More Honey Than Vinegar: Peer Review As a Middle Ground between Universalism and National Sovereignty

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INTRODUCTION

Dr. Martin Luther King famously suggested that the arc of the moral universe is long and that it bends towards justice.\(^1\) This vision is reflected in growing and evolving global acceptance of the universality of human rights values. The positive correlation between justice, especially as evidenced by respect for human rights, and the prevention of conflict has been well articulated.\(^2\) It has been argued that a generalized understanding is now developing regarding the conceptualization and implementation of human rights that diverges from the first, second, and third world doctrines, which dominated the global human rights agenda until the end of the Cold War.\(^3\)

Although elements of the philosophies underpinning Western,

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socialist, and developing countries’ doctrines on human rights continue to permeate inter-governmental human rights debates, albeit with many nuances no longer captured in traditional East-West or North-South divides, the current period is marked by a “broad consensus on the need to consider respect for human rights a sine qua non for full international legitimization.” An interesting proposition is that the existence of a “global consensus” in international law is the result of the overlapping views of a few powerful countries. Still, the voices contesting the universality of global values as foundations of international law, and particularly as foundations of the international human rights regime, are far from silenced.

This article explores the potential of strategies, rather than philosophies, for the implementation of human rights as a means of reconciling the universalist and relativist conceptual approaches. In doing so, it engages with the eternal issue of “sovereignty” as an impediment to strengthening the international human rights regime. The founders of the United Nations were unable to overcome their concerns regarding limitations to their sovereignty, including transferring various governance competencies to international organizations. As a result, Article 2(7) of the Charter of the United Nations (UN Charter) maintains the principle of state sovereignty, constraining the organization’s powers to intervene in the domestic affairs of member states, with the sole exception of collective action under Chapter VII in response to the breach of, or threats to, international peace and security. Despite this strong assertion, articulated among the principles of the organization, references to human rights included elsewhere in the UN Charter have been used as a foundation for an increasingly active UN human rights regime, permeating (at least nominally) all of the spheres of activity and structures of the United Nations.

6 Charter of the United Nations, Can TS 1945 No 7 (in force 24 October 1945) [UN Charter].
7 On the 1997 UN reforms, aimed at mainstreaming human rights, see Elvira Domínguez-Redondo, “The Millennium Development Goals and the Human Rights Based Approach: Reflecting on Structural Chasms with the United Nations System” (2009) 13:1 Int’l JHR 29 at 31. In her 2011 annual report, the UN high commissioner for human rights highlighted the approval of the following policy...
The evolution of the UN human rights regime has been significantly influenced by the changing cast of dominant state actors. The more developed Organisation for Economic Co-operation and Development (OECD) countries have generally been more open to accepting and promoting some evolving international norms, even though these may result in diminished sovereignty. They have been frequently prepared to specifically criticize and “call out” states deemed to be violating commonly accepted human rights principles. By contrast, the Non-Aligned Movement, then the G-77, and, more recently, the emerging powers known as BRICS (Brazil, Russia, India, China and South Africa) have had a different approach. The change in the relative participation and influence of emerging powers, many of which did not participate actively in the development of earlier conceptions of the international human rights machinery, has led to a significant debate. As the human rights machinery has grown, these states have aligned themselves, at least in theory, with a conception of human rights that is more consonant with the notion of state sovereignty, in which cultural differences often significantly contribute to the formulation of normative standards (for example, the discussion on the defamation of religions).


Between 1999 and 2011, the Commission on Human Rights and the Human Rights Council (HRC) adopted resolutions, sponsored by the Organisation of Islamic Countries, on “defamation of religions,” which implied some endorsement of controversial limitations to the right of freedom of expression. HRC Resolution 16/18 (2011) has changed this trend, replacing the focus on “combating defamation” with “combating religious intolerance.” See HRC,
The biggest impact, however, lies in their insistence that apolitical technical co-operation, rather than value-laden “naming and shaming,” is the appropriate approach by which to advance human rights. As a result, these states continue to resist measures deemed to monitor their compliance with human rights obligations without their express consent and, therefore, remain proponents of a restrictive conception of sovereignty. At the same time, however, a range of methodological approaches, such as the responsibility-to-protect concept (R2P) and peer-review mechanisms, both developed with the explicit support of G-77 states, reflect moves in this era of globalization towards more flexible interpretations of national sovereignty.

Two of the major initiatives focusing on governance and human rights are the UN Human Rights Council’s Universal Periodic Review (UPR) and the African Peer Review Mechanism (APRM). Both approaches are relatively new. The APRM was implemented in 2003 and the UPR in 2008. They represent, at least in theory, a fresh approach as they do not involve conditionality and have the potential to minimize North-South and other cleavages between regions.

This article begins by explaining the context in which peer review mechanisms were conceived as a means of addressing the long-standing denunciation of the political selectivity of investigation and/or condemnation of situations in particular territories. It

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explores the gap between the universalist and cultural relativist human rights perspectives and highlights the role of human rights in what is claimed to be a progressive erosion of the sovereignty of states. This exploration sets the scene to consider the nascent role of one international organization’s peer review process — the UPR — at the UN Human Rights Council in contrast to other, more traditional (and coercive) methods of influencing state behaviour regarding human rights. Through the prism of the UPR, this article will challenge common perceptions regarding regional blocs and the pursuit of national and regional policies on human rights issues and explain the potential of such a mechanism to showcase existing or emerging customary law. Furthermore, it will explore the role and potential of inter-governmental mechanisms based on peer review assessment in the prevention of human rights violations and conflict mitigation. In examining the last point, it will focus on the outcomes of the UPR but will also refer to the APRM.

Overall, this article aims to demonstrate that peer review mechanisms may, if used wisely, “thread the needle” by addressing national sovereignty concerns while concomitantly promoting adherence to universal human rights standards. It also posits the idea that the establishment of peer review mechanisms with which states are voluntarily engaging for the promotion and protection of human rights may be a reflection of a level of “maturity” of human rights law as a subject of international law.

**Universal Periodic Review: A Contemporary Inter-Governmental Approach to Implementing Human Rights**

While no general norm of international law obliges states to choose any particular means of monitoring their compliance with agreed standards or in resolving disputes, the vast majority of international disputes involving states and/or international organizations follow a pattern. Diplomatic means of dispute settlement are attempted first and other, more adversarial, means are used when diplomatic means do not bear fruit. In extreme cases where there is a threat to peace and security, the UN Security Council may decide a course of action that also follows the logic of gradually increasing severity of measures, from less to more aggressive, as exemplified in Articles 41 and 42 of the *UN Charter*.

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Contrary to other areas regulated by international law, human rights implementation mechanisms have rarely been left in the hands of states alone. Politicization is understood as being synonymous with inefficiency and injustice when it comes to assessing the work of human rights bodies. The actions of inter-governmental bodies such as the UN General Assembly, the Human Rights Council, or the Security Council are, by definition, political. Therefore, ever since the United Nations decided it had competence to address human rights violations, reversing its original position based on Article 2(7) of the *UN Charter*, these organs have used numerous expert bodies to assist in this work.\(^{14}\) This practice has provided legitimacy to their human rights work since initial reliance on governmental representatives alone met with fierce criticism.\(^{15}\) In addition, the non-reciprocal nature of human rights, the inequality between parties (individual versus state), and the configuration of human rights as legal claims protecting individuals from abuses of (state) power have all led to a very particular legal conception of human rights. As a result, the measures and mechanisms considered suitable for the implementation of human rights have frequently been based on legal principles articulated by independent experts, reflected in the myriad of *UN Charter* and treaty-based human rights bodies that have been created under the auspices of the United Nations.

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\(^{14}\) On the declaration of non-competence with respect to allegations of human rights violations, see ECOSOC Resolution 75(V) of 5 August 1947, UN Doc E/573, ESCOR, 5th Sess, Suppl No 1 at 20, endorsing the decision of the UN Commission on Human Rights during its second session (UN Doc E/259 (1946) at para 22). The only entry point for petitions to UN organs, until 1967, was restricted to those addressed to the now inoperative Trusteeship Council and the “24 Committee” that monitored implementation of the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN Doc A/RES/1654 (XVI) (27 November 1961). See, for example, Nigel Rodley, “Monitoring Human Rights by the UN System and Nongovernmental Organizations” in Donald P Kommers and Gilburt D Loescher, eds, *Human Rights and American Foreign Policy* (Notre Dame, IN: University of Notre Dame Press, 1979) 157 at 161-62. On the change of position of the organization, reflected in ECOSOC Resolution 1235 (XLII), ESCOR 42nd Sess, UN Doc E/4393 (6 June 1967) Suppl No 1 at 17, see Elvira Domínguez-Redondo, “Rethinking the Legal Foundations of Control in International Human Rights Law: The Case of Special Procedures” (2011) 29:3 Nethl Q HR 261.

\(^{15}\) On the criticisms and legal questions raised regarding the decision of the former UN Commission on Human Rights to use its own members (governmental representatives) as mandate holders of the first “special procedures,” see Theo van Boven, “Fact-Finding in the Field of Human Rights” (1973) 3 Israel YB Human
This development does not mean that extra-legal, non-adjudicatory methods of work, where the aim is other than to discern whether or not a state has failed to honour its human rights obligations, are alien to UN human rights monitoring bodies. Mandate holders of special procedures of the UN Human Rights Council and experts on treaty bodies offer technical co-operation to states and use tools aimed at protecting potential victims of human rights violations, often without entering into an assessment of the legality of the situation.\textsuperscript{16} Treaty bodies have demonstrated the potential for achieving positive results through engaging in constructive dialogue with the state concerned.\textsuperscript{17} In addition, “confidential enquiries” to investigate widespread or systematic violations are foreseen in the \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} (Article 20), the \textit{Optional Protocol to the Convention on the Rights of Persons with Disabilities} (Article 6), and the \textit{Optional Protocol to the Convention on the Elimination of Discrimination against Women} (Article 8).\textsuperscript{18}

Until recently, inter-governmental mechanisms of human rights implementation under UN auspices attained modest results, reinforcing the view that human rights monitoring was at an advantage in the hands of third parties, such as independent experts. The first example illustrating this point consisted of the establishment, in

\begin{thebibliography}{9}
\bibitem{16} On the emphasis placed on dialogue and co-operation in the mandates of special procedures and the humanitarian element of their work, see Bertram Ramcharan, \textit{The Protection Role of UN Human Rights Special Procedures} (The Hague: Brill, 2009).
\end{thebibliography}
1956, of a system of periodic reports to be submitted by states to the then UN Commission on Human Rights\textsuperscript{19} on progress achieved within their territories in advancing the rights enshrined in the Universal Declaration of Human Rights,\textsuperscript{20} the Declaration on the Granting of Independence to Colonial Countries and Peoples,\textsuperscript{21} and the Declaration on the Elimination of All Forms of Racial Discrimination.\textsuperscript{22} The purpose of periodic reports was not to criticize or evaluate the situation of human rights in a given country but, rather, to gather information and serve as a “valuable incentive to Governments’ efforts to protect human rights” and promote their implementation.\textsuperscript{23} The consensus among commentators at the time, still shared today, is that this mechanism did not result in any meaningful outcome\textsuperscript{24} in its twenty-


\textsuperscript{21} Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), UN Doc A/RES/1514(XV) (14 December 1960).

\textsuperscript{22} Declaration on the Elimination of All Forms of Racial Discrimination, GA Res 1904(XVIII), UN Doc A/RES/1904(XVIII) (20 November 1963).


five-year existence. Nevertheless, periodic reporting has been incorporated into all of the core international human rights treaties since then. Other equally flawed processes have included: (1) the much criticized “complaint procedures” (formerly 1503 procedure) whose impact is limited due to its confidentiality; (2) the still unused inter-state complaint mechanisms under some treaty-based bodies; and (3) the limited number of cases brought to the International Court of Justice (ICJ) based on human rights violations. In brief, past experience of human rights mechanisms dependent on inter-governmental bodies for their implementation suggests that states have not been particularly committed to the enforcement of human rights in other jurisdictions.


many were sceptical, if not openly against it. Experience has challenged this reflexive attitude, however, and the initial scepticism has given way to grounds for belief that many governments are engaging seriously with the mechanism. Assessments regarding state compliance with recommendations must await the end of the second cycle, at which time judgments on whether recommendations agreed to in the first cycle have been implemented. Research, however, shows high levels of acceptance of recommendations made during the process, and there is significant data indicating positive on-the-ground impact of the UPR in the short term. Its capacity to provide unprecedented data highlights the rather mediocre human rights performance of the permanent members of the UN Security Council, five countries enjoying de facto immunity from strong action by the UN Commission and Human Rights Council until now. In addition, topics consistently overlooked under the international human rights mechanisms, such as minority rights and sexual orientation rights, are finding accommodation under the UPR.

There are other positive outcomes. Peer review mechanisms for the implementation of human rights such as the UPR and the lesser

29 On the criticisms expressed, see Domínguez-Redondo, supra note 10 at 679-80.
30 By April 2013, the only country not to have participated as a state under review was Israel (in the fifteenth session in January 2013).
31 McMahon, supra note 8 at 13.
34 Joshua Castellino, “No Room at the International Table: The Importance of Designing Effective Litmus Tests for Minority Protection at Home” (2013) 35:1 Hum Rts Q 201.
36 For an analysis of the treatment of lesbians, gays, bisexuals, and transsexuals during the first eight sessions of the UPR, see UPR, “Issue Analysis: Lesbians, Gays, Bisexuals, Transsexuals” (2011), online: <http://www.upr-info.org/IMG/pdf/issue_analysis_lgbts.pdf>. Minority rights are among the top ten issues raised during the UPR process. See McMahon, supra note 8 at 20.
known APRM are, perhaps ironically, relying on traditional sovereign state diplomacy to further human rights implementation. We argue that this trend is positive at three levels: (1) at a theoretical level, it reveals an evolving maturity of the human rights regime with a capacity to detach from exclusively legalistic approaches to human rights implementation; (2) at a policy level, it has generated evidence of measured positive outcomes of peer review mechanisms, suggesting a preference for more co-operative approaches to human rights implementation as a first and complementary step to other more legalistic/adversarial means of implementation; and (3) peer review mechanisms offer both a theoretical and pragmatic framework under which to reconcile universalist and relativist approaches to human rights, accommodating international legal obligations while also formally accommodating the concept of sovereignty.

INTEGRATING UNIVERSALISM AND CULTURAL RELATIVISM

Proponents of universal values argue that all human beings have certain basic human rights such as the freedoms of religion, speech, association, and thought. The *Universal Declaration of Human Rights* is the most seminal document legitimizing this perspective, profoundly and positively affecting human rights globally. In 1948, the UN General Assembly proclaimed the declaration to be a “common standard of achievement for all peoples and all nations.” This sense of universalism is rooted in other jurisprudential theories such as natural law theory — that is, belief in a higher, divinely ordained law and its secular counterpart, the theory of rationalism.


39 *Universal Declaration of Human Rights, supra* note 20.
Some proponents have sought to justify an emerging consensus on the right to democratic forms of government.\textsuperscript{40} Another strand holds that since human rights are universal, their global observance leads to improvements in living standards throughout the world. One of the most influential proponents of this perspective is Nobel Prize winner Amartya Sen who has argued not only that personal freedom and individual rights are global in nature but also that they are inextricably linked to economic development.\textsuperscript{41} The internationalization of human rights — that is, the treatment of human rights as a subject of international law and politics,\textsuperscript{42} reinforces its foundational claim of universality. This claim is closely linked to liberal and constitutional conceptions of international law, based on shared global values.

The purported universality of some of these foundational values of international law has been the cause of unease and contestation among international lawyers.\textsuperscript{43} Third World approaches to international law have also pointed out that the universality of international law is a sub-product of colonialism.\textsuperscript{44} Similarly, the universality of human rights is an issue that has been hotly contested for decades by cultural relativists. They argue either that (1) such rights do not exist or (2) to the extent that such rights exist, they must be fully mediated and interpreted through the particular social, cultural, and historical prisms of the societies in which people live. The \textit{Universal Declaration of Human Rights} was challenged at its birth by the American Anthropological Association, which queried how the declaration could “be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in countries of Western Europe and America.”\textsuperscript{45}

\textsuperscript{40} Thomas Franck, “The Emerging Right to Democratic Governance” (1992) 86:1 AJIL 46.


Proponents of these views have spoken against a broad-based interpretation of human rights — for example, through the “Asian values” argument. Some leading developing world figures, such as Singapore’s former Chief Minister Lee Kuan Yew, have strongly contested universal interpretations of human rights and suggested instead that there are “Asian values” based on regional, rather than on universal, norms.

Rhonda Calloway suggests that this critique provides an alternative to Western states’ perspectives, emphasizing state sovereignty, respect for hierarchy and authority, and socio-economic rights. This view holds that Western political culture is too individualistic, suffers from a crumbling civil society, and has sought to impose its values inappropriately in non-Western contexts. Counter-arguments suggest that Asia is not homogenous and that there cannot be one over-arching set of values and that the Asian values argument has tended to be advanced by Asian governments or their supporters who benefit politically from doing so. This issue has also arisen in the clash of Middle Eastern or, more precisely, Islamic values and those of Western states. Ali Mazrui has focused on various aspects of this question, arguing that compatibility exists between the two cultures and that the West (his term) has much to learn from Islamic values. Other authors have noted that discrepancies in approach may have less to do with Islam than with the economic, social, and political distortions inherent in the Middle Eastern oil-based rentier contexts.

A similar debate has taken place regarding African approaches to human rights and democracy. African intellectuals in the post-independence period argued that single-party democracy was

50 Larry Diamond, Marc F Plattner, and Daniel Brumberg, eds, Islam and Democracy in the Middle East (Baltimore, MD: John Hopkins University Press, 2003) at xii.
possible and feasible in Africa. Presidents Julius Nyerere of Tanzania and Kenneth Kaunda of Zambia were ardent proponents of this theory, and President Yoweri Museveni of Uganda developed a “no-party” variation on this theme. While this perspective has been discredited due to the abuses of human rights and economic decline that accompanied the suppression of political pluralism, a germ of truth lies in the fact that political institutions cannot be grafted wholesale from one context into another, as they were from Europe to Africa with disastrous results after colonial rule. This argument has been adapted and developed by Daniel Osabu-Kle, although his approach is stronger in critiquing the impact of Western models than in proposing realistic and workable models of governance that reflect regional realities and universal values.51

In recent years, an increasing number of commentators have sought common ground between the complete adherence to immutable universal values, including human rights, and full cultural relativism in which rights can only be defined in the context of the particular society in question. These perspectives include the further articulation of the concept of a “right to culture,” in which the relativist regard for difference is made the subject of a universal right to express this different identity and examples by which universalist legal frameworks accommodate difference to reflect different traditions. Such thinking has been spurred on by the work of the United Nations itself. The landmark 1993 Vienna Declaration and Program of Action states that

[all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.52

Similarly, Jack Donnelly seeks to articulate what he views as the reality of both universal and contextual elements in human existence

by developing the concept of “relative universality,” although he recognizes that the devil can be in the detail when one determines how much weight to assign to the “relative” or the “universal” aspects of this concept.\(^{53}\) Michael Goodhart argues that one way to move beyond the divide is for analysts to avoid conceptualizing rights as either universal or relative.\(^{54}\) Michael Brown struggles with this dichotomy, stating that classical cultural relativism ... has been debated by scholars for more than a half-century. Today’s consensus is that, as originally conceived, cultural relativism has significant flaws ... Yet there is much to be said for the clarity and conciseness of classical cultural relativism’s claim that cultures constitute different life-worlds, as long as they are not taken too literally.\(^{55}\)

Adamantia Pollis and Peter Schwab, whose previous work has fallen squarely into the cultural relativist camp, have also evolved in their thinking, largely because of the reality of the phenomenon of globalization. They take the approach of integrating cultural elements into a universal concept of human rights, as opposed to fundamentally questioning the universality concept itself.\(^{56}\)

A related cleavage occurs in discussions concerning the nature and definition of human rights. One school of thought has focused on human rights as primarily civil and political in nature, as reflected in the work of non-governmental organizations (NGOs) such as Freedom House and Human Rights Watch. Hugo Bedau, for example, has argued that, at their core, human rights are “negative” in nature, in the sense that they are focused on protecting the individual from abuses by the government.\(^{57}\) Others, such as Henry

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Shue, have argued that human rights should be seen as “positive,” expanding the role of government in addressing basic human economic, social, and cultural needs. This discussion has been coloured by regional and geopolitical considerations, as Western states have tended to define human rights in the former terms, while communist bloc countries before the fall of the Iron Curtain and those in the developing world (especially governments) have argued for the broader interpretation. Richard Claude and Burns Weston, among others, have built on the concept introduced by Karel Vasak of “first-generation” civil and political rights, “second-generation” economic, social, and cultural rights, and “third-generation” “solidarity” rights, which represent a further extension of the rights concept into the areas of global redistribution of wealth, the sharing of global resources, and the right to peace.

As with the universalist and cultural relativity themes, some more recent observers have sought to identify bridges between “negative” and “positive” definitions of human rights. In a move that received considerable attention in the press and academia, the highly respected and influential American Anthropological Association altered its stance on the Universal Declaration on Human Rights in 1999, stating that its working definition [of human rights] builds on the Universal Declaration of Human Rights (UDHR), the International Covenants on Civil and Political Rights, and on Social, Economic, and Cultural Rights, the Conventions on Torture, Genocide, and Elimination of All Forms of Discrimination Against Women, and other treaties which bring basic human rights within the parameters of international written and customary law and practice.

Leonard Rubenstein has suggested that human rights groups have an important role to play in promoting economic, social, and cultural rights by (1) collaborating with partner organizations in the developing world in lobbying for systems and services that meet needs in a manner consistent with human rights requirements; (2) advocating for resources to fulfil economic, social, and cultural rights, especially by lobbying for funds from wealthy countries; and (3) monitoring compliance by states with the increasingly explicit obligations to protect, respect, and fulfil these rights. Bonny Ibhawoh has noted some movement on the part of Western state-oriented human rights NGOs to include economic, social, and cultural rights in their agendas. He has also emphasized the role that indigenous human rights organizations in the developing world can play to help further this debate.

These themes represent, in varying ways, attempts to find “middle ground,” to attenuate some of the highly polarized, partisan, and ideological thinking that was a feature of the Cold War, shifted onto a North/South axis, and that has subsequently evolved as a result of the “global war on terror” that followed the 11 September 2001 attacks. Proposals to achieve a paradigm shift reconciling the tension between universalists and relativists have also included: (1) proposals to move from a “representation of culture as abstract and static to one based on the reality of culture as practice”; (2) the cross-cultural approach advocated by Abdullahi An-Na’im; (3) the “inclusive universality” promoted by Eva Brems; and (4) the

66 Addo, supra note 17 at 612-13, based on arguments developed in Eva Brems, “Reconciling Universality and Diversity in International Human Rights: A
approach based on “legal practice” articulated by Douglas Donoho. After summarizing the shortcomings of these approaches, Michael Addo has suggested that the working methods of UN human rights treaty bodies could offer a model of good practice for managing the tensions between universalist and cultural relativist schools of thought. We suggest that the creation of the UPR (and other international organization, peer review processes) also reflects this ambitious, albeit imperfect, compromise, which promotes a global conception of human rights while acknowledging the realities of regional and/or cultural differentiation.

Recent research suggests that there is robust evidence supporting the proposition that states ratify treaties because they intend to comply with them. It is therefore fair to deduce that the engagement of states with international mechanisms reflects a level of commitment to them, at least at the time of engagement. In the case of the UPR, for example, all states have engaged with the system (with the exception of Israel for a few months during the second cycle in 2013). This record suggests, assuming these conclusions can be applied to other human rights commitments and mechanisms, at least some commitment on the part of participating states towards human rights implementation.

It is not the objective of this article to refute the widespread, but uncorroborated, belief about the limited impact of UN Charter-based bodies, such as the Human Rights Council and its subsidiary bodies, due to their characterization as political organs. Contrary to Addo’s assertion that a legal approach is a necessary condition to achieving reconciliation between cultural diversity and universal respect for human rights, this article argues that it is the more


67 Addo, supra note 17 at 613-14. This approach is articulated by Douglas L Donoho in “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards” (1990-91) 27 Stanford Journal of International Law 345.

68 Addo, supra note 17 at 613-14. 

69 Beth A Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge: Cambridge University Press, 2009) at 80-111.

70 Israel returned to the UPR a few months later, in November 2013.

71 Simmons, supra note 69.

72 Conversely, increasing evidence seems to point in a totally different direction. See Domínguez-Redondo, supra note 10; McMahon, supra note 8.

73 Addo, supra note 17 at 602, 614-15.
co-operative techniques used by human rights bodies in recent years, rather than the nature (that is, legal or political) of such bodies, that seems to be adding value to existing human rights implementation mechanisms. Preliminary research provides reason for optimism regarding the beneficial effects of peer review mechanisms on the enjoyment of human rights on the ground.74

Whatever the reasons behind it, the scale of engagement of states with the UPR is unprecedented, as is the data it is generating on levels of respect for global human rights as well as the evidence of opinio juris in relation to human rights and international humanitarian law. The preparation of state reports for the UPR and the interactive dialogue is particularly useful as a tool to identify and blend different sets of social values at the universal level since it allows “the identification of the positions which the responsible organs of governments have officially adopted.”75 In addition, the existence of this data has facilitated innovative research measuring the impact of the UPR. The efficiency of other UN human rights bodies has only been tested in recent times, after decades of existence,76 while quantitative and qualitative analyses of the UPR’s impact were available less than five years after its implementation.77 This phenomenon is related to the quantity and quality of data generated by the UPR itself, which is relatively standard and comparable for all states.78 It is also not dependent on restricted sources for certain countries or rights, a bane often undermining the reliability of conclusions reached by researchers engaged in empirical analyses of the effectiveness of human rights mechanisms prior to the UPR.79

74 See “UPR,” supra note 32; Domínguez-Redondo, supra note 10; McMahon, supra note 8. These include some specific examples of changes that have occurred in state promotion of human rights as a result of the UPR.
76 While similar works with different conclusions have proliferated since, the first relevant attempt to test empirically the effectiveness of the UN human rights machinery was undertaken by Oona Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) 112 Yale LJ 1935.
77 See “UPR,” supra note 32; McMahon, supra note 8.
This is the first comprehensive source of information allowing an analysis of the standards used in practice when states examine human rights performance in a peer context. For instance, by analyzing the types of action verbs utilized in recommendations and ranking them on a scale from one (minimal action) to five (specific action), it is possible to develop a picture of the extent to which recommendations are “softer” — that is, easier for states to accept — or “harder” — requiring more critical human rights reforms (and posing greater costs for states in rational choice terms).\(^{80}\)

**Evolving Perspectives on National Sovereignty and Human Rights**

States have not only committed themselves to protecting the rights of all within their jurisdiction, but they have also accepted that human rights no longer fall within their exclusive domestic jurisdiction. When obligations *erga omnes* are violated,\(^{81}\) including gross human rights violations, states other than directly injured states may invoke international responsibility.\(^{82}\) In extreme scenarios, there is discussion of the “right” (of humanitarian intervention)\(^{83}\) or even the responsibility to intervene (that is, R2P), if necessary, using armed force.\(^{84}\) The discourse over the R2P principle, its endorsement as a concept by states in 2005,\(^{85}\) and the United Nations-sanctioned interventions in Libya and Côte d’Ivoire in 2011\(^{86}\) have been interpreted as a confirmation that “human rights concerns have effectively become internationalized and the rights of non-interference

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\(^{80}\) See McMahon, *supra* note 8.


\(^{85}\) 2005 *World Summit Outcome*, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/Res/60/1 (2005) at paras 139-45.

and non-use of force have been qualified as a result ... [T]hose states advocating an absolute right to non-interference clearly represent a minority.”

Louis Henkin was one of the most enthusiastic proponents of the argument that state sovereignty becomes subsidiary when this foundational principle of international law clashes with the promotion and protection of human rights. He viewed human rights law as a real “revolution” of international law, changing its content, sources, and means of implementation. The erosion of the principle of sovereignty has been welcomed as a positive effect of the human rights regime at the international level. Sovereignty and human rights have traditionally been seen as being in an antagonistic relationship — Article 2(7) of the UN Charter has often been used by states as a shelter from scrutiny in relation to human rights.

Others suggest that human rights have re-conceptualized sovereignty rather than eroded it. Anne Peters, for instance, argues that the impact of human rights in international law may culminate in a wholesale redefinition of the legal status of state sovereignty through which the antinomy between human rights and sovereignty will be eliminated. Human rights would be more than limitations on state sovereignty. Rather, sovereignty would find its source and purpose (telos) “in humanity understood as the principle that the state must protect human rights, interests, needs and security.”

As a result, Peters claims that “sovereignty has already been relegated to the status of a second-order norm which is derived and geared

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90 Anne Peters, “Humanity as the A and Ω of Sovereignty” (2009) 20:3 EJIL 513 at 543.

91 Ibid.
towards the protection of basic human rights, needs, interest, and security.”

Similarly, Karel Wellens sees a demonstration of the “irreversible humanisation of international law” in the growing recognition of the responsibility to protect concept. The R2P principle did constitute an attempt at redefining sovereignty. Francis Deng and others argued in 1996 that responsibility, understood as the obligation of the state “to preserve life-sustaining standards for its citizens,” is the essence of, and a necessary condition for, sovereignty. In Anne Orford’s words, “[i]n its various formulations, the responsibility to protect concept can be seen as an attempt to redefine and delimit domestic and international jurisdiction, and to reassert the primacy of the UN in the face of proliferating functionalist claimants to international authority.”

The acceptance of monitoring mechanisms and peer-to-peer accountability — understood as mandating, reporting, surveillance, monitoring, and dispute settlement — has intensified significantly in the last century in many areas regulated by international law. The real innovation brought by human rights was not that states should be accountable for their legal commitments towards other states. Rather it was that the human rights regime, preoccupied with the rights of individuals within a state’s jurisdiction, “could be brought under this broader accountability trend in public international law.” Through their own consent, states have gradually allowed and increased the role and standing of individuals in international law and generated space for legal challenges of human rights violations before domestic and international bodies.

Nonetheless, a new concept of sovereignty dependent on human rights compliance remains at odds with the legal and political realities of contemporary international law. The fact that human rights

92 Ibid at 544.
94 Francis M Deng et al, Sovereignty as Responsibility: Conflict Management in Africa (Washington DC: Brookings Institution, 1996) at xvii; on the gradual erosion of sovereignty, see also 6-10.
95 Orford, supra note 84 at 178.
96 Simmons, supra note 69 at 27-31.
97 Ibid at 27.
98 For commentary on the conceptual flaws and political limits of Anne Peters’ proposal, see Emily Kidd White et al, “Humanity as the A (Alpha) and (Omega)
— and humanitarian — arguments are increasingly used to justify governmental action beyond borders is often mistaken for a real shift away from the centrality of sovereignty in international law and relations. This can be illustrated through the universal acceptance of the principle of R2P and the UN’s commitment to its “implementation.”\textsuperscript{99} In its final version, the concept is firmly located within the powers of the UN Security Council, the structure of which is, of course, rooted in sovereign authority. It therefore falls to a collection of nation-states to authorize (collective) humanitarian interventions, including through the use of force. This power, as is well known, does not find its legal foundations in the \textit{UN Charter} but, rather, in customary law or a functional approach to the competence of organs of international organizations.\textsuperscript{100} In addition, the modern endorsement of R2P does not create new legal obligations on the part of states to prevent or to respond to genocide, war crimes, ethnic cleansing, and crimes against humanity.\textsuperscript{101} Rather, the power of the concept relies on the fact that “it develops an ambitious conceptual framework aimed at systematising and giving formal expression to the protective authority exercised by international actors in the decolonised world since 1960.”\textsuperscript{102}

The R2P concept remains hotly contested, as evidenced by the allegations of misuse of UN Security Council Resolution 1973 in 2011, which authorized the establishment of a “no-fly zone” over Libya, provoking an ongoing controversy.\textsuperscript{103} It is also critiqued for

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\textsuperscript{99} See UN General Assembly Resolution 63/308, UN Doc A/RES/63/308 (2009); UN Secretary-General, “Implementing the Responsibility to Protect: Report of the Secretary-General,” UN Doc A/63/677 (2009). On the institutionalization of the concept, see Orford, \textit{supra} note 84 at 17-22.

\textsuperscript{100} Orford, \textit{supra} note 84 at 167-72.

\textsuperscript{101} UN Secretary-General, \textit{supra} note 99 at para 11. A very interesting critique to the responsibility-to-protect (R2P) concept as redefining sovereignty and distinguishing sovereignty \textit{de facto} and \textit{de jure} can be found in Jeremy Moses, “Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect” (2013) 39:1 Rev Int’l Studies 113.

\textsuperscript{102} Orford, \textit{supra} note 84 at 3; see also at 103-39, explaining the role of R2P as a tool for recognizing lawful authority.

\textsuperscript{103} See, for example, Ambassador Vitaly Churkin, President of the Security Council, Press Conference, News and Media: United Nations Webcast, online: <http://www.unmultimedia.org/tv/webcast/2011/12/press-conference-ambassador-vitaly-churkin-president-of-the-security-council.html>. See also John Murphy,
being only selectively applied, as in the failure of the Security Council to invoke it in the case of the Syrian civil war. The ICJ may have repeatedly recognized, in principle, the existence of obligations owed to the international community as a whole (that is, \textit{erga omnes} obligations). However, its reasoning in the \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)}, \textit{Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)}, \textit{Case Concerning East Timor (Portugal v Australia)}, and \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)} reveals that it has not enforced the legal consequences of such a recognition. Instead, the ICJ has refused claims by parties that have a specific legal interest in a dispute but are not directly affected. Likewise, an empirical assessment of the real influence of human rights litigation concludes that claims about the impact of human rights on sovereignty are exaggerated. After engaging in a thorough analysis to test whether facts support the narrative about the transformation of sovereignty, focusing on the extreme scenarios of military intervention, Theresa Reinold concludes: “Overall, the case studies dictate the sobering conclusion that we have not (yet) moved beyond Westphalia, and that sovereignty as responsibility continues to be a moral aspiration more than anything else.”

Alongside those who disagree that sovereignty has been “eroded,” those who acknowledge that sovereignty does wield less power than

\begin{footnotesize}
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\item \textit{“Responsibility to Protect (R2P) Comes of Age? A Sceptic’s View”} (2012) 18 ILSA J Int’l & Comp L 413.
\item 104 Aidan Hehir, “The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect” (2013) 38:1 Int’l Security 137.
\item 107 \textit{Case Concerning East Timor (Portugal v Australia)}, [1995] ICJ Rep 90.
\item 111 Reinold, \textit{supra} note 87 at 155.
\end{itemize}
\end{footnotesize}
in the past do not always view this development as being positive. Attenuating sovereignty does not ipso facto lead to greater capacity for the international community to modify states’ behaviour towards compliance with internationally accepted human rights standards. The activities of international financial institutions and non-state actors that led to the post-2007 global economic crisis, for example, have negatively affected the enjoyment of human rights. These developments, alongside unregulated globalization, have reified the need to reclaim, rather than cede, sovereignty for better rights protection.\footnote{Matthew S Weinert, “Bridging the Human Rights-Sovereignty Divide: Theoretical Foundations of a Democratic Sovereignty” (2007) 8:2 HR Rev 5.} Citizens expect to be protected by their politicians, but “States have been shedding power to globalisation.”\footnote{Philip Stephens, “Leaders Who Generate Diminishing Returns,” \textit{Financial Times} (19 January 2012) at 7, online: \textit{Financial Times} <http://www.ft.com>.} In the words of Martti Koskenniemi,

[w]hen questions of economic distribution, environmental protection, security, or human rights are conceived of as essentially global, best dealt with by the best forms of functional expertise available globally, then no room is left for communities to decide on their preferences.\footnote{Martti Koskenniemi, “What Use for Sovereignty Today” (2011) 1:1 Asian J Int’l L 61 at 68.}

re-empowerment”\textsuperscript{118} and that even “Grotians” are sceptical about the virtues of diminished sovereignty when faced with the backlash against the international investment regime, International Monetary Fund (IMF) conditionality, or the role of the UN Security Council as legislator.\textsuperscript{119}

This tension concerning state sovereignty \textit{vis-à-vis} the promotion and protection of human rights lies at the core of the divide between states favouring “co-operative” or, conversely, “confrontational” strategies to prompt respect for human rights.\textsuperscript{120} Beyond doctrinal debates and academic constructions of sovereignty that are difficult to translate into legal and political realities, there is a reluctance to accept human rights implementation mechanisms that use confrontational approaches towards states and that are perceived as violating the principle of non-intervention. This is the official position of the so-called Like-Minded Group of states, whose members have publicly acknowledged that they have been co-operating on a concerted strategy since 1996 in order to avoid tools aimed at “forcing states to co-operate” with human rights mechanisms.\textsuperscript{121}

It is nonetheless difficult to accurately locate states’ positions as either opponents or advocates of confrontational approaches to human rights implementation since political motivations often lead to changes of position depending on national and regional interests.\textsuperscript{122} The portrayal of such differences as characteristic of a North-South divide leads to an artificial polarization, with potentially long-term damaging effects for the human rights agenda.\textsuperscript{123} In fact, developing countries as a group no longer hold a unified, sovereignty-trumps-all approach to human rights. Some developing countries currently align themselves with positions analogous to those normally associated with Western states. A record of political alliances within the UN Human Rights Council during 2008–09 reveals that

\texttt{[t]he Asian Group, the Eastern European Group, and GRULAC [the Group of Latin American and Caribbean States] never spoke or voted as a group...}
and continued to serve as “swing regions” on a range of thematic and country issues. Russia, China, and Cuba almost always joined the African Group and OIC [Organization of Islamic States] positions while Japan, Republic of Korea, Ukraine, Chile and Argentina generally took similar positions as the EU.\textsuperscript{124}

The antagonism towards mechanisms that intrude on state sovereignty is visible even among states who led the creation of international human rights standards and monitoring mechanisms. Two contemporary examples of Western countries asserting sovereignty at variance with universal human rights values demonstrate this antagonism clearly. The first concerns the United States in its reluctance to ratify the \textit{Convention on the Rights of the Child},\textsuperscript{125} or the \textit{Convention on the Rights of Persons with Disabilities},\textsuperscript{126} as well as its unwillingness to allow unfettered access to human rights experts seeking to investigate the situation in Guantanamo Bay.\textsuperscript{127} The second concerns British posturing towards human rights treaties and their implementation, especially its resistance to implementing the European Court of Human Rights’ decisions regarding prisoners’ rights to vote.\textsuperscript{128} Others with a history of colonialism, including


the ‘Asian bloc,’ continue to contest a conception of human rights that places limits on state sovereignty through the use of confrontational approaches.129 Asian governments have tended to assert the sovereignty argument from a different perspective — one based on the “Asian values” debate summarized earlier. Respect for sovereignty is claimed, not on the grounds of Article 2(7) of the UN Charter, nor on the grounds of consent as the basis of international law, but, rather, on the grounds of culture.130

A significant number of countries tend to view the human rights discourse as neo-colonialist, with the potential to destroy cultural diversity while moving societies towards Western homogenization. China, Colombia, Cuba, Indonesia, Iran, Iraq, Malaysia, Mexico, Myanmar, Pakistan, Singapore, Syria, Vietnam, and Yemen have all been labelled as “culturally relativist” in relation to human rights, especially within the context of the UPR mechanism, despite their non-contestation of the principle of universality of human rights as such.131 A high degree of correlation exists between states identified as culturally relativist and those Like-Minded Group states advocating non-confrontational approaches to human rights implementation — eight of the fourteen “culturally relativist” states are members of the Like-Minded Group.132

129 See, for instance, the portrayal of the post-Cold War era as a “Westphalian order” versus an emerging “Eastphalian” order based on what it is described as a “Western-inspired effort to limit sovereignty and qualify the principle of non-interference” using international law standards such as human rights, humanitarian intervention, or the responsibility to protect. Sung Won Kim, Human Security with an Asian Face? (2010) 17:1 Ind J Global Legal Stud 83 at 85.


132 The divisive HRC Resolution on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind, “HRC Resolution 12/21, UNGAOR, 12th Sess, UN Doc A/HRC/RES/12/21 (2009), was sponsored by Russia and co-sponsored by Bolivia, Cuba, Algeria, Bangladesh, Belarus, Burundi, Cameroon, Chad, China, Djibouti, Egypt, Ethiopia, Gabon, Iran,
The United States has led the trend towards the reassertion of sovereignty in relation to investment treaties, confirming that a more nuanced analysis of the North-South narrative is necessary:

Critics of “hegemonic” international law, and particularly of economic legal regimes such as the IMF or that governing investment, would have not predicted that the world’s leading capital exporter, the state that has the most to gain from enhancing international protections for foreign investors, that has done the most to dismantle the Calvo doctrine that once barred investors from resorting to any forum other than local courts, and that produced the most investor-protective BIT in existence, would be leading the drive in the opposite direction.\footnote{See, for example, Eric Neumayer, “Do International Human Rights Treaties Improve Respect for Human Rights” (2005) 49 J Confl Resolution 925; Simmons, supra note 69.}

One positive outcome of the UPR mechanism is that it provides evidence that while there are some significant differences in how the OECD and G-77 states approach the UPR (OECD states tend to use “harder” recommendations), more democratic states tend to use the UPR more actively, irrespective of region.\footnote{Edward R McMahon, “Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review of the United Nations Human Rights Council” (2010) at 1, 15, Table 5, online: UPR <http://www.upr-info.org/IMG/pdf/McMahon_Herding_Cats_and_Sheeps_July_2010.pdf>.} This is consistent with other research regarding the engagement of states with UN treaty bodies.\footnote{Alvarez, supra note 117 at 36.}

Given the problems and uncertainties surrounding more interventionist approaches to implementing universal human rights norms, a voluntary and non-coercive approach such as peer review takes on added appeal. The UPR mechanism is, by its global approach and particular methodology, a forum and a tool that provides space for a more empirically based approach that attenuates North-South differences regarding human rights. Being public and transparent, it meets the desirable criteria not fulfilled by other diplomatic means of implementing international rules, thus conferring some legitimacy on the mechanism. At the same time, the UPR

mechanism is also consonant with arguments reaffirming the importance of sovereignty as a means of human rights protection.

**Peer Reviews and Conflict Mitigation**

The tentative, but ongoing, bridging of the universalism versus national sovereignty divide has important implications for multilateral actions promoting universal norms of human rights protection and peaceful conduct. Beginning with the 1948 adoption by states of the *Universal Declaration of Human Rights*, and especially after the dissolution of the Soviet bloc, the international community has developed a range of tools to promote human rights. In ascending interventionist order, these include: (1) international organization norm setting; (2) co-operative approaches to human rights monitoring and implementation, including peer review; (3) “naming and shaming” — that is, value-driven, country-specific critiques, typically not only by human rights NGOs and expert human rights bodies but also sometimes by governments; (4) targeted sanctions; and (5) R2P’s third pillar, relating to the use of armed force for (collective) humanitarian intervention.

The latter two approaches represent, in essence, tough love, while peer review occupies the opposing bookend, reflecting a less confrontational and critical approach to nurturing respect for human rights. The more interventionist mechanisms entail greater immediate costs both for implementing states and those that are the objects of these interventions, while peer review entails lower costs for both recommending states and states being reviewed. The more intrusive forms of intervention are typically aimed at situations involving massive human rights violations, while peer review, designed to be a regular part of state-to-state interactions, deals more with the “lesser” sins of autocratic rule and lower-level human rights violations. Given the costs entailed by the more interventionist approaches, they are best left sheathed to the maximum extent possible. By contrast, peer review represents a more user-friendly methodology with a focus on institutions and policies supporting human rights on a day-to-day basis, which, if properly used, can have a prophylactic effect, promoting human rights to reduce the number of instances requiring more interventionist actions.

Expanding the scope and impact of peer review creates the potential to extend international human rights and democratic norms by mainstreaming them. As such, they can become accepted as normal and regular parts of international discourse. The international organization peer review mechanisms are, by definition,
creations of the member states of the organization undertaking them. They have in common a tendency to be the products of a consensus decision-making process based on the states’ own willingness to engage. This reality, in turn, means that they almost invariably rely more on the carrot of positive reinforcement and inducements rather than on the stick of punitive measures. They are not designed to be quick response mechanisms for crisis situations, but, instead, their utility lies in their preventive function in establishing conditions so crises do not arise.

The UPR and APRM both emphasize follow-up actions to be taken as a result of the review. By their consensual and largely voluntary nature, peer review mechanisms are evolutionary rather than revolutionary in nature, and it is true that limited follow-up enforcement mechanisms and deficits in political will, resources, and discipline can all be impediments. There can be a tendency to make overly rosy assessments of particular human rights or governance situations or to fail fully to address key issues. The “you scratch my back and I’ll scratch yours” syndrome can act as a disincentive for states to engage energetically in peer review.

Peer review does, however, demonstrate a willingness of states to submit themselves to the examination, judgment, and recommendations of other states on how to improve human rights and/or governance performance, if the perceived costs of doing so are manageable. And the costs of not doing so are now rising, except for the small minority of incorrigible states that care little about international attitudes and actions. There is evidence that even states that are more resistant to external criticism may respond better to implementation mechanisms relying on co-operative, rather than confrontational, approaches. Should the UPR and other peer review mechanisms succeed in fulfilling their promise, they could reduce the need for more interventionist approaches by deterring future human rights abuses, which, in turn, would reduce the pressure and expectations of robust R2P third-pillar interventions.

Few analysts have yet made a systematic and comprehensive connection between how peer review does, or can, contribute to preventing conflict. Preliminary evidence exists, however, suggesting possible grounds for linking peer review and conflict prevention. Indeed, the latter issue is addressed in some peer reviews. For example, a UPR recommendation from Australia to Equatorial Guinea

has called for this country to “[c]ease all forms of forced displacement, in accordance with the Guiding Principles on Internal Displacement of 1998.”\textsuperscript{137} Similarly, a Canadian recommendation to Sudan, which was accepted by Khartoum, stated that it should “end attacks against civilians and ... ensure unimpeded humanitarian access to the camps of internally displaced persons in Darfur.”\textsuperscript{138} A relevant APRM example is a recommendation to Kenya to “[d]evelop and implement coherent land policy to address land ownership, use, tenure and administration.”\textsuperscript{139} Similarly, an objective in Burkina Faso’s APRM national plan of action is the “Early Warning Program: Conflict Prevention.”\textsuperscript{140} In addition, the APRM’s democracy and good political governance theme, for example, specifically includes the mandate to “[p]revent and reduce intra- and inter-country conflicts.” And the UPR human rights focus implicitly embraces conflict prevention, while many recommendations relate to causes or results of conflict.\textsuperscript{141}

These mechanisms reflect a formal commitment of states to participate in this process. Although some participating governments may be more motivated by the appearance of participation than by its reality, states increasingly find themselves bound to commitments and precedents simply by engaging in the process. Such participation represents in effect a tool for enmeshing states in a heightened acceptance of international human rights norms.

Considerable thought has been given to the ways in which the international community, including international organizations, can prevent conflict.\textsuperscript{142} There is also a modest amount of literature

\begin{enumerate}
\item\textsuperscript{141} Some related issues in UPR recommendations include asylum seekers, corruption, counter-terrorism, detention conditions, enforced disappearances, extra-judicial executions, freedom of association and of the press, extra-judicial human rights violations by state agents, and internally displaced people.
\item\textsuperscript{142} For a seminal report on this subject, see Carnegie Commission on Preventing Deadly Conflict, \textit{Preventing Deadly Conflict: Final Report} (Washington DC: Carnegie Corporation, 1997).
\end{enumerate}
on how peer reviews may do so.\textsuperscript{143} The Zimbabwean scholar-activist Webster Zambara argues that one of the greatest shifts in the international humanitarian order heralded by the end of the Cold War in 1990 has been the concept of holding state sovereignty accountable to international human rights standards. He suggests that while the concept of R2P has generally focused on humanitarian intervention at a macro level, “the period since the 1990s has also witnessed an increase of micro-level institutions, in the form of National Human Rights Institutions (NHRIs) that can advance R2P.”\textsuperscript{144} NHRIs also figure prominently in the UPR process.

In discussing the “enabling environment” surrounding the R2P concept, Dorota Gierycz has cited the existence of various protection tools available within the UN human rights machinery, in particular the Human Rights Council with its new Universal Periodic Review (UPR) system and the special procedures, and the OHCHR, with its extensive field presence tasked with public reporting and support to national protection systems and public defenders. It concludes that those tools could play a much stronger role in preventing and addressing atrocities — through timely provision of information, early warning or thorough analysis of protection conditions in various countries.\textsuperscript{145}

Mark Malan has drawn a link between the APRM and conflict prevention, suggesting that in the African context, “in terms of long-term conflict prevention and early warning, it is the political and governance component of the New Partnership for Africa Development (NEPAD) peer review that holds most promise.”\textsuperscript{146}


\textsuperscript{145} Dorota Gierycz, NUPR Report: The Responsibility to Protect: A Legal and Rights-Based Perspective (Oslo, Norway: Norwegian Institute of International Affairs, 2008).

Conclusion: Peer Review as a Middle Ground between Universalism and National Sovereignty

This article has presented the traditional universalist versus cultural relativist human rights divide and suggests that a middle path may be emerging. Against this backdrop, we have outlined the toolbox of international efforts designed to actualize universal norms. Viewing this array of mechanisms as a continuum from voluntary to coercive measures, we argue that the more collaborative approaches that minimize confrontation may have, over the long term, the salutary effect of attenuating arguments that national sovereignty shields countries from implementing universal norms.

A key mechanism for navigating these challenges is that of peer review, whereby states agree to have their conduct scrutinized by their peers. This emphasis carries practical policy implications for international organizations and national governments alike — namely that support for peer review should be enhanced and that priority should be given to increasing its effectiveness. This preventative approach has the potential to reduce the need for more interventionist and coercive measures. It can also help to further minimize the civil and political versus economic, social, and cultural rights divide by including both sets of rights within its purview. This more collaborative and less confrontational approach to improving human rights observance calls to mind the adage that it is easier to catch bees with honey than vinegar, although some circumstances will undoubtedly continue to warrant the stronger dosage.

The preparation of state reports for the UPR and the interactive dialogue can be particularly useful as a tool to identify and blend different sets of social values at the universal level. The UPR has the potential to showcase existing or emerging customary law, shedding light on state practice and the validity of arguments normally sustained by those taking either side of the universalist/relativist debate. The UPR and the APRM can be seen as manifestations of the internationalization of human rights and evidence that human rights compliance and domestic implementation have permeated the agendas of all of the governments of the world, particularly when engaging in institutionalized fora as the UN Human Rights Council. From early international efforts to create a regime that would ban slavery, plant the seed of minority protection, and develop modern international humanitarian law to initiatives to establish a

147 Tomuschat, supra note 75 at 71.
148 Domínguez-Redondo, supra note 10 at 703-5.
means of prosecuting individuals for atrocities against humanity, the introduction of peer review mechanisms reveals a maturity achieved by the human rights machinery within international law and politics. Being on the agenda of every foreign affairs ministry, states have started to treat human rights compliance as they would other topics in their international portfolio — that is, by using diplomatic mechanisms in addition to legal, expert-led mechanisms. The results so far suggest that states are more willing to engage with a more “political” means of dealing with international human rights matters. At the same time, a key characteristic of the UPR is that it is a public process, where the influence of civil society and other human rights bodies has considerable weight.

There is evidence that states are not particularly committed to the enforcement of human rights in other jurisdictions. This has been attributed to the particularities of human rights enforcement, which is reliant on collective action, and could be a feature held in common with other fields where reciprocity plays a limited role. Conversely, other international rules governed by the regime of reciprocity have been more successful in terms of compliance. Karl Zemanek concludes that institutional mechanisms of implementation (namely reporting, inspection, verification, and investigation systems, complaint procedures, and non-violent sanctions) in the fields of human rights law, environmental law, arms control, and disarmament law, “although they may indirectly encourage compliance, are not effective means for enforcing the erga omnes obligations deriving from these regimes.”

If nothing else, the UPR has proven successful in engaging all states in its process, participating not only to defend their own human rights record but also to understand and interrogate (or support) that of every other state. This article does not suggest that peer review mechanisms should, by definition, replace other, more confrontational, legal-based approaches. Different strategies can be mutually supportive, and treaties play an important role in the promotion of human rights. Without the kind of principled guidance offered in international treaties, efforts could become dissipated, actors could work at cross-purposes, and the coherent


151 Zemanek, supra note 109 at 16.
message of the priority of rights observance could become garbled. Treaties do not guarantee clarity, and there is much room to disagree on the proper interpretation of their content. However, in their absence, it would be much harder for all actors concerned to target the promotion of human rights, condition trade agreements in a coherent way, or have any yardstick to engage in a meaningful review of states under peer review mechanisms.\(^\text{152}\)

Peer review processes are works in progress, but they possess the potential to enmesh states within a web of heightened respect for universal human rights norms, thus preventing conflict. A longer-term perspective suggests that peer review represents a potentially inexorable dynamic. The slow-grinding operation of national and international bureaucracies has a good chance, over time, of shifting the debate and creating a “new normal” in terms of international standards of domestic political behaviour. Peer review scrutinizes the domestic affairs of states, blunting the traditional concept of sovereign independence — governments that have agreed to join cannot avoid review by claiming that matters in their countries are not open to scrutiny. And governments increasingly are coming under pressure from international financial institutions, other international organizations, fellow governments, and domestic public opinion to participate. Standing aloof now carries a stigma that governments have something to hide or are otherwise seeking to shield authoritarian tendencies from public view. This perception, in turn, can have deleterious effects on aid, trade, and other aspects of bilateral and multilateral relations. No longer are only serious international crimes to be made open to review. Peer review also serves to empower domestic voices in favour of human rights promotion and protection by providing tangible evidence of the interest of the international community in these issues and by spotlighting these human rights defenders, providing to some extent a protective shield for their activities.\(^\text{153}\)

\(^{152}\) Simmons, \textit{supra} note 69 at 375.

Sommaire

Les mécanismes d’évaluation par les pairs, tels l’Examen Périodique Universel, s’appuient sur la diplomatie traditionnelle entre États souverains comme moyen contemporain d’assurer la mise en œuvre des droits de la personne. Cet article soutient qu’il s’agit d’un développement positif pour plusieurs raisons. Tout d’abord, sur le plan théorique, il révèle une maturation du régime des droits de la personne par sa capacité de se détacher des approches exclusivement juridiques pour la mise en œuvre de ces droits. Deuxièmement, au niveau politique, il y a suffisamment de preuves de résultats positifs attribuables aux mécanismes d’examen par les pairs pour soutenir une préférence pour cette approche plus coopérative comme mesure préalable et complémentaire à d’autres moyens plus controversés, telles des approches juridiques ou interventionnistes (par exemple, le troisième pilier du concept de la responsabilité de protéger). Enfin, les mécanismes d’examen par les pairs offrent un cadre théorique et pragmatique pour concilier les approches conceptuelles universalistes et relativistes aux droits de la personne, servant à satisfaire à la fois ceux qui préconisent le respect du droit international des droits de la personne et ceux mettant l’accent sur le respect de la souveraineté étatique.

Summary

Peer review mechanisms, such as the Universal Periodic Review, rely upon traditional sovereign state diplomacy for contemporary human rights implementation. This article argues that this is a positive development for several reasons. First, at a theoretical level, it reveals an evolving maturity of the human rights regime through its capacity to detach from exclusively legalistic approaches to human rights implementation. Second, at a policy level, there is enough evidence of measured positive outcomes of peer review mechanisms to suggest a preference for more co-operative approaches to ensuring human rights compliance as a first and complementary step to other more controversial legal/adversarial means of implementation (such as the third pillar of the R2P concept). Finally, peer review mechanisms offer a theoretical and pragmatic framework conciliating between universalist and relativist conceptual approaches to human rights, accommodating and integrating views that call for compliance with international human rights law as well as those emphasizing respect for sovereignty.