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International Human Rights Standards in International Organizations: The Case of International Criminal Courts

Kenneth S. Gallant*

Professor Bert Swart introduced the issue of the law-making authority of international organizations in international criminal law at this Conference. He argued that the United Nations Security Council created terrorism as an international crime in its resolutions following the events of September 11, 2001.¹ In part I of this paper, I will discuss the international law-making function for and of international organizations as it relates to the human rights of individuals.

The development of international criminal law and procedure demonstrates that human rights law, originally designed to protect individuals against abuses by States, is now being reshaped to prevent abuses by international organizations, specifically international criminal tribunals. The law in question is particularly but not exclusively the law of the International Covenant on Civil and Political Rights. It is my hope—though this is beyond the scope of today's discussion—that other types of international organizations whose activities can affect the rights of individuals will also come to recognize relevant international human rights standards as binding on them as well.

In part II of this paper, I will discuss one shortcoming of the ICC Statute² relating to implementing international human rights standards: its failure to include a defense organ or other institutional voice for the defense in the Court's structure. I will conclude with a brief discussion of devices being used to remedy this omission, particularly the creation of the International Criminal Bar. The ICB is an organization currently in the process of

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1. Bert Swart, Commentator for Panel 3, International Crimes: Criteria for their identification and classification, and future developments; International Criminal Law: Quo Vadis, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 30 November 2002.

2. Rome Statute of the International Criminal Court, 53rd Sess., U.N. Doc. A/CONF. 183/9, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999, art. 1 [hereinafter ICC Statute].

formation that will provide a voice for lawyers representing both the accused and victims before the ICC.

I. Individual human rights and the ICC as an International Organization

Modern international organizations originated in the period around the turn of the twentieth century. The theory of state sovereignty had reached its high water mark. States were seen as the actors in the international legal system, and individuals were at best the objects of their actions. When these organizations were created, States were seen as their constituents and objects of their actions. Individuals were seen as irrelevant to their creation, and individual rights could not be threatened by their existence.

After World War II came the blossoming of international human rights law. The document we are most concerned with here, the International Covenant on Civil and Political Rights, is a treaty among most states of the world, drafted in the context of the United Nations system. Through the ICCPR, states have bound themselves to observe a broad range of individual human rights, including many rights related to criminal law and procedure.³

As we discussed on Saturday, some rights in the ICCPR have become customary international law—that is, they have become recognized as binding on states which have not ratified the convention. It was suggested in discussion that the core criminal procedure rights, in article 14, were not intended to become customary, because they are among the rights that can be derogated from in the case of emergency threatening the existence of the relevant nation under article 4.

Some of the article 14 rights, such as the to a fair trial before an independent tribunal and the right to counsel, have so formed the world's developed and developing systems of criminal justice—both national and international—that they are required under customary international law.⁴ At

3. International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force 23 March 1976), arts. 6 (limitations on death penalty), 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), 8 (prohibition of arbitrary arrest and detention, and other provisions related to personal liberty and arrest), 10 (treatment of arrested persons, including juveniles), 11 (prohibition of debtors' prisons), 14 (criminal procedure rights in general, including rights to counsel, to fair criminal process, to appeal, to a single proceeding and punishment in any state for a single offense [*ne bis in idem*], and to compensation for unlawful deprivation of freedom), 15 (*nulla crimen sine lege*; non-retroactivity; recognition of international crimes), 17 (right to privacy).

4. Michael Wladimiroff, Commentator for Panel 5, The emergence of uniform standards of "due process" in international and national criminal proceedings; International Criminal Law: Quo Vadis, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 2 December 2002.

most, the authority of states to derogate from these rights may be considered as a customarily permissible limitation of these rights in very limited circumstances.

Along with the growth of international human rights law, we have seen an explosion in the number and roles of international organizations. Some of these, most notably the international criminal tribunals and courts, have the power, and indeed the mandate, to affect individual rights and liberties. The international community has recognized the need for protection of individual rights by international organizations, though it did not do so all at once, and the recognition is not yet complete.⁵

The Nuremberg and Tokyo Tribunals were not international organizations in the modern sense, although the former was the direct creation of the London Agreement between states, and drew its law and authority from the Charter annexed to the Agreement. In the Statutes of both Tribunals, there were few protections for the rights of defendants, except for the very important right to counsel.

By the time of the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993, the international community recognized the need for more guarantees of fair process for the accused. In drafting the ICTY Statute, the Secretary General of the United Nations took these procedural rights from article 14 of the ICCPR.⁶ He also recognized the criminal law principles of *nulla crimen sine lege* and *non bis in idem*, from articles 15 and 14 of the ICCPR respectively. The procedural rights especially have a clear pedigree from the ICCPR, as they are taken into the Statute nearly word for word. Within a year, another example of mass atrocity forced the creation of the International Criminal Tribunal for Rwanda (ICTR). It adopted the same set of criminal law and procedure rights for individuals in its Statute.

As discussed by Mr. Piragoff, both the ICTY and ICTR are subsidiary organs of the United Nations as an international organization,⁷ created by the U.N. Security Council. They share in the legal personality of the United Nations.

5. For individual rights in international criminal law, especially the ICC, see generally Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003); Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW (ENFORCEMENT) 693 (M. Cherif Bassiouni ed., 2d ed., 1999).

6. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Add.1/Corr.1 (1993).

7. Donald Piragoff, Presenter for Panel 5, The emergence of uniform standards of "due process" in international and national criminal proceedings; International Criminal Law: Quo Vadis, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 2 December 2002.

What was recognized in the creation of the ICTY and ICTR was that an international criminal tribunal would have the bare power to act justly or unjustly towards individuals accused of crime. In procedural matters, the possibilities for human rights abuse are very similar in national and international courts. Thus as a matter of functional protection, it makes sense that the United Nations, an international organization, would borrow the definitions of fair elements of criminal procedure from the ICCPR, designed to ensure fairness in national proceedings.

Where functional differences exist between courts of a state and an international criminal tribunal, some differences in the definition of rights exist. Most notably, this occurs in the definition of *non bis in idem*, in some common law countries called the right against double jeopardy. In the ICCPR, this right applies within national systems only, but within those systems there is no exception for retrial after a corrupt determination of innocence.

Non bis in idem is an important element of a fair criminal justice system; thus it exists in the Statutes of the ICTY and ICTR (and now the ICC). The international community does not have a particular interest in seeing persons tried or punished twice for the same offense (though different states might each feel an interest in prosecuting a given crime), and wishes to encourage states to prosecute human rights abusers at the national level. Thus, its version of the *non bis in idem* contains the prohibition against double international and national trial and punishment, whichever system acts first. However, because the purpose of the Statutes of the International Tribunals is to prevent impunity, which might be achieved by manipulation of national criminal justice systems to produce acquittals after sham prosecutions or sham punishments after convictions, the right does not come into play in the international criminal tribunal unless there has been a fair proceeding in the national system. Thus this particular right is extended beyond its definition in the ICCPR because an international organization as prosecutor does not have the same interests as states do; and the right is limited in a way that is absent in the ICCPR, again because of the international community's specific interests in justice in cases of the most serious international crimes.

The alignment of interests here is not perfect. As pointed out, a State might still feel an interest in punishing an international criminal in its own system, even after international punishment. This is clear in the case of Rwanda, which has executed the death penalty against some of those involved in the 1994 genocide, even though death is not an available penalty in the ICTR. A person tried by the ICTR cannot be executed by Rwanda for the crimes tried by the ICTR, even if the crimes carry the death penalty in Rwanda. Nonetheless, the version of *non bis in idem* in the Statutes of the

ICTR and ICTY, as well as in the ICC Statute,⁸ demonstrates how a right set out against states in the ICCPR has been adapted to the situation of international organizations.

The ICTY and ICTR Statutes did not adopt all individual rights contained in the ICCPR. For example, they do not contain the remedy provisions of the ICCPR for violation of individual rights, or some of the specific provisions concerning the treatment of detainees.⁹ As an example of the latter, they omit protections for juveniles under arrest. This may be because no prosecutions were contemplated against juveniles by those writing the Statutes, and thus their rights were not of functional concern.

In any criminal justice system, the possibility of arbitrary, illegal or unjust detention exists. The lack of remedies provisions in the ICTY and ICTR Statutes demonstrates the real limits of the application of human rights law to international organizations as of 1993-94.

The Rome Statute of the International Criminal Court continues the expansion of individual rights against an international organization. We only have time to discuss a few of them here. First, the ICC Statute adopts protections for persons under investigation who have not yet been accused of international crime¹⁰ that are not part of the ICCPR or customary international law. Again, this is part of a functional recognition that abuses can occur during a criminal investigation, and can be reduced or prevented by specific protections in the Court's Statute. How this will contribute to the growth of criminal procedure both internationally and nationally remains to be seen.

Second, the Court and those acting for it in holding prisoners are required to comply with internationally recognized standards for humane treatment of those in custody.¹¹ What is interesting here is that these standards are defined in terms of "widely recognized international treaty standards governing the treatment of prisoners." This is stronger than saying that terms of imprisonment must comply with requirements of customary international human rights law. Not all rights in such treaties will have passed into customary international law, yet the ICC, and States with which it contracts for imprisonment of convicts, will nonetheless be bound to follow these treaties.

8. Where the first word is *ne*.

9. *E.g.*, ICCPR, arts. 10 (pretrial detainees); 14 (compensation).

10. ICC Statute, arts. 56, 57.

11. ICC Statute, art. 59(2) (rights of persons arrested in a State Party), 103 (Court to consider widely accepted international treaty standards in determining appropriate state for imprisonment of convict), 106 (state of imprisonment shall abide by widely accepted international treaty standards).

Third, the founding documents of an international organization, as with the constitutions of nations, will not generally provide all the protections for human rights that are needed in the organization's life. Thus, the ICC Statute has two open-ended provisions to protect individual rights, in Articles 21(3) and 31(3) (especially, for the purposes of this discussion, the former).¹²

Article 21(3) requires that the Court interpret the law in accordance with internationally recognized human rights standards. The text makes no distinction between substantive international human rights and the rights to fair criminal procedure that are the focus of today's panel. Nor indeed should it. What is necessary for the protection of human rights is that the Court should consider those ways in which its operations can affect individuals, and to ensure that it treats them as required by minimum human rights standards, even if they concern rights not specifically set forth in the ICC Statute.

It is too early to state in full what international human rights will exist against international organizations generally as a matter of customary international law. Because of functional differences among international organizations, there may never be a single list, but merely a set of principles which can be used to determine what rights apply to an international organization which exercises authority over individuals or over private rights generally. This is one reason why it is important to have provisions such as Article 21(3) in the organic documents of international organizations whose powers may affect the rights of individuals.

Finally, the compensation provisions of the ICC Statute¹³ grew out of an awareness that injustices can occur in any system of criminal sanctions, including those watched over by the international community. To have an enforceable right to compensation for an arbitrary arrest, for example, is a very progressive development in the law of international organizations. It continues the establishment of a direct relation of rights and duties between an international organization, the ICC, and those individuals whose lives it directly affects.

II. Lack of a Defense Organ in the ICC Statute

Institutional structures, as well as enumeration of specific rights, are important to the protection of individual interests. One failing of the ICC

12. ICC Statute, art. 31(3), provides that the Court may consider possible new substantive defenses to criminal charges. Substantive criminal law developments are being considered by others at this conference. However, the author elsewhere has indicated that ICC Statute, art. 21(3), can be used to ensure that the definitions of crimes under the ICC Statute do not infringe on substantive international human rights, such as freedom of expression. See Gallant, *supra* note 5, at 703-06.

13. ICC Statute, art. 85.

Statute, which should be reviewed in seven years, when the Statute is open for amendment, is the lack of a defense organ in the Court. There is an institutional voice for the Prosecutor in all major decisions concerning the Court,¹⁴ but no institutional voice for individuals, especially the accused.

There are non-governmental organizations and associations of counsel working on these issues, considering the interests of the accused (for example, the International Criminal Defense Attorney's Association) and victims (for example, the Victims Rights Working Group of the Coalition for an International Criminal Court). These, however, work outside the formal structure of the International Criminal Court. Efforts are therefore under way to ensure that the interests of the accused in individual rights are protected by institutions associated with the Court.

First, the Rules of Procedure and Evidence will require that the Registrar establish the Registry so as to protect the legitimate rights of the accused to vigorous, independent counsel.¹⁵ The First Year Budget contains funding for a Defense Unit within the Registry to administer legal aid programs and provide defense facilities. In some ways this office will be parallel to the Victim and Witness Unit in the ICC Statute, but it will not have the physical protection and counseling functions of the Victim and Witness Unit. While each office may serve the needs of individuals before the Court, they are necessarily institutionally neutral offices, because they are part of the neutral Registry.¹⁶

Thus, a second initiative has been undertaken. A number of individuals, Bars, and NGOs from around the world are establishing the International Criminal Bar for the International Criminal Court. The purpose of the ICB is to be a voice for counsel for both the accused and victims in the ICC, to protect their independence and professional integrity and their clients' rights.¹⁷ It will seek recognition from the Registrar under Rule of Procedure and Evidence 21 as a representative body of counsel and legal organizations to give input to the Registrar on all appropriate matters. If successful, it will be the beginning of the missing "Third Pillar"¹⁸ of the International Criminal

14. See, e.g., ICC Statute, art. 48 (Prosecutor may suggest changes to Rules of Procedure and Evidence; no parallel voice for other interests before the Court).

15. Rules of Procedure and Evidence 20, 21, in Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 Sept. 2002, Official Records, ICC-ASP/1/3, para. 22, at 5, 10, 27-28 [hereinafter ICC-ASP/1/3], adopted Sept. 9, 2002.

16. For this reason, the Victims and Witnesses Unit cannot be considered a truly independent voice advocating for interests of these groups. This in no way devalues the vital work assigned to the Unit in protecting and supporting individual victims and witnesses.

17. In accordance with the Civil Law tradition, prosecutors are not seen as part of the Bar in the current stage of the development of the International Criminal Bar.

18. Phrase used by Elise Groulx of Canada, Executive President of the International Criminal Bar and President of the International Criminal Defense Attorneys Association.

Court—the pillar protecting individual rights, in distinction to the pillars of the independent, neutral Judiciary and the Office of the Prosecutor.

Perhaps surprisingly, other international judicial bodies designed to be permanent, such as the International Court of Justice, have not developed Bars or Bar Associations, even though the concept is common to almost all lawyers practicing before them. The ICTY, an *ad hoc* Tribunal, which will probably complete its work within the decade, has successfully developed a Bar, but its Bar is relatively new.

The International Criminal Bar is structuring itself to ensure that lawyers from developing countries become trained to participate in practice before the ICC—to democratize the practice of international criminal law. The lawyers practicing before this Court should not be limited to those from developed countries who traditionally have had the training and other resources to develop an international practice.

This may have another benefit for the development of international human rights, this time at the national level. Lawyers from emerging democracies who practice before the Court may help bring back international standards of criminal justice to their developing court systems. The circle of human rights development, from standards for national justice to standards for international organizations will be closed as the international standards are re-integrated into the lives of nations emerging from dictatorship or anarchy.¹⁹

NOTE on later developments: On 21-22 March 2003, the International Criminal Bar met in Berlin, adopted its Constitution, along with a Code of Conduct and Disciplinary Procedure for Counsel, which it has proposed to the International Criminal Court. It also held elections for its first governing Council. At a meeting in the Hague 23-24 October 2003, it presented a Proposed Legal Assistance System for Indigent Defense Cases to the International Criminal Court, as a work in progress.²⁰

The need for an international court to have a Bar is not yet universally accepted. Thus, the Assembly of States Parties of the International Criminal Court took no action on recognition of the International Criminal Bar at the ASP's Second Meeting, 9-12 September 2003, in New York.

19. The creation of joint national/international tribunals, incorporating international human rights protections, such as the Special Court for Sierra Leone, is another device for assisting such nations in developing fair court systems.

20. Documents of the International Criminal Bar can be found at its website, www.icb-bpi.org.