

**The Pre-negotiation of UN Human Rights Treaties:
the case of the Convention on the Rights of Persons with Disabilities**

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Since 1965, nine UN human rights treaties have been adopted. Surprisingly, however, we know little about the conditions under which states arrived at negotiation because there has been no serious attempt to empirically identify the unique attributes of pre-negotiation in this context. I shed light on this process by examining the pre-negotiation of the UN Convention on the Rights of Persons (CRPD), drawing on diverse qualitative data sources, including interviews with state and non-state participants of the pre-negotiations. Informed by a constructivist perspective, I contribute to the pre-negotiation literature by identifying esteem-seeking behavior as a key motivation for some states to negotiate. I further show how a transnational advocacy network influenced the pre-negotiation process by leveraging states' esteem-seeking ambitions and appealing to their reputation as a way of pushing parties to negotiate. Additional tactics that non-state actors employ at the international level to expedite negotiations are also identified.

Keywords: pre-negotiation, human rights, United Nations, disability, reputation, non-state actors, transnational advocacy networks.

Pre-negotiation is the process of getting to the negotiation table – or negotiating about negotiation – and is viewed as analytically distinct from the process of negotiation (Stein 1988: 232). Technically, it is when one or more parties consider negotiation as a policy option and communicate this intention to other parties, and ends with either negotiation or abandoning the option to negotiate (Zartman 1989). The pre-negotiation process is considered crucial because its success determines whether negotiations will occur. And if it does succeed, it has important consequences for negotiation at the table and can even influence the outcome of negotiation (Stein 1989a; Stein 1989b).

Despite the considerable influence of pre-negotiation over the negotiation process (Guelke 2000), this subject has not received the attention it deserves (Schiff 2008, Waylen 2014). Specifically, no serious attempt has been made to empirically identify the unique attributes of the pre-negotiation of UN human rights treaties and to understand the conditions under which states arrived at the table and why they did so. Since 1965, nine UN human rights treaties have been adopted (UN Human Rights Office of the High Commissioner n.d.). But we know very little about how states arrive at the negotiation process in the first place. For example, detailed studies on the process of establishing the UN Convention on the Rights of Child and the UN Convention of the Rights of Persons with Disabilities only *begin* at the drafting table (Price 1990, Kanter 2007; French & Kayess 2008, Detrick 1999, LeBlanc 1995). These scholars treat pre-negotiation process as a kind of ‘scene-setting’ – providing an important account of the historical, legal and ideational antecedents of the treaty – but not as a worthy analytical project unto itself.

Given that rights are socially constructed concepts with their meanings continually negotiated (Parekh 2007, Vanhala 2015, c.f. Donnelly 2013), it is highly likely that states will seriously consider establishing more human rights treaties in the future. It is for this reason that a human rights perspective on pre-negotiation can give both state and civil society actors

interested in establishing additional human rights treaty a better understanding of what is involved in the stage prior to – but inseparable from – negotiation.

This article asks: what are the dynamics and factors that lead parties to negotiate UN human rights treaties? In answering this question, it draws on the successful pre-negotiation of the UN Convention of the Rights of Persons with Disabilities (CRPD). The pre-negotiation of the CRPD took place between July 2002 and June 2003, and the treaty was formally adopted by the UN General Assembly in December 2006. The elaboration of the CRPD is recognized as the huge achievement in empowering the persons with disabilities to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved recognition in a UN treaty (Kayess & French 2008).

The CRPD is an excellent case study to explore this question because the pre-negotiations took place recently enough for participants, who were interviewed for this article, to still remember the finer details of the process. While other UN human rights treaties have been adopted around the same time or since the CRPD, they received much low numbers of ratifications, especially the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Treaty Collection n.d.a; UN Treaty Collection n.d.b; UN Treaty Collection n.d.c). Given that pre-negotiations affects the outcome of negotiation, this suggests sufficient political support was not achieved in the pre-negotiation phase of the other relevant treaties (M. Estrémé, pers. comm., 6 October 2016), providing a further justification for selecting the CRPD.

The pre-negotiation literature, which largely draws on liberal international theory and is based on non-human rights case studies, such as trade, security and economics, provides helpful analytic tools to unpack how and why parties decide to negotiate human rights treaties. This literature privileges the role of the state in the pre-negotiation process, identifies the strategies they use, the roles they play and other dynamics to explain commencement of

negotiation. It mostly offers instrumental explanations based on material interests for why states consider negotiation (Zartman 1989, Stein 1989b, Touval 1989, Zartman & Berman 1982). The literature also claims that civil society groups can influence the preferences of their own state through domestic political structures (Stein 1989b, Putnam 1988).

By contrast, scholars studying the emergence of human rights treaties often deploy a constructivist account of international law, emphasizing the role of social relations and intersubjective ideas in explaining how and why states support human rights norms and laws (Finnemore & Sikkink 1998, Goodman & Jinks 2004). Specifically, they identify esteem-seeking behavior (or the desire to be seen to be doing the right thing) in the eyes of their peers as a key driver motivating states, particularly states insecure about their reputation, to support new human rights norms. Constructivists also theorize the role of non-state actors, including international non-governmental organizations (NGOs) and transnational activist networks, in their efforts to shape international politics and laws (Keck & Sikkink 1998). This article applies both perspectives to the case of the CRPD with the aim of deepening our understanding of pre-negotiation in a human rights context.

The article draws on ten in-depth interviews with participants in the CRPD pre-negotiations. They include senior state and civil society actors, three of whom were part of their respective government's delegation. Propositions from the pre-negotiation literature informed the questions respondents were asked. I triangulated the interviews with primary documentary sources, such as the daily summaries from the pre-negotiations at the UN in New York, as well as with secondary sources. While the CRPD is the focus of this article, I draw on examples from the still-ongoing pre-negotiation of the proposed Convention on the Rights of Older Persons (the elder rights convention). This not a comparative piece since the pre-negotiation process of the elder rights convention is not yet complete; however, examples from

this second case, which are drawn from over 30 interviews with state and civil society actors involved in the process, serve to strengthen the findings of the CRPD study.

This article starts by reviewing the literature on pre-negotiations and identifying its shortcomings vis-à-vis its application to a human rights case study. As a means of addressing these gaps, it discusses a constructivist perspective on international human rights. Here, I discuss the concept of reputation at the international level, the role that non-state actors play in the emergence of new human rights laws and norms. The article then introduces the background of the case study and applies the propositions previously explored. It concludes by summarizing the contribution this case makes to the pre-negotiation literature.

Getting to the table: the pre-negotiation perspective

The high-water mark for the pre-negotiation literature was the 1980s and 1990s (e.g. Stein 1989b, Zartman 1990, Saunders 1999). Based on these and other seminal pre-negotiation theories, Schiff (2008; 2012) identifies the central theoretical assumptions of the process school-approach to conflict resolution as they apply to a study of pre-negotiation. The first is the claim that negotiation is a problem-solving process comprised of different stages and turning points. The second is that the various stages of the negotiation process, including pre-negotiation, are related to one another. Finally, the goal of pre-negotiation is for parties to change their perceptions about the potential of arriving at a solution that all parties are prepared to accept through negotiations. Further to this last claim, states use pre-negotiation to learn about the issues relating to negotiation through formal and informal discussions, and to clarify their own core interests and the core interests of others (Stein 1989b:498, Touval 1989:162; Spector 1993).

Depending on the type of pre-negotiation studied, scholars offer different contributions to what we know about the dynamics and factors that lead parties to negotiate.¹ Studies that are based mostly on bilateral or trilateral cases are arguably the most well-known accounts of pre-negotiation (Stein 1989b, Tomlin 1989, Schiff 2008, Schiff 2012). They hold that a key feature of pre-negotiation is for states to try to *reduce uncertainty and complexity* surrounding the risks and benefits of negotiation (Stein 1989b:498, Zartman 1989:244-245, Spector 1993, Schiff 2008:391). States do this in a number of ways, including through what Stein calls *structuring activities* (Stein 1989b:482, Risse 2000:20). One such activity is to identify the boundaries and principles for negotiation (Saunders 1985:7, Stein 1989b). As expressed by Saunders, “Leaders on each side must be able to see the shape of an agreeable settlement that might come out of negotiation” (Saunders 1985:6). Narrowing the agenda also propels states towards negotiation because it reduces uncertainty and risk (Stein 1989b). Second, the literature shows that *defining and (re)framing* the problem increases the likelihood that states will negotiate (Saunders 1985:4, Stein 1989b:480, Spector 1993). As McDermott points out, delineating the issues in pre-negotiation and defining the problems to be addressed “can be highly influenced by the framing, wording, order, or method of presentation of the relevant options put forward for discussion” (McDermott 2009:88).

There are two central limitations of this account in its application to the pre-negotiation of UN human rights treaties. Firstly, the issues on which states seek certainty relate to the redistribution of tangible goods. This lends itself to a narrow rationalist explanation of decision making that focuses on calculations that seek to maximize material well-being. For example, Zartman and Berman argue that states try to reduce uncertainty surrounding the “possibility of exchanges, side-payments, compensation” and other benefits during negotiation (Zartman &

¹ While some of the claims within these perspectives have been classified by scholars as ‘functions’ of pre-negotiation (Zartman 1989), several of them are also recognized as factors that contribute to getting states to the negotiation table (Stein 1989b; Schiff 2012), which is how they are understood here.

Berman 1982:242). Negotiating parties also assure each other that they will bargain in ‘good faith’ (Stein 1989b:497). In Zartman’s (1989:242) words, “Prenegotiation is the time to convince the other party that concessions will be required, not banked and run away with” and that it is important for parties “to give a little to get something”. In other words, there is a certain amount of haggling and horse-trading going on behind the scenes.

Yet is very unlikely that states considering the establishment of a human rights treaty would require mutual, tangible concessions because they do not offer states any obvious reciprocal benefits in the same way as an agreement to end a conflict or to regulate trade between countries (Hathaway 2007:589). This is because international human rights treaties mainly impact states’ conduct toward their own citizens and specify the rights of the persons that the state must respect. For example, there were no benefits, such as loans or aid, conditioned on acceptance of the Convention on the Rights of Persons with Disabilities (Geisinger & Stein 2008:1135). All the state that commits to a human rights treaty explicitly receives in return is a promise from other members to treat their own citizens with similar respect (Koh 2005:979, Hathaway 2007:589). From this vantage point, we would expect states to be undertaking calculations that concern other benefits relating to non-material factors, such as identity and reputation.

Secondly, accounts on bilateral or trilateral pre-negotiations emphasize the role of domestic politics and coalition-building. Specifically, Stein uses Putnam’s “two-level game” theory (1998) to describe the conditions that bring parties to the negotiating table. In this model, state leaders (or chief negotiators) both respond to and manipulate negotiating parties at the international level as they do with regards to different state and non-state actors at the domestic level (Putnam 1988, Zartman 1989:246). The process of pre-negotiation not only permits leaders to build political support at home but also to build transnational coalitions (Putnam 1988:451, Stein 1989b:496). The two-level game model captures much of the dynamics of

human rights pre-negotiations; however, it omits crucial actors, such as international NGOs and transnational advocacy networks, which have been shown to influence international politics (Keck & Sikkink 1998). It also fails to acknowledge that the pre-negotiation process can take place at the regional level in addition to domestic and international levels of governance.

The second account of pre-negotiation applies solely to international multilateral pre-negotiations.² While scholars theorizing about multilateral pre-negotiations support some of the same propositions that apply to bilateral and trilateral pre-negotiations, for example the importance reducing uncertainty (Touval 1989:162, Albin & Young 2012), this perspective introduces other features which help to further elucidate the pre-negotiation of UN human rights treaties. It introduces the notion of *coalitions* which precede negotiations or are formed during the pre-negotiation phase (Touval 1989:161, Spector 1993). Coalitions, such as the European Union, improve states' bargaining power and allow them to more effectively influence the interests of other actors compared to a state acting alone (Touval 1989, Sjöstedt, Spector et al. 1994:8). Intra-coalitional bargaining also takes place among coalition members to iron out common positions and strategies, and respond to different demands and proposals of coalition members (Touval 1989, Sjöstedt, Spector et al. 1994:8). In addition, given the large number of participants in international pre-negotiations, the account introduces the notion of *role differentiation* – states playing different roles that serve a range of functions. States might assume a leadership role by advocating a position and encouraging others to support it too. Or a state might play the role of mediator, which is sometimes the chair, with the aim of searching for a middle ground and trying to find a compromise between conflicting points of view.

² Suskind and Ali (2014) do note that NGOs play a role in the early, agenda-setting stage of pre-negotiations of international environmental agreements but that their impact is limited.

To summarize, the literature review above identifies the following features of the pre-negotiation of human rights treaties: (1) Reducing uncertainty around the risks and benefits of negotiation is a key feature and states engage in structuring activities as a way of doing this; (2) the way issues are framed affects pre-negotiation and states' support for negotiation; (3) states engage with their domestic constituents and build transnational coalitions; (4) states play the roles of leaders and mediators at the international level to expedite negotiations; and (5) coalitions serve to improve states' bargaining power and allow them to more effectively shape the interests of others and states within them. Yet the literature also tends to offer instrumental explanations based on material interests as the reasons behind states considering negotiation and the literature does not recognize the influence of non-state actors beyond their domestic political structures. Such claims are likely to pose limitations for a study on the actors and processes surrounding the decisions of states to negotiate UN human rights treaties. The article now seeks to address these limitations.

Reputation and non-state activism

Given the lack of direct material incentives and imperatives, a constructivist perspective is helpful in understanding the motivations of some states in supporting human rights negotiation (March & Olsen 1998, Koh 2005).³ Constructivist accounts of state behavior posit that they are not solely motivated by maximizing their material wealth and security but also by “a sense of identity...or role” (March & Olsen 1998:949). Consequently, much scholarly attention has been devoted to understanding the extent to, and the ways in which norms and other collectively held or intersubjective understandings shape state behaviour (Ruggie 1998, Wendt 1999).

³ As Sjöstedt and colleagues point in the case of international environmental agreements, this does not mean that material incentives and imperatives do not come into play at all in the pre-negotiation of UN human rights treaties, but it does mean that their effect is uncertain and long-term (Sjöstedt, Spector et al. 1994).

While the distinction between instrumental (material) and affective (norm-based) rewards is opaque (Zehfuss 2001, Sell & Prakash 2004) (i.e. even so-called instrumental motivations are informed by normative imperatives and vice versus), a consideration of non-material imperatives helps to paint a more nuanced picture of the pre-negotiation process and why states might find their way to the table. Moreover, this perspective provides the philosophical backdrop for understanding the effect that civil society participants have over states at the international level, which will be discussed further below.

The constructivist literature on compliance with international human rights norms maintains that most states wish to be part of a global community of other states based on common rules, interests and values (Finnemore & Sikkink 1998, Risse & Sikkink 1999, Goodman & Jinks 2004). While the literature presents diverse mechanisms for how and why states comply with human rights norms, such as socialisation, persuasion and acculturation, they all emphasise the role that reputation plays in states' motivations. Importantly, Geisinger and Stein show how reputation is not only important in explaining norm compliance but is also a key factor in norm emergence (Geisinger & Stein 2007, Geisinger & Stein 2008). While they do not deal explicitly with the pre-negotiation phase, their preoccupation with why states support proposed (as opposed to existing) human rights treaties broadly concerns the same stage in the "lifecycle" of international human rights law.

Geisinger and Stein argue that states' preferences for esteem rather than direct material or economic benefits propels them to support new human rights norms. As scholars whose approach echoes many key assumptions of constructivists (e.g. Finnemore & Sikkink 1998, Sell & Prakash 2004, Stroup & Wong 2016), they argue that the "desire to be members of international society as resulting from the benefits states receive through cooperation...[explain] state's rational assessment of garnering global esteem" (Geisinger & Stein 2008:1139). In other words, reputation and esteem allow states to become members of

the international community which, in turn, gives them access to a range of benefits derived from cooperation.

Geisinger and Stein point out that the pull of the international society affects state behavior only to the extent that a state is concerned with how it is viewed by others to which it is attracted (Geisinger & Stein 2008). Scholars generally agree that states seek greater legitimacy in the eyes of their peers particularly when they are insecure about their reputation and therefore might be more likely to support new human rights norms. Such states often comprise less developed or even authoritarian states (Finnemore & Sikkink 1998: 906, Keck & Sikkink 1998:29, Risse & Sikkink 1999). As the case of the CRPD demonstrates, these types of states sought esteem through both championing the treaty and supporting negotiation, respectively. They are also more likely to be vulnerable to pressure from transnational activists and other non-state actors seeking to coerce and persuade states to support human rights commitments (Burgerman 1998, Price 2003, Hendrix & Wong 2013).

Non-state actors in general and transnational advocacy networks (TANs)⁴, mainly comprising NGOs, including national disability organizations, but also academics, UN bodies, National Human Rights Institutions (NHRIs) could be present in the AHC sessions (Quinn 2005:533). According to Kathy Guernsey (pers. comm., 27 September 2017), at “the first [Ad-hoc committee] session, there were really a very small handful of us actually at UN headquarters in New York.” But by the following session, Kayess (pers. comm., 8 August 2016) said that “you had over 100 people ... They weren’t just US-based. There was a good European contingent. And there was the voluntary fund”. She is referring to the Fund the

⁴ I rely on Keck and Sikkink’s (1998) classic definition as a loose coalition or network of advocates motivated by principled ideas or values. It can include international and domestic NGOs, local social movements, the media, academics, parts of the executive and/or parliamentary branch of governments and parts of regional and international intergovernmental organizations. NGOs in particular play a central role in advocacy networks, usually pressuring more powerful actors to take positions on certain issues but also mobilizing their own members and striving to influence public opinion. Some TANs are formalized but many are based on informal contacts and are characterized by the exchange of information, personnel and services.

UNGA decided to establish in 2002 to support the participation of NGOs and experts from developing countries, in particular from the least developed countries to attend the AHC meetings.

The TAN perspective reinforces the assumptions embedded in the pre-negotiation literature by recognizing that “governments represent (imperfectly) a subset of domestic society, and that individuals influence governments through political institutions and social practices linking state and society” (Keck & Sikkink 1998:214). But it goes further in arguing that individuals and groups may also influence “states elsewhere” (Keck & Sikkink 1998). In other words, networks, with members in various parts of the world representing both national and international organizations, come together to influence states by participating in domestic and international politics simultaneously.

Scholars have shown that networks influence states’ interests in the human rights realm, partly by drawing on states’ desire for esteem (Keck & Sikkink 1998, Risse & Sikkink 1999, Price 2003). TANs do this through “naming and shaming” (Betsill & Corell 2008, Hafner-Burton 2008) or publicly condemning the position of states on a given issue or area related to human rights norms, and framing issues to maximise their uptake (Busby 2010, Hadden 2015). They also exert influence over states at the international level through the provision of information to which decision-makers might not otherwise have access (Khagram, Riker et al. 2002:9, Zippel 2004), which is central to the early stages of norm development (Price 1998:617, Sell & Prakash 2004:145). Activists exert additional impact through the way they present information: they use symbols and personal stories or testimony to dramatize an issue and capture the attention of a wide audience (Keck & Sikkink 1998). Finally, activists amplify their impact indirectly through the way they organise themselves. Having many network members from diverse geographical backgrounds that are able to communicate and collaborate

well increases their ability to “speak with one voice” and gives greater authority and legitimacy to their message (Burgerman 1998, Keck & Sikkink 1998, Joachim 2003, Shawki 2011).

Having canvassed the main propositions of the pre-negotiation and constructivist literatures, I now apply these claims to the case of the CRPD.

Explaining the pre-negotiation process of the CRPD

After providing a brief background of the case, the first part of this section explained how and why states got to the table based on the relevant propositions in the pre-negotiation literature. The article then zooms in on additional features that this case highlights informed by the constructivist literature: the role of reputation and non-state actors and their strategies of influence.

The CRPD pre-negotiations commenced in 2001 when the Government of Mexico spearheaded a campaign to secure a mandate from the UN General Assembly (UNGA) to develop a human rights convention in relation to persons with disabilities. The resolution was co-sponsored by 19 other countries from the global South. When the issue was raised for debate at the 56th Session of the UNGA the same year, a resolution mandating states to consider proposals to develop a human rights instrument in relation to persons with disabilities was adopted by consensus (Kayess & French 2008:17). The resolution also mandated that an Ad Hoc Committee (AHC) – a committee that all states are invited to attend – be established as a forum in which proposals could be considered (UN General Assembly para. 1). Therefore, legally, the AHC had the mandate to commence negotiating; however, politically, state supported needed to be strengthened in order for this to happen.

The first AHC convened on 29 July 2002 until 9 August 2002. While the treaty had champions (including Denmark, Germany and states from Latin America), many states were

not convinced about the desirability of establishing a convention. Nevertheless, the AHC decided to continue the process of considering proposals for the elaboration of a treaty (Quinn 2005:533). The second AHC spanned from 16-27 June 2003 and it was here that states agreed that an expert Working Group should begin the task of drafting a text for the consideration of the AHC (Quinn 2005:534). This marked the end of the pre-negotiation process.

Reducing uncertainty and structuring activities

The pre-negotiation process of the CRPD reveals states engaging in structuring activities to reduce uncertainty. States were interested in finding out more information on the nature of rights claims relating to persons with disabilities, and the corresponding legal and practical implications for duty-bearers. As Luis Gallegos who chaired the early AHC meetings puts it, some states “were truly concerned that they didn’t have the capabilities to deal with this problem. They didn’t know about disabilities, they didn’t have the financial resources, the know-how and technology” (L. Gallegos, pers. comm., 21 September 2016). For example, Uganda stressed that states should agree on the major elements of the convention before meaningful steps towards negotiation were taken (Disability Information Resources 2002), while Pakistan raised concerns that the broad parameters of the convention needed to be agreed upon (Disability Information Resources 2002).

As a means of responding to these uncertainties, states that were in favor of establishing a CRPD employed the types of structuring activities identified in the literature. Mexico, for example, produced a draft treaty before the first AHC convened (Disability Information Resources 2002). According to several respondents, the draft was very influential in contributing to the momentum of moving through the pre-negotiation stages (R. Kayess, pers. comm., 8 August 2016; S. Langvad, pers. comm., 4 October 2017; K. Guernsey, pers. comm.,

27 September 2017). Mexico also prepared a body of principles to guide the way in which the treaty should be drafted (Disability Information Resources 2002), which was influential at the first session of the AHC (Quinn 2005: 533). In addition, during several of the early pre-negotiation meetings, states identified provisions to be included in a proposed convention, such as access to education, training and employment and an agreement that would allow the full participation of people with disabilities in decision-making processes. (Disability Information Resources 2002). Combined, the Mexican initiatives and government statements highlight the importance of using pre-negotiations to clarify the tone and substance of a convention to the more cautious states, which in turn contributed to reducing uncertainty about the nature of the law they were considering supporting (L. Gallegos, pers. comm., 21 September 2016).

Framing

Mexico's framing of the treaty was key to generating the momentum for some other states to co-sponsor the UNGA Resolution that mandated the establishment of an AHC. Gallegos stated that the way in which the problem (to which a treaty would respond) was defined "was a political decision" (L. Gallegos, pers. comm., 21 September 2016). The Mexican government argued that because persons with disabilities were not identified as a specific target group in the recently-adopted Millennium Development Goals, which aimed, among other things, to halve extreme global poverty by 2015, a specific human rights instrument was needed to ensure that persons with disabilities were not forgotten in global development efforts. Persons with disabilities are significantly over-represented amongst the world's "poorest of the poor". Framing the human rights agenda for persons with disabilities in terms of social development resulted in a rise of support from many of the world's developing and transitional economies,

including countries that had not traditionally demonstrated a strong commitment to human rights (Kayess & French 2008).

State roles and coalitions

Certain states can be seen playing the roles of leader and mediators to expedite negotiations. Mexico played a distinct leadership role (K. Guernsey, pers. comm., 27 September 2017; S. Estey, pers. comm., 29 September 2017; D. Mackay, pers. comm., 4 September 2016). In addition to the measures Mexico took to reduce uncertainty identified above (e.g. framing, introducing draft text of the treaty etc), it also collaborated with civil society to exert symbolic pressure over states that were reluctant to support a treaty. As told by Kathy Guernsey (pers. comm., 27 September 2017) of Landmine Survivors Network:

towards the end of Ad hoc committee two when it was still up in the air as to what was going to happen... civil society released an uncharacteristically short daily bulletin that just had a giant question mark on the front and I think it said, 'will they or won't they' [agree to draft], and Ambassador De Alba [of Mexico] said he put it down in front of some other delegations that he felt needed pressure and he pointed at it and walked away.

While Mexico was the most outspoken supporter of the convention, other states from Latin America and elsewhere were also strong advocates (K. Guernsey, pers. comm., 27 September 2017; D. Mackay, pers. comm., 4 September 2016). Among them was Ecuador whose Ambassador Gallegos chaired the early AHC meetings. This dual position meant that Gallegos needed to carefully negotiate both roles. On the one hand, as a representative of a country that

supported the treaty, Gallegos promoted a convention. He notes “You talk with countries, you meet with the regional groups you invite them to lunch, to dinner, you talk to the chiefs. In many cases, the [reluctant] negotiators were Second or Third Secretaries and I talked to their Ambassadors and they become more flexible” (L. Gallegos, pers. comm., 21 September 2016). He also encouraged states to support a convention by educating them about its content, noting that “we had to explain what, for example, ‘inclusive education’ meant”. On the other hand, as a mediator, the chair had to take “baby steps” towards drafting. Gallegos said, “You had to tread very cautiously in order to not instigate confrontation”.

In a similar way, when acting as the Chair of the Open-Ended Working Group on Ageing (the equivalent body to the AHC), then Deputy Permanent Representative of Argentina to the United Nations, Mateo Estrémé, also felt constrained in his advocacy of the elder rights treaty. Consequently, he predicted that at some point in the future, Argentina would “probably go to the floor in order to really make a difference” (M. Estrémé, pers. comm., 6 October 2016). In other words, Argentina might step down as the chair and take on a similar role to Mexico in the CRPD process.

Coalitions also featured prominently in the CRPD pre-negotiation process. One notable coalition is the EU – notable partly because of the intra-EU discussions contributed to changing the position of EU member states on the treaty and therefore the position of the EU coalition itself. That is, states do not only sit in the EU in their own capacity as governments but also as members of the EU where they must adopt a collective position (G. Quinn, pers. comm., 24 August 2016). The CRPD was the first human rights treaty which the European Union was involved in negotiating and signing alongside the EU Member States (De Búrca 2010:176). According to the rules of the EU, states should coordinate actions within international organizations (Lisbon Treaty 2007:Article 34) and so EU unity is one of the top priorities of member states and a factor that weighs heavily in discussions (pers. comm., former EU

diplomat, 4 October 2016). Legally, each state in the EU is equal and, because of the imperative to reach a consensus, even when there is only one state that supports an issue, sometimes that state can have an impact especially if other states do not hold a strong position on the issue in question (UK government official 1 and 2, pers. comm., 2016, 2017). At the start of the second AHC session, the EU was working as a bloc and did not openly support the convention (R. Kayess, pers. comm., 8 August 2016;). But states such as Germany which supported the establishment of a convention from the beginning (G. Quinn, pers. comm., 24 August 2016; T. Degener, pers. comm., 6 October 2017) tried to persuade other states within the organization to follow suit. They could do so more effectively within the coalition because of the rules of the EU.

A similar scenario took place in the case of the proposed elder rights convention, further highlighting the instrumental role that the coalitions play in shaping the position of members states on a human rights treaty in the pre-negotiation phase. Here, Slovenia, the only EU state to openly support a convention, tried to influence the UK, an initial opponent of a treaty, to soften its position. As a UK official puts it: “It was becoming increasingly clear that EU consensus was starting to fragment, with the UK and Slovenia most vocal at opposite ends of the debate. We considered EU unity to be ...important ... and we acknowledged that some flexing of positions within the EU would be required in order to maintain that unity” (UK government official 2, pers. comm., 2017).

Management of domestic politics and coalition building

The case of the CRPD case supports the proposition that pre-negotiation is a time when states both respond to domestic state and non-state actors, as well as seek to influence them. First, there are several examples of states being influenced by civil society via domestic pathways.

For example, Stig Langvad (pers. comm., 4 October 2017), who was the chair of the umbrella organisation representing over 30 organisations of persons with disabilities in Denmark, said that he, along with a prominent Danish lawyer who had a disability, put “pressure on the government from the DPO [Disabled persons’ organizations] side” and, as a result, the government “accepted to play at least a lead role in the first meeting of the Ad-hoc Committee”. In the pre-negotiation process of the proposed elder rights treaty, civil society was (in some instances) also successful in influencing the government to support negotiation. Slovenia changed its stance from being an opponent of a convention to an avid supporter partly because a large domestic interest group tied calls for the Pensioners’ Party, which in a coalition government, to support the convention in exchange for votes (author forthcoming).

Second, and conversely, we see negotiators strategically influencing colleagues within their own government in the domestic arena. For example, in the case of Germany, because of the subject the rights of persons with disabilities was relatively unfamiliar to government officials in Berlin, especially at the beginning, the German state representative at the AHC, who personally supported the idea of a convention, might have leveraged this opportunity to announce Germany’s support for a convention early and swiftly (T. Degener, pers. comm., 6 October 2017). A similar scenario unfolded in the pre-negotiations of the elder rights convention. Here, a representative from a European state was interested in “speeding up” the pre-negotiation process by expressing, for the first time, his country’s cautious interest in the convention. The state official noted that “changing the government’s position” on the issue of a convention “isn’t that easy. We have to get the commitment of all the ministries, Foreign Affairs, Finance, Justice etc” (Anonymous, pers. comm., 6 January 2017). To do so, a draft statement in English, which was not the main language spoken in this country, was sent to the relevant departments. The statement was also crafted in such a way that the new position was stated implicitly. In other words, “reading between the lines” revealed a clear shift in the state’s

position but this might not have been immediately apparent to someone reading it as a foreign language and without careful scrutiny. This sophisticated structuring of the domestic actors allowed the country in question to achieve the support it needed, which might not have been possible for a clumsier political operator.

Third, there is evidence of states building transnational coalitions to increase support for a convention internationally, which is broadly consistent with the literature (Putnam 1988:444). Although pockets of people, who represent the persons with disabilities globally had been lobbying for a convention, Mexico's initiative to establish a convention was a surprise to many activists who, at the time, were not well-organized and who believed that a treaty was nowhere in sight (Lord 2003). Consequently, just before the first AHC, Mexico convened a specialist meeting of experts from around the world in Mexico City (S. Estey, pers. comm., 29 September 2017). As a result, a draft treaty was produced and endorsed by those who represent the persons with disabilities around the world, which in turn proved to be influential at the first session of the AHC and which helped Mexico maintain political momentum (Quinn 2005:533). In addition, Guernsey (pers. comm., 27 September 2017) notes that two representatives from Mexico:

basically were going around doing briefings for different NGOs to alert them to the fact that Mexico was trying to kick-start a negotiations process and that we should anticipate that there would be meetings and they wanted to ensure robust NGO participation...Ambassador De Alba [of Mexico] did a simulated plenary session so people could understand what that was like so when they got into room four it wouldn't be an overwhelming experience and they could be very targeted in their interventions.

In sum, as the state champion of the CRPD, Mexico sought to educate global civil society about the pre-negotiation process and encourage them to contribute to it (S. Estey, pers. comm., 29 September 2017).

Having just discussed the relevance of the propositions from the existing literature in the context of the CRPD, the article now applies new propositions – states’ esteem-seeking motivations and the role of non-state actors and their tactics – to extend what we know about how and why states decide to negotiate UN human rights treaties.

Reputation

Glesinger and Stein (2008:1141) write that the formation and entry into the force of the CRPD can be explained “as a by-product of states wishing to be part of a global community”. They go on to point out that developing countries and those formerly authoritarian countries such as China, Mexico and others, held the position that the proposed CRPD was a “necessary function of an informed and progressive global society” (Geisinger & Stein 2008:1141). My own research supports their observations by highlighting how the esteem-seeking behavior of Mexico and China (partly) prompted them to trigger and engage constructively in the pre-negotiations, respectively.

One example that illustrates this is how the Chinese delegation responded to an instance of naming and shaming by INGOs, which reveals concerns for its reputation in the eyes of its peers. The example also reveals the effectiveness of one of key tactics used by transnational advocates – that is, naming and shaming - at the international level. The INGOs gave out “badges of honor and dishonor” in their daily *Disability Negotiations Bulletins* which were “an opportunity to highlight NGO concerns about positions taken, to call out delegations for good and bad” (K. Guernsey, pers. comm., 27 September 2017). Guernsey explains that:

The Chinese delegation had said something that we felt was not appropriate. I don't remember the specifics of their intervention but we highlighted it in the daily bulletin and gave them the "badge of dishonor" for that day. And they came running up to us the next day and said 'we don't think this is fair, our position was this' and we said 'you've got to be more clear about that' and so they then ended up making an intervention that was sort of responsive to the feedback that they'd gotten from us.

Perhaps the most poignant case of reputation playing a role in pre-negotiation process – and the TAN's efforts to leverage it – is that of Mexico. Mexico was a surprising state to champion a new human rights treaty. From 1929 to 2000 the country had been led by Institutional Revolutionary Party (PRI), which showed a lack of respect for human rights in their country and elsewhere, and was broadly viewed as authoritarian and illegitimate. Indeed, until the late 1990s, Mexico refused to accept international supervision of its internal human rights practices and did not show an interest in the human rights affairs of other states. But during the last years of the presidency of Ernesto Zedillo (1994-2000) and particularly during that of Vicente Fox (2000-2006), who was the country's first non-PRI leader, the government's approach to human rights dramatically changed. Zedillo and Fox opened Mexico up to international monitoring and assistance, ratified key international instruments, promoted constitutional, policy and legal reforms such as the National Human Rights Program (Muñoz 2009). This was partly because of pressure from a transnational advocacy network comprising international organizations, NGOs and some governments. For example, Mexico was "named and shamed" in the human rights regimes of the United Nations and the Organization of American States during the second half of the 1990s because of its serious human rights violations.

Despite the reforms that Fox introduced, Munoz (2009: 51) writes that “it is clear that the foreign policy component of the government's new approach to human rights continued to be influenced by (actual or potential) pressure ‘from above’. In other words, while Mexico had made much progress, the Fox government needed to consolidate the country’s new international identity as a democracy committed to human rights to ensure that its reputation would not regress, and that international pressure would not be reinvigorated. Championing the CRPD as part of Mexico’s foreign policy agenda was one way to sure-up its liberal democratic identity. Rosemary Kayess (pers. comm., 8 August 2016), an Australian civil society advocate who participated in the early AHC meetings, noted that Fox, “saw the opportunity to do something in a statesman-like manner on the international stage” Gerard Quinn (pers. comm., 24 August 2016), an expert in disability rights law who sat on the Irish delegation, further explained that because he was the first non-PRI President of Mexico, it was important for him to “varnish his newly democratic credentials around the world”.

Member of the TAN, including NGOs, UN agencies and academics, deployed other tactics, such as framing and the provision of information, to shape aspects of the pre-negotiation process. A key example of the impact of framing and defining issues can be found in a seminal OHCHR report, authored by prominent disability law scholars, Gerard Quinn and Theresia Degener. In the report, the problem was presented as the “invisibility” of persons with disabilities in existing international human rights law and the authors argued that a new treaty was needed to add specificity to the general rights as they apply to persons with disabilities and to identify correlating obligations. The problem frame identified by Quinn and Degener was convincing, especially in contrast to the comparable OHCHR report which sought to mount a case for the creation of an elder rights convention. In this case, instead of defining the problem as the invisibility of older persons, the report framed the problem as one of “normative gaps” in existing international law. But, according to Quinn, “the search for “normative gaps” to

justify creation of a new thematic treaty is a wild goose chase...[because] there are no normative gaps...if the universal scheme of rights is both comprehensive and universal” (Quinn n.d.). In other words, the problem frame used to justify an elder rights treaty is highly contested on philosophical and legal grounds. Consequently, this has served as a weapon for opponents of a treaty in their efforts to delay negotiations.

Non-state actors also exerted influence through the provision of information and expertise on substantive issues. Delegations welcomed the daily bulletins produced by the INGOs, which summarized the previous day’s proceedings, because it helped them keep track of issues and see the position of other delegations on key topics (K. Guernsey, pers. comm., 27 September 2017). In addition, the National Council on Disability, an independent US federal government agency, published a reference tool, which according to Guernsey, helped “people to understand the scope of what a treaty could cover thematically”. While it was published by a government agency, it was authored by Janet E. Lord of the INGO Landmine Survivors Network (LSN) who appeared to be using it to reduce uncertainty surrounding the issues that arise during the drafting stage.

In addition to NGOs, other non-state actors helped to clarify substantive issues relating to a convention. Gallegos (pers. comm., 21 September 2016) said that “As the chair, you had to look for people who could also help you that were experts. I had a group of people who were ‘friends of chair’ who graciously help guide the process”. Professor of law, Theresia Degener, was also part of the German delegation during the second AHC session to provide advice on rights of persons with disabilities. She said she was “amazed that often my advice was accepted” (T. Degener, pers. comm., 6 October 2017). UN agencies and NHRIs helped to further educate states on the content of a convention. For example, the World Health Organisation and the International Labour Organisation (ILO) were invited to explain how to make the workplace more accessible for persons with disabilities (L. Gallegos, pers. comm.,

21 September 2016). NHRIs hosted and participated in regional workshops where they formulated joint statements on the substantive elements of a convention (Brynes 2013:229). Drafts treaties, which were subsequently circulated during the early AHC sessions, were also produced at these regional workshops that were held and/or attended by UN bodies, NGOs, NHRIs and others.

NGOs were creative in the way they conveyed information to delegates. In particular, the use of stories and testimony had an impact. For example, at the side-panels of the AHC, testimonials from persons with disabilities and their families were shared and these were attended by some states who, according to Quinn, “took notice”. Guernsey (pers. comm., 27 September 2017) elaborates saying, “People were making interventions, in some cases practically telling their life story, but really impressing [on states] that this was a needed thing and that this would be transformative in the lives of persons with disabilities.” In addition, the visible inclusion of so many disabled people lent legitimacy to the convention process and functioned as a constant reminder of the reality that the treaty meant for this group of people (Sciubba 2016:9). Overall, Gallegos states, “If it weren’t for the NGO community, there would be no treaty” (pers. comm., 21 September 2016), a point confirmed by most of the respondents.

Finally, the large number, geographical spread and effective coordination of non-state actors also characterized their participation in, and impact on, the pre-negotiation process. At the AHC sessions, members of the disability community formed an activist network called the International Disability Caucus, which aimed to develop strategies to maximize their influence and ensure that they spoke with a united voice (National Council on Disability 2003). According to Lord (2003:26), the collective voice of the network was effective in engaging national delegations and key committee decision-makers. In addition, NGOs in Europe organized themselves through the European Disability Forum, which is an NGO platform

that brings together representative organizations of persons with disabilities from across the region. Langvad (pers. comm., 4 October 2017) explains that

the European Disability Forum is composed of representatives from the national umbrella organizations and representatives from the European umbrella organizations of specific impairment groups, like muscular dystrophy, or visually impairment or Autism Europe etc Together, they were putting pressure on the European Union [including] civil servants, European parliamentarians, the European Commission, the European Council of Ministers.

NHRI also coordinated themselves and spoke with one voice on the need for a convention. For example, prior to the second AHC session, members of the Network of National Institutions for the Promotion and Protection of Human Rights of the Americas agreed to “to urge the governments of the respective countries to evaluate the possibility of supporting the drafting” (Brynes 2013:229).

Conclusion

This article has shown that the pre-negotiation of UN human rights treaties has much in common with other types of pre-negotiations. Reducing uncertainty surrounding negotiations is central both in the literature and in the case(s). States do this by engaging in structuring activities so that those cautious about negotiation will have a better idea of what is to come, and the benefits and risks involved. Examples of this in the CRPD context included circulating draft treaties and discussing the possible content on the rights of persons with disabilities. Framing and defining problems was another way for states to generate support for negotiation, best illustrated through Mexico’s attempt to promote the treaty among states in Latin America. States formulated their positions on the proposed treaty by negotiating among themselves at

the international level as well as by engaging with different parties at the domestic level, as illustrate through the cases of Denmark and Germany. Building coalitions transnationally, which was seen in Mexico's attempts to sure-up the support and participation of NGOs in the AHC sessions, is another key strategy states use to get to the table. Coalitions also help to shape the position of individuals members, through bargaining and other forms of influence, which was exemplified using the example of the EU. Finally, specific roles that states played helped to generate momentum and interest in negotiations as well as to manage competing interests.

Due to the unique subject of the case study, three features stood out. The first is the importance of reputation in shaping states' political preferences. Consistent with a constructivist approach, some states, especially those that were developing or formerly authoritarian, sought esteem in the eyes of their peers. There was evidence that Mexico and China, for example, initiated and engaged constructively in the pre-negotiations, respectively, to sure-up their aspirational identities as progressive states, and worthy members of the international community. Second, non-state actors, especially the NGOs, sought to leverage this esteem-seeking behavior and shape the pre-negotiation process through their tactics, specifically though naming and shaming states. Other tactics of influence including framing the problem (to which the proposed treaty would respond), the provision expertise, and the clever packaging and delivery information. The number, diversity and coordination of non-state actors further amplified their impact.

A more robust explanation of 'successful' pre-negotiation of UN human rights treaties through a detailed comparative examination is needed to establish a more robust theory tailored the unique experience of pre-negotiating UN human rights treaties. In addition to the case of the CRPD, this article drew on example of the still-ongoing pre-negotiation process of the elder rights treaty to strengthen the findings of the former. Once complete, the latter could be a useful comparative case study to strengthen the framework constructed in this article.

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