No Rights without Remedy: in Search of an ICHR

Istvan Kantsin

There is no international court of human rights. At first glance, this is surprising as human rights are an international affair *par excellence*. How are victims of violations to seek remedy? Or more cogently, can remedy be sought at the international level at all? Below I look at some of the factors which mark human rights out as an anomaly within international law, the history that has led to this state of affairs, and grounds for hope that international justiciability of human rights may not be the pipedream that it appears today, more than fifty years after their entrance on the international stage. At stake is the gradual approach of individuals to international fora, at the expense of the state.

Human rights: a break with pre-war international law

From one perspective, it is surprising that human rights ever entered international law. In contrast with other international legal affairs, such as territorial integrity, fishing rights, trade relations, or diplomatic immunity, violations of human rights norms do not have direct consequences at the inter-state level. [1] Human rights violations may have indirect international consequences, such as causing cross-border ethnic tensions or refugee flows [2] - but it is nowhere argued that their implementation is intended primarily to prevent these outcomes. Curiously, the body of international treaties covering putative human rights violations with an explicit *international* dimension, such as those addressing war crimes or the treatment of refugees - the humanitarian laws of war and the Geneva Conventions - are not treated as integral to the core human rights machinery embodied in the UDHR and the subsequent UN Covenants.

At the heart of this differentiation is that human rights treaties explicitly protect persons, not as citizens or representatives of a given state, but as human beings *regardless* of state affiliation. [3] Previous to 1945, rights accorded to individuals in international law centred on the treatment of aliens - that is nationals of other states; [4] in 1912 Oppenheim can still write: "What the Law of Nations really does concerning individuals is to impose the duty upon all [states] to grant certain privileges to such foreign heads of States and diplomatic envoys, and certain rights to such foreign citizens as are on their territory." [5] By 1955, Lauterpacht has revised the same text to read "individuals are the ultimate objects of International Law," [6] a claim grounded in the human rights discourse that arises in the intervening years. Lauterpacht makes this clear in his book *International Law and Human Rights*, noting that "The constant expansion of the periphery of individual rights [...] cannot stop short at the limits of the state." [7] The international human rights machinery has, by 1950 in Europe and 1977 elsewhere, imposed an imputable vertical axis, allowing persons to address grievances to international bodies, over and above the state to which they may belong. Perversely, this tends to puncture the primacy of the state on the international stage, and arguably runs counter to the general tendency of international law which functions along a horizontal axis: inter-state agreements regulated by intergovernmental (as opposed to supranational) bodies, promoting the sovereignty of states. [8] This tension is particularly apparent in the history of the CSCE/OSCE - the Helsinki Accords incorporated both a statement of respect for the principle of territorial integrity and an affirmation of human rights principles.

This near contradiction is further manifest in numerous other areas of difference between human rights norms and the traditional domain of international law. Brierly (no fan of state sovereignty) notes that "[international] law is normally observed because [...] the demands it makes on states are generally not exacting, and on the whole states find it convenient to observe it." [9] He is echoed by Morgenthau, who characterises international rules of law as formulating "identical or complementary interests." [10] Both assumptions - that international law

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is generally observed, and that it aligns with state interests - are clearly problematic in the case of human rights norms. Compare Antonio Cassese: "The arrival of human rights on the international scene is, indeed, a remarkable event because it is a subversive theory destined to foster tension and conflict among States". [11] We may argue with Cassese's terms, but the general thrust of Cassese's comment - that international human rights norms, far from being 'convenient' to states are frequently considered a challenge to their sovereignty - is indisputable. [12] Furthermore, state violations of human rights norms are frequent, as even a cursory glance at the case law of any of the regional human rights bodies will quickly affirm. [13]

What threat to sovereignty?

Why, then, did states agree to the entry of human rights into the international legal order? An immediate answer is that, in an important sense, they did not. The enforcement mechanism for human rights at the international level is, in the words of Philip Alston, "seriously flawed." [14] The political negotiations that led to this state of affairs are well documented: even the monitoring mechanisms were constructed in an emasculated form. [15] Given that state interests cannot be relied upon to ensure enforcement, this issue is more acute in human rights than elsewhere in international law. Harris's remark that "a state can usually flout international law if it wants to and get away with it" [16] is more ominous if the laws in question do not, in Morgenthau's words, "enforce themselves." [17]

Yet the international enforcement framework for human rights violations is, if anything, weaker than that of other international law regimes. [18] Individuals, as victims and potential claimants, cannot address themselves to the United Nations judicial framework. The Statute of the International Court of Justice explicitly denies access to individual persons, [19]although it has jurisdiction "in all legal disputes concerning [...] any question of international law." [20] This is striking, as the Statute was elaborated at the same time (1945) as the UN Charter, which first introduced human rights to the international legal framework.

Nevertheless, human rights are now irreversibly internationalised. The factors leading to states' (limited) acceptance of human rights obligations at the international level are well known and beyond the scope of this paper - I note merely that observers agree that the Second World War and its aftermath were the *sine qua non* for this development. [21] There is less agreement about its impact on either international law or human rights. Indeed, while the seemingly anomalous nature of human rights within international law implies a qualitative break in international legal history, this is not apparent in standard narratives of international law which tend to view international legal developments as a process of accumulation: the incremental codification of customary law and practice into consolidated norms, supplemented by binding treaty. In this view, human rights norms are a substantially reasonable progression from prior legal developments - notably the abolition of the slave trade, the introduction of humanitarian laws of war, and the long evolution of minority rights regimes. [22]

But let us assume instead that the introduction of the human rights regime constitutes, by contrast, a radical break from previous legal advances, deriving as it did from the severe historical discontinuity that was the Second World War. For a start, the legal steps cited as having prefigured international human rights still belong firmly within the scope of "traditional" international law - their implications bear primarily on relations between states. [23] In addition to their humanitarian impetus, laws governing the conduct of war have a clear element of reciprocity. Minority protection, under the League of Nations regime and previously, was aimed specifically at those minorities whose interests could be safeguarded by their "mother" nations and did not extend to minorities who lacked a nation protector, such as the European Roma/ Gypsies. [24] (Historical accounts sometimes forget that the UN human rights regime deliberately passed over the League of Nations minorities regime [25] - and that only recently

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have minority rights re-entered the international lexicon, this time firmly under the human rights rubric. [26]) Even the abolition of slavery, while clearly driven by human rights intentions, is sometimes reckoned to have functioned first and foremost as a means to level the playing field in terms of international labour costs. [27]

Nuremberg: piercing sovereignty or rationalising discontinuity?

The Nuremberg trials too fit the model of historical discontinuity, and their interpretation appears to have been the site of a struggle over precisely the nature of this break. A crucial aspect of the International Military Tribunal (IMT) set up to prosecute nazi atrocities was precisely its reliance on the rule of law (as opposed to visiting summary judgement and/or execution on the prosecuted). [28] However, the Tribunal was called upon to pass judgment over crimes of an unprecedented egregiousness, equipped with an international legal system founded largely on precedent - in customary law or practice, or codified in treaties. Thus the Tribunal was forced to improvise, as it were, while attempting to reconcile its innovations with existing practices.

In its judgement, the Tribunal went to some length to counter the potential for claims that it was acting *ex post facto* in condemning many of those prosecuted for crimes against humanity *inter alia*. The innovations of the London Charter, the legal basis for the trials presided over by the victorious allies were, according to the Tribunal, rather the codification of existing norms and practices, with particular reference to the Hague Convention and the Pact of Paris (and, in one important instance, a US Supreme Court ruling). For example, where the Tribunal recognises that Article 2 of the Hague Convention explicitly applies the Convention only to contracting parties - and that "several of the belligerents in the recent war were not parties to this Convention" - it nevertheless finds it "not necessary to decide this question", because "...by 1939 these rules laid down in the Convention were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war..." [29] Invoking the nebulous notion of "civilised nations" appears to have been a necessary device in the eyes of the Tribunal to mediate between the need for precedent in the application of law, on the one hand, and the unprecedented nature of the crimes it was called upon to judge on the other. [30] As documented by Steiner and Alston, decisions of this kind, together with the asymmetrical nature of the trials (Allies' individuals were not tried on similar grounds) provoked considerable unease among observers, fearing that due process had been sacrificed to political expediency. [31] In the words of one, "this unsavoury feature of the Nuremberg judgment has undermined its authority in the minds of many, weakening its normative weight." [32]

On the other hand, the Tribunal's rulings, and particularly the concept of "crimes against humanity" as laid down in the London Charter, were clearly instrumental in paving the way for the international protection of human rights, by creating an international interest in a state's treatment of *its own* nationals, [33] even - potentially - in times of peace [34] (a category therefore separate from war crimes). Viewed from this perspective, some commentators note that, far from having overstepped its mandate, the Tribunal did not go far enough. Most starkly, Article 6c of the Charter concerning "crimes against humanity" was deemed by the IMT to be prosecutable only in the context of the outbreak of war in 1939. Cassese notes that this association meant that only those criminal activities were punished which 'directly affected the interests of other states' either because these activities were connected with a war of aggression or a conspiracy to wage such a war, or because they were bound up with war crimes, that is, crimes against enemy combatants or enemy civilians." [35] David Luban argues that the articles defining different crimes "pull in [...] opposite direction[s]", since, by simultaneously criminalizing aggression (Article 6a), "the Charter erected a wall around state sovereignty and committed itself to an old-European model of unbreachable nation-states." [36] Neither notes that the remarkable achievement of the Tribunal was to manage both

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to make this commitment to old Europe and, at the same time, in Luban's words, "pierce the veil of sovereignty" via "crimes against humanity". In other words, Nuremberg broke with previous international legal tradition, but only by appearing not to do so.

Nuremberg thus provided an ambiguous bridge between the traditional demands of international law, maintaining the primacy of the state in international affairs, on the one hand, and the intrusive human rights claim of the primacy of individuals over the state on the other. In the words of a contemporary commentator: "Nuremberg, far more than San Francisco, was the assumption of an irrevocable obligation - to build a world of just law that shall apply to all with institutions strong enough to carry it into effect." [37]

Human rights violations as "international crimes"?

If we accept this formulation (and the mandatory mention of Nuremberg in any account of the evolution of human rights would seem to support its admissibility), we are immediately faced with a fresh obstacle. The Nuremberg trials bear only the most superficial resemblance to the human rights regime which followed. The areas covered were later consolidated not in the human rights instruments, but in the Geneva conventions, which, as noted, belong to an arguably separate category of international law. They did not reflect "international agreement" in any credible sense, constituting merely the will of four allied victors of the war (albeit adhered to by 19 other states [38]). Most significantly, the London Charter was intended to legislate over *criminal* activities and the IMT (and contemporaneous tribunals) thus functioned in the role of an international criminal court. Its immediate successors are not the human rights institutions of today, but the tribunals established in the 1990s to rule over crimes committed in the Former Yugoslavia and in Rwanda and more recently, the projected International Criminal Court (ICC). (Significantly, with the exception of the latter, these tribunals were established by UN Security Council Resolution, and cannot therefore be regarded as reflecting international consensus. [39])

The issue of criminality matters from a human rights perspective because, although many of the violations covered in human rights treaties appear as crimes in domestic legislation (and some in Articles 5-8 of the ICC Statute), [40] they do not have this status internationally. Human rights treaties, like other international treaties are, in the words of Fitzmaurice, "a source of obligation rather than a source of law. In their contractual aspect, they are no more a source of law than an ordinary private law contract." [41] In keeping with this, states are not themselves criminally liable for breaching human rights treaties, not even in cases of crimes against humanity, according to the recently adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), elaborated by the International Law Commission (ILC). [42]

What would an ICHR look like?

Since 1945, therefore, besides the principal organ for adjudicating international legal disputes, the ICJ which, although a post-war institution, "adheres to the traditional view that only States can be parties to international proceedings," [43] two separate developments in international law have brought international proceedings closer to individuals, at the expense of states, both relating to human rights. In the first, a limited number of individual victims can take cases against states to regional courts. In the second, individual perpetrators can (pending ratification of the ICC Statute) be found guilty of criminal violations, even as state actors, where the relevant state can or will not do so. However, as yet, individual victims of human rights abuses at the hands of the state cannot petition an international court directly and expect just remedy. An International Court of Human Rights would thus need to combine the complaints mechanisms of the ECHR with the prosecutory possibilities of the ICC. It may even be useful to think of international civil and criminal courts for human rights.

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It appears that the human rights discourse of the UN Charter/ UDHR and the innovations of Nuremberg were mutually inspiring and mutually reinforcing, grounded as both were in the outright rejection of nazi values. They have continued to feed each other since, and, as a result, "the boundary lines" between international crimes with individual responsibility and human rights violations by state actors "are blurring". [44] Ultimately, human rights will only fulfil its international potential once a credible enforcement mechanism is put in place to ensure appropriate recourse for the individual, once, in other words, the maxim "there are no rights without remedies" is properly implemented at the international level. [45]

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Footnotes

[1] Steiner and Alston, p.56.
[2] *ibid.*, p.57.
[3] See Lauterpacht (1968), p.61, referring to "substantial developments in international law in which, notwithstanding traditional dogma, the individual is in fact treated as a subject of international rights" and "the acknowledgement of the worth of human personality as the ultimate unit of all law." Cited in Steiner and Alston, p.147.
[4] Harris, p.520.
[5] Oppenheim International Law: A Treatise (2nd ed., 1912), in Sohn and Buergenthal, p.1.
[6] Oppenheim International Law: A Treatise (8th ed., by H. Lauterpacht, 1955), in *ibid.*, p.5.
[7] Lauterpacht (1968), pp.69-70.
[8] See e.g. Fitzmaurice (1957) pp.70-80, on the monism-dualism debate, noting that "the supremacy of international law [in the international field] arises not because of any inherent supremacy of international law as a category of law [...] It is rather a supremacy of the same order as the supremacy of French law in France or English law in England." Cited in Harris, pp.68-71.
[9] Brierly, pp.42-43.
[10] "The great majority of the rules of international law are generally observed by all nations without actual compulsion for it is generally in the interests of all nations concerned to honor their obligations under international law." Morgenthau, p.312.
[11] Cassese, p.349.
[12] Steiner and Alston, pp.584-585.
[13] See, e.g. Henkin p.251: "The general culture of compliance with international law also is less effective for human rights law." Cited in Steiner and Alston, p.594.
[14] Alston, P., in Alston and Crawford, p.516.
[15] See in particular Steiner in Alston and Crawford,
[16] Harris, p.7.
[17] Morgenthau (1985), p.312, cited in Harris, p.8.
[18] Due to lack of space, I am here leaving aside discussion of the controversial issue of "humanitarian intervention".
[19] Statute of the International Court of Justice, Article 34(1): "Only states may be parties in cases before the Court."
[20] *Ibid.* Article 36(2).
[21] See e.g. Cassese p.351; Harris, p.624.
[22] See Robertson and Merrills, pp.15-23, for a standard presentation of the case for continuity.
[23] See Cassese , p.350; Henkin (1989), p.208, cited in Steiner and Alston, pp.127-130.
[24] Tsilevich (2001). This approach to minority rights remains an element of foreign relations in, for example, the bilateral treaties between many Eastern European countries.

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[25] *Ibid.* Minorities were not mentioned in any human rights document prior to the 1966 ICCPR (Art. 27).
[26] See the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1985 Council of Europe Framework Convention on the Protection of National Minorities; various OSCE documents dating from the 1990s on; the EU's 1993 Copenhagen Political Criteria for Accession.
[27] See FRUS, pp.406-408, cited in Cassese, p.350.
[28] See e.g. Wechsler, p.24.
[29] Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946), 41 Am.J.Int.L. 172 (1947), cited in Steiner and Alston, p.120.
[30] The Tribunal was aided in this by the Statute of the ICJ of two years previously, which includes as a source of international law "the general principles of law recognised by civilized nations". (Article 38(1) c).
[31] George Finch finds as "untenable [...] the argument [...] of the prosecutors and judges at Nuremberg that custom can be judicially established by placing interpretations upon the words of treaties that are refuted by the acts of the signatories in practice, by citing unratified protocols or public and private resolutions of no legal effect, and by ignoring flagrant and repeated violations of non-aggression pacts by one of the prosecuting governments which, if properly weighed in the evidence, would nullify any judicial holding that a custom [outlawing aggressive war] had been accepted in international law." Cited in Steiner and Alston, p.123.
[32] Osiel, p.122, cited in Steiner and Alston, p.125.
[33] "The 'crimes against humanity' were considered with the 'war crimes' from which they differed only in being directed against German nationals rather than against enemies." Wright, p.60.
[34] The Tribunal judgment is in fact profoundly ambiguous on this point, as the following sentence illustrates: "insofar as inhumane acts [...] did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes Against Humanity." Cited in Steiner and Alston, p.121.
[35] Cassese, p.249, quoting Schwelb, p.207.
[36] Luban, p.336. He describes the Judgment as "a legacy that is at best equivocal at worst immoral." Cited in Steiner and Alston, p.125.
[37] Wechsler, p.26.
[38] Wright, p.51.
[39] Should the ICC gain the necessary 60 ratifications for its entry into force (there are 52 as of 5 February 2002), this will represent a clear indication of the acceptance of international jurisdiction over individual criminals irrespective of their state ties, allowing investigations in cases where the State is "unwilling or unable genuinely to prosecute." See Statute of the ICC, Article 17.
[40] Evans, pp.447-452.
[41] Fitzmaurice, p.153, cited in Harris, p.45.
[42] I.L.C. Draft Articles on State Responsibility, I.L.C.'s 1996 Report, G.A.O.R, 51st Sess., Supp. 10, p.125, Article 19, cited in Harris, p.488. An earlier attempt by the ILC to consolidate the notion that states *could* be held criminally liable for crimes involving, inter alia, "an international obligation of essential importance for safeguarding the human being," (Article 19) was excised from the adopted Articles.
[43] Lauterpacht (1970) p.469, cited in Harris p.140.
[44] Steiner and Alston, p.1132.
[45] See Lauterpacht (1968), pp.151-152.

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