that ‘the US has stretched the notion of American exceptionalism to a claim of American exemptionalism – owing to its unique unipolar position and associate special responsibilities, it is asserted, the US needs and deserves to be exempt from the binding constraints represented by international law.’<sup>23</sup> Dunne echoed this idea two years later, arguing that the United States might attempt to create a ‘two tiered standard of legitimacy,’ one for itself and one for all other states.<sup>24</sup> Several scholars have claimed that this type of claim has historical precedent. Michael Ignatieff maintained that,

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<sup>22</sup> Michael Byers, "Terror and the Future of International Law," in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Timothy Dunne (Basingstoke, New York: Palgrave, 2002), 124-25.

<sup>23</sup> David P Rapkin, "Empire and Its Discontents," *New Political Economy* 10, no. 3 (2005): 400.

<sup>24</sup> Dunne, "The Rules," 279.

‘the greatest champion of human rights overseas, the United States, is simultaneously an uncompromising defender of a highly unilateralist definition of its own sovereignty. American leaders of all political stripes regard foreign criticism of its domestic human rights norms ... as either irrelevant or impudent.’<sup>25</sup> Given this, the thesis will examine whether the United States both attempted an exemptionalist strategy with respect to *habeas corpus*, torture and rendition, and whether this attempt was successful. If the United States were successful, it could have different effects on the human right system than would a strategy where the United States simply defects from the norms outright.

Third, most international action taken against serious human rights abuses has been against states that were relatively weak materially in comparison to the states that supported the human rights system. It is important to understand whether this process changes when this is not the case, particularly where the international norms of human rights are being challenged by the defection of the materially preponderant state in the system.<sup>26</sup> Some scholars such as Richard Falk argued that there is a ‘hegemonic logic’ in the determination of international human rights. He argues that the purpose of such norms, like any other tool of foreign policy, is solely to advance the interests of the hegemon. Human rights regimes should therefore only include the rights enjoyed by the hegemon and its allies – any rights claims that would demand a change in domestic or foreign policy of the hegemon would not be accepted as legitimate.<sup>27</sup> If this is the case, then the introduction of *habeas corpus* restrictions and the use of techniques that arguably constitute torture might have effects that radiate out to international society. Overall, scholars dispute the effect of materiality on

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<sup>25</sup> Ignatieff, "Human Rights," 59.

<sup>26</sup> This thesis avoids the term “hegemon” unless it is directly specified in other texts, relying instead on the idea of “material preponderance.”

<sup>27</sup> Richard Falk, "Theoretical Foundations of Human Rights," in *The Politics of Human Rights*, ed. Paula R. Newburg (New York: New York University Press, 1980). Cited in Evans, *US Hegemony*, 39.

norms, with some arguing that materiality explains all norms and others arguing that materiality and norms are somewhat independent but related in particular ways.<sup>28</sup> What seems to be more certain is that the United States, even independently of its economic and cultural influence, has a material advantage that is unparalleled. As Kenneth Waltz noted, ‘Never since Rome has one country so nearly dominated its world.’<sup>29</sup> Colin Gray agreed, going as far as stating that ‘when the United States wishes to act it is literally unstoppable by any combination of politics and institutions.’<sup>30</sup> If the United States was able to successfully alter the well-entrenched international human rights norms of *habeas corpus* and the prohibition of torture, then this would lend some weight to the idea that materiality helped to alter norms.

This thesis will examine each of these issues in the three case studies through analysing the pursuit of legitimation strategies by the United States and other members of international society. For instance, if the legitimacy claims of the United States concerning their human rights conduct were accepted by most members of international society, then this would point much more strongly to the possibility of a norm cascade than if the majority of actors in the international system disputed their legitimation claims. Similarly, to understand whether the United States was successful in promoting an exemptionalist position would require looking for, as Byers notes, “The development of exceptional rules [that] would

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<sup>28</sup> For those who see materiality as structuring all norms, see Kenneth N Waltz, "The Continuity of International Politics," in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Timothy Dunne (Basingstoke, New York: Palgrave, 2002). For those who believe that they are related, see Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005); Christian Reus-Smit, "International Crises of Legitimacy," *International Politics* 44, no. 2/3 (2007); Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture*, Princeton Studies in International History and Politics (Oxford: Princeton University Press, 2002); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

<sup>29</sup> Waltz, "The Continuity," 350. This comparison to Rome is not unique, see Byers, "Terror," 118; Colin Gray, "World Politics as Usual after September 11: Realism Vindicated," in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Timothy Dunne (Basingstoke, NY: Palgrave, 2002), 227.

<sup>30</sup> Gray, "World Politics," 233.

depend on the responses of other countries to the exceptional claims.”<sup>31</sup> Finally, studying the way in which the United States attempted to legitimate its actions and probing the reactions of other members of the international community might provide some idea of the effects of materiality on this process, particularly if the United States fails to legitimate its position despite its material advantage. The normative position of this thesis is to provide an “emancipatory critique” concerning the effects of the United States on the human rights norms of international society, whereby the analysis allows readers to free themselves of potential false perceptions of the social structures at work.<sup>32</sup> This analysis is important because, though outside of the scope of this thesis, if one were to construct an emancipatory strategy based on a normative position that these three human rights categories should be widely enforced, the chance of success for this strategy will be increased if the relative nature and strength of the structures at work are known to the best of one's ability.

It must be noted at this juncture that this project is excluding from its analysis NGOs and other members, in English School terms, of “world society.”<sup>33</sup> Though it is true that such organisations provided a constant normative critique that supported the existing human rights norms throughout the Bush administration, the focus of this project is on the legitimisation debates of other states and organisations created by states. This is delineated for a number of reasons. The claims by members of international society are likely to be more variable than those of human rights NGOs, whose sole task is to defend the human rights system.

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<sup>31</sup> Byers, "Terror," 125.

<sup>32</sup> John Michael Roberts, "Critical Realism and the Dialectic," *British Journal of Sociology* 52, no. 4 (2001): 668.

<sup>33</sup> World society was originally defined by Bull as ‘a sense of common interest and common values, on the basis of which common rules and institutions may be built.’ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (New York: Columbia University Press, 1995), 269. Buzan later clarified that ‘While international society is focused on states, world society implies something that reaches well beyond the state towards more cosmopolitan images of how humankind is, or should be, organised.’ See Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004), 1.

International organisations and particularly states, on the other hand, have multiple and often contradictory goals that they must achieve both to satisfy their internal needs and those of international society. The likelihood of the United States being successful in legitimating its conduct with other members of international society is non-trivial, whereas with NGOs the likelihood is close to nonexistent. Though there is a great deal of literature surrounding the role of NGOs in the growth of international human rights, both international organisations and states are equal if not more important actors. Previous work by Terrence Chapman suggests that the activity of international organisations has the ability to influence public opinion in states, which can constrain or influence leaders.<sup>34</sup> Rosemary Foot similarly argued that the UN human rights institutions have been ‘crucial to the elaboration and legitimation of human rights norms, and in providing a platform upon which governmental and NGO criticisms of abuse can be aired.’<sup>35</sup> In addition, they are also ‘significant actors in their own right when it comes to diffusing norms. The annual gatherings of experts and of member governments for human rights meetings raise the profile of the issue area and the level of active diplomacy engaged in by those who suspect their records might come under scrutiny, whether or not their practices actually lead to the formulation of draft condemnatory resolutions.’<sup>36</sup> Concerning states, Rosemary Foot argued that they have,

played a vital role in carrying the [human rights] message forward. It is the body that signs the convention and then produces the requisite domestic legislation. Operating externally, the state may create new human rights norms, and then utilize the diplomatic tools at its disposal to promote adherence to international standards on the part of other states in the system.<sup>37</sup>

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<sup>34</sup> Terrence L Chapman, "Audience Beliefs and International Organization Legitimacy," *International Organization* 63, no. 4 (2009): 760.

<sup>35</sup> Rosemary Foot, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000), 1.

<sup>36</sup> *Ibid.*, 9.

<sup>37</sup> *Ibid.*, 1-2.

There is still a large imbalance between NGOs and members of international society in their ability to directly affect both domestic and international human rights law. NGOs almost solely work through naming and shaming, affecting the moral discourse of the system, while states and international organisations can affect both the moral and legal character of the system. As such, I argue that members of international society are the more relevant actors given that the project seeks to address the effect that the United States had on international human rights norms, whose legal character can be influenced or even directly changed by their actions of members of international society.

The chapter structure of the thesis will proceed as follows. Chapter One reviews the theory related to the thesis, explaining how norms and legitimacy are theorised within international society. In particular, it evaluates the expectations surrounding norm change under the conditions of anarchy present in the international system, focussing on the relationship between norms and material power. It concludes by outlining how these particular human rights norms were structured within international society prior to the terrorist attacks of 9/11. Chapters Two, Three and Four are the empirical case studies of torture, *habeas corpus* and rendition, respectively. Each of these chapters begins by reviewing the history of conduct and internal discourses for each human rights area during the Bush administration. With this background, each proceeds to analyse the legitimisation strategies of the United States and other actors in international society, looking for patterns that can tell us something about the relative strength of the norms involved. Finally, the conclusion will review the case studies and attempts to draw some conclusions as to the relationship between the observations made and the theory outlined in the Chapter One.

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