

## The Universal Declaration of Human Rights: Learning from Experience

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For an international lawyer, the significance of the Universal Declaration of Human Rights (UDHR) lies in its belated completion of an underlying value system that had remained inchoate for some two hundred years. After a period in which its first modern articulators (Grotius, Vitoria) looked partly to a natural law based on human dignity for a framework of principles in which to set down the rules binding nations, the behaviour of governments or sovereigns forced scholars and practitioners to accept that international law was no more than the rules by which the governments agreed to conduct their relations. There was nothing in this system that prevented governments waging war on each other or from treating their citizenry as arbitrarily or brutally as they chose.

Yet international law was still seen as embodying humane values. To the extent that it could and did establish rules to cover problems that arise in interstate relations, it was providing for the peaceful adjustment of disputes, a decidedly better solution than armed conflict.

The Kellogg-Briand Pact (Pact of Paris, 1928) closed a major gap in the edifice by outlawing recourse to war as a legitimate tool of statecraft. Eleven years later the Second World War broke out. The Charter of the United Nations which followed it strengthened the prohibition of resort to armed force to settle disputes and introduced into the field of general international law the obligation to promote respect for and observance of human rights and fundamental freedoms. Here was recognition of a lesson learnt from the war, that governments that were allowed to treat their own citizens as mere objects beyond international concern could end up also treating other states and their populations with similar disdain. The Universal Declaration of Human Rights was the document that ensured that the Charter's human rights clauses did not remain a dead letter.

The Declaration itself contained elements that reflected the experience of the Second World War, while building on the historic models of the French *Déclaration des Droits de l'Homme et du Citoyen* and the American Bill of Rights. For example, in Europe under Nazi German control the phenomenon of torture, long thought abolished as a tool of government, resurfaced as a systematic practice. Article 5 of the Universal Declaration responded: 'No one shall be subjected to torture or to cruel, inhuman or

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\* This essay is a substantially updated and expanded version of my contribution of the same title to a Netherlands Ministry of Foreign Affairs publication: B. van der Heijden and B. Tahzib-Lie (eds.), *Reflections on the Universal Declaration of Human Rights – A Fiftieth Anniversary Anthology* (The Hague/Boston/London: Martinus Nijhoff, 1998).

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degrading treatment or punishment’.

The next step in our learning process was the realization that, just as the promotion of respect for human rights could be seen as a safeguard against war, human rights too needed safeguards. Again, taking the prohibition of torture as an example, we soon learned that as long as people who are arrested or detained remain at the unsupervised mercy of their captors and interrogators, they are at great risk of being tortured. So one protracted exercise in standard-setting, launched in 1975 and completed in 1988, was the establishment of a Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Principles are an integral part of the United Nations General Assembly’s work to prevent torture.

Despite these advances, for at least two decades the dead hand of tradition prevented the United Nations from moving beyond the standard-setting phase to one of implementation, a term used to connote monitoring and holding to account. Many governments felt, as a few still do, that it was improper intervention in their internal affairs for the international organization to examine their human rights performance, unless this was agreed to under a treaty to which the government concerned was a party. At the Universal level, the key general treaties, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, were adopted only in 1966 and took ten years to secure the thirty-five adherences that brought them into force. As far as the former treaty was concerned, the only monitoring mechanism was by scrutiny of states’ periodic reports. The latter used the same technique, but also permitted states to accept on an optional basis interstate and individual complaints. Even now, only 111 of the 161 states parties have accepted the right of individual petition under the (first) Optional Protocol to the Civil and Political Covenant. The interstate complaint procedure has yet to be used.

So for much of the time since the foundation of the UN it was left to non-governmental organizations (NGOs) like Amnesty International and the International Commission of Jurists to try to hold governments accountable for their violations of the norms contained in the UDHR. The NGOs themselves were not satisfied with UN inertia in the face of its members’ flouting of those norms. They kept calling for action and questioning the legitimacy of the UN’s practice of ‘turning a blind eye’ to the violations. By the late 1960s certain relatively friendless countries’ human rights records were starting to be subjected to scrutiny by the UN, notably in the former Commission on Human Rights. But some countries were immune from scrutiny because of voting patterns in that Commission.

This in turn led to the establishment from the 1980s of ‘thematic machinery’ which would look at types of violation on a country-by-country basis. The first of these was the Working Group on Enforced or Involuntary Disappearances (1980), followed by the Special Rapporteur on summary, arbitrary and extrajudicial executions (1982) and the Special Rapporteur on torture (1985). Numerous others have been created since, but the first three developed the range of practices that are followed to a greater or lesser degree by others: making urgent appeals to government, transmitting substantiated cases to governments for their comments, reporting annually to the Commission on Human Rights (now the Human Rights Council) with their country-specific observations, and undertaking and reporting on missions to countries that agree to invite them. One mechanism, the Working Group on Arbitrary Detention (1991), is specifically mandated to draw conclusions on individual cases.

Despite the existence of these mechanisms, the first three dealing with what might be called criminal violations of human rights, the practices continued. This led to calls for action to put an end to impunity for the perpetrators.

The Vienna Declaration and Programme of Action adopted by the 1993 World Conference on Human Rights acknowledged as an issue of major importance the question of impunity for violations of human rights. It 'view[ed] with concern the issue of impunity of perpetrators of human rights violations' and affirmed that states 'should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law'.

But does it not seem strange that the question of punishment should have entered so positively the vocabulary of human rights discourse? After all, among the most potent symbols in human rights demonology have been 'cruel and unusual punishments', often handed down after unfair trials for sedition by 'Star Chambers', in other words the arbitrary and oppressive action of an overweening state that could not tolerate individual freedom of speech, conscience, association and assembly. The human rights project, in short, has been suffused with an ethos that sought to inhibit state power, especially its powers of compulsion enforced through the criminal law. Indeed, a definition of human rights that arguably best encapsulates the concept of human rights is that they consist in precisely those rights that insulate the individual from state power or, at any rate, mediate the power of the state in its relation with the individual. So why should the proponents of more effective protection of human rights have looked to national and international tribunals applying criminal law against individuals (as opposed to the 'civil law' of state responsibility) to assist their cause?

No simple answer suggests itself, but a number of elements could contribute to the formulation of an answer. First of all, there was general revulsion at the spectacle of murderers, torturers and kidnappers ensconced in presidential palaces purporting to absolve themselves of the crimes they evidently knew they were committing, by means of amnesties or similar techniques to avoid criminal responsibility. Where they did not grant the amnesty themselves, they would procure it from civilian forces anxious to replace them at the helm of government. I recall my own revulsion during a mission for Amnesty International to Chile in the mid-1980s, when I met many torture victims, witnessed their physical and other scars and had to confront the cynical reality that the only constitutional route to a return of civilian, popularly-chosen government required accepting a constitution that effectively guaranteed the persistence of the amnesty granted in 1978 by the military junta to itself and its forces. At the time, Amnesty International had not taken a position on such amnesties and I myself had favoured a neutral position for the organization. After the Chile experience I came off the fence and I note with satisfaction that Amnesty International subsequently came out against pre-trial amnesties for human rights crimes within its mandate.

Yet the problem of impunity was not new to me. On the contrary, the existence of *de facto* impunity was the evident pre-condition for the crimes in question to take place, as they did (and still do) in all too many countries. Indeed, as I have already noted, much human rights activity in this area is aimed at erecting safeguards against extreme violations, such as the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. What was especially offensive about the formal amnesty was the project of giving legal form to the impunity. For those who hold law as expressing some form of moral consistency and legitimacy, here was a poisoning of its well-springs, a perversion of its purpose. Just as the world reacted with greater intensity to apartheid, institutionalized racial discrimination, than it did to everyday racism, reprehensible though this be, so it seemed to reject *de jure* impunity with more vehemence than it does the *de facto* version.

It was perhaps a similar sense of disgust that led to the joint intervention by the Special Rapporteurs on torture, on summary, arbitrary and extrajudicial executions and

on the independence of judges and lawyers, as well as the Chairman of the Working Group on Enforced or Involuntary Disappearances, in respect of two Peruvian laws of 1995. These granted amnesty to official personnel for crimes committed in the 'struggle against terrorism', and excluded judicial review of the application of the amnesty. Joint interventions by mechanisms established by the Commission on Human Rights were at that time rare, especially involving so many mechanisms. Equally unusual was the use of the urgent appeal mechanism in respect of a law that had yet to be acted upon, rather than of an incident involving an actual violation within their mandate. The widespread use of torture, murder and enforced disappearance committed by the Peruvian security forces had been on a scale that could plausibly have allowed them to be characterized as crimes against humanity, and the government in whose name they had been committed was absolving its agents and officials from responsibility for them.

A further element, especially for international lawyers, is the existence of the beacon of Nuremberg. There, for the first time, international justice was brought to bear on those acting in the name of the state who were responsible for atrocities that shocked the conscience of mankind. The corporate veil of the state was pierced, and behind the abstract entity were revealed the individuals who conceived and executed acts that were too awful to have been considered for proscription by legislative enactment. The principles of Nuremberg were not only the victory of justice over the intolerable fiction of the unassailable state and an affirmation of the supremacy of a higher positive law, they were also the base upon which a positive international law of human rights could be built, namely, identification of the duty of those sharing in the exercise of power to respect, at least to a minimal extent, the dignity of those subject to that power.

Another relevant element was the growing realization that the 'cycle of impunity' can be the breeding ground for cycles of atrocity. Indeed, I first heard the term used by the United Nations Secretary-General's Special Representative in Burundi at the time, Ahmedou Ould-Abdallah, at the height of the genocide in Rwanda. Here was a UN peacemaker, the sort of diplomat who might normally be expected to be seeking to concoct some expedient arrangement reflecting a balance of hostile forces, appearing to lament the absence of something far more radical, a calling to account of the leadership and others within those forces responsible for the atrocities. This was a few days before the Security Council created a commission of inquiry that, modelled on the method by which the international criminal tribunal for the former Yugoslavia was set up, was to lead to the establishment of the tribunal for Rwanda.

It may be that the constitutions of both tribunals were initiatives designed to give the appearance of action, while avoiding the necessary (military) action that could have ended the carnage, but there was also a recognition of the need to address the cycle of impunity. Then 1998 produced a truly millenarian event, the adoption of the Rome Statute for the International Criminal Court (ICC). The creation of such a court had had its advocates for decades, but always seemed improbable to 'realists', including myself. The international community had dipped its collective toe in the water with the Yugoslav and Rwanda tribunals and found the temperature bearable. There was also the lingering disquiet – reminiscent of the one telling criticism of the Nuremberg Tribunal – that ad hoc tribunals represented selective justice. A permanent court would address that challenge.

It is significant that the only crimes currently indictable before the Court are what may be considered human rights crimes: genocide, crimes against humanity, and war crimes. The very existence of this and other courts dispensing international criminal justice may indeed be expected to deter national amnesties immunizing perpetrators of human rights crimes from natural jurisdiction, or at least to permit the possibility of international jurisdiction being exercised despite the obstacle of a national amnesty.

The case of Sierra Leone is instructive. A 1999 'peace' agreement envisaged impunity for the atrocities committed there in the previous three years. The UN, having participated in this process, unprecedentedly dissociated itself from this aspect of the agreement. Eventually, after the agreement failed to halt the violence, the government and the UN jointly set up a Special Court for Sierra Leone to deal with war crimes, crimes against humanity, and certain crimes under Sierra Leonean law. This is almost a textbook illustration of the short-sightedness of politicians and diplomats succumbing to the temptation to trade impunity for (a usually spurious) peace.

Another aspect of transnational criminal justice that could conduce to the avoidance of safe havens for perpetrators of human rights crimes is the possibility of universal jurisdiction over them, that is, criminal jurisdiction exercised by any state where a suspected perpetrator may be found. The past decade began on a wave of optimism for this possibility. This was because of the detention in the United Kingdom for the purposes of extradition to Spain of the former President of Chile, Augusto Pinochet Ugarte. Despite his eventual return to Chile on grounds of apparent ill-health, the precedent was clearly set by the top British court, the House of Lords. Since then a number of cases, both international and national, have left uncertain the extent to which such transnational jurisdiction can survive claims of state immunity, absent a treaty provision explicitly or implicitly excluding state immunity claims. The latter was the case with Pinochet, the 1984 UN Convention against torture which provides for universal jurisdiction over public officials having formed the basis of the House of Lords judgment.

Meanwhile, the 2005 UN World Summit Outcome document paralleled the achievement of the Rome Statute for the ICC. For the first time, the General Assembly as a whole affirmed that situations characterized by genocide, ethnic cleansing, crimes against humanity and war crimes gave rise to a 'responsibility to protect' and could be the subject of enforcement action by the Security Council under Chapter VII of the UN Charter. In other words, not only were such situations no longer matters of domestic jurisdiction, they could even be threats to or breaches of international peace and security. In 2006 the Security Council also reaffirmed the point in a thematic resolution on armed conflict. While some states are seeking to backtrack on this notion, the genie is out of the bottle. The normative evolution cannot be reversed. This too may well be an example of learning from experience. The NATO intervention in Kosovo in the face of an apparently paralysed Security Council may have led at least some states to consider the desirability of international decision-making in this area, rather than leaving it to the uncontrolled discretion of individual states.

In the meantime, having sought through the ICC to address selectivity in the area of international criminal justice for human rights crimes, the United Nations decided it should do something more about the same selectivity in scrutinizing country situations that the Commission on Human Rights had shown. This was a key reason for its replacement in 2006 by the Human Rights Council. This new institution would, it was hoped, scrutinize all UN members' human rights performance through the Universal Periodic Review (UPR) mechanism. While this appeared to be learning from experience, it seemed to ignore an earlier experience between the 1950s and 1980s. This had involved a procedure by which the Commission on Human Rights was to review states' human rights performance on the basis of reports submitted by states themselves. With UPR there will be state reports, but there will also be reports prepared on the basis of material from UN treaty bodies and special procedures, as well as from NGOs and other 'stakeholders'. The fact is that governments have not shown themselves well adapted to holding each other to account by such means. This is being written during the first Council session devoted to UPR; which lesson will have been learned remains to be seen.

With some possible exceptions these reflections have generally described a trajectory of ever-increasing means of responding to human rights violations around the world. Account now has to be taken of the atrocities of 11 September 2001 and the reactions to them. There is and should be no denying the appalling nature of the 9/11 challenge to the common values that humanity had embraced in the period of the United Nations. There should also be no lack of understanding of the demands of people that their governments protect them from further such atrocities. At the same time, the myopia, if not political opportunism, of some of the responses has been a challenge to the steady advance of the human rights paradigm.

The attempted creation of legal 'black holes' on the basis of off-shore or outsourced detention and interrogation, as well as assertions of non-applicability of human rights and humanitarian law treaties has been a setback, especially in the light of previous United States leadership in the field. 'Enhanced interrogation techniques' and 'extraordinary rendition' are two particularly prominent among several Orwellian euphemisms that the world has had to learn to deconstruct as meaning torture and abduction. The 'global war on terror' also formed the backdrop to sustained campaigning against the ICC and in favour of the supremacy of state immunity over universal jurisdiction.

The attempt to roll back half a century of achievement may well, however, be being rolled back itself. I was in Washington participating in the 2005 Annual Meeting of the American Society of International Law when the news came in that the US, despite sustained strident and intransigent hostility to the ICC, had not vetoed a Security Council resolution referring the situation in Darfur to the ICC. The elation at the meeting was palpable. The US had blinked at the prospect of being seen to prevent the Security Council from acting and, once the Council had put its imprimatur on the Court, it was no longer a vulnerable target. Then the US Supreme Court stretched the notion of non-international armed conflict to ensure that US law incorporating the Geneva Conventions applied to persons detained at Guantánamo Bay. US national NGOs and international NGOs campaigned unremittingly against the new practices. The damage done to the reputation of the United States so affected the 2008 US presidential primary elections that no serious remaining candidate is defending this aspect of the US counter-terrorism strategy.

I suggest that two lessons may be learned from this experience. First, governments will all too readily abandon the principles they claim to defend in the interests of being seen to respond to public demands for greater security. Second, human rights achievements are only as secure as the determination of civil society to defend them is maintained or recovered.

Yet, at the risk of appearing hopelessly naïve, I would venture that the norms that have been challenged will, if anything, emerge strengthened, precisely by virtue of their having been so vigorously defended. After all, the development of the whole human rights regime was itself wholly 'unrealistic'. Governments agreed, first, to the norms, then to the machinery to hold them to the norms. They built and then sat in the stocks. So, I am prepared to predict that, despite attempts to escape, they will be forced to stay there. This too is a lesson from experience.