

The Stephen Livingstone Lecture: ‘The problems with human rights’ – given on 21 November 2019

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Abstract

This is the text of the 2019 Stephen Livingstone Lecture delivered at Queen’s University Belfast on 21 November 2019. It explores three types of problems which frequently arise when advocates of human rights try to convert a claim into a human right. These are philosophical problems (people differ greatly in how they conceptualise human rights), legal problems (it is an accident of legal history that human rights became a term of art in international law before it did so in national law, meaning that even today some human rights activists maintain the view that only states can be accused of violating human rights) and practical, or implementational, problems (where there difficulties with the remedies made available to victims of human rights abuses).

Keywords: human rights; conceptions of rights; Bill of Rights; non-state actors

Introduction

Thanks very much for that kind introduction. I’d like to begin by reiterating very sincerely that those of us in the Law School who knew Stephen still miss him very much. His intellect and his good humour are unforgettable, and it is therefore all the more a privilege and a pleasure to be again giving the lecture established in his name. I only hope I can do his memory justice.

The title of my talk is ‘The problems with human rights’. It was partly chosen as a provocation, an attempt to lure an audience. But I want to make it clear at the outset, lest there should be any misunderstanding, that I am not here to argue that human rights are themselves a problem. Far from it, for I remain a strong supporter of human rights. Instead, I want to address the question of why it is often so difficult for those who are advocates for human rights to ensure that human rights are appropriately protected *by law*. I want to suggest that there are basically three types of problem which hinder the achievement of that goal. I’ll cover each of them in detail, but let me start by listing what they are (and please bear in mind that the categories overlap a little).

Firstly, there are *philosophical problems*. These arise from the fact that, when asked to really think about it, people tend to differ over what they think human rights are. Their conceptualisation of human rights varies greatly. Putting this another way, people disagree over what human rights *are for*.

Secondly, even if we could all agree on how to conceptualise human rights (and I do not think that is at all likely), there are still problems over how to express human rights *in law* – i.e. *legal problems*. Which human rights are already well recognised in law? What are the limits to those rights? And who should be held accountable for breaches of those rights?

Thirdly, even if the law precisely defines a human right, there are often problems associated with how to protect that right: what mechanisms are available for identifying whether it has been violated, and what remedies should be provided to victims of the violation and to prevent similar violations in the future? I am calling these *practical (or implementational) problems*.

So, having roughly mapped out my territory, let me spend the next 35 minutes or so reflecting in more detail on the various problems.

Philosophical problems

There is a huge literature on this topic and innumerable accounts have been presented as to what really lies at the base of the concept. A Professor of Law and Anthropology at the University of Sussex, Marie-Bénédicte Dembour, has written a great book entitled *Who Believes in Human Rights?*,¹ where she examines four of the myriad ways in which human rights can be conceptualised. She first discusses the utilitarian approach, according to which a human rights claim should be supported if doing so adds to the sum total of human happiness in society. She then explains the Marxist approach, which supports the protection of individual rights only if doing so ensures that every member of society gives according to his or her abilities and receives according to his or her needs. The cultural–relativist approach maintains that in different societies at different times particular human rights should be recognised, such as the right to engage in certain rituals, gather in certain places or commemorate certain deeds. Finally, Dembour expounds the feminist approach to human rights. This seeks to redress actual and perceived imbalances in the way human rights are enjoyed by men but not by women, as well as claiming protection for rights that only women could have, such as the right to terminate a pregnancy.

There are numerous other ways of conceptualising human rights. Some people are convinced that they derive from morality, whether the content of that morality is determined divinely (which is the so-called natural law approach, still supported by some judges and legal academics in the Republic of Ireland, by the way) or whether the morality derives from another core value such as ‘personhood’, as suggested by the American philosopher James Griffin,² or ‘dignity’, something which my colleague Christopher McCrudden has written about.³

Today’s so-called ‘critical legal scholars’ tend to conceptualise human rights as a kind of sop, granted to individuals to make up for the negative aspects of capitalism, colonialism and globalisation. The Kenyan-born scholar Makau Mutua talks sarcastically about human rights being something which the liberal West has generously ‘gifted’ to the developing world. He castigates human rights activists for portraying themselves as ‘saviours’, riding to the rescue of victims who have been deprived of their agency by

1 Cambridge University Press 2010.

2 *On Human Rights* (Oxford University Press 2009).

3 E.g. ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655–724. See too C McCrudden (ed), *Understanding Human Dignity* (British Academy 2013).

'savages'.⁴ Twenty years ago the Harvard-based scholar David Kennedy suggested that things were already so awry that the human rights movement had itself become part of the reason why there were still so many serious human rights violations in the world.⁵

The most recent critiques of human rights focus on the failure of the concept to deal with the worldwide problems of poverty, inequality and climate change. These frustrations are evident in book titles such as Eric Posner's *The Twilight of Human Rights Law* (Oxford University Press 2014), Stephen Hopgood's *The Endtimes of Human Rights* (Cornell University Press 2015), and Samuel Moyn's *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018).

The common thread running through many of these critiques is that protecting individual rights, while it may do a lot to protect the interests of liberal elites, is not successful at tackling deep-rooted structural flaws in the international world order. In the year 2000, in part acknowledgment of that reality, the UN adopted a set of eight Millennium Goals, to be reached by 2015.⁶ They included the eradication of extreme poverty and hunger, the delivery of universal primary education, the promotion of gender equality and the reduction of child mortality. Needless to say, the goals were not reached within the timescale envisaged, so in 2015 a further set of 17 Sustainable Development Goals was adopted, targeted for achievement by 2030.⁷

It is too early to say whether the focus on setting goals and changing policies has had a greater impact on systemic human rights violations than the international human rights movement has had, but that may well turn out to be the case. Of course, the one approach does not preclude the other. A human rights approach can still have some kind of effect on the systemic problems in question. My colleague Kathryn McNeilly, in her challenging book entitled *Human Rights and Radical Social Transformation*,⁸ makes a plausible case for the view that a human rights approach to fundamental problems *can* facilitate radical social change.⁹

I've briefly surveyed different ways in which human rights can be conceptualised in order to demonstrate how problematic it can be for human rights advocates to gain

4 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201–245. See too T Evans, 'International Human Rights Law as Power/Knowledge' (2005) 27 Human Rights Quarterly 1046–68; C McCrudden, 'Human Rights Histories' (2015) 35 Oxford Journal of Legal Studies 179–212.

5 'The International Human Rights Movement: Part of the Problem?' (2001) 3 European Human Rights Law Review 245; reprinted at (2002) 14 Harvard Human Rights Journal 101–126. He updated this in a later book chapter: 'The International Human Rights Regime: Still Part of the Problem' in O W Pedersen (ed), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2013).

6 There were eight of them: (1) to eradicate extreme poverty and hunger; (2) to achieve universal primary education; (3) to promote gender equality and empower women; (4) to reduce child mortality; (5) to improve maternal health; (6) to combat HIV/AIDS, malaria and other diseases; (7) to ensure environmental sustainability; and (8) to develop a global partnership for development.

7 There are 17 of these, the targeted completion date being 2030. They include clean water and sanitation, affordable and clean energy, decent work and economic growth, responsible consumption and production. See <www.un.org/sustainabledevelopment/sustainable-development-goals>.

8 Routledge 2017. The author's approach is premised on the idea that human rights can be reconceptualised 'as inherently futural and capable of sustaining a critical relation to power and alterity in radical politics'.

9 A not dissimilar approach has been advocated in several articles by Paul O'Connell from SOAS in London, although his manifesto is more avowedly Marxist in tone: see 'On the Human Rights Question' (2018) Human Rights Quarterly 962–988; 'Brave New World. Human Rights in the Era of Globalization' in M Baderin and M Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Taylor & Francis 2016) ch 10; 'Human Rights: Contesting the Displacement Thesis' (2018) 69 NILQ 19–35; 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review 532–54.

support for human rights claims, especially novel ones. Not everyone shares the same idea of what a human right is. I often wonder whether unionists and nationalists in Northern Ireland have the same concept in their heads. My next-door neighbour in the Law School, Louise Mallinder, recently published a piece which argues that unionists have adopted strategies towards the application of human rights law which are aimed at promoting their own political interests.¹⁰ I dare say similar evidence could be adduced to show that nationalists have done the same. It is interesting at the moment to see how unionists and nationalists are reacting differently to suggestions that some kind of line should be drawn under all investigations, prosecutions, inquiries and inquests relating to the troubles in Northern Ireland. There seems to be increasing support for those suggestions in the very highest corridors of power and spheres of influence. There are, indeed, human rights arguments for and against drawing such a line. Back in 1996, for example, the Constitutional Court of South Africa ruled that even access to justice has to take a back seat if what is in the front seat is the reconciliation of a country's people.¹¹

But, to end this brief examination of philosophical problems relating to human rights, let me run by you some of the recent candidates proposed for human rights status so that you can reflect in your own time on whether they do deserve to be recognised as human rights: the right of childless couples to receive free IVF treatment; the right of sex offenders to receive chemical castration treatment (because they genuinely want to have their sex drive reduced);¹² the right of parents to have their baby sons circumcised; the right of parents to have their daughters' genitals cut; the right to die with dignity; the right to have free access to the internet; the right of prisoners to vote in elections; the right of 16- and 17-year-olds to vote in elections; the right 'to be forgotten' (so that internet search engines cannot continue to spew out information about your past, even if it is true);¹³ the right to a uniform basic income; the right to migrate to whichever country you want to go; the right not to be discriminated against merely on the basis of where you live in a country; the right to a higher life expectancy than your parents had; and, last but by no means least, the right to clean air. That is quite a mixed bag, and I would suggest that where you stand on whether any of those claims is a genuine human right or not will depend very much on your understanding of what the purpose of a human right actually is.

Legal problems

Let me turn now to some legal problems facing human rights advocates. The first of these, paradoxical though it might seem, is that 'human rights' became a term of art in international law before it did so in national law, even though it was in the national law of France that the concept first saw the light of day. The legal document which broke new ground was the Declaration of the Rights of Man and the Citizen endorsed by the French National Assembly on 26 August 1789. It continues to be part of France's Constitution today and still makes for inspiring reading. It highlights just four specific rights – the right to liberty, to property, to security and, most surprisingly perhaps, to resist oppression. It defines liberty as the permission to do anything you want to do so

10 'Metaconflict and International Human Rights Law in Dealing with Northern Ireland's Past' (2019) 8 Cambridge International Law Journal 5–38.

11 *AZAPO v President of the Republic of South Africa* 1996 (4) SALR 671 (CC).

12 This has been an issue in the Czech Republic.

13 See the decision of the Court of Justice of the European Union (CJEU) in *Google Spain SL v Agencia Española de Protección de Datos and González* (Case C-131/12; 13 May 2014). For commentary on two recent CJEU decisions expanding upon the 2014 decision, see <<https://privacylawblog.fieldfisher.com/2019/the-right-to-be-forgotten-and-the-eu-court-of-justice-round-2/>>.

long as it does not harm anyone else. Two years later a more specific Bill of Rights was adopted by the young USA, and that document too is very much alive and well, although heavily amended. The Americans call those rights constitutional rights, not human rights. And for over 70 years, let us remember, America lived with its Bill of Rights while at the same time tolerating the practice of slavery. English common law, if we are honest about it, has never fully embraced the idea of human rights. From the seventeenth century onwards it recognised certain 'liberties' and 'freedoms', but it was not until the second half of the twentieth century that UK judges began to call these 'rights', and even today it is rare for a judge to categorise a common law right as a human right or a constitutional right; the furthest the judge might go is to label it a fundamental right.

What changed things dramatically for the concept of human rights was the world's reaction to the horrors of Nazism in the 1930s and 1940s. The Universal Declaration of Human Rights, issued on 10 December 1948, marked a seismic shift. In just 30 articles, and fewer than 1500 words, the United Nations set out a list of human rights 'to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights . . . and by progressive measures . . . secure their universal and effective recognition and observance'.¹⁴

The Universal Declaration has become the most translated document in history, now available in more than 500 languages. It asserts that human rights are values which need to be guaranteed by states to all individuals living in those states in order to preserve a minimum level of human decency. This was a huge development because until then international law required states to be beholden only to other states, not to any individuals. But, of course, the Declaration was only an *inspiring statement*, not a *binding agreement*, and it took a further 28 years before its provisions became obligatory for those states which had ratified the two subsequent UN treaties, or Covenants, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights. Today those two Covenants have been ratified by 173¹⁵ and 170¹⁶ states respectively, though the fact that China has not ratified the Civil and Political Covenant and the USA has not ratified the Economic, Social and Cultural Covenant tells you a lot about how states differ in the way they prioritise different rights. Moreover, in states which have ratified both Covenants, civil and political rights are generally much better protected than socio-economic rights.

A further point is that, very commendable though they are, the two UN Covenants reinforced the idea that human rights are rights which can be claimed only against states and not against any other entity or individual. That was not an inevitable deduction from the Declaration, which is specifically addressed not just to all peoples and nations but also, as I have said, to 'every individual and every organ of society'. The Covenants could have, but did not, embed the idea that human rights are *values* which need to permeate all levels of society and be legally vindicated even in disputes between private entities. The internationalisation of human rights law has therefore given the impression that only states can violate human rights, not anyone else – not non-state armed groups, not multinational companies, not trade unions, not the press, not you, I or any other individual.

This unintended consequence of the two Covenants has been exacerbated because the UN has developed seven additional 'core' human rights treaties which adopt the same

14 These are the last words of the Preamble to the Universal Declaration of Human Rights.

15 Not e.g. Malaysia, Myanmar, Saudi Arabia or the UAE. China has signed but not ratified.

16 Not e.g. Malaysia, Myanmar, Saudi Arabia, the UAE, Botswana or Mozambique. The USA has signed but not ratified.

approach. In chronological order they deal with racial discrimination (1965), discrimination against women (1979), torture and ill-treatment (1984), children's rights (1989), the rights of migrant workers and their families (1990), the right to be protected against enforced disappearance (2006) and the rights of persons with disabilities (2006).

And it is not only the UN which has sponsored human rights treaties. Amongst the other intergovernmental bodies to have done so are the Council of Europe and the EU. The treaty which is most relevant to the islands of Britain and Ireland, of course, is the European Convention on Human Rights (the ECHR).

So, with all of these international human rights treaties in place, it is easier than ever to identify the human rights that can be claimed against states under international law. And that is a very good thing. But international law is largely silent on the responsibility of entities other than states to protect human rights.

Some critical legal scholars are not happy with that conclusion because they maintain that the international legal system is itself the product of overt and covert power structures, as well as of cynical political manipulation. Oona Hathaway at Yale University has demonstrated that many governments ratify human rights treaties simply to improve their image in the world and without any intention of properly implementing the treaties.¹⁷ My answer to such critics is that, whatever its faults, the international human rights system has still achieved a huge amount since the 1960s, and without it the victims of appalling mistreatment would be even more numerous today than they already are.

Before leaving the topic of international human rights law, it is worth mentioning the huge problem of when does a state's non-compliance with its human rights obligations become so grave that it is acceptable under international law for other states to use force against that state to protect the people living there from suffering further violations? Let us not forget that in the 1970s the world refused to use force to stop either Idi Amin from slaughtering some 500,000 people in Uganda or the Khmer Rouge from massacring more than a million-and-a-half people in Cambodia. The UN did not cover itself in glory prior to the killing of about 800,000 people in Rwanda in 1994, and UN troops shamefully stood by while 8000 Muslim Bosniaks were murdered by Serbian forces at Srebrenica in 1995. This year's review into the UN's inaction prior to the ethnic cleansing of the Rohingya people in Myanmar in 2017 also makes for depressing reading.¹⁸

To achieve reform in this area we clearly need changes to the UN's Charter and/or to its veto system. Alternatively, a brand new multilateral treaty needs to be negotiated on the protection of people against grave and systemic human rights violations by their own governments. In 2005 the UN *did* unanimously commit to a 'Responsibility to Protect' doctrine,¹⁹ which was aimed at preventing genocide, ethnic cleansing, war crimes and crimes against humanity, but, alas, this commitment has not yet made the world a noticeably safer place. The people of Turkey, Syria and Yemen can certainly testify to that – those that are still alive that is.

Turning now to legal problems with human rights closer to home, let us consider the uncomfortable truth that, sometimes, human rights conflict with each other or need to be

17 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935–2042, online (revised 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=311359>.

18 Gert Rosenthal, *A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018*, 29 May 2019 <www.un.org/sg/sites/www.un.org.sg/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf>.

19 The 2005 World Summit Outcome Document, paras 138 and 139 <www.unsystem.org/content/2005-world-summit-outcome-document-16-september-2005>.

suppressed in order to allow other values to flourish. In the case of *Child S* in 2004, the House of Lords held that an eight-year-old boy's right to anonymity had to take second place to the right of the public to know that the boy's mother was being tried for killing his older brother.²⁰ During election periods, as we know only too well at present, what can or cannot be broadcast on radio or television has to be restricted in order to preserve the fairness of the electoral process,²¹ and, of course, political advertising on those media is banned at all times (though not on the internet).²²

I think our law has adopted a sensible approach when considering such limitations to rights. It requires the limitation to be in pursuit of a legitimate aim, to be necessary in a democratic society and to be proportionate, although reasonable people can reasonably disagree over at least one of those requirements, namely the test of proportionality. A good example is Belfast's 'gay cake' case between Gareth Lee and Ashers Bakery, where the right of someone not to be discriminated against on the basis of his sexual orientation or political opinion needed to be weighed against the right of a business not to be forced to express a political message it did not agree with. Where to strike that balance divided human rights activists up and down the country, but at the end of the day the five Supreme Court Justices who dealt with the dispute, including the two most liberal Justices – Lady Hale and Lord Kerr – came down on the side of the bakery.²³ Mr Lee, however, has lodged an application with the European Court of Human Rights, and we await with interest what view that court will take, probably within the next year.

We are now so inured to the way the European Court operates that we forget it was a total novelty when it was established 60 years ago this year. Until then no state could be held to account in an international court by an individual, only by another state. The impact of the European Court's case law has been huge, especially in the UK, where the ECHR was effectively made part of UK domestic law when the Human Rights Act 1998 came fully into force in October 2000. But, again, a possible downside of these welcome developments is that they have skewed still further the concept of human rights as one which pertains only to bad things done by states. In the European Court and under the Human Rights Act it is always the state, or one of the state's public authorities, which is the party trying to justify the alleged breach of rights. The extension of international law to individuals' complaints has not been matched by an extension to the range of potential respondents to those complaints.

It is easy to see how we've got to this position. Human rights law is a relatively new kid on the block, and it developed at the international level because there was a huge gap in the mechanisms available for holding states to account for mistreating their own people. Mistreatment of people by other entities was dealt with by national law under the headings of criminal law and civil law. Those laws were not portrayed as protecting human rights, but, in reality, that is what they were doing.

So, even though national law does not explicitly label murder, assault or damage to property as breaches of human rights *law*, they are to my mind still clear breaches of human rights *values*. It is therefore hypocritical, or at the very least an example of highly selective reasoning, for someone to call what a representative of the state does when he or she kills or injures someone unjustifiably (i.e. not in self-defence or in defence of

20 *In re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593.

21 *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

22 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

23 *Lee v Ashers Baking Company Ltd* [2018] UKSC 25, [2019] 1 All ER 1.

others) a violation of human rights but to refuse to use that expression when talking about a killing or injury perpetrated by a private individual or organisation. Human rights NGOs were slow to pick up on this point until comparatively recently, but it is now mainstream thinking that non-state actors commit human rights violations too. There are already several books analysing such violations.²⁴

In two fields, in particular, human rights are now applied in private contexts where they used not to be. One is the field of domestic violence. A senior lecturer in this Law School, Ronagh McQuigg, has written extensively on how a human rights approach to domestic violence has the potential to greatly reduce its incidence.²⁵ International treaty law now recognises that what a victim of domestic violence suffers is a violation of his or her rights and the state in question is therefore under a duty to try to prevent such violence and thoroughly investigate it when it occurs.

The other new field is that of businesses and human rights.²⁶ In view of the significant power of many of today's multinational corporations, some of them much wealthier than sovereign states, it would be perverse not to require them too to protect human rights. The shocking behaviour of the Union Carbide Corporation, which led to the loss of some 2000 lives in the Indian city of Bhopal in 1985, was an important turning point in this context, as was the UN's endorsement of the Ruggie Principles in 2011.²⁷ But, as we saw with the collapse of the Rana Plaza building in Bangladesh in 2013, some commercial enterprises continue to pay little heed even to the right to life of their employees. More than 1100 people died in that calamity.

A remaining challenge in the field of non-state actors and human rights is to find a way of ensuring that armed groups which violate human rights can somehow be made accountable for their violations. The International Criminal Court is beginning to make some progress on that front, but only slowly. A decision of the UK's Supreme Court last week suggested that the UN's Convention Against Torture might be enforceable against a member of a non-state armed group if it was effectively acting as a governing authority in a particular community at the time.²⁸ Even in the absence of legal proceedings, however, it is already perfectly proper to describe what non-state armed groups do as violations of human rights. There may well be a human right to resist oppression, but limits must still be placed on the kinds of action that can be justified under that heading.

Practical problems

I now turn, finally, to the third type of problem which besets human rights – practical problems. I want to highlight three of these.

24 See the books by Nadarajah Pushparajah, *Human Rights Obligations of Armed Non-State Actors in Non-International Armed Conflicts* (Wolf Legal Publishers 2016); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005).

25 See e.g. 'Is it Time for a UN Treaty on Violence against Women?' (2018) 22 *International Journal of Human Rights* 305–24; 'The CEDAW Committee and Gender-Based Violence against Women: General Recommendation No 35' (2017) 6 *International Human Rights Law Review* 263–78; *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge 2017).

26 See e.g. Dorothee Baumann-Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Routledge 2016); Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

27 UN's Guiding Principles on Business and Human Rights <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

28 *R v TR4* [2019] UKSC 51; see the post on this case by Katharine Fortin on the blog of the European Journal of International Law, 20 November 2019 <www.ejiltalk.org/author/katharinefortin/>.

First, many human rights violations are identified and condemned by international bodies, but, because of the lack of an effective enforcement system, the violations go unremedied. This applies even to decisions taken by the European Court of Human Rights. In the latest annual report of the Council of Europe's Committee of Ministers, which oversees the execution of the court's judgments, we read that 'persistent shortcomings in the effective national implementation of the Convention remain a major concern'.²⁹ Compensation awards remain unpaid, recommended investigations remain unfinished, and changes to laws remain unmade.

There are also problems with the enforceability of conclusions reached by the monitoring committees established under each of the nine UN human rights treaties I have already mentioned. Those committees issue observations and recommendations on self-assessments which states submit to the committees every few years, and they also (for states that have accepted the practice) take decisions on complaints brought to the committees by disaffected residents of states.³⁰ But apart from *political* pressure, there are no legal mechanisms in place to ensure that the states concerned comply with the committees' recommendations and decisions. There is also a problem in that the remits of the committees often overlap, and the work that they do sometimes repeats that carried out by similar committees established under European human rights treaties. The UN treaties also issue what are called 'General Comments' on the way their treaties should be interpreted: these comments are not always the product of widespread consultation, and at times they lend themselves to the accusation that the committees are over-reaching themselves, thereby damaging their legitimacy.

It is worth noting in passing that the judgments and opinions of the International Criminal Court and the International Court of Justice do occasionally touch upon human rights, but in most cases they do not. Despite the campaigning of eminent human rights activists such as Manfred Nowak in Austria, there is not yet a UN Court of Human Rights, nor is the prospect of one anywhere on the horizon.³¹

The second practical problem relates to the remedies available to victims of human rights abuses committed by non-state actors.

As it is part of my thesis that national criminal and civil law do implicitly but not explicitly protect human rights, it follows that whatever remedy is made available to the victims of breaches of those laws should include some kind of acknowledgment of the human rights element of the crime or civil wrong. Believe it or not, it is already the law in this jurisdiction, as it is in England and Wales, that whenever a court convicts a person of a crime it must give reasons why it has decided not to order the convicted person to pay compensation to the victim of the crime.³² I could be mistaken, because I could not find any relevant statistics on this, but my strong feeling is that, to borrow from Hamlet, the obligation to consider the ordering of compensation is much more honoured in the breach than in the observance. To the extent that it *is* honoured, I have never heard of a

29 *12th Annual Report of the Committee of Ministers' Supervision of the Execution of Judgments and Decisions of the European Court* (Council of Europe Committee of Ministers 2018) 7.

30 The only exception is the Committee on Migrant Workers: an individual complaints mechanism is pending and will begin operating when 10 states parties have made the relevant declaration under Article 77 of the 1990 Convention on the Rights of Migrant Workers. So far only four states parties have made that declaration.

31 See e.g. M Nowak, 'On the Creation of a World Court of Human Rights' (2012) 7(1) *National Taiwan University Law Review* 257–91 also at <<https://ssrn.com/abstract=2118352>>. See too Ignacio de la Rasilla, 'The World Court of Human Rights: Rise, Fall and Revival?' (2019) 19(3) *Human Rights Law Review* 585–603.

32 *Criminal Justice (NI) Order 1994*, Art 14(1).

court awarding such compensation in a criminal case because the victim's human rights have been breached, although I cannot see anything in the wording of the legislation to prevent it from being interpreted in that way.³³

For examples of deficiencies in the practical implementation of our human rights law we need look no further than at the arduous struggles of two groups of victims here in Northern Ireland. The first comprises victims of the widespread child abuse which the recent Hart Inquiry found had occurred in numerous public and private institutions between the foundation of the state and 1995.³⁴ Fortunately, an Act to provide compensation for those victims obtained Royal Assent just hours before Parliament was dissolved earlier this month³⁵ and a Redress Board is soon to be established under the chairmanship of Mr Justice Colton. It is good, too, that at least one of the churches which ran the children's institutions has already pledged to contribute to the compensation fund.

The second group of victims consists of those who suffered as a result of supposedly politically motivated crimes committed during the conflict here from 1969 onwards. Proposals for their compensation are out for consultation at the moment.³⁶ I hope that, amongst others, the many thousands of victims of 'paramilitary-style attacks' – better known as 'punishment shootings and beatings' – will successfully apply for payments under that scheme. It is just regrettable that the assets of the paramilitary organisations in whose names those attacks were carried out can probably not be tapped for contributions to that compensation fund.

My third and final point under the heading of practical problems has to do with the continuing call in some quarters for a Bill of Rights for Northern Ireland. I am not now going into the history of that call, and I acknowledge that there are respected human rights activists who are still very much in favour of the Westminster Parliament enacting such a Bill. My own view is that, while we do need some human rights reforms, we are not currently in a human rights crisis in Northern Ireland. The Human Rights Commission's latest Annual Statement on the human rights situation in Northern Ireland, which is very thorough,³⁷ does not support the notion that we are in crisis mode, and that was issued *before* the latest reforms relating to same-sex marriage and reproductive rights. I would be surprised if the Commission's Annual Statement next month talks of a crisis.

We do need reforms on several fronts, but focusing on a Bill of Rights is no longer the most efficient or effective way of achieving them. We require much stronger protection of the right to integrated education, removal of the exemption relating to school teachers from the law on fair employment, protection of older people from being discriminated against when accessing services, especially financial services, better guarantees around the use of Irish, and changes to our law on defamation so as to broaden the freedom of speech of journalists and researchers. All of those changes, along with others, can more swiftly be achieved by campaigning for separate pieces of legislation than by waiting for the big bang that an all-embracing Bill of Rights would

33 Compensation can be paid under s 8 of the Human Rights Act 1998, but only in limited circumstances.

34 The Inquiry's report is available at <www.hiainquiry.org/historical-institutional-abuse-inquiry-report-chapters>.

35 Historical Institutional Abuse (NI) Act 2019.

36 'A Legal Framework for a Troubles-Related Incident Victims Payment Scheme' issued by the UK government on 22 October 2019
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841467/VP_consultation_FINAL.pdf>.

37 'The 2018 Annual Statement'
<www.nihrc.org/uploads/publications/2018_Annual_Human_Rights_Statement.pdf>.

entail. We have enough political bones of contention in this place without continuing to squabble over one that has really very little meat on it.

Conclusion

In conclusion, let me sum up what I have been trying to argue in this talk, however inadequately. *Firstly*, it is not possible to reach a consensus on the most appropriate way in which to philosophise about human rights, so we ought not to allow disagreement over that issue to stop us from moving forward on the human rights front. *Secondly*, when deciding whether to accept that a novel claim should be given the label of a 'human right', we should look primarily at whether there is yet an international consensus that that claim can be embraced by a right already contained in a UN or Council of Europe treaty. *Thirdly*, if there is local consensus on a claim being recognised as a human right, even though it is not yet recognised at the international level, it should still be protected by law because how else can international consensus change if each jurisdiction does not contribute its own view to the collectivity of views? *Fourthly*, if human rights are values worth protecting, they should be protected not just against violations perpetrated by states but also against violations perpetrated by other organisations and individuals.³⁸ Equality law is so applied, so why not human rights law? The growing realisation that perpetrators of domestic violence, child abusers, exploitative businesses and non-state armed groups also violate human rights should make the concept more acceptable to those who are unduly sceptical of it in the first place because they perceive it as being confined to abuses committed by the state. *Fifthly*, more should be done at the legal level to ensure that the international system for implementing the recommendations and decisions of monitoring committees and international courts operates more effectively.³⁹ *Sixthly*, all victims of human rights abuses, especially abuses that leave long-lasting scars, physical or mental, should be entitled to have their status as human rights victims officially recognised and to benefit from more effective remedies, not necessarily confined to monetary compensation. *Finally*, what matters as far as the protection of human rights in domestic law is concerned is not the vehicle which the law uses to confer its protection, but rather the effectiveness of the protection actually granted.

I do not know how many of those conclusions Stephen Livingstone would have agreed with, but I am confident he would have given me a fair hearing. Thank you for doing likewise.

38 In some countries human rights provisions do have what is called 'horizontal' effect. South Africa's 1996 Constitution, for instance, provides in s 8(2) that: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' And in s 39(2) that: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

39 EU law, for example, allows fines to be imposed on entities, including states, if they breach certain provisions of EU law such as those relating to competition law or the rules on state aid.

