**Can Human Rights Law Live Up to Its Promises?**

In this short Article I demonstrate that vast the number of international human rights institutions that were developed after the Second World War fail to protect human rights properly. Predominantly voluntary compliance and state sovereignty restrict the reach of international human rights institutions when they are needed most: during human rights crises. The human rights crisis in Belarus which has been unfolding since 2020 is an illustration of this inability to impact states which are unwilling to cooperate. This paper argues that international human rights machinery needs to be reformed as it is not working as it was intended. The reforms need to focus on improved enforcement mechanisms, increased impact on the ongoing situations, decoupling human rights from politics and focusing on key important rights rather than spreading their scope too thinly.

**Introduction**

After the Second World War, significant progress has been made in the area of creation of international human rights protection mechanisms. The idea behind these mechanisms was to ensure that massive human rights violations that happened during the War would never happen again.[[1]](#footnote-1) However, the reality was and still is quite different to this aspiration; global and regional institutions of human rights protection cannot prevent human rights violations. Although there has not been a new global war, international crimes and massive human rights violations do happen regularly.[[2]](#footnote-2) Does it mean that human rights law and the institutions that supervise it fail in delivering its promise? This opinion piece is a tribute to Jonathan Cooper who was a true believer in human rights and who did everything in his power to ensure the effectiveness of human rights law.

Academic and practicing lawyers are often asked questions related to the effectiveness of human rights institutions. How can human rights law help when it is needed here and now and not in five/ten/fifteen years? Who can protect people from brutal regimes? How can the promise of the primacy of human rights be realised? Can the international community do anything when the state is in crisis? In this short opinion piece, I will argue that the human rights academics and activists need to be brutally honest and say that as things stand at the moment, human rights can only work when the state is operational, the economy is working fine and there are no major social crises. International human rights instruments are hardly ever effective when there is no will and desire coming from the states to engage and to comply. Human rights law is incapable of stopping brutal violations of human rights and such expectations should not be created because otherwise people’s trust in human rights will be completely lost and even the greatest supporters of human rights will stop believing in them. In reality, international human rights law can only acknowledge and compensate for human rights violations that happened in the past.

This short opinion piece will first briefly outline the mechanisms that were created to ensure human rights protection. Then it will see if their creation was to any degree effective in the human rights crisis in Belarus. Finally, I will consider whether human rights law is fit for purpose or whether we should reconceptualise our understanding of human rights law altogether.

**Proliferation of Human Rights Mechanisms**

The Universal Declaration of Human Rights (UDHR) was perhaps the trigger that initiated the creation of a high number of human rights documents that were adopted globally, regionally and nationally. The UDHR only set out a particular corpus of human rights and already in the late 1940s when the European Convention on Human Rights (hereinafter, the ECHR) was drafted, it was clear that there should be a mechanism of supervision of compliance with the human rights obligations. Human rights declarations are not be enough to ensure human rights protection. Here, their formal legal status – whether purely declaratory or legally binding – is not crucially important. Legally binding mechanisms are often as easily dismissed as the declaratory ones if they are not followed by the supervisory mechanism and effective sanctions for non-compliance.

There are plenty of examples that prove that such formal adherences to human rights might mean almost nothing in real terms. Among well documented cases is the fact that the Stalin constitution of 1936 contained an extensive set of human rights.[[3]](#footnote-3) Having said that, this Constitution utterly failed to prevent the Great Terror (1937-1938) when millions of people were killed or sent to the Gulag.[[4]](#footnote-4) Another example from much more recent history is Turkmenistan that signed and ratified almost all UN human rights conventions[[5]](#footnote-5) but according to Freedom House, has a score of 2 out of 100 in human rights protection ranking, making it among the least human rights compliant countries in the World (for comparison, the score of North Korea is 3).[[6]](#footnote-6) So, entering into legally binding treaties for the protection of human rights does not guarantee that human rights will in fact be respected.

If simply setting out human rights is not enough, some international treaties envisage an instrument of supervision. The ECHR created the European Court of Human Rights (hereinafter, the ECtHR) as such instrument; the UN system of Human Rights protection has a plethora of different institutions. They include various reporting mechanisms that require states to submit their reports on how well they comply with human rights. They also include systems of individual petition, country visits, special rapporteurs and many others. There are other regional organisations which also have some human rights protection mechanisms. For example, the Organisation for Security and Cooperation in Europe (OSCE) initiated a Moscow mechanism[[7]](#footnote-7) according to which the rapporteur prepared a report detailing human rights violations in Belarus.[[8]](#footnote-8) Some mechanisms of human rights protection also exist within the Commonwealth of Independent States but this institution has hardly ever been used in practice. All these are also not a panacea against human rights violations. One of the key reasons for their modest effectiveness is that the failure to comply with the recommendations and judgments is rarely followed by any meaningful sanctions. The lack of sanctions can be explained by the fact that states have to agree to all the mechanisms that are established as a part of human rights protection machinery. They cannot be forced to accept any form of responsibility. And therefore, unsurprisingly they are not eager to create additional effective enforcement regimes by themselves for themselves.

This is problematic because sovereign states are not very keen on losing any of their sovereignty. The difficulty with securing agreement is also that many countries have widespread human rights issues and by agreeing to give sharper teeth to human rights institutions they open themselves up to external control. Plenty of ink was spilled in the discussions related to for instance, the reform of the UN human rights machinery[[9]](#footnote-9) but the oft-repeated conclusion is that any reform will make the system even less effective than what we have now. Despite various international institutional routes designed to protect human rights, the reality is that in times of crisis the state authorities can either simply ignore all the decisions and claims of human rights institutions or, if they have sufficient political weight, even prevent many of these instruments from engaging with the situation. The system is often slow and cannot impact the ongoing crises. This criticism can be directed to all human rights institutions including the ECtHR[[10]](#footnote-10) which predominantly deals with human rights violations that have already happened, meaning that its impact on ongoing situations is limited.[[11]](#footnote-11)

So, despite a wide variety of human rights institutions, it is unlikely that they can have a meaningful impact on a human rights crisis if the state in which this crisis is taking place has no interest in cooperating with them. The question of whether the international community is capable of enforcing any human rights standards needs to be transferred from the realm of law to the realm of international politics. The human rights crisis in Belarus clearly demonstrates how little international human rights law can do to ameliorate an ongoing human rights crisis.

**Human Rights Crisis in Belarus**

Jonathan Cooper has never been to Belarus. This however has not stopped him from supporting Belarusian lawyers and raising awareness about the events that take place there. He was the brain and the heart of the series of seminars and workshops that brought together prominent lawyers, academics and politicians from Belarus, UK and other countries. These events looked at the human rights crisis that started in summer 2020 and continues up until now. The question that was in the forefront of all these discussions was what international human rights law and lawyers can do to prevent violations and protect human rights in Belarus. This section looks at the development and depth of the human rights crisis there.

Belarus has only been truly democratic for a couple of years after the collapse of the Soviet Union. In 1994, the first presidential elections were won by Alexander Lukashenko. Soon after, he personally took control over all branches of power, changed the constitution through a series of controversial referenda and continued ruling the country singlehandedly until 2020. In Belarus, the president is above all other branches of power: he appoints all the judges in the country. Most judges are appointed for a period of five years and it is therefore not surprising that the judiciary in the country is not independent. The President appoints a significant number of the members of the upper chamber of the Belarusian parliament while the elections to the lower chamber are carefully controlled.

In August 2020, new presidential elections resulted in an unprecedented level of political activity in Belarus. Peaceful rallies and demonstrations quickly spread across the country. The elections were followed by mass protests which were violently dispersed by the police and military forces. Hundreds of protesters were arbitrarily arrested, ill-treated, and then forced to emigrate.[[12]](#footnote-12) In August and September 2020, the Belarusian authorities evidently violated almost all civil and political rights, there were thousands of victims.

Belarus is not a party to the Council of Europe or the European Union and the reaction of these organisations was very slow and weak.

One might suggest that human rights law is unable to impact ongoing events but it can provide compensation to the victims and force the governments to effectively prosecute the perpetrators of the past. This is however not immediately evident. More than a year has passed, at the moment of writing, since the events of August 2020 and no tangible results were achieved by various human rights institutions that tried to investigate the claims of torture, for example. Moreover, the Belarusian authorities continue violating human rights en masse. The Belarusian regime has ended up in the headlines of the World Media quite a few times since the mass protests in August 2020. What captured this attention was the landing of the Ryanair flight that was going to Lithuania and it was forcefully grounded in Belarus. The opposition journalist Roman Protasevich, who was on board, was arrested.[[13]](#footnote-13) Needless to say, these actions of the Belarusian authorities are very questionable from the perspective of international law. The ongoing violation of human rights of undocumented migrants that is happening on the border between Belarus and Poland is still unresolved.[[14]](#footnote-14)

Since August 2020, dozens of journalists, political activists, and human rights defenders remain in prison. Criminal cases against them continue to be filed and they are sentenced to imprisonment. Recently, human rights defender Leonid Sudalenko, who provided legal advice to hundreds of victims of human rights abuses and won numerous cases in the UN Human Rights Committee including those were he was a victim[[15]](#footnote-15) was sentenced to three years in prison.[[16]](#footnote-16) The UN special rapporteur on Belarus published a few reports on human rights abuses in Belarus[[17]](#footnote-17) but they barely have any impact on the situation. Moreover, she is not even allowed to visit Belarus. There are plenty of examples like this. The UN bodies were also not particularly effective because the UN is full of countries with extremely problematic human rights efforts who can block many effective measures.

If anyone in Belarus were hoping that international human rights machinery would prevent human rights violation by the Belarusian authorities, they had to face a bitter disappointment. The EU and some other countries introduced economic sanctions against the Belarusian authorities, but I do not consider effectiveness of the sanction regime[[18]](#footnote-18) in this opinion and only concentrate on the human rights law.

**The Long Game?**

Does it actually help the victims of human rights violations that international human rights law might acknowledge the violations committed in their respect? Is it better than nothing that there is a chance that the victims might get compensation at some point in a distant future? It is unlikely to be so, if people are tortured, arrested and forced to flee. The distant promises are not enough. The global human rights system requires a structural overhaul. Those who warn that the system might end up being even worse after such an overhaul need to explain why one should preserve a system that is not operating properly. I will now try to consider the key reasons why human rights law is unable to substantively remedy human rights violations, especially systemic and structural ones. This analysis is not comprehensive but highlights some areas for future research and innovative thinking and perhaps reform.

*Lack of enforcement.* Human rights enforcement is frustratingly voluntary. The failures to comply with the opinions and recommendations of human rights committees are not followed by any consequences beyond naming and shaming. It seems that naming and shaming can have an effect when the target state genuinely wishes to comply with human rights but there are some obstacles to enforcement; if the state deliberately breaches human rights systematically, some more punitive sanctions are required. There is no effective remedy in international human rights law against the latter states. From this perspective, an even more effective system of enforcement of human rights established by the ECHR also does not have much bite. The sanction of last resort for failure to comply with human rights would be suspension and then expulsion from the Council of Europe. In many cases such expulsion might be counter-productive as it closes the line of communication between the organisation and the state in question. There are no punitive financial sanctions in the world of international human rights law. Moreover, if the human rights institutions order the member states to pay significant compensation, such compensation often remain unpaid.[[19]](#footnote-19)

The lack of enforcement is explained by two key reasons. First, as I have already pointed out, the states are keen to maintain their sovereignty. Even despite the fact that the concept of sovereignty has been eroded in international law, it is still a significant principle that guides international relations. The link here is quite obvious, the states claim sovereignty over how their citizens are treated. Any limitations can be seen as interference. It seems that for human rights to be truly effective, the whole concept of sovereignty needs to be reconsidered. Second, the principle of reciprocity prevents advances in effective enforcement of human rights law. It means that all states that enter into agreement should allow the same level of sanctions vis-à-vis each other. In order to establish such a system, a high level of trust is required and trust is in very short supply in international relations these days. Moreover, there is no country in the world which does not have human rights issues. Therefore, allowing effective human rights enforcement means exposing everyone to some effective remedies. This possibility is hard to sell to the state authorities especially to those who are contemplating the possibility of human rights violations.

Another danger for the effective international human rights protection mechanisms is that the state in crisis might withdraw from a treaty and no remedies will be applied to them. This challenge is closely connected to sovereignty and inability to force states to be part of a particular mechanism of human rights protection. Belarus which remained outside the European system of human rights protection when all other European states joined is one example of such non-participation. Greece’s withdrawal from the Council of Europe in the 60-s[[20]](#footnote-20) is another illustrative example here.

*Extension of the scope of human rights beyond the minimal core.* The flip side of the sovereignty problem is the challenge that human rights institutions themselves create. Namely, some institutions engage in very creative interpretation of human rights. It means that human rights enter into some areas which would not have been seen as relevant to human rights in the past. One of the examples is the ever-extended scope of the right to private and family life as interpreted by the ECtHR. This leads to dilution of stigma associated with human rights violations and accusations that human rights institutions are engaged in political decision-making replacing democratically legitimate national authorities. Inflation of human rights and going beyond their core detracts the attention from brutal violations of the most fundamental human rights such as right to life, prohibition of torture, right to liberty and security and others.

*Post factum reaction*. Another challenge that undermines the effectiveness of international human rights law is that judicial and quasi-judicial human rights bodies deal with situations that happened in a relatively distant past. These bodies have a very limited ability to influence ongoing situations. In many cases, international human rights mechanisms can be triggered only after all national remedies are exhausted and this increases the delay.

The mechanisms of self-reporting can perhaps be seen as more up-to-date remedies as they require the member states to present reports of how human rights are respected in a particular country. However, these mechanisms are again frustratingly ineffective. Surely, the state parties present their achievements and are much more reluctant to showcase their problems; self-reporting is highly unlikely to be overly critical. Moreover, no consequences usually follow the failure to perform.

*Close proximity to politics*.

The effectiveness of human rights protection often depends on politics. The impact of the decisions of human rights institutions depends on how influential a particular country is. This argument is clearly illustrated by the Belarusian scenario, in which the actions of Belarus are backed up by the Russian authorities. The latter state is a permanent member of the UN Security Council and it makes effective influencing of the situation increasingly difficult.

This brief and inherently limited overview shows that international human rights law is unable to ensure human rights protection in a situation of crisis. The Belarusian scenario demonstrates it vividly. Human rights activists, lawyers, politicians and academics must either work to reform the whole system or accept that international human rights law can only work in relation to countries that wish to engage and fails to do anything meaningful in the situation of crisis.

Jonathan Cooper was a great human rights enthusiast, he would not like this pessimistic piece of mine. He would probably want to try to make positive changes, to reform and to make the whole system more effective. RIP Jonathan, your enthusiasm and commitment to human rights are deeply missed.

1. Bates E, The Evolution of the European Convention on Human Rights (Oxford University Press 2010), chapter 1. [↑](#footnote-ref-1)
2. International crimes and human rights violations in Rwanda (1994), Srebrenica (former Yugoslavia, 1995), more recently in Syria (from 2011), Myanmar (2016 and 2017) and plenty other places immediately come to mind. [↑](#footnote-ref-2)
3. Articles 118-133 Constitution (Fundamental law) of the Union of Soviet Socialist Republics, <https://www.marxists.org/reference/archive/stalin/works/1936/12/05.htm> [↑](#footnote-ref-3)
4. Khlevnyuk O. (1995) The Objectives of the Great Terror, 1937–1938. In: Cooper J., Perrie M., Rees E.A. (eds) Soviet History, 1917–53. Palgrave Macmillan, London. [↑](#footnote-ref-4)
5. Ratification Status for Turkmenistan <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=180&Lang=EN> [↑](#footnote-ref-5)
6. Turkmenistan. Freedom in the World Report. <https://freedomhouse.org/country/turkmenistan/freedom-world/2021>. [↑](#footnote-ref-6)
7. “The Moscow Mechanism, adopted at the third stage of the Conference on the Human Dimension in 1991, complements and strengthens the Vienna Mechanism. It provides the option of sending missions of experts to assist participating States in the resolution of a particular question or problem relating to the human dimension.” See more, <https://www.osce.org/odihr/20066>. [↑](#footnote-ref-7)
8. OSCE Rapporteur’s Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus. <https://www.osce.org/odihr/469539>. [↑](#footnote-ref-8)
9. See for example, O’Flaherty M, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 *Human Rights Law Review* 319; Surya P. Subedi, The Effectiveness of the UN Human Rights System (Routlege, 2017); Morijn J, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) 58 *Netherlands International Law Review* 295. [↑](#footnote-ref-9)
10. The ECtHR is perhaps the most effective regional human rights institution. [↑](#footnote-ref-10)
11. In the context of the ECtHR, it can only impact the ongoing situation when it issues the so-called interim measures (injunctions) that prevent states from worsen the ongoing situation of the applicant. However, interim measures can only be used sparingly and in case of the most serious violations. See, Kanstantsin Dzehtsiarou and Vassilis Tzevelekos, Interim Measures: Are Some Opportunities Worth Missing? (2021) 2 *European Convention on Human Rights Law Review,* 1. [↑](#footnote-ref-11)
12. Report of the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin. <https://undocs.org/A/HRC/47/49>. [↑](#footnote-ref-12)
13. OHCHR Press briefing notes on Belarus, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27110&LangID=E>. [↑](#footnote-ref-13)
14. Belarus-Poland crisis: Human rights of trapped migrants ‘paramount’. <https://news.un.org/en/story/2021/11/1105672> [↑](#footnote-ref-14)
15. See, for example, Sudalenko v Belarus, Communication No. 1750/2008, 14 March 2012; Leonid Sudalenko v Belarus, Communication No. 2114/2011, 22 October 2014; Sudalenko v Belarus, Communication No. 1992/2010, 27 March 2015. [↑](#footnote-ref-15)
16. Human rights activists handed prison terms in Belarus. The Washington Post, 3 November 2021, <https://www.washingtonpost.com/politics/human-rights-activists-handed-prison-terms-in-belarus/2021/11/03/2cd3f8d2-3cd7-11ec-bd6f-da376f47304e_story.html>. [↑](#footnote-ref-16)
17. Supra note 10. [↑](#footnote-ref-17)
18. See, for example, Francesco Giumelli, The effectiveness of EU sanctions: An analysis of Iran, Belarus, Syria and Myanmar (Burma). <https://research.rug.nl/en/publications/the-effectiveness-of-eu-sanctions-an-analysis-of-iran-belarus-syr>. [↑](#footnote-ref-18)
19. See, for example the failure of Russia to pay the compensation in the judgement given by the European Court of Human Rights in *OAO Neftyanaya Kompaniya Yukos v. Russia* (just satisfaction), no. 14902/04, 31 July 2014. See also, Dzehtsiarou K and Fontanelli F, 'Unprincipled Disobedience to International Decisions: A Primer from the Russian Constitutional Court' in Strohal C and others (eds), *European Yearbook on Human Rights* (Intersentia 2018). [↑](#footnote-ref-19)
20. In the 60-s after the military coup Greece withdrew from the Council of Europe and European Convention on Human Rights. See, Dzehtsiarou K and Coffey DK, 'Suspension and Expulsion of Members of The Council of Europe: Difficult Decisions in Troubled Times' (2019) 68 *International and Comparative Law Quarterly* 443, 449. [↑](#footnote-ref-20)