

The Politics of the U.N.'s Human Rights Regimes: Pushing for Incremental Change in State Practices

Barbara A Frey

Introduction

I'm so pleased to be part of this conference which, in addition to its critical subject matter, also serves as recognition of Professor Joseph Schwartzberg, an esteemed researcher, teacher, colleague and global activist. We are inspired by Professor Schwartzberg's example of refusing to accept things as they are, yet also refusing to resort to the role (too prevalent in academic institutions) of being merely a critic without suggesting how to make things better. The political discourse that saturates our nation and world is filled with critical, and often mean-spirited attacks, intended to tear down institutions without proposing what should replace them. In that culture of discourse it is truly refreshing to engage with visionaries like Joe Schwartzberg, who choose not to settle for mere criticism of our obviously flawed laws, structures and institutions, but who also have the courage to suggest reforms to make those structures fairer, more rational, more just. This courage to envision better world institutions, and to set this vision bare for all of us to ponder and critique is a significant contribution to global discourse, for which we are all extremely grateful.

My own background in human rights activism has positioned me to be more of an incrementalist in my vision than Professor Schwartzberg. I associate my own philosophy of social change with that so eloquently framed by the Rev. MLK Jr., who observed that "The arc of the moral universe is long, but it bends towards justice." I embrace that philosophy because I have witnessed the important role that civil society plays in demanding human rights. I have witnessed individuals and groups who advocate peacefully but persuasively to insist that local, national and inter-governmental institutions actually do what they promise, and that those institutions reflect the lived experience of the populations who are affected by their actions, or inaction. I believe that the role of civil society – of non-state actors including NGOs, churches, academia, civic groups – must continue to be central if we are to continue to exert meaningful pressure along that arc of the moral universe, in order to produce a more just, more "workable" world.

One of the places that civil society has been effective is in the United Nations, specifically in working to shape and use its human rights mechanisms. Since we are considering at this conference the institutional reforms of the United Nations, I would argue that the human rights system is one arena in which, as a whole, there has been relatively rapid and impactful reform. The key word is "relatively." While changes in the human rights system have been most measurable since the end of the Cold War, there has been steady growth in the content and the enforcement of human rights since the United Nation's inception, marked by the creation of the U.N. Commission on Human Rights under the U.N.'s foundational document, the Charter. The very creation of the U.N. Commission and its first official accomplishment, the adoption of the Universal Declaration of Human Rights, put in motion

a set of ideas and expectations about the rights of each individual person that has continued to grow incrementally but steadily in the decades that followed. This growth has been fueled by NGOs, which at the international level have been critical to the progress in every phase of the human rights regime, from promoting and drafting new standards, to designing enforcement mechanisms, to providing timely and reliable information regarding States' practices as measured against those standards, to monitoring States compliance with the recommendations they receive from U.N. bodies.

United Nations Special Procedures as an incremental step in human rights protection

In response to the inexorable geopolitical dynamics of actions and reactions in the field of human rights, the U.N. system has developed in much the same way as a foot-trodden pathway does after a sudden snowstorm (a reference that seems apt for a conference taking place in Minnesota). Each step makes forward progress, with a zig and a zag --never in a straight line -- and occasionally the path veers substantially off course. The institutional responses to human rights crises at the U.N. are often limited by available political choices, which usually result in negotiated half-measures. They are incremental changes that are not satisfying but at least make a small forward step.

Many U.N. procedures now central to the human rights system were initiated in response to an immediate human rights crisis, and designed in the moment based on what was politically possible. Those changes then became a permanent part of the human rights landscape.

Consider, for instance, the now robust system of **Special Procedures** which have been authorized incrementally since 1980 by the U.N. Commission on Human Rights, (now called the Human Rights Council). These procedures are now comprised of 41 different thematic reporting mechanisms and 14 country reporting mechanisms. Independent experts are selected by the Office of the High Commissioner of Human Rights to do this work, serving in their individual capacities as U.N. human rights fact-finders and reporters. These experts are mandated to monitor and report the Council and the General Assembly on two categories of information, pertaining either to a particular thematic human rights issue or to a particular country of interest for its human rights problems.

The United Nations' thematic procedures initially centered on the core civil and political rights that took the forefront in human rights advocacy in the late 1970s and early 1980s, such as enforced disappearances, torture or extra-judicial executions. In the late 1990s and early 2000s the themes addressed by the U.N. significantly expanded to include more economic and social rights issues, with Special Procedures created to survey right to health, housing, water and sanitation across the globe. At the beginning of the millennium further new thematic rapporteurs were created to address issues of emerging importance such as human rights and terrorism, the mechanisms of transitional justice, foreign debt and trafficking in human persons. And a growing number of the procedures now also address the rights of particularly vulnerable groups, such as women, children, migrants, internally

displaced persons, indigenous groups, older persons, and most recently, persons with albinism.

In addition to these thematic rapporteurs, the United Nation's human rights system also supports several "country rapporteurs" who are tasked with monitoring the *overall* human rights situation in those countries which have been identified as having particularly important or serious human rights problems, or which need substantial technical or institutional expertise. The current list of country rapporteurs and independent experts – the latter indicating a more technical and less critical approach, is informative, listed here with the date they were created: Belarus (2012); Cambodia (1993); Central African Republic (2013); Côte d'Ivoire (Independent Expert)(2011) ; DPRK (2004); Eritrea (2012); Haiti (Independent Expert) (1995) Iran (2011); Mali (2013); Myanmar (1992); Palestinian Territories Occupied since 1967 (1993); Somalia (Independent Expert) (1993); Sudan (Independent Expert)(2009); Syrian Arab Republic (2011). These countries take up a great deal of time and diplomatic resources within the U.N.'s human rights sphere because of their entrenched or systematic challenges to internationally recognized norms.

As Professor Schwartzberg pointed out in his chapter on the U.N.'s human rights mechanisms, the monitoring provided in part by this collection of Special Procedures, is neither uniform, comprehensive nor systematic (114). Instead the procedures and their particular mandates are the outcome of the politically possible. We must always heed the fact that the United Nations is just that – a collective of nation States united to work on common concerns, but which bring to the process their various ideologies, allies and short-term objectives. As such, the human rights work of the UN goes only as far as the States collectively are willing to go.

Given that context, it is a global achievement that all States have agreed to some level of human rights laws, and that most States have agreed to most human rights laws. (Hafner-Burton, 2013, at 9). At one time, powerful States may have assumed that they would never be subjected to significant international scrutiny. In the early years of the U.N. human rights systems, this was a safe assumption, but with the deepening of human rights commitments and the strengthening of enforcement procedures, even the powerful States must defend their records on a regular basis. Weaker States had to be more vigilant from the start. Because of this, regional blocs play an influential role in human rights politics at the U.N. The African members (which now represent 27% of the member States of the U.N. Human Rights Council, comprising 13 of its 47 seats) typically vote as a bloc. Members of the Non-Aligned Movement – a bloc of roughly 120 States that value "mutual respect for each other's territorial integrity and sovereignty" above all – typically promote development-related rights or economic and social rights over the civil and political rights agenda that is prioritized by the Western States.

One important outcome of these kind of regional and ideological bloc politics is the "tit for tat" kind of negotiating that goes on with regard to the establishment of new mandates in

the Human Rights Council. In 2000, for instance -- a banner year in the creation of new thematic procedures -- western groups were supportive of establishing a new mandate for a special rapporteur on the situation of HR defenders. This mandate exemplified the groups' concern with core civil and political rights, such as freedom of expression and freedom from violations against personal integrity. Meanwhile, the growing strength of the members of the Global South championed three new mandates addressing: (1) the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; (2) the right to food, and (3) the right to adequate housing. The creation of these new procedures represented very distinct priorities for U.N. member States from the developed and developing worlds. It is not unusual, then, that for every new procedure that is created, a second one is added to ensure balance in the political priorities of the States.

Regardless of the politics that go into the creation of these Special Procedures and their gaps in coverage and relatively weak mandates, as a whole, the Special Procedure process has turned out to be an engine of research that has proven to be quite important for vetting the flow of information from the grassroots upward. This trend is one that characterizes the human rights institutions in the U.N.: while politics may be at the heart of the creation of any new mechanism, once it is established, and its work carried out in earnest, it usually results in the advancement of human rights protections. In practice, these advances come only through the involvement of civil society actors, who are able to use them effectively. Transnational pressure is a necessary condition to ensure domestic improvements in human rights, and participation in international organizations can be a key part of that external pressure. (Risse, Ropp and Sikkink, 1999). But transnational advocacy is not sufficient for sustainable human rights protection, which also requires mobilization of domestic pressure. (Simmons, 2009).

The United Nations serves as an outlet for transnational advocacy, when the domestic efforts of human rights advocates are blocked. (Keck and Sikkink, 1998). The Special Procedures provide an extremely accessible entry point for bringing human rights violations to the attention of the international community. The threshold for providing reviewable information to the procedures is low: any individual, group, non-governmental organization, inter-governmental agency or Government who has reliable knowledge of violations of the rights associated with the mandate of the Special Procedure can submit a complaint. Many Special Procedures have the authority to act on urgent cases, by communicating a request for information on the case directly to the government. According to the U.N., the core collective functions of Special Procedures include:

- ✓ acting on individual cases;
- ✓ acting on concerns about systematic or structural violations by sending communications to States and other important actors to bring alleged violations or abuses to their attention;
- ✓ carrying out thematic studies and convening expert consultations,
- ✓ contributing to the development of international human rights standards,
- ✓ engaging in advocacy on behalf of victims,

- ✓ raising public awareness, and
- ✓ providing advice for technical cooperation.

Fundamentally, the work of the Special Procedures helps to protect human rights by affecting the global reputations of particular countries. No government wants to be the subject of resolution creating a country rapporteur authorized to scrutinize its practices. Indeed, States go to great lengths to avoid this outcome using diplomatic strategies that result in tactical concessions on human rights issues designed to placate criticism and by lobbying through any means possible to prevent any effort to be the focus of a country-based special procedure. The halls of the U.N. human rights bodies are important political venues in which the global reputations of specific governments are constructed. This is what ultimately motivates governments to make at least limited reforms to avoid a prolonged exposure to the naming and shaming mechanisms such as those used by Special Procedures.

The Universal Periodic Review: More than an incremental reform

Within this political context of communication and dialogue, most progress in the U.N. system is incremental. But in 2006, the U.N. departed substantially from this incremental approach, and thrust ahead with a set of major reforms to the human rights enforcement mechanisms. Then Secretary-General Kofi Annan initiated the process at the urging of powerful States, including the United States Government. The primary motivating concern was the politicized nature of the Human Rights Commission, composed of 53 governments who seemed more interested in blocking human rights gains than in making them. (Davies 2010, 452) Several States, such as Sierra Leone, Sudan and Zimbabwe, were aggressive in seeking seats on the Commission in order, apparently, to block any actions that might single them out for their own record of serious human rights violations. Worse, in 2003 the Libyan delegate was actually elected chair of the Commission, adding further credence to the criticism of many observers that the integrity of the body was beyond repair.

The negotiations that ensued resulted in replacing the tarnished Commission with a new body known as the Human Rights Council. Despite this break, to a casual observer the Council looks a lot like the Commission. It has retained many of the same rules, personnel and procedures, including the Special Procedures described above.

One major new procedure, however, has arguably made the transition worthwhile. The U.N. General Assembly Resolution (60/251) which established the Council, mandated that the new body "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States." By subjecting every country to periodic review by its peers, the universal periodic review, or UPR, was intended to increase transparency of the human rights process and ensure equal treatment of all member States. By offering transparency for the western States and equality for the less powerful States, the UPR represented another act of political balancing. Governments, including the most powerful, were to be held to a new test, and civil society was there to play the critical role in making sure this happened.

The first UPR session took place in April, 2008, in an atmosphere of nervous anticipation. The first sixteen States were judged cautiously as the new procedure unfolded. But the reviews gradually picked up momentum as all participants began to better understand how the UPR worked, procedurally and politically. By 2012, all of the 193 U.N. Member States had undergone a review and the mechanism was slightly modified to improve the process for subsequent reviews. For the first time, every U.N. Member States had voluntarily subjected its human rights record to international scrutiny, marking a new era for human rights compliance through the international system.

The UPR consumes a significant amount of the Council's time, with reviews of fourteen States taking place three times a year. In an attempt to ensure equal treatment of each country under review, each session is carefully timed and the speaking slots are divided up in minutes and seconds. Each U.N. Member State has the opportunity to register its concerns through a brief Statement, and only the statements that are made orally are included in the final report. Because of this, "meticulous attention is given to quantification," (Jane Cowan and Julie Billaud), resulting in rapid fire oral statements, sometimes limited to as few as 50 seconds each. This form of abbreviated diplomacy has the overall impact of being more blunt and potent. States under review seek to shield themselves from criticism by packing the list with friendly States, but the shift to a speaker's list in alphabetical order, with the first State speaker drawn at random, prevents any extreme manipulation of the process.

The final report, including summaries of the State under review's intervention and the interactive dialogue, is released one week after the end of the UPR Working Group session. Meanwhile, the State under Review considers whether to "support" or "note" the recommendations. The State under Review cannot "reject" recommendations but can provide comments, including explanations on why they do not support certain recommendations.

The jury is out with regard to the long-term effectiveness of the Universal Periodic Review process. No State has yet chosen to opt out of the procedure, despite some harsh criticisms in the review. The UPR has also proven to be a useful vehicle for civil society engagement on human rights issues. The Obama administration created regional listening forums for civil society groups to participate in shaping its government reports for its 2010 and 2015 reviews. Additionally, forty written reports by NGOs and 52 joint submissions by civil society groups helped to shape the review process. (OHCHR)

While participation in the process and acceptance of the recommendations made by other States provides one measure of success, the ultimate objective of the UPR is to improve human rights on the ground. In a 2014 study based on research from data collected from 165 countries, UPR Info, an organization dedicated to the success of the review process reported that 48% of the UPR recommendations had resulted in some kind of action by the State under review. Based on its findings, UPR Info concluded that the UPR is not only an effective platform for discussion at international level, but that it had a positive impact on human rights at national level (75).

Conclusion

Incremental change through the U.N.'s human rights procedures may be frustratingly slow in the face of serious human rights violations. In the context of global politics, however, enforcement mechanisms such as the Special Procedures and the Universal Review Process play more than a minor role in holding States accountable. Through the detailed work of acting on individual cases, carrying out thematic studies and providing technical assistance, Special Procedures can bring about or enforce improvements in State practice. These mechanisms are in an early phase of development. As we approach the end of the second round of Universal Periodic Review sessions, implementation of some recommendations to U.N. member States is already resulting in measurable improvements of human rights in domestic law and practice. Finally, all of the U.N.'s mechanisms are made more effective through the involvement of civil society groups which provide information, measure compliance and insist on transparent and fair procedures for holding States accountable for their human rights commitments.

References

Jane Cowan and Julie Billaud, "Between learning and schooling: the politics of human rights monitoring at the Universal Periodic Review," *Third World Quarterly*, Volume 36, Issue 6, 2015.

Mathew Davies, "Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations," *Alternatives: Global, Local, Political*, 2010, Vol. 35(4), pp. 449-468.

Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: 1999.

United Nations, Office of the High Commissioner for Human Rights, Universal Periodic Review, United States of American, "Contributions for the Summary of Stakeholder's information," accessed at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx>.

UPR Info, "Beyond Promises: the Impact of the UPR on the ground," Geneva, available at http://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf.