

Enforcing International Human Rights Law: Problems and Prospects

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HANNAH MOSCROP, APR 29 2014

‘The enforcement mechanisms which exist for the protection of international human rights law are simply not fit for purpose’. Discuss.

The end of World War II signalled a change in the international community’s attitude towards human rights. Since the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, many more instruments of international human rights law have been developed with corresponding enforcement mechanisms. This essay shall focus on the argument that, despite the large human cost of their failings, these enforcement mechanisms are fit for purpose and that the strongest enforcement mechanism is simply the fact that human rights are codified in international law. This argument is primarily based on the compliance pull of the legal strength of human rights instruments on international actors, particularly nation states. I shall then briefly examine some UN Charter-based enforcement mechanisms in light of this argument. There are two types of these instruments: declarations and conventions. Declarations are not legally binding but do have political impact. Conventions are legally binding under international law. Both declarations and conventions can become customary international law over time, which makes them universally legally binding.

A further distinction is to be made between mechanisms for human rights protection: the global and the regional. There are also individual domestic laws within states, which this essay shall argue are the result of a vertical compliance pull of the internalisation of international human rights norms derived from the international and regional declarations and covenants. This essay shall conclude that whilst there are irreconcilable political issues inherent in an anarchical society of uneven power and development, the acculturation power of international law is the dominant protector of human rights. Whilst the two founding principle of modern international society – non-intervention and state sovereignty – will always be a hinder to the enforcement of international human rights law when instances of humanitarian intervention might be considered, the legal instruments for the protection of international human rights are vital. They have, and will continue to be, a relative success when it comes to the enforcement of human rights laws.

Harold Koh argues that whilst international human rights are under-enforced, “they *are* enforced” through the transnational legal process (1999: 1399). This process consists of interaction between international institutions, interpretation of the legal norms they develop, and internalisation of these norms into the collective consciousness of international actors and domestic systems. He also draws a distinction between obedience of the law and enforcement of the law (1999: 1401) – although this essay argues that internalisation of human rights norms is initially enforced through the adoption of international law, and once properly internalised into the thinking of international actors and populations will result in obedience to human rights law and its corollaries. The path to internalisation of norms and laws is however long and with many different branches. Koh identifies five complementary reasons for ““why nations obey”: *power*; *self-interest* or rational choice; *liberal explanations...*; *communitarian explanations*; and *legal process explanations*” both horizontal and vertical (1999: 1401). This essay shall take a slightly different approach to these five reasons, arguing that together they are a process but do not tend to run concurrently – we have moved away from realism to a more liberal international society.

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The *initial* reasons for state obedience of international human rights law are likely to be based firstly in power, as from a realist perspective. The birth of international human rights law was under the United Nations, created by the victors of World War Two: the UN system therefore favoured, and indeed still does, the interests of the powerful states of the mid-1940s. This is most strongly reflected in the powers of the P-5 in the Security Council. Secondly, self-interest has encouraged other states to participate in the international legal system. Rather than, as Thucydides explained, “the weak suffer[ing] what they must” (Strassler 1998: 352), it made rational sense in terms of game theory to take part.

Thirdly, the increase in global participation has led to liberal and communitarian reasons for obeying international law. The spread of democracy during the mid-20th century onwards has led to an ever-increasing global liberal society. Much work has been done on the theory of the democratic peace (see Doyle 1986), but Anne-Marie Slaughter has taken it further to suggest that “democracies do law...better – at least with each other” (Alvarez 2007: 17). The spread of liberal democracy, and therefore the increase in success of international law (at least between these democracies), leads on to an increase in communitarian reasons for state obedience of international law. These are based on the idea that “one’s membership in a community helps to define how one views the obligations of that community” (Koh 1999: 1406). A good example of this is the Council of Europe and the peer pressure exerted by long-standing members onto newer members, such as the Ukraine and Turkey. Koh compares this to the relative lack of success of the African Charter on Humans and Peoples’ Rights, under which democracies and authoritarian regimes work together with less success (1999: 1405-6).

This logical progression has taken us from realist theories of law obedience to liberal and communitarian theories, showing that the international human rights legal system is a dynamic and evolving process. Once law is obeyed for communitarian reasons on a horizontal, state-to-state plane, the vertical internalisation of legal norms and values seems the logical next step. Through the transnational legal process described above, norms are integrated into domestic law. This is a vertical ‘drip-down’ effect from global concerns to regional institutions which often requires states to adopt charter provisions into domestic law. Once in place as domestic law, these values become internalised.

The socialisation of legal human rights norms is the most effective method for guaranteeing obedience to human rights laws, and is identified by Goodman and Jinks as “*acculturation*” – defined as the “general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture” (2004: 621). In an increasingly liberal democratic international society, and within predominantly liberal regional organisations, the acculturation of societies within each state is inevitable – peer pressure and socialisation, coupled with the increase in communications, INGOs, and globalisation lead to an assimilation of beliefs about human rights and the power of international human rights law. The acceptance of human rights norms into popular culture, political society, and behaviour is the most powerful method of enforcement.

Due to this process, the values we now hold about human rights (as codified in the human rights Declarations and Covenants of the UN) are now so internalised that any disobedience of international human rights law is all the more shocking, and often triggers over-criticism of the enforcement mechanisms for international human rights law. Whilst any human rights abuse comes at a humanitarian cost which cannot be ignored, obedience to international human rights law globally is set at a high level. For reasons of conciseness, this essay shall however examine UN Charter-based enforcement mechanisms only; there are separate mechanisms for enforcement at regional and domestic levels, and independent bilateral enforcement methods such as diplomacy and sanctions. The enforcement mechanisms examined here shall be the Human Rights Council and the Universal Periodic Review. This shall be done in reply to criticisms of the UN human rights mechanisms. and in light of the above argument that the internalisation of human rights norms among states is the most powerful enforcement mechanism.

In 2006, the High Commissioner for Human Rights, Louise Arbour, voiced concerns about the human rights mechanisms under the UN, including: “the *ad hoc* manner in which the treaty body has grown”, “the low levels of public awareness”, and “the absence of effective, comprehensive follow-up mechanisms for recommendations” (O’Flaherty 2011: 70). These shall be examined in order.

Firstly, the *ad hoc* manner of adoption of human rights treaties is to be expected in an international system

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characterised by sovereign states with differing political systems. The proliferation of liberal democracy is still a modern and ongoing concept. If the development of international human rights law is due to the spread of liberal democracy and acculturation, then human rights law is bound to grow with liberal democracy in a reactive manner – rarely is law pre-emptive.

Secondly, perceived low levels of public awareness do not correspond with the internalisation element of the legal process. However, lack of public awareness of *international* human rights norms is not to say that there is no public awareness of *domestic* human rights norms, which, from the drip-down of norms from the international arena identified above, are likely to be very similar. True internalisation of norms and laws means that one is not 'aware' of the reasons behind their normative values in a legal sense, but that they are inherent in that society's beliefs system. Therefore, low levels of public 'awareness' do not equate to public apathy.

Thirdly, the absence of effective follow-up mechanisms for recommendations is a damning critique of the UN human rights protection system. Two examples of the mechanisms that do exist – the Human Rights Council and the Universal Periodic Review – are examined below. However, the principles laid out under Article 2(4) of the UN Charter (1945) (the ban on the use of force), severely curtails the options of enforcement by the UN toward states that commit serious human rights abuses. The contested concept of humanitarian intervention is a heated debate, and the UN Security Council historically tends not to have a unified opinion on this. The states mainly associated with humanitarian intervention are the US, Britain, France, Australia and Canada. Currently, these states are only likely to intervene in their direct sphere of influence, region, or ex-colonies. International-led interventions by the UN have been ad hoc, with a "dismal record" (Kurth 2005: 100) due to the veto power of the P-5.

There is potential for regional organisations with more cohesive human rights policies (due to the communitarian reasons for adopting human rights norms) to intervene in their sphere of influence in humanitarian crises. The Responsibility to Protect doctrine gives regional ownership before international (UN) ownership, and 'prototypes' of this kind of intervention have been seen, such as the EU and NATO providing training and support for African Union troops on the ground in Darfur in mid-2005 (Kurth 2005: 101). However, the recent adoption of Security Council resolution 1973 over Libya shows that UN-authorized humanitarian intervention is a possibility (UN Security Council 2011). One could find reason for this in the horizontal transnational legal process of acculturation of human rights values, particularly through the spread of the media and internet.

Following criticism of the legitimacy of the UN Commission on Human Rights, the Human Rights Council was created and held its first session in June 2006 (Weissbrodt 2011: 15). The UN's reaction to criticism of the Commission demonstrated firstly the power of internalised human rights norms at societal and INGO level (the Commission was heavily criticised by Human Rights Watch over the nomination of Libya as Commission Chair (2002)), and secondly the power of these norms at state and international organisation level within the UN. The perceived legitimacy of the claims against Libya was the result of the acculturation of the human rights norms laid down in the International Bill of Rights and other Declarations and Conventions.

The Universal Periodic Review, held first in April 2008, shows the power of peer pressure in enforcing human rights law. States' commitments to human rights are reviewed in regards to the UN Charter, the Universal Declaration of Human Rights, any conventions which the state has ratified, and any voluntary commitments a state may have made (Weissbrodt 2011: 23). The idea behind the Universal Periodic Review makes sense from the argument put forward above: the universality of the process makes it applicable to all UN member states. The process of legal obedience tends *generally* towards liberal, democratic, developed states being more successful in terms of co-operation and coherence of policies. Therefore the self-interest rationale put forward by rational choice theorists suggests that states who are not yet part of the 'liberal democratic group' will strive towards that goal, and one method to do this is to comply with the UPR and gain a favourable review from the Working Group.

This argument is backed up by the figures from June 2009, which show that after 70 states had undergone review there had been a "100 per cent cooperation rate" (Weissbrodt 2011: 23). Immediate action by Uruguay, for example (Brett 2009: 10), shows the normative compliance pull of the human rights advocacy 'culture' amongst states. This is in contrast to the International Covenant on Civil and Political Rights, for example, where states have been over a

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decade late in submitting their reports on its implementation (Brett 2009: 10). A reason for this could be the lack of universality – the ICCPR applies to many states, but the UPR applies to *all* UN member states.

In conclusion, there are many shortcomings in the enforcement mechanisms of international human rights law; this essay has examined some of those found amongst the UN enforcement mechanisms. However, these weaknesses are due to unavoidable aspects of our anarchic global society, especially the principle of state sovereignty. Whilst this concept is hard to reconcile with the use of force to enforce human rights, there is hope amongst the recent decisions of the UN Security Council over Libya, and also for regional bodies with more credibility within their regions to act. The most powerful enforcer of human rights is the horizontal and vertical transnational legal process and the resulting internalisation and socialisation of human rights values. The acculturation of human rights within liberal democratic government frameworks encourages domestic internalisation and the spread of these values amongst states, especially states who perceive they have commonalities, such as democracy, or who aspire to be counted amongst those 'morally higher' states. Whilst the enforcement of any kind of international law is fraught with issues that domestic laws do not have due to the lack of an international authority, the value of socialisation and peer pressure is not to be underestimated when it comes to the enforcement of international human rights law.

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