

RESEARCH BRIEF

UNIVERSALITY IN THE HUMAN RIGHTS COUNCIL CHALLENGES AND ACHIEVEMENTS

KEY MESSAGES

- Human rights universality has different meanings and is used in multiple ways to indicate various phenomena including: universal adherence to international human rights standards, the global geographic coverage of human rights monitoring mechanisms, equal weight being given to each of the rights recognized in the UDHR, and the adoption of substantive protection mechanisms for internationally-agreed human rights at the national level.
- Challenges to the universality of human rights within the Human Rights Council and elsewhere come from many different States and regional groupings.
- These challenges to the universality of international human rights law are grounded in arguments related to security, economic development and/or socio-cultural values.
- Differential implementation of human rights as well as mainstreaming measures to ensure substantive equality and the protection of historically marginalized groups is essential to the universal realization of international human rights norms.
- The Human Rights Council plays a crucial role in mediating global discussions concerning the universality of human rights and in upholding the 'highest standards in the promotion and protection of human rights' for all people.

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INTRODUCTION

Universality is one of the guiding principles contained in the mandate of the UN Human Rights Council. The Council, through its subject matter coverage of the human rights recognized in the Universal Declaration of Human Rights (UDHR) and its role as the host of the Universal Periodic Review (UPR) as well as a range of other monitoring mechanisms, is an institution that claims to embody and promote both the formal and the substantive aspects of the universality of international human rights law.

What are some of the meanings that have been given to human rights universality by the Council and its members and have these changed during the first decade of the institution's existence? How does universality articulate with other foundational principles, such as equality, respect for cultural diversity, and the indivisibility and interdependence of all human rights, which underlie the work of the Human Rights Council? What challenges and opportunities do discussions around the concept of human rights universality within the Council present for the universal implementation of all human rights for all people?

This summary paper outlines the findings of two larger studies undertaken by the Geneva Academy and provides preliminary recommendations to inform future work on the topic of human rights universality within the UN Human Rights Council.

HUMAN RIGHTS UNIVERSALITY IN THE COUNCIL

When it was established in 2006, the UN Human Rights Council was mandated to carry out its functions, 'guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation', to enhance the promotion and protection of all civil, political, economic, social and cultural rights, as well as the right to development.

An examination of the practice of the Council over the past decade suggests that despite general agreement on the universal nature of most human rights guarantees, there are significant differences of opinion surrounding the specific meaning and content that should be given to these rights, the manner in which human rights should be weighed against one another, and the ways human rights should be implemented in national and regional contexts. Challenges to universality in the Human Rights Council take a variety of forms and these have also changed over time in response to debates occurring in other parts of the United Nations

system and in the broader community at the international, regional and national levels.

The studies note that discussions about the universality of human rights in the Council can play an important part in advancing the universal protection of human rights, for example, by developing or strengthening recognition of the equal rights of particular groups, such as indigenous peoples or minorities. Challenges to universality may, however, undermine the protection afforded by universal human rights guarantees. In a number of contexts, particularist claims are advanced to the detriment of the human rights of women and girls, migrants, and LGBTI persons, or to justify non-compliance with human rights in particular situations, such as real or perceived threats of terrorism.

In reflecting on the practice of States in the Human Rights Council over the first decade of its existence it's interesting to examine when and how different States invoke human rights universality. A key question is whether and to what extent particularist arguments based on the need to limit rights guarantees in specific contexts are being deployed to trump claims relating to the universality of human rights?

ASSESSING CHANGE IN HUMAN RIGHTS COUNCIL PRACTICE

The two studies carried out by the Geneva Academy focus on selected practice of Council Members within the different mechanisms established to monitor and implement international human rights guarantees. Due to the wide scope of the Council's human rights activities, it was agreed that certain themes would be chosen as case studies in order to illustrate various dimensions of the institution's approaches to universality.

The specific issues highlighted represent a broad cross-section of the Council's work, although care was taken to include topics that have been the site of explicit and implicit debates concerning human rights universality. The themes addressed include; climate change, the right to development, terrorism and other threats to security, the rights to food, water and sanitation, maternal morbidity and mortality, cultural rights, the death penalty, the human rights of migrants, traditional values and the protection of the family, and non-discrimination against persons on the basis of sexual orientation and gender identity.

The analysis of change over time is based on an assessment of the institution's practice as this is manifested in:

- voting patterns and explanatory memoranda on thematic and country resolutions

- recommendations made, accepted or noted in the UPR
- the content and scope of thematic panel discussions and requests for studies and reports linked to these
- decisions to engage in the development of new normative instruments and monitoring mechanisms.

The methodology used in the studies is a qualitative, international human rights law-based analysis of publicly available documents. Some secondary sources are cited, in particular, the quantitative data gathered by the Centre for Economic and Social Rights (CESR), in relation to the comparative frequency of recommendations on economic, social and cultural rights within the UPR (CESR, 2016).

The scope of the two Geneva Academy studies provides a limited overview of certain aspects of Council practice from the standpoint of international human rights law. Additional research needs to be undertaken from other disciplinary perspectives, in particular political science and sociology, in order to fully capture the different dynamics at play in Human Rights Council discussions of universality. Based on the initial mapping work carried out in the studies, a more detailed quantitative and qualitative examination of the practice of the Council, including a series of interviews with key actors, would also provide a platform from which to draw far-reaching conclusions about institutional practice and to make further recommendations for change.

FORMAL HUMAN RIGHTS UNIVERSALITY IN THE COUNCIL

As mentioned in the introduction, the Human Rights Council reflects the principle of universality in its formal dimension through monitoring mechanisms that examine the human rights performance of all States in relation to the promotion and protection of civil, political, economic, social and cultural rights and the right to development.

The Universal Periodic Review (UPR) is frequently cited as an example of the application of the concept of formal human rights universality. The relative success of the UPR, at least in terms of the global scope of its coverage, has led some commentators to suggest that there “need be no concern about the principle of universality” (Geneva Academy, 2010, 5). The two research studies, however, suggest that the UPR demonstrates both opportunities and limitations in relation to the promotion and protection of universal human rights.

The UPR Working Group process does not require that every member endorse each recommendation, this means that the UPR provides a forum in which contested human

rights issues may be raised and addressed in a bilateral exchange between the State under review and the State putting forward the recommendation. The potential for recommendations to have a broader human rights impact is, however, limited by an absence of systematic follow-up mechanisms. Implementation of the UPR recommendations is the sole responsibility of the State under review, with the Council’s ability to intervene limited to situations of persistent non-cooperation.

All UN Member States participate in the UPR and every State is theoretically able to make recommendations concerning the human rights performance of its peers. In practice, many smaller States do not have the necessary resources to actively contribute to the review process, thereby constraining the potential of the mechanism to act as a universalising force.

The Council’s adoption of new working methods, including panel discussions (which grew in number from two in 2007 to 23 in 2014), as well as seminars, and interactive debates, have opened up further institutional spaces to address questions of human rights universality. These discussions act as entry points for politically sensitive, complex or emerging human rights issues, which are unlikely to be considered under other items on the agenda. At the same time, the increasing numbers of panel debates require the institution to effectively follow up on and maintain momentum in advancing an ever-expanding number of thematic issues.

RELATIVISM AND UNIVERSALITY

One of the most recurrent challenges to the substantive universality of international human rights law is the assertion of moral relativism. Some relativist arguments maintain that human rights law is grounded in a limited set of experiences that do not, in fact, represent all people and all societies. In this viewpoint, international human rights law is only valid to the extent that it can be reconciled with existing local, national and regional values and practices.

Claims related to the relative universality of human rights have been made in the Human Rights Council at regular intervals and in different forms over the past ten years. Although important steps have been taken by the institution in connection with the promotion and protection of cultural rights, in particular through the creation of a new Special Procedure in the field of cultural rights in 2009, the question of how cultural values are defined and the ways in which these are interpreted in relation to international human rights law remains contentious.

In 2009, following a preliminary study on the topic produced by a member of the Human Rights Council's Advisory Committee, a group of five Asian and European States tabled the first of several biennial thematic resolutions on the 'traditional values of human kind' (A/HRC/12/L.13). In 2014, the Council adopted, by a recorded vote, Resolution 26/11 on the protection of the family, which emphasized the family as the locus of traditional moral and cultural values. The reassertion of 'traditional values' by States from a number of geographic regions is a trend that has gained momentum in recent years and looks set to continue into the foreseeable future, with far-reaching consequences for the Council's work in upholding 'the highest standards in the promotion and protection of human rights.'

Against this backdrop of increasingly relativist discourses centered on 'traditional values', other actors in the Human Rights Council, in particular the Working Group on Discrimination Against Women in Law and Practice, have highlighted the fact that many 'traditional family values' are premised on unequal gender relations and forms of discrimination that are incompatible with universal human rights guarantees. In this vein, the Council has also sought to address specific harmful cultural practices – including female genital mutilation and child, early and forced marriage – in panel discussions and through the adoption of thematic resolutions that have been tabled without a vote.

In addition to discussions surrounding 'traditional values' and the protection of the family, cultural relativist claims have also been advanced by States in connection with a number of other topics, such as sexuality education and non-discrimination on the basis of sexual orientation and gender identity. These ongoing debates in the Human Rights Council about the relative universality of human rights have not yet been systematically or successfully linked to considerations of the ways in which cultural diversity or guarantees of substantive equality could be used to strengthen the implementation of universal rights by tying them more closely to their local context.

SUBSTANTIVE EQUALITY AND UNIVERSALITY

Many of the Council's mechanisms - the Special Procedures and thematic resolutions, as well as a large number of UPR recommendations – have emphasized that States and other duty bearers have positive obligations to ensure equality and non-discrimination for all people. Over the past decade, the Human Rights Council has played a significant role in rendering visible different forms of discrimination and

inequality and in advancing understandings of the ways in which international human rights law should be applied for the realization of the rights of all people, everywhere.

It is widely agreed by the Council that the development and implementation of specific policies, programmes, budgets and laws for the purposes of ensuring de facto equality, do not constitute prohibited discrimination, nor should they be viewed as undermining the universality of international human rights guarantees. By the same token, the Council's recent emphasis in resolutions and annual panel discussions on the integration of a gender perspective throughout its work and mechanisms demonstrate that obligations to ensure substantive equality require complementary approaches that link mainstreaming non-discrimination guarantees into the general practice of the institution with specific measures to combat inequality. These positive measures to redress past disadvantage and guarantee equality for particular social groups in relation to all of the human rights dealt with by the Council are essential to ensure the universality of the substantive coverage of international human rights law.

EXCEPTIONALIST AND EXEMPTIONALIST CHALLENGES TO UNIVERSALITY

Challenges to universality within the Council have also emerged when States have asserted that while they respect internationally-recognised human rights, they should be able to determine their own measures of human rights implementation or that, due to specific circumstances, they should be exempt from the reach of international human rights norms. As with the arguments made in connection with relativism – in fact, several of the same States that have taken relativist stances with regards to 'traditional' values have also been responsible for making claims of human rights exceptionalism or exemptionalism – these come in different guises and have varied over time.

Exceptionalist and exemptionalist claims in the Human Rights Council can be seen in several areas including; in relation to UPR recommendations and plenary discussions on the progressive realization of economic, social and cultural rights on in obligations to cooperate for the implementation of the right to development, and with respect to political interests, such as national security. While these specific 'exceptions' to general human rights guarantees are most apparent at the local, national or regional levels, they are also manifest in the workings of the Human Rights Council.

As in the case of relativist arguments in connection

with human rights, discussions of exemptionalism and exceptionalism in the Human Rights Council have been characterized by ambivalence. On the one hand, the Council has devoted considerable attention to ensuring the protection of human rights in relation to real or perceived threats to security, for example, challenging the tendency of some States towards human rights ‘exceptionalism’ in the context of counter-terrorism. Through its active engagement, the Council has emphasized the applicability of human rights in all contexts and has called on States to make specific commitments, for example to ensure that counter-terrorism legislation is accessible, precise, non-discriminatory, non-retroactive and in accordance with international law. Panel discussions convened by the Council to address politically sensitive or divisive issues also have helped to take forward debates on questions ranging from mass surveillance and the right to privacy in the digital age, to the use of armed drones in accordance with international law.

The two Academy studies also reflect, however, on the extent to which exceptionalist and exemptionalist claims have influenced the adoption by vote of resolutions on human rights and preventing and countering violent extremism, and on the effects of terrorism on the enjoyment of all human rights. Exceptionalist arguments have also been invoked by States in relation to obligations to cooperate to respond to the human rights impact of climate change or to advance the right to development and the progressive implementation of economic, social and cultural rights. These forms of contestation of the universal applicability of international human rights law in different contexts may work to undermine the Council’s mandate to ensure the substantive universality of all human rights.

CONCLUSIONS

Discussions of human rights universality within the Human Rights Council mirror broader debates regarding the relationships between States, communities and individuals in light of changes in political, economic, social and cultural ideologies and institutions. Prior to the Council’s establishment, discourses on the universality of human rights tended to focus on national or regional communitarian value systems that were thought to be antithetical to the individual rights guarantees contained in international human rights instruments. Since the Vienna World Conference on Human Rights in 1993, the focus of these discourses has shifted, and as reflected in the trends apparent within the Human Rights Council’s debates,

recent challenges to human rights universality have taken more subtle forms, including appeals (whether implicit or explicit) to exceptionalism on the basis of particular security threats or prevailing economic and environmental conditions. The question of cultural relativism is still present, however, and is most apparent in discussions concerning freedom of religion, women’s sexual and reproductive rights, ‘traditional values’, the protection of the family and the rights of LGBTI persons.

The principle of human rights universality does not require that all human rights are implemented in exactly the same manner in every context. Indeed, concepts such as substantive equality require that both mainstreaming and special temporary measures be taken to ensure that historically marginalized groups are able to effectively enjoy human rights without any discrimination. The idea of ‘progressive realisation’ for economic, social and cultural rights and the concept of ‘common yet differentiated responsibilities’ in the field of environmental and climate change law and policies also recognise that universal human rights guarantees must be contextualized in order to be effective in regional, national and local practice.

RECOMMENDATIONS

- Human Rights Council panel discussions should be expanded so that they become more substantive and enable a real exchange of views concerning the form and content of international human rights and their implementation in practice.
- Greater coherence should be achieved between the Human Rights Council's different mechanisms, including the Special Procedures, thematic and country resolutions and the recommendations adopted within the UPR.
- Systematic thematic linkages should be made with other components of the international human rights monitoring system, in particular the treaty bodies.
- Coordinated and institutionalized implementation and follow up mechanisms should be created to monitor the commitments and recommendations made by the Council and UN member States - whether through the UPR process, in thematic or country resolutions, in response to special procedures initiatives and reports, or subsequent to commissions of inquiry - in order to enhance the potential of the Council to advance human rights universality in practice.
- Further qualitative and quantitative research should be carried out with stakeholders at the Council in order to better inform understandings of and future approaches to the universal implementation of international human rights law.

THE GENEVA ACADEMY

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

RESEARCH PROJECT ON THE UNIVERSALITY IN THE HUMAN RIGHTS COUNCIL

This project launched in 2015, examines different concepts of universality, maps contemporary challenges to the principle of Human Rights universality in the context of specific themes covered by the Human Rights Council and discusses the role of the Human Rights Council in the promotion and protection of universally guaranteed Human Rights.

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