Human Rights: Universal Justice or Post-modern Nihilism? ()

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'*Of course* we're non-political. The real power always is.'
C. S. Lewis, *That Hideous Strength*

Introduction

The advocates of the extension of international legal norms and the establishment of new international tribunals argue that these measures are necessary to prevent political and military leaders escaping accountability for human rights abuses. They assert that the doctrines of sovereign immunity and long standing international bars on external interference in domestic legal jurisdictions seek to defend the indefensible. They embellish their arguments with appeals to the natural and deep sense of outrage people feel when atrocities are committed, and by insisting that what they are trying to do is to bring law and justice into a legal and moral vacuum. Many leading lawyers and theoreticians call for the return to moral principles and an 'international social idealism' which establishes universal norms of human rights legislation which can be ruled on by an international judiciary (for example, Allott, 1999; Booth *et al*, 2000).

This chapter claims that these arguments are mistaken. The development of international legal tribunals will not necessarily lead to a more just world, because the premise that states cannot themselves render justice is false. It is also false to assume that international bodies are necessarily objective and unpolitical. On the contrary, human rights activists are in danger of aggravating the very thing they say they want to eliminate, namely the wielding of power without responsibility, because international bodies are, by definition, beyond the reach of democratic accountability.

The reason why this danger is real is that the central claim of the proponents of the new supra-nationalism is flawed. That claim, that state sovereignty means that there is no law higher than the state, betrays a deep ignorance of the history of political philosophy. On the contrary, the paradox that the prince is both author and subject of the law is one of the oldest topics of political thought. Aristotle is one of the most famous proponents of the natural law tradition; the principle that the prince or the state is subject to natural law continued to influence political thought for over a thousand years up to Aquinas and beyond. In the pre-Reformation Western Christian tradition, it was always quite explicitly recognised that princes govern subject to God's law. Even monarchs whose names are associated with the doctrine known as absolutism never claimed that they were absolved of their duties towards God and the principles of eternal justice. All that the doctrine of state sovereignty affirms is the circular argument that there is no civil law higher than the state, for the simple reason that if a state is subject to a higher body then that higher body becomes sovereign.

It is only in the modern secular period that states have regarded them as literally absolute. Hobbesian positivism and Rousseau's 'general will' do indeed seem to suggest that the highest law is the state's arbitrary will. In our own century, the theories of Hans Kelsen have also added grist to the absolutist mill by attempting to define value-free state structures. As we shall see, it is no coincidence that people from such positivist traditions, especially Kelsen, are precisely those who advocate world government. Because they do literally believe that government is simply a structure of essentially arbitrary commands, they see no problem is subjecting the whole planet to one single system of 'governance'. This chapter will seek to show, by contrast, that sovereign states, i.e. independent self-governing political entities, are the ones most likely to govern in accordance with natural justice.

The Claims of Moral Universalism

The last three years of the twentieth century saw a sudden institutionalisation of the view that 'morality' should now be introduced into the allegedly nihilistic world of state sovereignty. Key events succeeded each other very rapidly. The treaty bringing the International Criminal Court into being was signed in July 1998. The former Chilean president, Augusto Pinochet, was arrested in London in October of that year on a Spanish extradition warrant; he was held in Britain for over a year on charges relating to crimes allegedly committed against Chileans by the Chilean police in Chile. Nato launched its high-altitude bombing campaign against Yugoslavia in March 1999, ostensibly because the need to protect universal human rights demanded it. The following month, Nato formalised this 'new strategic concept' and claimed the moral right to unilaterally intervene against sovereign states because of their domestic policies, something specifically ruled out by the United Nations Charter. In turn, in May 1999, the International Criminal Tribunal for the former Yugoslavia indicted six serving members of the Yugoslav and Serb governments, including the serving head of state, Slobodan Milošević, for crimes against humanity - an event which seemed to give a legal basis to Nato's military intervention. In February 2000, fourteen EU states introduced diplomatic sanctions against Austria because the Freedom Party was included in the federal government coalition: the domestic politics of Austria were said to be a matter of

common concern.

In June 2000, the International Criminal Tribunal at The Hague effectively endorsed the legality of Nato's new strategic concept and *ipso facto* of the bombing of Yugoslavia when it washed its hands of claims that Nato had itself committed war crimes. It reported that it had no competence to adjudicate over crimes against peace, thereby rescinding perhaps the single greatest advance in international law made at Nuremberg when, using perfect sovereignist logic, the International Military Tribunal ruled that all war crimes derive from war and that therefore the primordial war crime is the 'crime against peace', i.e. military aggression against another sovereign state Rabkin, 1999). In October 2000, the United Kingdom, the one country in the industrialised world which had maintained a legal *ancien régime* without a written charter of rights, integrated into its domestic law the European Convention on Human Rights. Thereby subjecting all British Parliamentary legislation to the jurisdiction of judges and ultimately making UK law subject to the views of the unelected judiciary sitting in the European Court of Human Rights in Strasbourg. In December 2000, the European Union adopted a Charter of Fundamental Rights at Nice; another article in the same treaty allowed EU member states to suspend the voting rights of a member state if it felt human rights were threatened by that state.

In December 2000, the outgoing Clinton administration signed the Rome treaty on the International Criminal Court. In May 2001, Belgium announced that its jurisdiction extended to the whole world where human rights were concerned and so it put two Rwandan nuns on trial for complicity in genocide. In June 2001, Slobodan Milošević was abducted from Belgrade and delivered to The Hague, in direct contempt of a ruling by the Yugoslav constitutional court. This act was welcomed by human rights activists in the same way as they had welcomed the arrest of General Pinochet in London: they said it was both ground-breaking and also well-grounded in existing law. (1) In July 2001, a group of Danes applied for the arrest of the Israeli ambassador to Denmark because of his stated support for the use of torture against Palestinians, while Belgium also announced that it was preparing an indictment of the serving Israeli prime minister, Ariel Sharon, for his role in the Sabra and Chatila massacres of 1982 - events which had already been the subject of a judicial enquiry in Israel itself. All these events testify to the increasing consensus that the doctrine of universal human rights should override the traditional privileges of states and their parliaments.

It is important to understand the philosophy which animated these seminal developments. Human rights advocates assert that the purpose of human rights law is to subject supposedly lawless sovereign states to the rule of law. The new international law should therefore be understood as a body of law directed specifically against the state, its officials, or any other body claiming political power. As British human rights lawyer, Geoffrey Robertson QC, clarifies:

> What sets a crime against humanity apart both in wickedness and in the need for special measures of deterrence is the simple fact that it is an act of real brutality ordained by government - or at least by an organisation exercising or asserting political power. It is not the mind of the torturer but the fact that this individual is part of the apparatus of a state which makes the crime so horrific. (2000: 338)

In other words, if the police in the United Kingdom discover - as they often do - that a drug dealer employs torture on rival dealers or clients who will not pay, the torture committed there would not be prosecuted under the Human Rights Act but instead under the normal criminal law. By contrast, if the police themselves were accused of using undue force or of practising torture, then the alleged crime would be regarded as an attack on human rights. By a similar token, rape has now been included as a war crime in the jurisprudence of the International Criminal Tribunal but only when committed in war and in spite of the fact that it is already a crime in the normal criminal code of most states. The same is obviously true of murder which has also made its way into human rights law under the awkward term 'violation of the right to life'.

Because it is directed specifically at actions taken by states and their officials, or by people claiming political power, international legal measures concerning human rights are obviously of very great constitutional importance. The claim is repeatedly made by supporters of human rights law that it removes the alleged 'immunity' (often deliberately confused with 'impunity') of state officials. If the declared purpose of human rights law is to usher in a new world order in which states are no longer sovereign, (2) then questions about the constitutional implications of these new arrangements must be posed. If heads of state and state officials may now be prosecuted by bodies other than those of the states (including their own) on whose territory they allegedly committed their crimes, then it is imperative to examine whether the new powers which will accrue to human rights tribunals, especially international ones, carry political responsibilities with them or are subject to any control. In particular, the danger must be addressed that officials of these bodies might begin to believe that they are somehow above the normal human realm of politics. (3)

Morality and Law

The claims made for the legitimacy of the new international law and its institutions rest on moral universalism. It is very common to hear the advocates of international humanitarian law justifying the jurisdiction of their new international tribunals by saying that the crimes judged there are so heinous as to be 'beyond human forgiveness' (Geoffrey Robertson). The idea is that if an act is criminal in all places and at all times then it should be subject to the jurisdiction of an international tribunal.

This reasoning is doubly false. First, even if one accepts that a certain act is always and everywhere criminal, it does not follow that a body with universal jurisdiction must be created to judge it. On the contrary, when the Convention on the Prevention and Punishment of Genocide was signed in 1948, it enjoined the signatory states to prosecute those accused of genocide in their own courts. It is noteworthy that the International Criminal Tribunal for the former Yugoslavia has unilaterally rescinded a key provision of this treaty, duly ratified by the parliaments of the states which signed it, when it declared that it, not national courts, alone had jurisdiction over persons accused of genocide in the former Yugoslavia.

Second, however, the claims made for moral universalism are highly problematic in the terms in which they are presented. To put it bluntly, there is precious little evidence of universality in the way human rights activists operate. As many opponents of Nato's war against Yugoslavia in 1999 argued, that war, waged in the name of universal standards, was in fact a perfect example of double standards. Why bomb Yugoslavia in the name of human rights but tolerate the Russian attacks on rebels in Chechnya? Why indict the Yugoslav leaders and exculpate Nato or the Albanian rebels from any war crimes?

Indeed, in the view of this author, the attacks on Yugoslavia were merely the high point of a decade of terrible double-standards practised by the human rights industry and its Western governmental supporters. (4) The pronouncements on human rights matters, especially in the former Soviet bloc, have owed far more to Western policy goals than to any objective truth. One stark example of such double-standards is the contrast between the way in which Russia and Belarus have been treated in the 1990s. When President Yeltsin of Russia faced opposition from the State Duma in 1993, he sent in the tanks to shell the parliament building and succeeded in changing the constitution to reduce the power of the State Duma, turning Russia into a presidential dictatorship (Williamson, forthcoming). But when President Alexander Lukashenko of Belarus found his government systematically stymied by parliamentary opposition in 1996 and called a referendum to introduce a semi-presidential system, he was branded a dictator. (5)

By the same token, the long-serving prime minister of Slovakia, Vladimir Mečiar, was constantly branded 'authoritarian' during his period in office and accused of harassing the media. In fact, only the main state television channel was supportive of the government: all the press and much of the electronic media was in the hands of the opposition. When the new government took power, by contrast, it took over the state TV as well and therefore all media, press and electronic media included, were pro-government. The opposition under Mečiar then had no media outlets at all. Moreover, the new government proceeded to conduct a war of attrition against its political opponents and the country's judicial authorities, yet these attacks were met with deafening silence by human rights campaigners in the West (BHHRG, 2001).

No doubt such claims of double standards are open to debate. But it is precisely debate which the discourse of moral universalism stifles. The value of the acts of politicians such as those mentioned above can only be evaluated properly within an open democratic state system; they should not be subject to the say-so of unaccountable NGOs who have no stake in the societies they so mercilessly attack.

How Human Rights Law Changes Over Time

Leaving aside, however, the polemical value of the objection about double standards, it is surely quite impossible to continue to sustain the view that international humanitarian law has the right to trump national law because the former is universal when, in fact, international humanitarian law changes over time. But how can an act which is supposedly at all times and in all places a crime disappear from the canon of international humanitarian law?

History shows that this is exactly what happens. One of the clearest illustrations of the flexible and politicised nature of these so-called universal moral norms is the shifting approach taken to the fundamental question of war crimes. The first international attempt at setting down laws against war crimes came was the International Peace Conference held at The Hague in 1899. Its final Act made three Declarations, one of which forbids belligerents from dropping bombs from the air (Declaration 3: 'To prohibit the launching of projectiles and explosives from balloons or by other similar new methods.') Although passed before the aeroplane had been invented, this article was formulated explicitly in the light of the great speculation that a flying machine would soon come into being. According to the International Committee of the Red Cross:

> The attempts (at the Second Peace Conference at The Hague) in 1907, to adopt a permanent prohibition of the discharge of projectiles from the air led to the insertion in Article 25 of the Hague Regulations on land warfare, which prohibits the attack or bombardment of undefended towns, villages, etc., of the words 'by whatever means' in order to cover attack or bombardment from the air. (ICRC, 1907)

Article 25 of the Regulations contained in that 1907 Convention indeed states: 'The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.' There was also a specific 'Declaration on the Launching of Projectiles from the Air', dated 18th October 1907. It is worth noting, in passing, that this prohibition on aerial bombardment had no effect whatsoever on the way in which wars were waged in any subsequent conflict, particularly not in the

Second World War.

Contemporaneously with this interdiction on aerial bombardment, a provision was drawn up at the first Hague conference specifically outlawing dum-dum bullets. Named after the suburb of Calcutta where these bullets were first made, they were referred to in a rather cumbersome way as 'bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'. This exact same phrase about bullets which flatten, etc., has somehow made its way down the century unchanged and is reproduced, *verbatim*, in the section of the Rome Statute on the International Criminal Court of July 1998 which defines war crimes [Article 8, 2 (b) (xix)]. This is in spite of the fact that it is over one hundred years since dum-dum bullets first excited passions. As with aerial bombardment, it is doubtful whether this interdiction has actually had any effect: the Palestinians have accused the Israelis of using dum-dum bullets to suppress the Al Aqsa Intifada. But, in striking contrast to the provision on bullets which flatten, etc., the legal interdiction against aerial bombardment has been quietly dropped from the texts on international humanitarian law. It does not feature, for instance, in the 1998 Rome treaty.

It is obvious why this is so. The Second World War, the Vietnam War, Gulf War and the Nato war against Yugoslavia were all fought with the massive use by the Great Powers of aerial bombardment. With the wars against Yugoslavia and the daily reconnaissance flights and regular bombings over Iraq, aerial bombardment has indeed effectively become an integral part of American foreign policy (Burnham, 2001). Its frequent use is not even merely a matter of military technique: aerial bombardment is also highly symbolic of the almost millenarian moralism in which American diplomacy and the supporters of international 'humanitarian' intervention cloak themselves. (6) Bombing has thus acquired an almost mystical importance which was made quite explicit during the attacks on Yugoslavia when the Supreme Allied Commander of Nato, General Wesley Clark, said that for Mr. Milošević, the vast air power being used against him 'must be like fighting God' (SHAPE, 1999). In the same vein, a noted British defence commentator wrote, in an article on the military use of air power, that: 'Technology and international morality now march in step.' (Keegan, 2001)

In other words, in one hundred years, aerial bombardment has gone from being a crime of unsurpassable evil to an instrument of the highest morality, or even of God. Yet if the values embodied in human rights documents are supposed to be objective and universal - a crime against humanity is 'a crime so black that it does not admit of human forgiveness', according to Geoffrey Robertson (2000: 374) - it is extremely difficult to see how they could evolve over time. It might be possible for new crimes to be added as time goes on: one could argue that the moralists had 'discovered' new evils and tried to codify interdictions against them into law. But it is impossible, in the philosophical framework proposed by human rights activists, for aerial bombardment to be considered so wrong in 1899 that it merited a special international conference and yet not even deserve a mention a century later.

The same must be said of the notion of 'crimes against peace'. It was one of the main advances in international humanitarian law at Nuremberg to define the violation of state sovereignty by force as a criminal act. Crimes against peace were the first category of crimes established at Nuremberg: the Nazi leaders were all indicted under the charge of planning and executing an aggressive war. Supreme Court Justice Robert Jackson was convinced that aggressive war was the *fons et origo* of all war crimes. His view, codified at Nuremberg, was immediately adopted in the Charter of the United Nations and, in both cases, reflected a very old traditional principle of international law that states are not allowed to attack other states.

Indeed, it is important to understand that the primacy given to national sovereignty by Nuremberg and in the UN Charter had a key anti-fascist political purpose. That purpose was to institutionalise an antithesis to the Nazi theory of international relations. State sovereignty was considered, after the Second World War, to be the answer to the fascist view that international relations should be based on the concept of *Großraum* or 'great space' (Bennhold, 1999). According to that theory, the international system was (or should be) divided up between centres of power. Some states had the right to dominate others or to bring them into their sphere of influence within the *Großraum*. The Nazi philosopher of law, Carl Schmitt, expressed this theory in his book, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (A Constitutional Order based on the Concept of Great-Space, with a Rule against Intervention by Powers outside the Great Space) published in 1941. As the title suggests, the theory of the unequal sovereignty of states accorded the right of the hegemonial power to wage war against other states within its sphere, while naturally denying the right of other states in other *Großräume* the right to wage war against them. Each great power had to deal with its own back yard. Indeed, many Nazi theoreticians - like Marxists - believed that state sovereignty was an artificial construct which should be discarded (see further, Laughland, 1997).

It was this theory which the post-war institutions were intended to bury. Put in legal terms, what the post-war order denied was the *ius ad bellum*, the right to wage war. State sovereignty was naturally used as the best legal instrument to express this absolute interdiction against war, except in self-defence, an interdiction which the fascist theory of international relations specifically denied. Consequently, the right to wage war was specifically and repeatedly denied as a basis of the international order in all international post-war documents. All wars of aggression are forbidden and the principle of the friendly coexistence between states emphasised as the driving thought behind the new international order. Indeed, not only is the use of force illegal in post-war international law; even the threat of the use of force is illegal (according to Article 2 paragraph 4 of the UN Charter). Meanwhile, any treaty obtained through the use of force or the threat of the use of force is null and void, according

to Article 52 of the 1969 Vienna Convention. So radical, indeed, is the interdiction against war in international law that the International Pact on Citzens' and Political Rights of 1966, which otherwise guarantees freedom of expression, even makes war propaganda illegal. (7)

One would have thought, then, that the 'crime against peace' would continue to enjoy overriding importance as human rights law 'advances'. In reality, the opposite has happened. The 1998 Rome treaty on the International Criminal Court mentions crimes against peace but does so in a way which means that it cannot be adjudicated: it has left to a panel of experts a later decision on how this matter should be formulated. (8) In other words, it will be killed off in committee. Meanwhile, the statute which established the International Criminal Tribunal for the former Yugoslavia does not even mention 'crimes of aggression' or 'crimes against peace'. When it was asked to adjudicate on whether Nato had committed a war crime by attacking Yugoslavia, the Tribunal's Prosecutor commissioned a report which concluded that:

> The *ius ad bellum* regulates when states may use force and is, for the most part, enshrined in the UN Charter. In general, states may use force in self defence (individual or collective) and for very few other purposes. In particular, the legitimacy of the presumed basis for the NATO bombing campaign, humanitarian intervention without prior Security Council authorization, is hotly debated. That being said, as noted in paragraph 4 above, the crime related to an unlawful decision to use force is the crime against peace or aggression. While a person convicted of a crime against peace may, potentially, be held criminally responsible for all of the activities causing death, injury or destruction during a conflict, *the ICTY does not have jurisdiction over crimes against peace*.[emphasis added] (ICTY, 2000)

The spirit of Pontius Pilate therefore is alive and well and resides in The Hague. The fact that the primary international organ responsible for Yugoslavia chooses to wash its hands of the suggestion that Nato's aggression might have been illegal - especially in the context of very detailed speeches by world leaders arguing for a new *ius ad bellum* to overturn the old UN prohibition against war (Blair, 1999) (9) - means that, to all intents and purposes, the notion of crimes against peace has been more or less dropped from the canon of international humanitarian law. But if the most fundamental principle of international humanitarian law can be quietly dropped, then the claim to universality looks pretty threadbare.

The Philosophy of Human Rights

These problems associated with the claims to moral universalism are not coincidental. The theory itself is flawed. To be sure, it is noteworthy that, as traditional morality collapses at home, a highly moralistic attitude in international affairs moves in as if to compensate. Just as it might be argued that the drive towards European integration is a kind of substitute for the reality of the disintegration of the traditional state and the family, so the increasing moral nihilism of Western societies in traditional areas is now being compensated for by a vehemently moralistic attitude in new ones. The black and white terms in which much foreign policy and international humanitarian discourse may give a comfortable sense of moral superiority to the speaker and, of course, humanitarian intervention is invariably perpetrated by strong states against weak ones. But is it true that objective truth exists only in the abstract or universal realm, as our humanitarian activists claim, or might it be the case that it inheres instead in the real and the particular?

An article of this length cannot, of course, resolve an issue which has bedevilled Western philosophy for millennia. Suffice it to say that the international humanitarian operates within a Kantian framework (and not only Kantian) whose key concept is that of universality. Kant held that moral truths (and indeed all ultimate truths) are to be found only in the realm of abstract universals and not in the realm of the real or the particular. The moral agent becomes moral only to the extent that his motives are detached from all contingency. The 'categorical imperative' - the cornerstone of Kantian moral and legal philosophy - must, for Kant, be formulated in such a way as to enjoin universal rules. It is categorical if and only if it is universalisable.

The Aristotelian and Thomist view, by contrast, is that objective truth is to be found in the real world, not only in some unknowable abstract realm. Whereas for Kant, the faculty of judgement consists in deciding how to operate according to universal and abstract rules, the Aristotelian tradition regards the real world - and especially the polis - as the appropriate framework within which to judge the value of acts. This faculty of judgement is essentially comparative: the value of an act is ascertained by comparing it with other acts in the public sphere. Philosophers in this realist tradition believe, unlike idealists, that reality is itself intelligible, that the created world is fundamentally ordered and meaningful, and that truth can be found in it.

In the Aristotelian and Thomist tradition a right is a right to a thing and law is the right proportion in the distribution of things. Justice is real, not ideal, although it is of course based on a transcendent notion of equity. It is precisely because civil law is about discerning how individual cases exhibit general principles that it is legal nonsense to talk about universal human rights. Since a right is a claim to a thing, it is obvious that human rights conflict with one another. The whole point of having a judicial system is to adjudicate between these competing claims and to judge each individual case on its merits.

What all this means in practise is that it is unnecessary and largely nonsensical to try to define universal

crimes or universal rights. No one doubts that genocide or rape is always evil. The question is whether certain individual acts fall into certain categories and if they do what to do about it. Because both these questions are questions of practical reason, law is always political in the sense that it is always about the right regulation of the polis. It is a matter of weighing up competing claims between citizens with a view to preserving the social order within specific political and territorial boundaries.

Consequently, any judicial system - even if it based on so-called moral universalism - operates politically. This much is obvious from the behaviour of the International Criminal Tribunal for the former Yugoslavia, which allows lenient treatment of indictees if they agree to testify against other indictees. According to this logic, the former Bosnian Serb president, Biljana Plavsić, indicted of genocide, the ICTY's most serious charge, was allowed in 2001 to return to Belgrade to live quietly there because she has agreed to testify against Slobodan Milošević. Not only does this decision by the ICTY shock the moral senses; it also reflects the Tribunal's own institutional-political imperatives. It is far more important for the ICTY's overall mission as the embryo of a future International Criminal Court to indict and convict a real head of state like Milošević: therefore it can afford to plea-bargain with a woman who is constitutionally less important even though, at the time of her release, she was accused of worse crimes than he.

This example and the preceding considerations should show that the right legal response to atrocities is not purely moral outrage. The right response is, instead, to consider what legal and political structures are best suited to safeguarding rights and liberties. Above all, it is essential to question the philosophical basis for the claims to legitimacy made for international human rights tribunals and to ask what mechanisms there are for submitting such tribunals to political accountability. It is clearly problematic for human rights activists and Western governments to claim that they are 'ending the culture of impunity' if, in the process, they set up institutions with dubious claims to legitimacy which are themselves apparently above the law. Human rights activists cannot claim that states are necessarily worse at rendering justice than international organisations unless they prove it empirically and constitutionally.

Human Rights and Political Accountability

It is unfortunate that many advocates of human rights do not appear to recognise that the new powers claimed for human rights institutions themselves beg new questions. The *non sequitur* which claims legitimacy for international bodies in the name of objectivity or universalism appears to assume that international bodies somehow rise, by a mysterious process of political levitation, above the normal realm of human affairs and take on especial wisdom and neutrality simply in virtue of being 'international'. But why should individuals be regarded as having special virtues simply because they sit on a committee with individuals from other nations? It seems rather that the opposite assumption should hold. International organisations - the United Nations, the European Union, or for that matter the High Representative in Bosnia and Herzegovina - have agendas of their own which should be regarded as political in the same way as any national government or governmental body is political. Human rights activists seem not to understand that the power wielded by, say, the International Criminal Tribunal for the former Yugoslavia in The Hague is itself political and that it must, as such, be subjected to the usual checks and balances which we generally associate with the liberal order.

The view that mechanisms of accountability are not required flows ultimately from the Gnostic assumptions which underlie the human rights framework. Instead of asking, 'Who guards the guardians themselves?' human rights activists seem to argue that they have a right to judge others because of their supposedly superior knowledge of universal truths. The ordinary person - on whose behalf human rights activists claim to be acting - is, it seems, too preoccupied by the imperatives of day-to-day life to think about universal truths. He or she therefore needs to be guided and by self-appointed elites. One egregious example of this attitude is the statement by Aaron Rhodes, the Executive Director of the International Helsinki Federation:

> The 'Western' public seems incapable of identifying moral and political principles by which to interpret very complex conflicts and, through that exercise, to come together on a course of action. *Indeed, it is romantic to think that the 'public' should be responsible for identifying those principles. That is the job of those more concerned with principles than with the here and now*, more concerned with things that are true regardless of historical contexts and routine life. *In other words, it is the responsibility of intellectuals*. [emphasis added] (Rhodes, 1999: 193)

Not since Plato's parable of the cave in Book VII of *The Republic* (10)has there been a more brazen claim for the rights of 'philosopher-kings' over the pettifogging self-interest of ordinary people. Such statements only make explicit what is in fact the basis for all human rights ideology, namely the view that the 'non-political' judgements, which are said to flow from human rights norms, depend for their validity on the claims to a 'higher truth' accessible only to self-selecting elites but apparently beyond the political sphere of democratic decision-making. The claim to be above the 'petty interests' of the political sphere is thus the corner-stone of the alleged legitimacy of human rights ideology. Human rights activists use it to argue that international human rights legislation, which they falsely equate with objective and universal justice, overrides domestic legislation and domestic constitutional law.

In reality, this claim of superiority over the state misrepresents the doctrine of state sovereignty in

order deliberately to de-legitimise existing states and so that international or supranational institutions can step in to take their place. But it is false to allege that the doctrine of state sovereignty necessarily affords legal immunity to state officials. This mistaken view is clearly stated by Geoffrey Robertson:

> It has taken half a century [i.e. since the proclamation of the Universal Declaration of Human Rights in 1948] but we seem at last to be working out a way to bring tyrants to justice. Why did it take so long? The problem is that the world has always been organized on the principle of 'sovereignty' of the state ... There must be no intervention in their internal affairs. (1998)

However, the doctrine of state sovereignty never holds that the state can do what it likes without fear of recourse. Instead, the doctrine simply means that political power always obeys a certain constitutional logic. That ineluctable logic applies as much to international tribunals or political systems as to national ones. Put simply, the doctrine of state sovereignty means that, while state power is of course morally subject to moral higher laws, those laws cannot be implemented over and above the state without it disappearing as a state and transferring its quality of sovereign statehood to the higher power which does the implementing. That higher power must, in turn, be based on some kind of legitimacy. It is this simple but unavoidable constitutional fact which the discourse of moral universalism seeks to avoid.

Sovereignty, in other words, simply describes the structures within which political authority is exercised. Without the conceptual framework to delineate lines of responsibility and to show where the buck stops, accountability can never be ensured. Because the concept of state sovereignty makes explicit what the ultimate source of authority is and what powers flow from that, it is the pivotal point on which all other political and legal norms rest: without knowing which body of rules are operative in a state, you cannot know who is responsible for what. If sovereignty is discarded as a concept, as human rights ideologues demand it should be, then power will be wielded without responsibility. In sum, without the concept of sovereignty you cannot make sense of that body of rules which we associate with the term 'the rule of law' (see Laughland, 1997: Chap 4).

Far from introducing lawless absolutism, in other words, the doctrine of sovereignty is the only legal bulwark against it. This is true as much of domestic (municipal) law as it is true of international law. For just as state sovereignty describes the boundaries of political authority within a state, so it provides a legal focal point for that state's interaction with other states in international relations. Sovereignty in international law is thus the exact equivalent of personhood in civil law: it is the legal concept which we use to enable states (or persons) to undertake obligations and enter into contractual agreements with others.

There is absolutely no contradiction between the sovereignty of a state and the subjugation of its political or military leaders to the rule of law. On the contrary, state sovereignty is the prerequisite for such subjugation. The body of rules governing the exercise of political authority within a legal order will include things which the prince is allowed to do or forbidden from doing. No doubt in many states the rules are too generous for heads of state. But any body which seeks to change them - an international tribunal, for instance - is itself wielding political power and must therefore have legitimacy and be accountable.

Human rights ideologues are quite right when they draw a distinction between customary international law, based on contractual agreements between states, and the new international law they seek to introduce, which will have a constraining power over states. (11) That key problem is that, by supplanting the sovereignty of states, the new bodies with the power to wield this constraint will themselves assume sovereign powers. There is no evidence that the supporters of such moves have thought about the constitutional implications of this.

Because they are based on a contempt for the very principles of constitutionality itself, the international tribunals which currently exist behave in a highly questionable manner. Consequently, the dangers for the rule of law are already apparent. In its zeal to punish alleged criminals, the International Criminal Tribunal for the former Yugoslavia has broken almost every rule in the book. Instead, it makes up new rules as it goes along, as Louise Arbour stated: 'The law, to me, should be creative and used to make things right' (Laughland, 1999a). The procedural shortcomings of the ICTY are becoming a by-word for unfairness, as the Tribunal picks and chooses from legal systems around the world to find excuses for its actions. In one case, the Prosecutor defended itself against charges that it had illegally seized documents from he Bosnian government by saying that the seizure had been compatible with the law in Paraguay. Even The Hague's formal legitimacy itself is open to question, since it was not established by law but instead by a *fiat* of the UN Security Council. Its existence has not been ratified by the statute of any law-making body. Instead, the ICTY was created by and is funded by Western governments or private organisations with very close links to those governments. This may be why the ICTY has refused to undertake investigations into Nato's war crimes, as the Nato spokesman, Jamie Shea, said on 17th May 1999, when he was asked whether the ICTY might investigate Nato for war crimes:

> As you know ... without Nato countries there would be no International Court of Justice nor would there be any International Criminal Tribunal for the former Yugoslavia because Nato countries are in the forefront of those who have established these tribunals, who fund these tribunals and who support on a daily basis their activities. (Shea, 1999)

Ultimately, therefore, the approach of human rights lobbyists is hostile to the political and legal

mechanisms of liberal democracy. It is based on the view that rights can be enjoyed outside of the political framework, as well as on the implicit assumption that the statehood is always at least incipiently if not actually an instrument of repression. It is not unrelated, therefore, to the doctrine of the withering away of the state, a central plank of Marxism. Lenin understood perfectly well that statehood and democracy were antithetical to Communism and that Communism would supersede them. He wanted man to liberate himself from it. In his essay, 'A United States of the World', Lenin wrote that 'the complete victory of communism (would) bring about the total disappearance of the state, including the democratic state' (1965: 270).

Ultimately, of course, state structures will not disappear under universal human rights any more than they did under Communism. On the contrary, it is precisely one of the most sinister aspects of the anti-sovereignty argument that it will break down precisely those barriers which do protect individuals from oppression. In fact, a seminal work on human rights make warm references both to the apparent fact that 'the whole notion of autonomous self-hood has been called into question' (Eagleton, 1999: v) and to a totalitarian-sounding future in which freedom will not be freedom 'from the state' but through it (Savić, 1999: 5). Nato's attacks on Yugoslavia showed how dangerous any potential New World Order will be and seemed to confirm Alexandre Kojève's prediction that the universal order would be a universal tyranny:

> Even though the end-state embodies the deepest hopes and dreams of mankind, Kojève did not assume that everyone would be wise enough to submit willingly to the principles of the universal and homogenous state. He assumed that there were bound to be people who were recalcitrant, obstinate and irrational enough to pit themselves against the universal order. The universal tyrant is therefore necessary to coerce or imprison those who constitute *inconveniences* to the rational order of the end-state. Nevertheless, it is important to keep in mind that this is no ordinary tyranny. The universal tyrant is but a 'cog in the machine,' an incarnation of the rationality of the final order of things ... Kojève's depiction of the tyranny of reason is daunting. The end of history is the apotheosis of the Gulag parading as the victory of reason. (Drury, 1994: 45)

Conclusion

This chapter has argued that the attempt to universalise human rights protections is political and legal nonsense. The attempt to separate statehood from law is based on a misrepresentation of the true relationship between law and the state. The nation state, essential to the derivation and application of the law at both domestic and international levels, is misrepresented as a barrier to the rule of law, while the law itself is idealised and held to be generated independently of the political process and capable of application without a constitutional framework of legal equality. As the above section considering the changing nature of the definition of war crimes demonstrates, it is necessary to be aware of the political way in which allegedly universal norms are applied. Without any mechanisms of accountability, these attempts to replace domestic with international jurisdictions can only lead to greater arbitrary rule and to the further erosion of the rule of law.

Notes

. From *Rethinking Human Rights: Critical Approaches to International Politics*, edited by David Chandler, Palgrave-Macmillan, 2002.

1. See the contradictory statements by Human Rights Watch: 'Milosevic Arrest Breaks Ground on International Justice,' (28th June 2001) and 'Transfer of Milosevic Founded in International Law,' (2nd July 2001). On the latter occasion, Richard Dicker, the Director of HRW's International Justice Progamme, tried to square the circle by saying incoherently that the transfer of Milošević was 'a historic precedent with a sound basis in international law.'

2. Many commentators argue that the end of state sovereignty is an inevitable historical development, the result of anonymous and unstoppable historical forces. See, for instance, Cooper (2000).

3. An amusing example of this came on 26th July 2001 when Florence Hartmann, the spokesperson for the International Criminal Tribunal for the former Yugoslavia (and a former correspondent for *Le Monde*) attacked a statement made on 24th July by the Bishops' Conference in Croatia as 'political'. Like the office of the High Representative in Bosnia & Herzegovina, whose spokesperson has similarly attacked the Bishop of Mostar for 'being more of a politician than a priest,' it seems never to have occurred to the people who work for the ICTY that their own activities might also be vulnerable to the same charge.

4. It is commonly supposed that the 'non-governmental organisations' which proselytise human rights are in fact non-governmental. However, this is not so. There is often a very deep intertwining between the personnel of the large so-called NGOs and governments. Governments also very often fund these organisations. Often these associations - especially the funding - are openly admitted on NGOs' web pages. On other occasions, the association is more covert. An intriguing account of the way NGOs are funded by the US government to promote American foreign policy objectives abroad is given by the US, comes from an official at the Carnegie Endowment for International Peace, Thomas Carothers (2001).

5. See the reports on Belarus by the British Helsinki Human Rights Group, of which this author is a

trustee. See especially the 1997 report published after the much-criticised 1996 referendum. The anathemas heaped on this constitution and on the referendum which ratified it were based largely on a report by the EU's Venice Commission which was itself on an early draft of the constitution which was not, in the end adopted.

6. For the history of American millenarianism, see Tuveson (1968). For a good example of the structural faults of such thinking, see John Rawls (1993). Rawls divides the world into 'ordered' and 'disordered' societies and allows the former to intervene against the latter in the name of the law of peoples. His article is an early articulation of the concept which was later popularised with the term 'rogue states.' The division between ordered and disordered societies - it is never suggested that the same society might be both, or that it might evolve from ordered into disordered - recalls the Manichean division of mankind into 'the elect' and 'the damned.'

7. Like many articles of international law, this one has proved futile. The Kosovo war was notable for very brazen war propaganda, especially on the atrocities allegedly committed against Albanian civilians. See my own articles on this (Laughland, 1999b and 1999c); Phillip Knightley's classic, *The First Casualty: the War Correspondent as Hero and Myth-maker from the Crimea to Kosovo* (2000), and also Philip Hammond and Edward S. Herman (eds) *Degraded Capability: the Media and the Kosovo Crisis* (2000).

8. Article 5 stipulates that the crime of aggression does come under the Court's jurisdiction but adds, 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' Unlike all other war crimes, 'aggression' is then not mentioned anywhere else in the treaty.

9. Blair's speech was a straightforward attempt to re-write existing international law. He said, 'We are all internationalists now ... We cannot refuse to participate in global markets if we want to prosper. We cannot ignore new political ideas in other countries if we want to innovate. We cannot turn our backs on conflicts and the violations of human rights within other countries if we want still to be secure. On the even of the Millennium we are now in a new world. We need new rules for international co-operation and new ways of organising our international institutions.'

10. In Book VII, 'On Shadows and Realities in Education,' Socrates says, 'You must not wonder that those who attain to this beatific vision are unwilling to descend to human affairs; for their souls are ever hastening into the upper world where they desire to dwell; which desire of theirs is very natural, if our allegory may be trusted. Yes, very natural. And is there anything surprising in one who passes from divine contemplations to the evil state of man, misbehaving himself in a ridiculous manner; if, while his eyes are blinking and before he has become accustomed to the surrounding darkness, he is compelled to fight in courts of law, or in other places, about the images or the shadows of images of justice, and is endeavouring to meet the conceptions of those who have never yet seen absolute justice?'

11. The difference was once powerfully expressed by the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Louise Arbour, who declared: 'We have passed from the era of co-operation between states to an era in which states can be constrained.' (*Le Monde*, 6th August 1999)

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