Universal human rights: Assessing practicality in the absence of a global state

TIM PFEFFERLE

CORRESPONDENCE:
tim.pfefferle@gmail.com

INTRODUCTION

Anarchy is an assumed fact within international relations scholarship. While there is disagreement on the precise nature of anarchy, few would dispute the notion that, at the global level, hardly any governance arrangements exist that mirror the scope and power of those at the state level. Authority is thus dispersed, with no clear hierarchy to determine effective coercive measures to reign in misbehaving states or transnational companies. There is no global government.

For the global human rights regime, the absence of government at the global level is highly problematic. Without an ultimate global authority to enforce compliance with a universal human rights regime, the whole notion seems to be reduced to absurdity. Ultimately, what is a right worth if it cannot be enforced consistently and effectively?

This essay argues that even absent a global government, universal rights have practical implications. While not enforceable analogously to domestic law, the universal rights regime nonetheless has significant influence over the conduct of both states and individuals. For one, through normative processes, codified universal rights define what is and is not legitimate behavior and action, thereby constraining actors. Secondly, in the absence of global government, an institutional web has been established to assume some of the governance responsibilities, enhancing compliance with human rights norms. Lastly, universal rights themselves are essential in laying the groundwork for more legitimate and democratic global governance.

UNIVERSAL RIGHTS DEFINED

To start with, some definitional work is required. What do we mean by rights, and what, if anything, is universal about them? For purposes of clarity, human rights here refer to those enshrined by the United Nations Declaration on Human Rights (UDHR), which comprises a concise list of civic, political, economic and social rights, among them the right to free speech and assembly, personal liberty and security, as well as the right to employment, social security and education (United Nations 1948). To further define the terms employed in this essay, universal will be taken to mean that "if any human being is entitled to protection of her basic interests, every human being is likewise entitled" (Jones 2005, 3). The essay will proceed on the basis of these definitions.

RIGHTS BUT NO RECOURSE?

The contemporary human rights regime is built on nation states as the agents to enforce human rights law. For states, domestic control over human rights is an issue of sovereignty. The United States' refusal to join the International Criminal Court (ICC) is a case in point, having repeatedly invoked implications for sovereignty to justify not acceding to the court [(Wind 2009, 84-85); (Edlin 2006, 6-7)], given the "unprecedented erosion [the ICC] would work on state sovereignty" (Nill 1999, 16). Other states have referred to sovereignty to protect specific cultural or social practices widely regarded as directly contravening universal rights. These instances illustrate that the main obstacle faced by advocates of universal human rights is the persistence of an international system highly dependent on states as implementing agents.

National governments are thus in a position to act strategically in enforcing or rejecting a given rights framework. This appears to be anathema to the idea of universal human rights. In essence, states are tasked with policing themselves, given the circumstance that human rights violations are often perpetrated by states themselves. This could be taken as tantamount to asking criminals to turn themselves in. The juxtaposition between rights and domestic sovereignty is evident within the UN Charter itself. While article 1 highlights the protection of fundamental rights as one of the founding purposes of the institution, article 2 affirms that member states are not to interfere in one another's domestic affairs (United Nations 1945).

Institutionally, the most important global governance body, the United Nations Security Council, operates on the basis of power politics. Veto powers such as the United States and China have repeatedly exercised their veto rights in favor of protégés such as Israel or North Korea, respectively, even though rights abuses associated with these states have frequently been reported on many occasions. Thus, the council as the sole global enforcement mechanism does not operate on the basis of universal rights. Rather, rights are enforced on a case by case basis depending on whether a particular instance in which rights were breached merits political involvement. Hence, rights concerns are frequently subordinated to strategic interests.

The fragmented nature of global governance, with an ever growing array of actors – states, quasi-states, institutions, non-governmental organizations, social movements and transnational businesses – moreover means that consensus over human rights, much less their consistent enforcement, appears to be elusive. While states are looked at as the guarantors of rights, reality is becoming increasingly more complex. Therefore, universal human rights are embedded within a multifarious governance framework which makes enforcement increasingly complicated.

Given the environment delineated above, what are the prospects for universal rights in a world characterized both by sovereign nation states and an ever more complex array of actors?

THE NORMATIVE FORCE OF UNIVERSAL RIGHTS

Universal human rights are first and foremost a normative concept. As such, they prescribe what are and what are not legitimate ways for both state and non-state actors to behave, leading them to behave in ways they would not have otherwise. In this context, Goodman and Jinks refer to the "acculturation of states" (2013, 13). Risse highlights that it is "virtually impossible for [states] to deny the validity of global human rights norms themselves without risking being labeled as 'pariah' states" (2001, 17). This appears to be the case particularly in countries with strong democratic features and significant participation by citizens(Neumayer 2005). Chilton (2014) finds that international human rights agreements create obligations that change the domestic political climate and significantly influence public opinion. Human rights norms can thus circumscribe harmful action as well as enable certain positive action. Nevertheless, ratification of human rights treaties by autocratic regimes can sometimes be associated with stronger violations (Hafner-Burton, Tsutsui and Meyer 2008). In fact, Hathaway (2007) argues that non-democratic states with poor human rights records are quite likely to ratify treaties, since prospects for enforcement are low. Hence, the record is mixed. Further complicating matters are Hill's (2010) suggestion that different treaties have different effects on the ratifying parties, as well as Ritter and Conrad's findings that "[human rights treaty] obligation is connected to increased mobilized dissent only in states where leaders are secure and domestic courts are ineffective" (2015, 22). Finally, Clark suggests that ratification of treaties can have positive effects particularly in "the most difficult cases" (2013, 143). The normative effects of universal rights thus have to be decluttered.

Sen (2004) argues that while the ultimate realization of rights should be aimed for, in practice this may not always be possible. From Sen's cosmopolitan perspective, it is important to recognize obligations to then design specific action based on this prior recognition. Process is more important than outcome. Sen identifies three different approaches to promote rights; recognition, agitation, and legislation (2004, 343-344). Rights can be promoted through declarations – such as the UDHR – but also through social pressure and monitoring. Legislation refers to instances where rights were institutionalized, such as in the case of the establishment of the European Court of Human Rights.

For consequentialists such as Singer (1972) such arguments are insufficient, given that outcomes should dictate what does and does not constitute success. However, advancements in promoting

rights at the global level are not insignificant. States are now regularly monitored and evaluated, both by other states as well as by non-state actors such as Human Rights Watch and Amnesty International, in addition to intergovernmental bodies like the UN Human Rights Council. This means that in order to avoid negative publicity, states and business actors may need to alter their behavior in ways they would not have contemplated previously. As highlighted by Finnemore, states' national interests are "shaped by internationally shared norms and values that structure and give meaning to international political life" (1996, 3). The development of the "responsibility to protect" (R2P) as an international norm reflects the significant influence a norm shift can have. Based to a large extent on a universal conception of rights, the reconfiguration of "sovereignty as responsibility" [(Evans and Sahnoun 2002, 101); (Deng 1996)] has opened up humanitarian action previously regarded as illegitimate. However problematic R2P may be as a concept, a norm shift has reshaped the way many actors think about humanitarian intervention, for instance, enabling enforcement in diplomatic, economic and on limited occasions military terms. In fact, as Cook (1993, 236-237) suggests, it may be the internalization of norms rather than the strict application of laws that is most effective in securing human rights.

GOVERNANCE INSTEAD OF GOVERNMENT: GLOBAL INSTITUTIONAL ARCHITECTURE

Beyond the normative power of universal rights ideas, a plethora of institutional arrangements exists as proxies for compliance mechanisms. The post-Cold War world has seen a growth in institutional bodies established to provide governance vis-à-vis human rights. In essence, the question here is a familiar one: in global politics, how much do institutions matter in the end?

In specific instances, rights violations have been dealt with by the international community in a manner resembling domestic judicial systems. These are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although these are likely to be sui generis cases, such tribunals do indicate that in spite of considerable obstacles enforcing human rights, if ex post, is possible within the current system. In addition, there are hybrid courts such as the ones instituted to deal with past human rights abuses in Sierra Leone and Cambodia, combining both domestic and international features to enable officials to prosecute violations. Even though the tribunals' deterrent effect has been questioned (Barria and Roper 2005), they constitute an important building block of a tightening institutional web to aide enforcement of rights. Birdsall(2006), for instance, argues that the ICTY has in fact contributed to the institutionalization of human rights norms. Moreover, Shinoda (2002, 44) points out that both the ICTY and the ICTR are established and underwritten by the Security Council, lending them credence.

The International Criminal Court (ICC), despite the concerns over sovereignty issues outlined above, seems to be the most comprehensive actor within this institutional web. Although problems associated with case selection bias and limited membership have been highlighted (Phooko 2011), the existence of the ICC as such illustrates that human rights abuses can be prosecuted in systematized fashion, if on a limited basis. Helfer and Slaughter(1997) argue that there is indeed scope for more supranational adjudication in making treaty bodies act more like courts, while Pogge has advocated for dispersed sovereignty (2008, 178-179), of which the ICC seems to be one instance. Governments have handed over prosecutorial powers to the ICC, indicating that particularly in severe cases of abuse, there is a willingness to facilitate enforcement. The establishment of the ICC can thus serve to constrain actors' behavior, who have to think about possible legal ramifications. Precedence is important.

In addition to hard governance provided by tribunals and courts, there are soft measures as well. The Goldstone Report is an example of an outcome produced by institutionalized processes in the field of human rights. The report, commissioned by the UN High Commissioner for Human Rights, criticized both Hamas and the Israeli government with regard to their conduct during the Gaza war in 2006 (United Nations 2009). Other examples include the concerted institutional effort to end female genital mutilation [(World Health Organization 2008); (United Nations Mission in Liberia (UNMIL) 2015)]. Such processes allow third actors to then make claims on the basis of the findings. Given the reputation of the UN, non-governmental organizations and media outlets can subsequently put pressure on actors and eventually effect change. By contrast to the relative lack of hard enforcement, the monitoring regime is more advanced and can act more quickly. There are thus indirect ways in which a soft global enforcement system operates, in addition to hard governance based on criminal tribunals and courts.

UNIVERSAL RIGHTS AND DEMOCRATIC GLOBAL GOVERNANCE

Codified rights have laid the foundation for the development of democracy. Some prominent examples include the United States (US Declaration of Independence and subsequent Constitution), the UK (Magna Carta) and France (Declaration of the Rights of Men and of the Citizen). In this sense, specific ideas about rights and, crucially, a consensus about their legitimacy, are state-making constructs.

While more complicated at the global level, universal rights and their codification contribute towards establishing the necessary processes to arrive at more democratic governance. Domestically, legitimate democratic governance is premised on the existence of a consensus around rights and protection under those rights. Universal rights as an idea are necessary to arrive at more democracy at the global level. Beitz (2001), in fact, argues that legitimate global democracy presupposes an affirmation of the idea of universal human rights. Risse employs a Habermasian framework of communicative action to delineate how, through the existence of universal human rights norms, deliberation at the global level is facilitated(2001, 29-30). By enabling such deliberation to take place, universal rights assume a critical role in fostering the type of discussion and participation necessary to allow for democracy to develop. For example, small island states have been able to make claims based on universal rights, both as it regards the state (self-determination) as well as the individual or community (the right to a home) (Stoutenberg 2015, 331). This gives less powerful states a voice among the international society of states they would otherwise not have had, while also allowing individuals within those states to make normative claims towards their own representatives.

The notion of democracy described above is a limited one. According to Dahl, the prospects for international institutions to ever become fully democratic are dim (1999). Fundamentally, Dahl argues that the measure of delegation necessary to provide the kind of global governance mechanism capable of dealing with emerging global challenges – poverty, health, environmental degradation – would render meaningful individual participation by citizens impossible. It is nevertheless important to recognize that universal rights can have a significant impact with regard to protecting both vulnerable states and people. As such, they have practical utility.

CONCLUSION

This essay has argued that, absent perfect enforcement, universal rights are nonetheless important in three ways. First, they lay the foundation for normative constraints on actors. Secondly, they underpin the institutional system that has been developed in terms of hard measures such as international tribunals and courts as well as soft measures such as rights monitoring. Lastly, universal rights are important in undergirding frameworks of democratic governance.

Ultimately, if the measure of success applied to universal rights is complete and comprehensive enforcement on a global level, the absence of an institutionalized global hierarchy makes such success all but impossible. Yet, that is a high standard to apply. In the real world, this need not mean that universal human rights are impractical. Perhaps the best way to assess the practical impact of universal rights ideas is to imagine the counterfactual. Absent such ideas, the world would likely be a much different place.

REFERENCES

Barria, Lillian, and Steven Roper. "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR." The International Journal of Human Rights 9 (3), 2005: 349-368.

Beitz, Charles. "Human Rights as a Common Concern." The American Political Science Review 95 (2), 2001: 269-282.

Birdsall, Andrea. "The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?" Peace, Conflict and Development 8, 2006: published online.

Chilton, Adam. "The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study." Chicago Journal of International Law 15, 2014: 110-137.

Clark, Ann Marie. "The Normative Context of Human Rights Criticism: Treaty Ratification and UN Mechanisms." In The Persistent Power of Human Rights: From Commitment to Compliance, by Thomas Risse, Stephen Ropp and Kathryn Sikkink, 125-144. Cambridge: Cambridge University Press,

2013.

Cook, Rebecca. "Women's International Human Rights Law: The Way Forward." Human Rights Quarterly 15 (2), 1993: 230-261.

Dahl, Robert. "Can International Organizations Be Democratic? A Skeptic's View." InDemocracy's Edges, by Ian Shapiro and Casiano Hacker-Cordón, 19-36. Cambridge: Cambridge University Press, 1999.

Deng, Francis. Sovereignty as Responsibility: Conflict Management in Africa. Washington, DC: Brookings Institution, 1996.

Edlin, Douglas. "The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court." Boston College International and Comparative Law Review 29 (1), 2006: 1-22.

Evans, Gareth, and Mohamed Sahnoun. "The Responsibility to Protect." Foreign Affairs 81 (6), 2002: 99-110.

Finnemore, Martha. National Interests in International Society. Ithaca: Cornell University Press, 1996.

Goodman, Ryan, and Derek Jinks. Socializing States: Promoting Human Rights through International Law. Oxford: Oxford University Press, 2013.

Hafner-Burton, Emilie, Kiyoteru Tsutsui, and John Meyer. "International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties."International Sociology 23 (1), 2008: 115-141.

Hathaway, Oona. "Why Do Countries Commit to Human Rights Treaties?" Journal of Conflict Resolution 51 (4), 2007: 588-621.

Helfer, Laurence, and Anne-Marie Slaughter. "Toward a Theory of Effective Supranational Adjudication." Yale Law Journal 107 (2), 1997: 273-292.

Hill Jr, Daniel. "Estimating the Effects of Human Rights Treaties on State Behavior."Journal of Politics 72 (4), 2010: 1161-1174.

Jones, Charles. "Institutions with Global Scope: Moral Cosmopolitanism and Political Practice." Canadian Journal of Philosophy 35 (1), 2005: 1-27.

Neumayer, Eric. "Do International Human Rights Treaties Improve Respect for Human Rights?" Journal of Conflict Resolution 49 (6), 2005: 925-953.

Nill, David. "National Sovereignty: Must it be Sacrificed to the International Criminal Court?" Brigham Young Journal of Public Law 14, 1999: 119-150.

Phooko, Moses. "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court." Notre Dame Journal of Comparative & International Law 1 (1), 2011: 182-209.

Pogge, Thomas. World Poverty and Human Rights. Cambridge: Polity Press, 2008.

Risse, Thomas. "'Lets's Argue!' Communicative Action in World Politics." International Organization 54 (1), 2001: 1-39.

Ritter, Emily, and Courtenay Conrad. "Human Rights Treaties and Mobilized Dissent Against the State." The Review of International Organizations, 2015: published online.

Sen, Amartya. "Elements of a Theory of Human Rights." Philosophy and Public Affairs 32 (4), 2004: 315-356.

Shinoda, Hideaki. "Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals." International Journal of Peace Studies 7 (1), 2002: 41-58.

Singer, Peter. "Famine, Affluence, and Morality." Philosophy and Public Affairs 1 (3), 1972: 229-243.

Stoutenberg, Jenny. Disappearing Island States in International Law. Leiden: Brill, 2015.

United Nations. "Charter of the United Nations and Statute of the International Court of Justice." 1945. www.treaties.un.org/doc/publication/ctc/uncharter.pdf (accessed January 12, 2016).

—. "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict." Office of the High Commissioner for Human Rights. 2009. www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed January 12, 2016).

United Nations Mission in Liberia (UNMIL). "As Assessment of Human Rights Issues Emanating from Traditional Practices in Liberia." Office of the High Commissioner for Human Rights. 2015. www.ohchr.org/Documents/Countries/LR/HarmfulTraditionalPracticesLiberia.pdf (accessed January 12, 2016).

United Nations. "The Universal Declaration of Human Rights." General Assembly Resolution 217A. 1948. www.un.org/en/universal-declaration-human-rights (accessed January 12, 2016).

Wind, Marlene. "Challenging Sovereignty? The USA and the Establishment of the International Criminal Court." Ethics & Global Politics 2 (2), 2009: 83-108.

World Health Organization. "Eliminating Female Genital Mutilation: An Interagency Statement." 2008. www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Elimi\nnating_FGM.pdf (accessed January 12, 2016).