Human Rights: A Sustainable Basis for Developing International Law?

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MAURICE DUNAISKI, NOV 10 2012

Does the Idea of 'universal human rights' offer a Sustainable Basis for Developing International Law?

Introduction

My argument is twofold. In the first part of this essay I will show that the *social* framework for 'universal human rights' is not given in the international sphere. The cosmopolitan society which is implied and presupposed by the concept of 'universal human rights' exists only as an ideal. In the second part I will argue that the *political* framework is also not in place yet. The current political framework can give rise to a distorted form of global justice where international laws based on the idea of human rights are only enforced when it is in the interest of powerful states. In the absence of a conducive *social* and *political* framework, the idea of 'universal human rights' cannot offer a sustainable basis for developing international law.

Laws based on the idea of human rights emerged *within* the confines of sovereign states and they were intended to limit state action against individuals in times of peace (Teitel, 2002). In contrast, public international law traditionally sought to regulate behaviour *between* sovereign states in the absence of a global sovereign and under the conditions of anarchy (ibid.). The bearers of rights and duties in public international law are primarily states; human rights however are attributed to individuals (Nickel, 2010). The idea of *universal* human rights and the legal cosmopolitanism it implies can therefore be potentially subversive of what have historically been the core principles of public international law: the sovereign equality, territorial integrity and legal supremacy of states (Cohen, 2004a). Post-World War II developments saw the akward merger of these two previously autonomous legal regimes (Teitel, 2002), resulting in 'soft' international laws or codes of conduct based on human rights such as the Universal Declaration of Human Rights and 'hard' or legally enforceable international laws based on human rights such as the European Convention for the Protection of Human Rights and the Rome Statute of the International Criminal Court (Abbott & Snidal, 2000; Nickel, 2010). This incorporation of human rights law into the body of international law has caused "a shift away from states as the dominant subjects of international law to include *persons* and *peoples*" (Teitel, 2002, p.362). Therefore it can be said that enforceable international laws based on the idea of human rights have already developed. However, this development gives rise to two important questions: *Whose* human rights are enforced? And *who* enforces them?

I.

Proponents of human rights often take their universality for granted (Roth, 2001). It is claimed that human rights represent "a set of values which can be universally observed despite the particularity of the human traditions from which those respecting these values come" (Langlois, 2002). What constitutes a human right and which rights are to be included in the list of 'universal human rights' is a controversial issue even amongst staunch defenders of the idea. The different views range from a *minimalist* conception of human rights which is limited to the right to bodily security and freedom from torture (Ignatieff, 2001), to more a *extensive* conception which might include a right to education, to equality before the law or to democratic government (Cohen, 2004b; Reisman, 1990). What unites these

conceptions, however, is the underlying assumption that human rights are universal and therefore independent of the existence of positive law (Brown, 1997). In order to establish and justify universal human rights a different kind of law is necessary because positive rights are dependent upon particular jurisdictions; they cannot be universal in a world of sovereign states (ibid.). Therefore some kind of 'natural', divine or pre-institutional law has to serve as the foundation for human rights since they are "supposed to belong to people 'naturally' – that is, solely in virtue of their common humanity" (Beitz, 2003, p.41; Hart, 1955). I argue that this 'foundationalism' is problematic.

The problematic nature of human rights foundationalism becomes apparent when we look at more *extensive* conceptions of human rights such as those enshrined in the Universal Declaration (UN, 1948) and those advocated by human rights activists (e.g. Amnesty International, 2012). The rights to equality before the law, to freedom of religion and to popular sovereignty cannot be founded *directly* on some variant of pre-institutional or 'natural' law because they presuppose specific institutions such as a functioning legal system and the separation of church and state (Cohen, 2004b). The discourse of 'universal human rights' obfuscates the fact that these institutions are the brain child of a particular human tradition: the secular, liberal and democratic tradition of the Enlightenment (Langlois, 2002).

The best we can hope for, it seems, is a worldwide consensus on a *minimalist* conception of human rights. Surely the right to life would be included in this 'overlapping consensus' amongst the different ethical and religious traditions of the world? I argue that even this minimalist conception of human rights is problematic. As always, the 'devil lies in the detail'. Consider, for example, a devout Catholic and a secular Liberal confronted with a situation where an abortion is the only means to save a pregnant woman's life. The right to life of the mother and the right to life of the foetus are mutually exclusive. In this case the Catholic and the Liberal would certainly disagree on what exactly constitutes the 'human right to life' (Langlois, 2002). To put it polemically: A devout Catholic nation could call for a humanitarian intervention "to prevent the thousands of cases of abortion routinely practised in the secular West" and justify it with a *particular* conception of the human right to life (Koskenniemi, 2002, p.167). Nevertheless, this does not mean that we have to reject the idea of an 'overlapping consensus' on basic human rights amongst the world's different philosophical and religious traditions. The point is that these human rights are acceptable only to those adherents of any particular tradition that have already accepted the liberal notion of what it means to be a human individual. The world consensus on the good life and the cosmopolitan society which are implied by the discourse of 'universal human rights' do not exist. The *social* framework for universal human rights is not (yet) in place. The human rights on which international law instrumentalities are based have their origins in a particular human tradition, namely the political liberalism of the Enlightenment (Brown, 1997).

I suggest that we see human rights as a *discursive tool* rather that an intransigent set of "attributes worn by primitive men like amulets, which they carry into civilisation to ward off tyranny" (Freeman, 1994, p.498). The reconfigured human rights discourse would have to allow all the different human traditions to translate their understanding of justice into the language of human rights so that they can see these rights as emanating from their own worldview and not from the ideas of a particular period in European history (An-Na'im, 1992).

II.

In the first part of my argument I have shown that the *social* framework which is presupposed by the idea of 'universal human rights' is not given in the international sphere. In the second part I contend that this is also the case with regard to the *political* framework. The current framework can render international law based on human rights subordinate to the foreign policy choices of powerful states. Due to constraints of space I focus on *one* international law instrumentality based on the idea of human rights in order to illustrate my point: International criminal law.

International criminal law is dominated by the legacy of the Nuremberg and Tokyo war crimes trials (Teitel, 2000). For the first time, responsibility for large scale human rights violations was attributed to individuals rather than states. This 'new humanitarian regime' based on the rights of *persons* and *peoples*, rather than states, sought to overcome the limitations and the "hopelessly political" character of domestic criminal law in post-war periods and it sought to satisfy the core legal principles of fairness and impartiality (ibid., p.33). However, there is consensus, even amongst defenders of the Nuremberg and Tokyo criminal tribunals, that they were characterized by 'selective justice' (Bass,

2002). The dominant pragmatic-legalist approach to international criminal justice defends this distorted form of global justice with reference to the exigencies of the anarchical international system. They argue that in a world where "impunity is all too common […], waiting for perfect international justice would probably mean getting no justice at all" (ibid., p.1040). In contrast, I argue that instead of getting half a loaf of justice, we get a rotten one.

The pragmatic-legalist approach fails to see that the current international framework, in which power is distributed unevenly, enables influential states and their local protégés to enlist international law for their own purposes (Graubart, 2010). The proceedings of the World War II criminal tribunals exempted all war crimes committed by the United States and its allies. Although these crimes did not amount to those committed by the Nazis, they certainly entailed large scale violations of human rights. The use of nuclear bombs against thousands of civilians in Hiroshima and Nagasaki or the "use of incendiary bombs on urban populations in cities such as Dresden and Tokyo" were not subject to legal investigation because of the subordination of the tribunals to power politics (ibid., p.413).

Post-Cold War developments saw the increasing 'legalization' of international criminal law as tribunals gained *formal* autonomy from state actors (ibid.). The ad-hoc international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) established that local conflicts which traditionally called for domestic management are now considered to merit international attention; the laws of war now apply to intra- as well as inter-state conflicts (Teitel, 2002). However, despite the increased scope and autonomy of international criminal law, it is still characterized by 'selective justice' and amenable to power politics. The ICTR, for example, "lacks both means and political support to force the US-backed Rwanda Patriotic Front [which is now in power] to surrender its officials or soldiers" (Graubart, 2010, p.416). These PRF troops are estimated to have killed up to 200.000 Hutus in Rwanda and the neighbouring Congo since 1994 (Moghalu, 2005). With regard to the ICTY, a statement by the former chief prosecutor, Carla Del

Ponte, illustrates my point:

I quickly concluded that it was impossible to investigate NATO [actions], because NATO and its member states would not cooperate with [the tribunal]. They would not provide us access to the files and documents. […] I had collided with the edge of the political universe in which the tribunal was allowed to function. (2009, p.60)

NATO's bombing of Serbia in 1999 is estimated to have caused up to 500 civilian casualties and constituted a breach of international humanitarian law (Koskenniemi, 2002). The international criminal tribunals have entrenched a "distorted legal order that obstructs rather than advances the cause of genuine global justice" (Graubart, 2010). It remains to be seen if the newly established International Criminal Court can offset the shortcomings of the ad-hoc tribunals and function as a truly impartial and fair instrument of international criminal law. Suffice it to say that the USA, China, India and Russia have already exempted their citizens from the Court's potentially universal jurisdiction and that the members of the UN Security Council may postpone ICC prosecutions infinitely (Mayerfeld, 2003, p.123). The *political* reality of the current international system is still a far cry from the cosmopolitan society which the idea of 'universal human rights' presupposes.

Conclusion

For two reasons the idea of 'universal human rights' cannot offer a sustainable basis for developing international law. Firstly, the *social* framework for 'universal human rights' is not given in the international sphere: We cannot agree on their universality. Secondly, the *political* framework is not in place yet: In this climate, international law based on human rights can lead to a distorted form of global justice. Unless we develop a more flexible understanding of human rights and unless we can guarantee the impartiality and fairness of international law institutions, the one cannot offer a sustainable basis for developing the other.

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Written by: Maurice Dunaiski
Written at: University of York
Written for: Dr Chris Rogers
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