International Human Rights Law

TOPIC ONE: HISTORY AND BACKGROUND

INTRODUCTION

Violations of human rights are different, they are generally rooted within states rather than in interstate engagements, but they need not on their surface involve any international consequences whatsoever. In typical instances of violations, the police of state X torture defendants to extract confessions; the government of X shuts down the opposition press as elections approach; prisoners are raped by their guards; courts decide cases according to executive command; women or a minority group are barred from education or certain work. Each of these events could profitably be studied entirely within a state's (or region's cultures) internal framework, just as law students in many countries traditionally concentrate on the internal legal-political system, including that system's provision for civil liberties and human rights. In today's world, human rights are characteristically imagined as a movement involving international law and institutions, as well as a movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law and institutions as well as by pressures from other states trying to enforce international law.

COMMENT ON THE NUREMBURG TRIAL

The trial at Nuremberg in 1945-1946 of major war criminals among the Axis powers, dominantly Nazi party leaders and military officials, gave the nascent human rights movement a powerful impulse. The UN Charter that became effective in 1945 included a few broad human rights provisions. But there were more programmatic than operational, more a programme to be realized by states over time than a system in place for application to states. Nuremberg, on the other hand, was concrete and applied: prosecutions, convictions, punishment. The prosecution and the Judgement of the International Military Tribunal in this initial, weighty trial for massive crimes committed during the war years were based on concepts and norms, some of which had deep roots in international law and some of which represented a significant development of that law that opened the path toward the later formulation of fundamental human rights norms.

One specialized field in prosecuting the humanitarian laws of war, had long included rules regulating the conduct of war, the so-called 'jus in bello'. This body of law imposed sanctions against combatants who committed serious violations of the restrictive rules. Such application of the laws of war, and its foundation in customary norms and in treaties, figure in the judgement, infra. But the concept of individual criminal responsibility was not systematically developed. It achieved a new prominence and a clearer definition after the Nuremberg Judgement, primarily through the Geneva Conventions of 1949 and their 1977 Protocols. Gradually other types of conduct have been added to this small list of individual crimes under international law – for example, slave trading long prior to Nuremberg and genocide thereafter. Recent years have seen the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda in the 1990s and the initiation of the International Criminal Court in 2002.
As the Second World War came to an end, the Allied Powers held several conferences to determine what policies they should follow towards the Germans responsible for the war and for the systematic barbarity and annihilation of the period. These conferences culminated in the London agreement in which the parties determined to constitute 'an International Military Tribunal for the trial of war criminals' on 8 August 1949. The Charter annexed to the Agreement provided for the composition and basic procedures of the Tribunal and stated the criminal provisions for the trials in its three critical articles:

<u>Article 6</u>
The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7.
The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.
The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

At the core of the Charter lay the concept of international crimes for which there would be ‘individual responsibility’, a sharp departure from the then existing customary law or conventions which stressed the duties of states. In defining crimes within the Tribunal’s jurisdiction, the Charter went beyond the traditional ‘war crimes’ in two ways.
First, the Charter included the war-related ‘crimes against peace’ – so-called ‘jus ad bellum’, in contract with the category of war crimes or jus in bello. International law had for a long time been innocent of such a concept. After a slow departure during the post-Reformation period from earlier distinctions of philosophers, theologians and writers on international law between ‘just’ and ‘unjust’ wars, the European nations moved towards a conception of war as an instrument of national policy, must like any other, to be legally regulated only with respect to jus in bellow, the manner of its conduct.
Secondly, Article 6(c) represented an important innovation. There were few precedents for use of the phrase ‘crimes against humanity’ as part of a description of international law, and its content was correspondingly indeterminate. On its face, paragraph (c) might have been read to include the entire programme of the Nazi government to exterminate Jews and other civilian groups, in and outside Germany, whether ‘before or during the war’, and thus to include not only the Holocaust but also the planning for and early persecution of Jews and other groups preceding the Holocaust.
In other respects as well, the concept of crimes against humanity, even in this early formulation, developed the earlier international law. War crimes could cover discrete as well as systematic action by a combatant – an isolated murder of a civilian by a combatant as well as a systematic policy of wanton destruction of towns. Crimes against humanity were directed primarily to planned conduct, to systematic conduct.

INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS

Antecedents of the International Law of Human Rights

Early international law began to attend to internal matters that help special interest for other States, and those sometimes include concern for individual human beings, or at least redounded to the benefit of individual human beings. Bur what was in fact of interest to other states, were limited a priori by the character of the state system and its values. Of course, every state was legitimately concerned with what happened to its diplomates, to its diplomatic mission and to its property in the territory of another State. States were concerned, and the system developed norms to assure, that their nationals in the territory of another State be treated reasonably, 'fairly', and the system and the law early identified an international standard of justice by which a State must abide in its treatment of foreign nationals. States also entered into agreements, usually on a reciprocal basis, promising protection or privilege to persons whom the other state party to the treaty identified because of common religion or ethnicity.

Following the First World War, concern for individual human beings was reflected in several League of Nations programmes. Building on earlier precedents in the 19th century, the dominant States pressed selected other States to adhere to 'minorities treaties' guaranteed by the League, in which States Parties assumed obligations to respect rights of identified ethnic, national or religious minorities among their inhabitants. The International Labour Office was established at this time and it launched a variety of programmes including a series of conditions setting minimum standards of working conditions and related matters.

The UN Charter and the UDHR

In 1948 the UN General Assembly approved the Universal Declaration of Human Rights. This held centre stage until 28 years later, in 1976, when the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights became effective. Together, the Covenants form the International Bill of Human Rights which is universal. The Human Rights regime is not simply a systematic ordering, basically through treaties and customary law, of fundamental postulates, ideologies and norms. They are imbedded in institutions, some of them state and some international, some governmental or intergovernmental and some nongovernmental and in related international processes. The Charter builds on the precedents to which the Nuremberg Judgement refers and states the UN's basic purpose of securing and maintaining peace. It does so by providing in Article 2(4) that UN members 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state', a rule qualified by Article 51's provision that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs' against a member.

In 1946 the Economic and Social Council (ECOSOC) established the Commission on Human Rights which evolved over the decades to become the world's single most important human rights organ, at its inception, the new commission was charged primarily with submitting reports and proposals on an international bill of rights. The UN Commission first met in 1947 and in 1948 adopted a draft Declaration which was adopted by 48 states. The Universal Declaration was meant to precede more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification. The plan to use the Universal Declaration as a springboard to treaties triumphed finally in 1966, but only achieved ratification in 1976. As a declaration voted in the General Assembly, the UDHR lacked the formal authority of a treaty that binds its parties under international law. Nonetheless, it remains in some sense the constitution of the entire regime, as well as the single most cited human rights instrument.

Historical Sequence and Typology of instruments

That part of the universal human rights regime consisting of intergovernmental instruments can be imagined as a gour-tiered normative edifice, the tiers described generally in the order of their chronological appearance.

1. The UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject. But what it does say has been accorded great significance through interpretation and extrapolation.
2. The UDHR, viewed as further elaboration of the brief references to human rights in the Charter. It gained legal force by becoming a part of customary international law.
3. The two principal covenants, which alone among the universal treaties have broad coverage of human rights topics, develop in more detail the basic categories of rights that figure in the Universal Declaration, and include additional rights as well.
4. A host of multilateral human rights treaties as well as resolutions or declarations with a more limited or focused subject than the comprehensive international bill of rights, have grown out of the United Nations and been ratified by large numbers of States. They develop further the content of rights that are more tersely described in the two covenants or, in some cases, that escape mention in them.

STUDY NOTES – WEEK ONE

Historical origins

The purpose of the first week of lectures is to introduce you to the historical origins of international human rights law – both conceptually/philosophically and in terms of its legal sources.

Below are a summary of the main themes canvassed and which will – in tandem with the above sources - serve as a useful study guide:

- The origins of contemporary human rights discourse is in its earliest days intertwined with the development of the Common Law itself through instruments which you may already have heard of from legal history – such as the Magna Carta and 1689 Bill of Rights. The extent to which these instruments enshrine significant individual rights protections is highly questionable. But gradually, these developments did lead to progressive limitations being placed on notions of absolute Sovereign rule.
- In the Common Law tradition, increasing individual rights came to be enshrined in procedural protections such as trial by jury, although the notion of 'individual rights' in these days was far from comprehensive and universal. Note the divergent history of Continental legal systems in this period.
- Political philosophies – particularly those of the Enlightenment figures – were also influential in this period. The United States and France took an early lead in the late 18th century by enshrining prevailing philosophies of governance in written constitutions.
- Also influential were humanitarian ideals, and thus indirectly religious and moral values. (Although the notion of human rights is predicated on rights that are fundamental and owed to us all by virtue of our common humanity, we will later in the course we will look at challenges to the 'universality' of human rights law and critiques of human rights law, including whether this enshrines certain values that are not universally shared, or which may be subjected to radically different interpretations in differing contexts. We will also later in the course look at the extent to which certain fundamental human rights can permissibly be limited).
- One tangible expression of the impulse toward humanitarianism is reflected in the desire to mitigate the suffering caused by armed conflict. Having witnessed the plight of wounded soldiers following the Battle of Solferino in the late 19th century, Henri Dunant was moved to established the precursor of the International Committee of the Red Cross. Instructions to spare civilian lives and property also started to appear in military manuals and other state practice from around this time, and thus some rudimentary constraints on the conduct of warfare came to be articulated.

Although the early history of human rights law is found in constitutional developments in domestic law, contemporary international human rights law derives from a number of key *international* legal instruments and sources. It is thus useful to have a basic understanding of the basic sources of international law – namely, treaties and customary international law. This is a complex area (pp. 72-90 of Alston and

Goodman outlines some of these complexities for those who are especially interested in this area) and this course does not assume that you have a sophisticated grounding in general international law. It is though useful to understand that international human rights law is developed on the international plane both via treaties and custom. Later in the course we look at international and regional institutions that monitor compliance with international human rights principles, as well as some examples of how these norms are incorporated in national law (including in Australia).

Note that despite the current importance of international law for international human rights law, international law was (with few exceptions) traditionally quite unconcerned with the rights of individuals. Rather, international law was principally focussed on the interests of States and sought to regulate relations between States. International law had little to say about how States treated citizens or other individuals found within national borders. Despite this, the treatment of individuals within state boundaries did become a concern in a limited number of instances (e.g. laws of diplomatic protection) – although it could be argued that this reflected less of a concern regarding the individual rights of diplomatic staff suffering mistreatment, but rather the interests of States in ensuring the free and unfettered conduct of international diplomacy.

The abolition of slavery is an excellent early example, however, of how increasing clamours for abolition and reform led, firstly, to changes to national law outlawing slavery. Once this had occurred in a significant number of countries, this enabled States collectively to meet and denounce this practice in international fora. Gradually, and once outlawed in a significant range of countries, this led the way, eventually, to the more general abolition of slavery via the adoption of treaties.

The preoccupations/focus of international law, and the sheer number of international instruments adopted and which enshrine or protect fundamental human rights, changed dramatically after the Second World War.

Post-World War II

The Second World War was a significant turning-point in the international human rights law after which the field developed at a far greater pace and extent than previously. There are several reasons for this.

- The Holocaust profoundly shook the foundations of civilisation and galvanised public opinion in favour both of the articulation of fundamental rights that we all enjoy, and acceptance of the need for limitation on a State's freedom of manoeuvre in terms of the treatment of individuals within its own borders;
- The preamble of the United Nations Charter, adopted in late 1945, enshrined human rights as a core value although it did not articulate specific human rights in any detail (Article 2(7) of the UN Charter also contained/retained a significant echo of traditional notions of State sovereignty, as it expressly prohibits intervention in matters that are essentially within the domestic jurisdiction of any State).
- The establishment of the United Nations also created a far more effective international forum which enabled States to convene, discuss and adopt future legally-binding international instruments.
- The Nuremberg Tribunal overcame objections based on *ex post facto*-ism and subjected the surviving leadership of the Third Reich to criminal prosecution for Nazi enormities. The Nuremberg Tribunal articulated notions of crimes against humanity for the first time, articulating a category of crimes within general international law. This not only inspired future developments in international criminal law (which we will also look at later in the course) but also reinforced and inspired the burgeoning international human rights movement more generally.
- Calls for a Universal Bill of Rights (akin to the US Constitution but instead on the international level) did not bear fruit. However this inspired the 1948 Universal Declaration of Human Rights, which articulated in sparse and elegant language a number of core features of contemporary international human rights law.
- In terms of its formal status, this is a United Nations General Assembly resolution rather than an international treaty or other legally binding international instrument. However it has taken on

immense symbolic significance. It also inspired the creation in due course of two foundational multilateral human rights instruments (the two International Covenants), which enshrined many of these rights, although the Covenants did not come into force until several decades later (we look at this in more detail next week).