



Meeting Summary

Transatlantic Dialogues in International Law: International Law and Human Rights

A summary of the Atlantic Council/Chatham House meeting held at Chatham House on 10/11 November 2010.

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Introduction

This report is a summary of a joint workshop held at Chatham House with the Atlantic Council of the United States on 10/11 November 2010. The workshop reflected on both the differences and commonalities in practice and policy of international law and human rights between the US and European States.

The workshop contributed to an ongoing debate regarding issues of international law.¹ The value of cooperation to the relationship between the US and European States has been critical to healthy relations and the progress of international law and policy.

This report includes summaries of the discussions including recommendations for policy and cooperation which emerged from some participants.

¹ See 'Transatlantic Dialogues on International Law: Preparing for the Next US Administration', summary of the meeting of 5/6 December 2008 (available at http://www.chathamhouse.org.uk/files/13377_il051208.pdf); 'Transatlantic Dialogues on International Law: Preventative Detention and International Law', summary of the meeting of 7/8 December 2009 (available at <http://www.acus.org/files/TAR/DecLawSummaryFINAL2.pdf>); Issue Brief, 'Beyond Closing Guantanamo: Next Steps to Rebuild a Transatlantic Partnership in International Law', February 2009 (available at http://www.acus.org/files/publication_pdfs/3/Closing%20Guantanamo%20Transatlantic%20International%20Law%20Atlantic%20Council.pdf).

US AND EUROPEAN STATES' APPROACHES TO INTERNATIONAL LAW AND HUMAN RIGHTS

There are similarities between the human rights traditions of European States on the one hand and the US constitutional tradition on the other. They have more in common than differences.

It is difficult to draw straightforward comparisons with EU States as a single community. While these States declare acceptance of international human rights standards and are parties to the European Convention on Human Rights, they differ widely in their interpretation, application and implementation of the law. Nevertheless, it is possible to identify important general similarities and differences in outlook.

Legal and philosophical traditions

The US has a longstanding old and highly elaborated domestic rights regime set forth in the Declaration of Independence and the Constitution founded on a concept of fundamental inalienable individual rights. This tradition, which has its philosophical roots in the Enlightenment and the concept of natural rights, predates the modern human rights movement and does not use the language of 'human rights'. By contrast, newly emergent European democracies with constitutions drafted in the post World War II era are much more robust in their express recognition of human rights protections as such

The European system has evolved dramatically over time and today places human rights at its heart. Although the European Convention on Human Rights (ECHR) is the most prominent instrument there are other influential treaties and a considerable body of relevant European Union law. Human rights play a central role in both internal action and external relations of the EU. Internally, since 1969 the European Court of Justice has found sources for fundamental rights as general principles of European Union law.² There are now many relevant legislative measures including regulations, directives and the European Charter of Fundamental Rights. The Treaty of Lisbon, which entered into force in 2009, provides that the European Charter of Fundamental Rights has the same legal status as the EU Treaties. It also empowers and requires the EU to accede to the ECHR. There is a legitimate

concern that certain EU formulated standards fall below their ECHR equivalents.

Approaches towards international law

Over time US courts and institutions have developed a more conservative relationship with international law than their European counterparts. In the 19th Century the US was much more receptive to the direct operation of treaties and customary law than it has been during the 20th Century, especially in the latter part. The original welcoming attitude may be partly explained by an early desire of the US to be accepted by the international community just as newly emerged states are often quick to ratify human rights treaties. Reasons for its receding may include reluctance to cede decision-making power to any external authority and a perception domestically that international law is slow, uncertain and may not be consistent with what US society feels the law should be. The recent decision of the Supreme Court in *Medellin v Texas*,³ which rejected the direct application of a judgment of the International Court of Justice ('ICJ'), has not assisted in the reception of international law.

Attempts to expose human rights violations and bring accountability have had more traction before European States' courts, including in the UK, than before US courts. Legal representatives have experienced particular success by relying on well established commercial principles in an innovative way.⁴ By contrast, parallel litigation in the US has been treated very differently and the US Government has successfully relied on the state secrets privilege to prevent judicial scrutiny and deny victims an effective remedy.

Public attitude and domestic politics

In contrast with European States, the US is currently experiencing a particularly hostile reaction from certain quarters towards international law and international human rights. A recent Oklahoma amendment precludes

² *Stauder v. City of Ulm*, 1969 ECR 419, 425.

³ *Medellin v Texas* (2008) United States Supreme Court, No. 06-984.

⁴ One example is the use in the UK of the 'Norwich Pharmacal principle' which requires a party innocently caught up in the wrongdoing of another to disclose any relevant documents in his

state courts from considering international law or Sharia law. A number of other states wish to introduce similar constitutional amendments. While Congress has multiple positions, it has shown support on the role of human rights in foreign policy but many members are sceptical of international law. For example, the Treaty on Family Maintenance Obligations stalled in the Senate ratification process simply because the preamble referred to the non-ratified Convention on the Rights of the Child. Existing trends are likely to increase following midterm elections in which the Republicans gained a number of seats.

The Obama administration, however, has become a supporter of the potential of international law and human rights. The appointment in 2009 of individuals with significant claimant-based human rights experience to key administration positions - Harold Koh as Legal Adviser and Michael Posner as Assistant Secretary of State for Democracy, Human Rights and Labour - was significant. President Obama has been criticised for failing to condemn specific human rights violations abroad. However, it appears that the administration is investing in a fundamental long-term role for human rights standards, if not human rights law, in US foreign policy.

Broad agreement

The status of human rights treaties in domestic law

The domestic reception of international human rights standards depends partly on the domestic status of international law. Some states accept international treaties as part of their law (monists) and some do not (dualists), but the distinction between monism and dualism, although sometimes useful for illustrative purposes, cannot be given too much importance. The domestic status of an international law rule depends significantly on the nature of the rule itself and the context in which it arises for interpretation or application. Under US law human rights treaties are generally not self-executing. Domestic incorporation is also required by many European States including the UK. For example, the ECHR was incorporated into UK law through the Human Rights Act 1998.

possession. In this way lawyers have secured the release of certain documents of relevance, for example, to extra-ordinary rendition flights.

Equivalence in substance of rights

Although the US legal order does not generally use the lexicon of 'human rights' in substance the US Constitution provides individual rights which have some equivalency. But US constitutional rights vary depending on the nationality and status of the individual. Although aliens generally do not benefit from the extra-territorial application of constitutional rights, the Supreme Court in 2008 held that alien Guantanamo Bay detainees were entitled to bring *habeas corpus* petitions challenging the validity of their detention.⁵

The objective is respect for human rights. On one view, how you get there does not matter. But there are costs to not using human rights concepts. On the international plane effective cooperation with other states requires some degree of shared understanding regarding the nature and scope of human rights obligations. For example, in the context of joint military operations it is important that the participating states have a common understanding of jurisdiction and attribution.

'Human rights proofing'

What may be called 'human rights proofing' of domestic law involves the assessing of law and practice against the norms of international human rights law accepted by a state. One advantage of specific internalisation of human rights is that it may help judges to feel more comfortable adjudicating human rights cases. The UK is heavily involved in this activity; it has also recently established an independent Human Rights Advisory Group composed of representatives from human rights organisations, academics and practitioners. The practice in European States is however uneven. A particular incentive is that aspirant EU Member States are subject to examination of the compatibility of their municipal law with human rights. Although the US has not internalised international human rights law to the same degree, the U.S. Congress has created a Senate Sub-committee on Human Rights and the Law. The administration is engaged on a daily basis in trying to implement human rights treaties in their practice, whether or not the treaties are 'self-executing'.

⁵ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Credibility issues

The US and European States, some more than others, face the common problem of damage to their international credibility and moral reputation on human rights issues. Accusations of double standards and selectivity present a significant obstacle to the effective promotion of international human standards to third states.

Credibility issues have arisen in a number of contexts. Most prominently, the widespread exposure of abusive counter-terrorism practices, including authorised torture, extra-ordinary rendition and secret prisons, have particularly damaged the reputation of the US and those European States alleged to have been involved. The US has not ratified many of the core UN human rights conventions and lesser but significant gaps exist among the EU States.

Although the EU has long emphasised international human rights standards as lying at the heart of its internal and external relations, it too suffers from embarrassments. For example, widespread racism and xenophobia including the expulsion of Roma and bans on religious clothing demonstrate that not all human rights are as secure in Europe as is commonly assumed. Authority in calling on third states to comply with reporting obligations and implement the recommendations of monitoring bodies is undermined by the typical response, sometimes spurious and tactical, that several EU Member States are severely behind schedule in their own reporting and have not implemented equivalent recommendations made to them.

President Obama has reinvigorated and emphasised the US' human rights commitment. One of his first acts was to issue executive orders which repudiated the use of torture, ordered the closure of the detention centre at Guantanamo Bay and demanded the dissolution of all secret prisons. Although not all of these have been achieved, the administration's continuing emphasis on international standards and general re-engagement with the UN is intended to repair some of the damage resulting from previous policies.

Public attitude critical/unconcerned regarding human rights

In contrast to the general perspective of the legal profession, a significant section of the public has a rather negative perception of international human rights obligations. In Europe this discontent may be partly attributable to the absence of a common European philosophical framework underpinning human rights.

Transnational and domestic legal education may play a role in shaping positive public attitudes. The US and EU States may be contrasted with Hong Kong, for example, where, because the International Covenant on Civil and Political Rights is entrenched in domestic law through the Bill of Rights and Constitution, all law students cover international law and human rights in their undergraduate law courses. This helps give rise to a community mentality which recognises the need and means to promote human rights.

Structural differences

Treaty ratification

Unlike EU States, the US has not ratified many of the core UN human rights conventions. Examples include the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (Disabilities Rights Convention) and the Convention on the Rights of the Child (CRC). There is a real problem with accepting international treaties, although the content of the rights may not be problematic.

There are less prominent but still significant gaps in the ratification practices of EU States. In particular, no EU Member State has ratified the UN Convention on the Rights of all Migrant Workers. The Optional Protocol on the Convention against Torture and the Convention for the Protection of All Persons from Enforced Disappearances have only been ratified by fourteen and three Member States respectively. Additionally, not all Member States have ratified all optional Protocols to the ECHR.

When assessing the implications of this difference it is important to take into account the fact that the domestic constitutional treaty-making processes vary among states. In many European States only a simple majority of the legislative assembly is required and in the UK this power vests solely in the executive acting on behalf of the Crown. By contrast, in the US ratifying

legislation is required and there is a constitutional requirement to secure at least a two-thirds majority in the Senate for advice and consent. Seen in this light, US non-ratification does not necessarily reflect unwillingness or non-acceptance of the international human rights standards contained in the relevant treaties. The US has a long history of bringing its law into compliance with international human rights standards but this is articulated differently by reference to the domestic rights regime.

The Obama administration has declared its intention to ratify CEDAW and the Disabilities Rights Convention. However, the current make-up of the Senate damages the prospects of achieving this.

Enforcement by judicial and other mechanisms

The area of judicial enforcement is one where the US and Europe appear to be most distinctly divergent. The European human rights regime has at its centre the European Court of Human Rights (ECtHR), an external supervisory body which can pronounce authoritatively on member states interpretation and application of Convention rights. The domestic incorporation of the ECHR allows individuals to petition for enforcement of Convention rights before national courts. Additionally, most but not all EU States have accepted the individual petition mechanisms under UNCAT, CEDAW and the ICCPR. By contrast, there is no external supervisory body that can authoritatively evaluate US compliance with its human rights obligations. There is no equivalent of the ECtHR. The US has not consented to the compulsory jurisdiction of the Inter-American Court of Human Rights or the individual petition mechanisms of the international human rights treaty bodies and it is largely not subject to the jurisdiction of the International Court of Justice.

The traditional focus in the US has been on the protection of individual rights through the domestic system. Since human rights treaties have not been incorporated in US law, domestic courts are not generally directly involved in the interpretation and application of human rights law. One prominent exception is litigation under the Alien Tort Claims Act which involves the exercise of US jurisdiction over violations of customary international human rights norms committed abroad. However, the general focus has instead been on the translation of international norms through the domestic regime. This approach may in fact have brought the US and Europe closer together than many people realise.

The divergence may not be quite as wide as appears at first sight, especially when one takes into account the fact that the ECtHR allows states a margin of appreciation in carrying out some of its human rights obligations. But US commitment to human rights would be greatly strengthened if it would accept one of the systems of individual petition. The fact that other federal states such as Canada, Australia and Germany can function with such a system shows that the federal difficulties should not preclude acceptance. The matter is discussed further below.

Extra-territorial application of human rights treaties

The US and European States disagree over the extra-territorial scope of human rights treaties. Treaties differ in scope and it is necessary to consider each individually. However, generally speaking the US has consistently been far more hostile than European States to the concept of extra-territorial application. One prominent exception (but not relevant to states' obligations) is the extra-territorial application of customary human rights obligations in the context of the Alien Torts Act.

In Europe the ECtHR has long held that the ECHR applies extra-territorially in certain circumstances. The Human Rights Committee to the International Covenant on Civil and Political Rights ('ICCPR') and the Committee to the Convention on the Elimination of Racial Discrimination ('CERD') have both clearly expressed in concluding observations that those conventions also require extra-territorial protection of human rights in certain circumstances. The ICJ in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('Wall Advisory Opinion') endorsed the Human Rights Committee's view that the ICCPR applies extra-territorially despite the conjunctive language of Article 2(1), which refers to "all individuals within its territory and subject to its jurisdiction."⁶

The current US administration is reviewing its position on the extra-territoriality of many human rights treaties. In particular, the US is likely to look towards state practice to inform workable interpretations. A recommendation was made that the US should revise the Bush administration's position on the scope of the ICCPR, which argued that the conditions of territory and jurisdiction were cumulative with respect to both positive and negative

obligations. Although this position can be traced back to Eleanor Roosevelt, it has been widely overlooked that her concern was about the scope of positive obligations only. This is consistent with the view of the ICJ in the *Wall Advisory Opinion* that the International Covenant on Economic, Social and Cultural Rights, which imposes principally positive obligations, “guarantees rights which are essentially territorial”. The prospect of successful review is complicated by the difficulties under US law of revisiting interpretations articulated in the Senate during the treaty ratification process. In any event, the US’ rejection of extra-territoriality does not mean that the US considers itself obligated to ensure domestic compliance only. When the US appeared before the Human Rights Council for its Universal Periodic Review (UPR) it asserted that there are no ‘law free zones’.

Despite certain States’ acceptance of extra-territorial application, the meaning of ‘jurisdiction’ in the relevant human rights treaties is debated. The Human Rights Committee supports a test of “effective control” over either foreign territory or individuals. There have been many attempts to rationalise the cases of the ECtHR, which has favoured a more limited approach; its caselaw has been criticised and future cases are awaited

While the law of non-international armed conflict may be developed to fill some gaps left by the extra-territoriality debate in the human rights context, that body of law itself has gaps, for example, on the question of due process in the context of overseas detention. Further, there is no equivalent forum to bring challenges of IHL breaches. In the context of international armed conflict a recommendation was made that the US ratify Additional Protocol 1 to the Geneva Conventions. Article 75, which is a specific elaboration of the customary law prohibitions in common Article 3 and is suggested itself to have customary status, provides certain fundamental guarantees for persons in the power of a party to the conflict.

⁶ [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.](#)

IDENTIFYING CONVERGENCE AND DIVERGENCE: SPECIFIC ISSUES

Substantive disagreement over content of rights

The US and European States disagree over the substance of particular human rights, especially the death penalty, freedom of expression and the obligation to investigate under the prohibition of torture.

Death penalty

The death penalty is the greatest divergence between the US and European States. The majority of states view abolition as the goal, including some who currently practice capital punishment. In Europe the sixth protocol to the ECHR abolishes capital punishment except in non-peace times and the thirteenth protocol would abolish it entirely. Similarly, the second protocol to the ICCPR would abolish capital punishment in all Member States. However, the death penalty has very deep foundations in the US and is retained by the majority of states, the federal government and military courts. This was a central source of criticism during the recent US' recent UPR before the Human Rights Council.

Faced with broad international consensus in favour of abolition, it is unhelpful and unrealistic to argue that the death penalty is not an issue within the purview of international human rights but merely a matter of US domestic criminal policy or religious opinion. US recognition of this would enable a more constructive debate. It is not necessarily the case that under existing international human rights law the death penalty must be abolished immediately.

In practice, international human rights law and abolitionist states do play a limited role in educating the population and effecting pressure for reform. For example, in holding that a juvenile cannot be sentenced to life without parole the Supreme Court noted that this punishment was rejected the world over and was inconsistent with basic standards of decency. But although the US has sometimes granted assurances that the death penalty will not be sought in connection with extradition requests or where legal assistance is provided, these compromises are viewed as necessary evils rather than indicating a reconsideration of the US approach.

The future of the death penalty in the US is likely to be determined by internal debate on a range of issues including the role of deterrence and retribution as aims of criminal justice and the increasing exposure of miscarriages of justice through technological advances.

Freedom of expression

Freedom of expression is protected in the US under the First Amendment of the Constitution and in Europe under various sources including Article 10 of the ECHR. However, there is marked divergence over the content of the right. Whereas the US is characterised as having a strong belief in free speech, European States are stereotyped as having strong privacy and blasphemy laws.

Article 10 of the ECHR is a qualified rather than absolute right. Also of relevance in this context is Article 17 which prohibits the abuse of rights, meaning conduct aimed at the destruction of others' Convention rights. By contrast, the First Amendment is phrased in absolute terms. Different US Supreme Court judges have in the past adopted different approaches; some absolutist and some balancing conflicting interests. Under international law Article 20 of the ICCPR prohibits advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence. Similarly, Article 4 of CERD prohibits and criminalises incitement of racial discrimination or hatred.

During the drafting of article 20 ICCPR European States and the US broadly shared concerns that the provision would unduly limit freedom of expression and eventually voted against its adoption. Similarly, there has been common opposition to the concept of defamation of religion notwithstanding recent US attempts to engage with proposing states. The recent Human Rights Council resolution, jointly sponsored by the US and Egypt, on 'Freedom of opinion and expression' which included negative stereotyping on religious grounds was interpreted by some states as movement towards accepting defamation of religion.⁷ The Human Rights Committee's General Comment on Article 19 of the ICCPR states that blasphemy laws 'may not be applied in a manner that is incompatible with' the ICCPR, but it is unclear to what extent this will

⁷ [A/HRC/RES/12/16, 12 October 2009.](#)

succeed in resolving the defamation debate.⁸ Since the entry into force of CERD in 1969 Europe has experienced a movement towards hate speech laws including the strengthening of existing prohibitions such as holocaust denial. After 11 September 2001 this movement accelerated.

At EU level particular attention was drawn to the 2003 Additional Protocol to the Convention on Cybercrime criminalising racist and xenophobic acts committed through computer systems and Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The Decision creates a number of new widely drafted criminal imprisonable offences including publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court.⁹ It also puts publishers and universities at risk by providing that legal persons may be punished for a lack of supervision or control which makes the offensive conduct possible.

The ECtHR is criticised by some for gradually eroding free speech protections. A number of recent cases demonstrate a worrying trend of finding interferences with Article 10 rights to be justified. These include upholding the conviction of a French mayor for provoking racial and religious discrimination by advocating a boycott of Israeli products and a cartoonist who had depicted the attack on the twin towers for complicity in condoning terrorism.¹⁰ It was also suggested that the case law of the Court protects the religious feeling of individuals to a degree which unduly inhibits free speech. The Court has found justified interferences of freedom of expression in relation to the seizure and banning of films likely to offend Christians and the conviction of a book publisher for publishing insults against Islam.¹¹ By contrast, one contributor argued that the Court insufficiently protects expression of religious belief, sometimes failing even to balance the conflicting interests at stake.

Although qualified rights entail the possibility of disagreement between states, the divergence between the US and European approaches is material because non-democratic states may choose to model their laws on the restrictive European approach.

8 UN Doc. CCPR/C/GC/34/CRP.5 (available at <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.34.CRP.4.doc>).

9 Article 1(1)(c), Council Framework Decision 2008/913/JHA.

10 Willem v. France (application no. 1083/05), judgment of 16 July 2009; Leroy v. France (application no. 36109/03), judgment of 2 October 2008.

11 See: Otto Preminger Institut v. Austria (application no. 13470/87), judgment of 20 September 1994; Wingrove v. United Kingdom (application no. 17419/90), judgment of 25 November 1996; I.A. v. Turkey (application no. 42571/98), judgment of 13 September 2005.

Torture

The US and European States are in agreement that there is an absolute prohibition on torture. The difference relates to obligations to investigate. The US has failed to investigate credible allegations of torture and cruel, inhumane and degrading treatment or punishment in connection with counter-terrorism policies. President Obama has declared a need to 'look forward, not back'. This approach is deficient from a European human rights viewpoint, which would require a full criminal investigation and the prosecution of offenders as well as senior officials who authorised the practices and an effective remedy for victims. Even the possibility of having a truth commission seems to have been denied by the US.

EUROPEAN / US COOPERATION: CRIMINAL JUSTICE

Cooperation between the US and EU States was discussed with reference to US/Polish collaboration in the field of criminal justice under mutual legal assistance treaties, which allow for extradition in certain circumstances.

While Poland has treated US requests as a matter of priority, Polish authorities have not experienced reciprocity from the US. The average wait for a reply is between one and two years, with many requests simply going unanswered. The situation has not improved despite attempts to address the issue through diplomatic channels. Frustration is compounded by the frequency and speed with which the US invokes the national interest or national security exception clause without providing any justification. Poland has not invoked this clause in response to a US request since 1996.¹²

This example demonstrates that a more effective approach to cooperation is required. Particular recommendations for reform include compensating for the problem that Eastern European authorities typically do not speak English, introducing direct contact between equivalent state authorities. In particular, the US should show greater reciprocity and supply justifications for its reliance on the national security clause.

Monitoring and Enforcement

Monitoring and enforcement of international human rights obligations was discussed with reference to international and European mechanisms.

International monitoring and enforcement mechanisms

The last forty years have seen a proliferation of international mechanisms. There are now eight, soon to be nine, treaty bodies which all receive state reports and strongly evaluate compliance. There are also 31-32 thematic UN special procedures, all built upon the model of the Working Group on Enforced Disappearances.

¹² See Article 3 of the Poland-US Mutual Legal Assistance Treaty.

Treaty bodies

The activities of each treaty body overlap to some degree. The current system imposes a considerable reporting burden for even developed states. At the same time, given the limited powers of treaty bodies, the fact that multiple committees may be raising the same question may provide more suasion. Additionally, reporting forces states to take positions on issues. A number of proposals for streamlining and harmonising were evaluated. First, a single comprehensive treaty body encompassing the work of all existing committees raises the legitimate concern that the specific focus of many treaties would be lost. Second, a consolidated state report for all treaty bodies does not seem very workable in practice and the few states who have attempted this approach have been criticised by the Human Rights Committee for doing so. Third and more promisingly, several committees have introduced pre-hearings and sending Member States lists of issues to be responded to in writing. This proactivity prevents Member States from having to report on all issues and enables the oral hearing to be used for targeted follow up questions. A particular problem of resources often prevents documentation from being translated, resulting in duplication of much work at hearings.

Special procedures

'Special procedures' is the name given to the mechanisms adopted by the Human Rights Council to address specific country situations or general thematic issues. Special procedures provide an effective tool for examining systemic practices within Member States. They do not largely duplicate the work of treaty bodies or the UPR, tending not to involve state reporting or the issuing of conclusions. More problematically, the UPR process duplicates much state reporting to treaty bodies. Although the UK and the US have both been supportive of special procedures they have both reacted defensively when under scrutiny. The UK has argued that its information and evidence was given insufficient weight by the special procedure on disappearances. The US encouraged China to accept the special visitation procedures required by the Special Rapporteur on torture but subsequently refused a visit to Guantanamo Bay. Additionally, whereas all EU States have now accepted standing invitations to Special Rapporteurs, the US has not and should do so. This would help give a uniform approach to promotion.

NGO participation and national institutions

As a significant source of information, it is important for NGOs to be able to engage fully with formal monitoring bodies. Monitoring bodies have developed varying attitudes towards NGOs with differing degrees of engagement. While it may be desirable for NGOs to participate in review hearings, this may discourage the state participation which gives these processes weight. On the domestic level the US has shown more support for and greater relationships with civil society than European States. In preparing its UPR report the Obama administration engaged thoroughly in year-long civil society consultations across the US. It is recommended that the EU States should facilitate greater engagement. NGOs and national human rights institutions should also undertake follow-up and monitor implementation of treaty obligations. There is some movement in this direction. Both OPCAT and the Disabilities Rights Convention introduce a new mechanism requiring Member States to establish national monitoring institutions. At present, there is a tendency among OPCAT EU Member States to request the ombudsman, rather than national institutions, to visit places of detention. However, national bodies must not be seen as a comprehensive solution. In particular, not all institutions are sufficiently robust, credible and independent.

Human Rights Council

EU States have generally been supportive of the Human Rights Council. US re-engagement demonstrates a shift away from a more pessimistic view. The US has provided much support and led to some significant achievements including an attempt to restore consensus on freedom of expression, the retention of votes to renew mandates and constructive debate on economic and social rights. However, the Council has not entirely fulfilled its mandate. The results are patchy and the level of scrutiny is far from desirable. It is partly unsurprising that, absent major institutional change, many of the problems affecting the Human Rights Commission have migrated to the new institution.

The Council is an essentially political body where states often wage polarised battles under the guise of the context of international human rights law. Its reports are often not structured as legal analysis. A central problem is the Council's membership includes states with questionable human right records.

The intention for competitive elections based on human rights records has not been realised. Regional groups simply decide and even democratic states sometime vote questionably.

With the prominent exception of Israel, the Council has adopted few condemnatory and critical resolutions. Even democratic states are increasingly reluctant to sponsor such resolutions owing to dwindling support. There have been sustained attempts to dilute the standards of special sessions and the mandates of certain special rapporteurs. Many states refuse involvement in special procedures believing that the UPR provides sufficient monitoring and that in the absence of complaints one may trust that the situation is acceptable. Despite lacking enforcement, the UPR has enabled international scrutiny of a number of states who would otherwise escape review. However, the states which have taken the process most seriously have been free democratic states with the best human rights records who are scrutinised daily by independent domestic institutions.

Although the US and EU States generally cooperate effectively, the US is more wary of progressive development and dynamic interpretations. The UK is more reluctant than some other states to commit to resolutions with budgetary implications.

The Council is awaiting review of its status and membership before the General Assembly. It would be desirable to achieve major institutional reform, including universal membership, the abolition of block voting, increased NGO participation, introducing follow up to the UPR and making it easier to call special sessions. However, it is important to pursue a pragmatic approach to what can realistically be achieved. The review should focus on improving the existing institution by focusing on shared goals and enhancing effectiveness.

Individual petition and adjudication

A number of human rights treaties provide for individual petition. However, this is conditional upon Member States not only ratifying the treaty concerned but also accepting this additional protection mechanism. While EU States have accepted many individual petition mechanisms and the US has accepted none, neither the UK nor US has ratified the Optional Protocol to the ICCPR. It is recommended that both should do so, especially in light of the fact that nearly two-thirds of all Member States are party to it.

Individual petition has proved much more significant than originally envisaged. The inter-state complaint system has been used very infrequently partly due to political unwillingness. Even where complaints are brought, these generally serve not only a human rights issue but a domestic political agenda of the complaining state. Individuals are less inhibited in seeking a legal remedy. Individual cases have not only obtained redress for individuals but have also developed the interpretation and application of the framework rules supplied by human rights treaties. The primary influence of the ECHR has not been the Convention itself but the substantial body of case law of the European Court of Human Rights (ECtHR) which interprets and applies the ECHR. Through a dynamic and purposive approach the ECtHR has expanded the Convention, which it considers to be "a living instrument", beyond the intent of its original drafters. It has expanded the scope of rights.

These changes in law and practice are perhaps the most important impact of individual petitions and adjudication even if the relevant law affects only a limited number of individuals. European States are generally more comfortable than the US with the notion of evolutionary treaties even if they do not welcome the results. Another effect is that the mere process of bringing cases before international tribunals, irrespective of the legal consequences for the state, may helpfully generate media attention and empower victims. The difficulty is generally in implementing the decision. Occasionally Member States may attempt to refer the same question back to Strasbourg for reconsideration where they consider that the Court has reached an incorrect conclusion.

Individual petition and adjudication has proven to be the most effective tool in human rights enforcement but it cannot be a comprehensive solution. In particular, since adjudication involves delay and an individualised focus, it is unable to function as an early warning system and is not necessarily effective at dealing with widespread or systematic violations. The development of the ECHR solely through adjudication has produced a common law system with the potential for haphazard results.

The use of the individual petition regime is imposing an increasing burden on adjudicatory bodies. Not only are a greater number of individuals bringing human rights claims but, as the scope of human rights obligations develops, a greater range of issues are capable of being characterised in human rights terms. The ECtHR is often stated to be a victim of its own success. The relative stability of Europe and relative homogeneity in Western Europe has allowed consideration of many cases which fall close to the dividing line.

However, the fact that a great number of decided cases have not concerned complex legal issues indicates that the real failure is of Member States to properly implement Convention obligations and introduce effective domestic remedies. The expansion of individual petition regimes also brings into sharp focus the problem of limited resources allocated to adjudicatory bodies. It was queried whether the financial limits on the Inter-American Court of Human Rights are deliberately imposed to control its case load.

EU monitoring and enforcement mechanisms

EU internal monitoring

The European Fundamental Rights Agency (FRA) is not a particularly effective mechanism for monitoring the internal human rights dimension of the EU. The FRA is limited to advisory and research functions and its work is determined by the Commission. By contrast, the former EU Independent Network of Legal Experts on fundamental rights engaged fairly rigorously in independent monitoring albeit with a focus on domestic implementation and with a connection to the Commission.

EU external relations and human rights promotion

The EU Treaties provide that the EU must promote human rights in its external relations.¹³ The EU has developed a number of tools to achieve this objective.

The Council has adopted a series of EU Guidelines on selective human rights which set out the EU's policy position and create strategies. Guidelines include: the death penalty; torture; human rights defenders; children and armed conflict; rights of the child; violence against women; and international humanitarian law. All Guidelines urge third countries to ratify and implement the core UN human rights conventions.

In addition to raising human rights in mainstream political dialogue, the EU has established some forty human rights dialogues with countries worldwide.

¹³ See Article 21(1), Treaty on the European Union.

These dialogues take place at the level of senior officials and are held about once or twice a year. Basing itself, wherever possible, on the reports of UN monitoring bodies, the EU raises concerns, makes recommendations and offers cooperation to promote reform. The EU also engages in ad hoc human rights promotion.

Since 1995, the Commission has sought to include a 'human rights and democracy clause' in agreements concluded with third states to demonstrate shared commitment. Such a clause, generally the first or second of the agreement, is now in force with almost 140 states. Since there are no preconditions for signing an agreement, this cannot be taken as an indication that the EU feels that the contracting states are meeting international human rights standards. The EU can suspend the agreement in cases of grave or systemic breach of human rights. In practice, the clause has been invoked as the legal basis for sanctions against some 20 states.

In the area of financial cooperation the Commission can programme projects with governments to promote human rights, for example, on police training or improving prison conditions. Additionally, the European Instrument for Democracy and Human Rights, which is implemented by the Commission, enables it to provide funding worth some € 120 million each year, direct to civil society organisations worldwide, without the intervention of governments.

The main tool for linking trade and human rights is the Generalised System of Preferences Regulation (GSP), which has two important human rights aspects. First, the standard GSP trade advantages – which are enjoyed by most developing states - can be withdrawn from a beneficiary state for serious and systematic violations of the principles of the human rights and ILO conventions contained in the Annex to the GSP Regulation. This possibility has been exercised only sparingly. The GSP has been withdrawn from both Burma and Belarus on these grounds, but only after the International Labour Conference had adopted resolutions criticizing these countries.

Second, certain States which ratify and effectively implement the core UN human rights conventions and ILO conventions on labour rights, as well as key environmental conventions, are eligible for special incentive GSP privileges (the "GSP+"). Fifteen countries currently benefit from the GSP + scheme and the Commission is engaged in a continuing dialogue with the beneficiaries to encourage them to step up implementation of these conventions. In effect, countries are admitted to the scheme solely upon proof of ratification of the conventions. Only if it comes to the Commission's

attention later that the country is not effectively implementing the conventions will the Commission consider opening an investigation.

This has been done twice. In 2009, the Commission opened an investigation into El Salvador, following a judgment of the El Salvador Supreme Court that El Salvador's ratification of ILO Convention No 87 was unconstitutional. The prospect of loss of access to GSP+ benefits appears to have been instrumental in persuading El Salvadorian to amend the Constitution rendering ratification of the Convention constitutional. In Sri Lanka, by 2008 it had become clear that there were manifest violations of the ICCPR, UNCAT and the CRC. A committee of independent experts appointed by the Commission conducted a year-long investigation, finding grave violations of UNCAT and the ICCPR. In February 2010 the Council suspended Sri Lanka from GSP+ subject to a six-month grace period. Although Sri Lanka presented recent improvements at negotiations, its rejection of the condition of improved UN cooperation led to its suspension in August 2010.

IDENTIFYING FUTURE CONVERGENCE AND DIVERGENCE

Constitutionalisation of international human rights law

The constitutionalisation of human rights at international and European level may undermine some European states' attempts to resist the domestic application of international human rights law. For example, the Irish Constitution provides that no international agreement can become part of domestic law unless determined by the Parliament. Criticism of Ireland's delay in incorporating ratified conventions has led to a tendency, in reference to the US approach, to rely on the Constitution as embodying equivalent standards. This approach may need to be revised as a result of what may be referred to as 'constitutional' EU human rights developments reinforcing international standards. These include the heightened status of the European Charter of Fundamental Rights and the forthcoming EU accession to the ECHR.

Particularly challenging issues

Conflict of norms

An especially challenging issue concerns the interaction between human rights law and UN Charter Chapter VII obligations. Article 103 of the Charter provides that in the event of a conflict between Member States' Charter obligations and other treaty obligations, the former take precedence. The questions of whether there is a true conflict of norms and if so how this is to be resolved are some of the most difficult. For example, a conflict between UN anti-terrorism obligations and EU human rights law has led to the *Kadi v. Commission* litigation regarding UN targeted economic sanctions before the EU Court of Justice, and demonstrates the potentially serious implications for

the implementation of Security Council resolutions.¹⁴ This issue is currently before the ECtHR in the joined *Al Jedda v. UK* and *Al-Skeini v. UK* cases.¹⁵

Relationship between international human rights and humanitarian law

International human rights law and international humanitarian law are complementary regimes. However, their precise interaction is challenging. International humanitarian law has been suggested to be a specialist framework or *lex specialis* which applies during armed conflict. But that does not necessarily exclude human rights law. The appropriate question is whether each human right is reasonably and sensibly capable of applying in the context of various military operations. The closer the scenario is to battlefield operations, in a non-technical sense, the less likely it is that human rights law applies. The closer to detention, the more likely it is that human rights law applies. Whereas some rights, such as the prohibition on torture, are capable of applying to all circumstances of armed conflict, others, such as free speech, may not be. The broad brush approach which courts tend to take, for example the ICJ in the *Wall Advisory Opinion*, in holding that the two sources of law apply in parallel may fail to engage properly with the issue.

The issue of applicable law is closely linked to issues of extra-territoriality and attribution for the purposes of international responsibility. In the *Behrami* case the ECtHR held that the conduct of KFOR and UNMIK in Kosovo was attributable to the UN and not the troop contributing countries.¹⁶ Since the UN is not subject to the jurisdiction of the ECtHR, this rendered unnecessary any discussion of extra-territoriality. However, the case usefully demonstrates some implications of the extra-territoriality and applicable law debates. On one hand a finding of attribution and violation could have produced a chilling effect prompting European States to withdraw participation from UN missions. On the other hand, from the victims' perspective the judgment risks creating a black hole in accountability for human rights violations.

14 Case T-306/01, *Yusuf and Al Barakaat Int'l Found. v. Council and Commission*, 2005 E.C.R. II-3533; and Case T-315/01, *Kadi v. Council and Commission*, 2005 O.J. (C 281); Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council and Commission*; Case T-85/09, *Kadi v. Commission*.

15 *Al-Skeini and others v. United Kingdom* (no. 55721/07) and *Al Jedda v. United Kingdom* (no. 27021/08).

16 *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, Grand Chamber, Decision, 2 May 2007.

Derivative state responsibility

International cooperation raises difficult questions of derivative state responsibility whereby a state may find itself responsible for the conduct of another state. This was discussed with reference to *non-refoulement* and complicity.

The question of the weight to give to diplomatic assurances in the context of *non-refoulement*, the transfer of individuals under circumstances where that person faces the risk of torture, has produced much debate. Whether assurances should or should not be sought is an ideological, not legal question. The legal question is whether there are sufficient safeguards and monitoring of the situation. The UK courts have grappled with this problem and demonstrated that it is difficult to gain access to the information necessary to evaluate assurances. States should not accept assurances from states which have been proven to betray past assurances. Generally, the worse a state's human rights record, the less likely it is that guarantees can be monitored and enforced.

It will not always be possible to attribute to the cooperating state direct responsibility for another state's human rights violations. It is unclear in what circumstances a state will be found to be complicit in another state's violations. Potential common scenarios in which this question may arise include not only military operations but granting aid for building dams and training foreign police and narcotics officers. The UK has explicitly accepted that Article 16 of Articles on Responsibility of States for Internationally Wrongful Acts reflects customary law. However, the applicable standards of knowledge, intention and facilitation are unclear.

Lack of global support for US/EU human rights positions

New challenges are arising with the shift towards a multi-polar world and the diminishing power of Western States. This makes increasingly important a close cooperation between the US and European States.

Summary by Sean Aughey