Exposing the Universality of Human Rights as a False Premise

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In the twenty-first century, the ability to migrate to some country other than one's own, and to enjoy in that country legal status akin to that of a citizen, is a global marker of privilege. Such freedom is accorded only to a small class of people. For Bauman (1998, 9), international mobility is now the world's 'most powerful and most coveted stratifying factor' (as cited in Castles 2005, 217). In Castles's account (2005), there exist hierarchies of citizenship based on how much international freedom of movement a country's passport provides and the degree to which the rights of its citizens are recognised at home and abroad. On this basis he identifies five tiers of citizenship, with citizens of the US occupying the first tier; citizens of other highly developed countries the second; citizens of transitional and newly industrialising countries the third; and citizens of less developed countries the fourth tier. In the fifth tier, Castles includes members of failed states, stateless people and a group he refers to as 'non-citizens', whose residence status where they live is irregular or unlawful. While we might quibble with the details – for example, placing citizens of the US in the top tier ignores the inability of the country's poorer citizens to access rights in their own country and material constraints on their ability to migrate – this taxonomy makes it clear that the universal enjoyment of human rights is heavily circumscribed. It suggests rights realisation correlates strongly with privileged categories of citizenship.

Remarking that rights realisation is linked to citizenship of just a few states draws into question what the instruments of international human rights law describe as 'beyond question' – the universality of human rights (Vienna Declaration, para. 1). While accepting the reality of widespread rights violations, supporters of the international human rights system argue it is designed to ensure that *one day* all human beings will enjoy all human rights. In the words of a former UN Special Rapporteur on Non-Citizens, '[t]he architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights' (Weissbrodt [2003] in Larking 2016, 201). In fact, however, the architecture of international human rights law is built on the premise of sovereignty, which accords states freedom from external interference and equal standing and authority within a global society of states (Larking 2014, 144).[1] As such, the international human rights regime assumes that individuals enjoy human rights – if they do so at all – primarily by virtue of their membership of some rights-recognising state. This suggests there are structural impediments to universalising human rights that are downplayed by many international law scholars and human rights practitioners.

By comparison, international relations scholars tend to emphasise the centrality of sovereignty as a structuring principle of international law.[2] Some also take the claimed universality of human rights seriously and suggest its theoretical import is to fundamentally qualify sovereignty. In the late 1970s, Hedley Bull (1977, 146) suggested that '[c]arried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of states' (as cited in Noll 2000, 82–3). In a similar vein, in the 1990s many cosmopolitan political theorists described the world as moving towards an era in which the universal realisation of rights might become possible in the form of 'post-national' or 'de-territorialised' rights (see Stasiulis 1997, 198 citing Jacobsen 1996; Sassen 1996; Soysal 1994). Although not presaging the demise of the

Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

sovereign state, they took the European Union as an exemplar and suggested that citizenship was no longer a privileged category or precondition for rights recognition. They pointed to 'new forms of post-national membership and rights, protected by international human rights provisions…and increasingly accepted and indeed organised by nation states' (Stasiulis 1997).

Yet in a world in which strident nationalism is resurgent, political parties that vilify migrants are gaining ground,[3] and states that once viewed themselves as 'settler societies' no longer see the incorporation of migrants as fundamental to nation building (see Dauvergne 2016), it is becoming clearer that individuals without access to a privileged category of citizenship are individuals without human rights.

After detailing how international law ties human rights to membership in rights-recognising states, I discuss the normative heft of sovereignty, locating it in the principle of political self-determination. I argue that recognising a qualified right to international freedom of movement and placing corresponding limits on how states police their borders would do more for political self-determination than continued deference to the principle of sovereignty in the instruments of human rights and in international frameworks governing migration. Re-casting human rights along these lines may be achieved by the advocacy of citizens within rights-recognising states, combined with international pressure from coalitions of states whose residents are most disadvantaged by the current global institutional order. In order to promote mobilisations in this direction, clarity is necessary about the role currently played by human rights instruments in upholding an outdated conception of sovereignty.

How International Human Rights Recognise and Uphold the Principle of Sovereignty

The international human rights regime is based on multilateral declarations and treaties between states that have bound themselves to recognise the rights contained therein. There is nothing unusual about states as sovereign entities entering into multilateral arrangements that constrain their future behaviour. In the case of human rights instruments, however, sovereignty is preserved as a structuring principle, with only minimal constraints imposed and the freedom of states in relation to border controls protected. The regime's foundational instruments specify that rights should be exercised in a manner consistent with the UN's 'purposes and principles' (Universal Declaration of Human Rights, Art. 29(3)) which include the sovereign equality of all Member States (Charter of the UN, Art. 2(1)). With the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) constitute an international bill of rights, specifying all the key human rights. Although primarily dedicated to individual rights, article 1 of both Covenants affirms that 'all peoples have the right to self-determination', allowing them to 'freely determine their political status', 'freely pursue their economic, social and cultural development', and 'freely dispose of their natural wealth and resources'. I discuss the relationship between peoples, self-determination, and sovereignty in the next section.

As well as upholding sovereignty and self-determination, the international bill of rights imposes obligations on states to protect without discrimination the rights of all individuals subject to their jurisdiction or on their territory (ICCPR, Art. 2(1)). Discrimination on the basis of national or social origin is illegitimate (ICCPR, Art. 2(1) and ICESCR, Art. 2(2)).[4] This would seem to imply that people living in a state that fails to protect their rights are free to migrate to another rights-recognising state, but in fact no human rights instrument accords a right to international freedom of movement. States are entitled to control their borders (Noll 2000, 13) and the sovereign right of states to refuse territorial access or deny naturalisation to non-citizen residents is not questioned by international human rights bodies (Guiraudon and Lahav 2000, 168). States determine the conditions for lawful residence and treat individuals who do not comply with these conditions as unlawfully present. Despite explicitly opposing discrimination, if a person is unlawfully present, international human rights instruments allow that their rights can be qualified. Most significantly, they can be detained and deported. This means they are unlikely to make themselves known to authorities in order to claim other rights to which they may theoretically be entitled, or to protest rights violations (Larking 2014, 132).

The sovereign control that states exercise over matters related to membership has been treated by the European Court of Human Rights as qualifying the rights even of native born or long-standing non-citizen residents. This is telling because the Court is widely celebrated as uncoupling human rights recognition from national status and

Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

curtailing the sovereign autonomy of EU Member States. Yet in a number of cases, the Court has found that the deportation of non-citizen residents who have committed crimes does not breach their human rights. In hundreds of other cases it has refused even to consider the question, ruling challenges to deportation orders inadmissible (see Dembour 2003).[5]

The right to seek asylum in article 14(1) of the UDHR has not prevented states from constructing elaborate border control regimes to prevent asylum seekers accessing their territory. These regimes have been treated as 'within the letter, if not the spirit' of international law (Goodwin-Gill and McAdam 2007, 360) and the UN*Convention Relating to the Status of Refugees* ('Refugees Convention') itself recognises that an asylum seeker's presence in a Convention state may be unlawful (Art. 31(2)). While parties to the Refugees Convention should consider protection claims of asylum seekers who arrive on their territory, and afford protection to those who have a well-founded fear of persecution in their home state,[6] in practice this protection is afforded to a tiny percentage of refugees globally.[7] It offers little comfort, moreover, to those people impelled to migrate because of poverty or starvation, war or civil conflict, or environmental disaster. In the remainder of this chapter, I use the expression 'forced migrants' to refer to both Convention refugees and people who migrate for any of the reasons just listed.[8]

The Normative Defence of Sovereignty

Given it is states that are parties to international human rights treaties, it is not surprising that these treaties should preserve state sovereignty. But that they do so is not regarded merely as marking the limits of the possible in international relations. Rather, it is defended on the basis that sovereignty is a good in itself, and desirable from the perspective of human rights on the basis that it supports political self-determination. As we saw earlier, this concept is equated in the international bill of rights with the freedom of peoples to 'determine their political status', 'pursue their economic, social and cultural development' (ICCPR and ICESCR, Art. 1(1)), and 'dispose of their natural wealth and resources' (ICCPR and ICESCR, Art. 1(2)). The claim that sovereignty supports political self-determination is true only in a very limited sense. The boundaries of all current states are based on histories of violence and dispossession, and most are host to a number of different national, cultural and ethnic groups – some of which view themselves as politically autonomous or as deserving of political autonomy. In international law, however, the self-determination principle has been treated primarily as applying to existing states and to the overseas colonies of the European imperial powers (Mayall 1999, 481). Appeals to self-determination have not proved effective as a more general route to sovereign autonomy – international recognition of sovereignty tends to follow in the aftermath of successful secessionist struggles rather than to support them. And while the UN Declaration on the Rights of Indigenous Peoples includes a right to self-determination, this is heavily qualified. Rather than being correlated with the exercise of sovereign powers, the Declaration specifies that the rights it contains cannot be used to undermine the 'territorial integrity or political unity' of the state in which indigenous peoples reside (Art. 46; see also Larking 2014, 145).

Despite the fact that the principle of sovereignty provides only heavily qualified support for political self-determination, it retains powerful normative appeal as a mechanism to ensure some degree of respect for political autonomy, self-government, and the collective right of members of states to freedom from overbearing control by imperial or alien powers. Consistently with this, sovereignty should act as a barrier to global tyranny, preventing the concentration of power in any one state or group of states.

Recognising a Qualified Human Right to International Freedom of Movement

We have seen that an aspect of sovereignty is a state's right to control the composition of its population and those who cross its borders. I want to suggest here that how this right is currently exercised does not advance the principle of political self-determination that provides normative justification for sovereignty. It is, moreover, fundamentally at odds with the aspirational claims of human rights, including the suggestion that 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (UDHR, preamble).

As things currently stand, the burden of hosting and caring for forced migrants is very unevenly shared. The vast

Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

majority are contained in their own countries or regions. The capacity of these countries and regions to 'freely pursue their economic, social and cultural development' and 'freely dispose of their natural wealth and resources' (ICCPR and ICESCR, Art. 1) – and thus to be politically self-determining – is limited by the fact that they shoulder most of the costs of accommodating the world's forced migrants.[9] This inequity is both produced and compounded by other forms of inequality within global institutions and regimes. Wealthy and powerful states strongly influence how international trade, finance and other governance regimes function, with the result that they benefit disproportionately from these regimes.[10] Ensuring that these states support a larger share of the financial and social burden of resettling or otherwise assisting forced migrants would provide an incentive to make the international rules of engagement fairer. This would reduce the number of people forced to migrate in the first place. It would also promote the causes of political self-determination and genuinely universal human rights.

One major barrier to achieving more equitable burden-sharing in relation to forced migration – and thus to incentivising the creation of fairer global trade and finance regimes – is the perception within wealthy, rights-recognising states that according even a qualified right to international freedom of movement will undermine social conditions for current citizens. Very large, unregulated influxes of people entering a country in a short space of time do place pressure on social infrastructure, but research suggests that the long-term economic benefits of immigration either outweigh the costs or are cost neutral, and moreover, that immigration may be necessary to fuel the economies of post-industrial states with ageing populations.[11] Globally and within many countries, wealth and income inequalities have reached historically unprecedented levels (see Alston 2015, paras 8–9, 10, 35 and 37). These inequalities impede economic growth and pose greater dangers for social cohesion than the challenges posed by even large-scale migration.

Members of wealthy, rights-recognising states must confront what are genuine threats to their lifestyle, rights and culture. These threats do not stem directly from forced migration, but from global inequalities combined with the corrosive effects on the rule of law within states from designating forced migrants as unlawfully present and denying them equal recognition and protection under the law. The proposition endorsed by the US Supreme Court that 'Congress may make rules as to aliens that would be unacceptable if applied to citizens'[12] is at odds with the idea that even democratically elected parliaments are bound by rule of law principles. It contradicts the 'revolutionary principle of equality' that Hannah Arendt argues must support and legitimate government in all rights-recognising states.[13] Governance in accordance with the rule of law requires that laws are capable of impartial application and do not single out particular groups, including non-citizens, for punitive measures. Building border fences, denying entry, and creating zones of exclusion does not dissolve this problem because border regimes must be administered within the framework of the law, regardless of whether the law is state-based or regional. If democratic states disavow their commitment to a foundational law of equality, they accept the idea that some people have an innate or inherent right to govern. Historically, this idea justified the rule of the monarchy, but it can also be used to justify the rule of larger collectives, as in Hitler's claim that 'right is what is good for the German people' (see Larking 2004, 16; 2014, 45). Who counts as a member of 'the people' is endlessly contestable and revisable. Recognising the threat posed to their own rights by the refusal to accord rights to unwelcome outsiders, privileged individuals who are members of rights-recognising states and who inhabit Castles's top tiers of the citizenship hierarchy must mobilise in support of fairer global rules of institutional engagement, combined with a right to international freedom of movement for all forced migrants.[14]

These mobilisations could be supported by the advocacy of states in the global south whose members are currently disadvantaged by global trade and finance regimes, and by the failure in international human rights instruments and migration frameworks to accord even a qualified right to international freedom of movement. Coalition building among these states and their members, and between them and concerned citizens of wealthy rights-recognising states, would recognise their shared interests. It would promote the ideals of political self-determination and of human rights shared and enjoyed by 'all members of the human family'.

Notes

[1] I have previously developed versions of this argument in Larking 2004; 2014, ch. 8; and 2016. See also Larking 2012, 72–3.

Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

[2] While noting Falk's assessment that the concept of sovereignty is – as Mayall couches it – 'in such deep trouble that its use should be left to politicians but discarded in serious academic analysis', Mayall points out that '[t]he formal order of international society continues to be provided, in the main, by the collectivity of sovereign states' (1999, 474). Characterisations of sovereignty as the foundational structuring principle of international law is consistent with widespread scepticism about the degree to which it reliably constrains state behaviour – see Jack Goldsmith's account of this prevailing scepticism (2000, 959–61).

[3] The election of Donald Trump in the United States and Britain's decision to leave the EU are two of the more notable examples reflecting a resurgence in xenophobic nationalism. Regarding the growing popularity of anti-immigrant parties in Europe, see Chakelian 2017 and Adler 2016. While Adler accepts there has been a rise of nationalism and anti-immigrant sentiment in Europe, she denies this is evidence of a recent lurch to the far-right.

[4] With these qualifications: developing countries may determine to what extent they guarantee economic rights to non-nationals (ICESCR, Art. 2(3)), and non-citizens do not have rights of political participation (ICCPR, Art. 25). Note as well that the *International Convention on the Elimination of all Forms of Racial Discrimination* does 'not apply to distinctions, exclusion, restrictions or preferences…between citizens and non-citizens' (Art.1(2)).

[5] See Guiraudon and Lahav (2000, 169) for an account of the few cases in which the Court ruled *against* the legality of deportation on the basis deportation would breach the right to family life or to protection against inhuman or degrading treatment.

[6] To qualify for protection under the Refugees Convention as amended by its 1967 Protocol, the reasons for persecution must relate to a person's race, religion, nationality, membership of a particular social group or political opinion (Art. 1).

[7] Border controls prevent most refugees from leaving the region in which their home state is located and thus from accessing protection under the Convention. Official resettlement programs for refugees are also very limited. In 2015, the UN High Commissioner for Refugees estimated there were 21.3 million refugees and another 44 million forcibly displaced people worldwide. In the same year, 107,100 refugees were resettled (UNHCR 2015).

[8] As indicated above (fn 6), the Refugees Convention defines the term 'refugee' restrictively, requiring a person to be outside his or her country of nationality and unable to return to it 'owing to a well-founded fear of being persecuted for reasons of race, religion [etc.]' (Art. 1(2)).

[9] See Hansen 2017, 12–3. The discussion primarily concerns refugees but also refers more generally to displaced populations.

[10] See Joseph 2007; George 2004, 53ff. and 57ff.; and Pahuja 2014.

[11] See OECD 2014 and Koser 2007, ch.7, 'The economic impact of immigration'.

[12] *Demore v Kim* 538 U.S. 510 (2003) 11, in Wilsher 2012; and see Larking 2016, 197.

[13] This principle must be protected by 'the complete impartiality of the law' (see Arendt 1968, 11 and 91, and my discussion in Larking 2014, 29–35 and 165–7).

[14] Previously I have argued in support of a right to international freedom of movement only for victims of genocide, but supplemented by obligations on wealthy rights-recognising states to share the burden of resettling or otherwise supporting all forced migrants (Larking 2012; 2014). In *Refugees and the Myth of Human Rights* I suggested obligations in relation to forced migrants who are not victims of genocide could be spelled out in a multilateral resettlement treaty (2014, 164–5).

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Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

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Exposing the Universality of Human Rights as a False Premise
Written by Emma Larking

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Exposing the Universality of Human Rights as a False Premise

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