International Human Rights Law: A Short History

The phrase "human rights" may be used in an abstract and philosophical sense, either as denoting a special category of moral claim that all humans may invoke or, more pragmatically, as the manifestation of these claims in positive law, for example, as constitutional guarantees to hold Governments accountable under national legal processes. While the first understanding of the phrase may be referred to as "human rights", the second is described herein as "human rights law".

About the author

Frans Viljoen

Frans Viljoen is Director, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

While the origin of "human rights" lies in the nature of the human being itself, as articulated in all the world's major religions and moral philosophy, "human rights law" is a more recent phenomenon that is closely associated with the rise of the liberal democratic State. In such States, majoritarianism legitimizes legislation and the increasingly bureaucratized functioning of the executive. However, majorities sometimes may have little regard for "numerical" minorities, such as sentenced criminals, linguistic or religious groups, non-nationals, indigenous peoples and the socially stigmatized. It therefore becomes necessary to guarantee the existence and rights of numerical minorities, the vulnerable and the powerless. This is done by agreeing on the rules governing society in the form of a constitutionally entrenched and justiciable bill of rights containing basic human rights for all. Through this bill of rights, "human rights law" is created, becoming integral to the legal system and superior to ordinary law and executive action.

In this article, some aspects of the history of human rights law at the global, regional and subregional levels are traced. The focus falls on the recent, rather than the more remote, past. To start with, some observations are made about the "three generations" of human rights law.

Three generations of international human rights law

Human rights activism can be described as a struggle to ensure that the gap between human rights and human rights law is narrowed down in order to ensure the full legal recognition and actual realization of human rights. History shows that governments do not generally grant rights willingly but that rights gains are only secured through a successful challenge to absolutist authority. Following on the Magna Carta, which set limits on the powers of royal Government in thirteenth century England, the 1776 American Declaration of Independence and the 1789 French Declaration des droits de l'Homme et de du citoyen (Declaration of the Rights of Man and Citizen) were landmarks of how revolutionary visions could be transformed into national law and made into justiciable guarantees against future abuse.

The traditional categorization of three generations of human rights, used in both national and international human rights discourse, traces the chronological evolution of human rights as an echo to the cry of the French revolution: Liberté (freedoms, "civil and political" or "first generation" rights), Egalité (equality, "socio-economic" or "second generation" rights), and Fraternité (solidarity, "collective" or "third generation" rights). In the eighteenth and nineteenth centuries, the struggle for rights focused on the liberation from authoritarian oppression and the corresponding rights of free speech, association and religion and the right to vote. With the changed view of the State role in an industrializing world, and against the background of growing inequalities, the importance of socio-economic rights became more clearly articulated. With growing globalization and a heightened awareness of overlapping global concerns, especially due to extreme poverty in some parts of the world, "third generation" rights, such as the rights to a healthy environment, to self-determination and to development, have been adopted.

During the period of the cold war, "first generation" rights were prioritized in Western democracies, while second generation rights were resisted as socialist notions. In the developing world, economic growth and development were often regarded as goals able to trump "civil and political" rights. The discrepancy between the two sets of rights was also emphasized: "civil and political" rights were said to be of immediate application, while "second generation" rights were understood to be implemented only in the long term or progressively. Another axis of division was the supposed notion that "first generation" rights place negative obligations on States while "second generation" rights place positive obligations on States. After the fall of the Berlin Wall, it became generally accepted that such a dichotomy does not do justice to the extent to which these rights are interrelated and interdependent. The dichotomy of positive/negative obligations no longer holds water. It seems much more useful to regard all rights as interdependent and indivisible, and as potentially entailing a variety of obligations on the State. These obligations may be categorized as the duty to respect, protect, promote and fulfil.

Global level

For many centuries, there was no international human rights law regime in place. In fact, international law supported and colluded in many of the worst human rights atrocities, including the Atlantic Slave Trade and colonialism. It was only in the nineteenth century that the international community adopted a treaty abolishing slavery. The first international legal standards were adopted under the auspices of the International Labour Organization (ILO), which was founded in 1919 as part of the Peace Treaty of Versailles. ILO is meant to protect the rights of workers in an ever-industrializing world.

After the First World War, tentative attempts were made to establish a human rights system under the League of Nations. For example, a Minority Committee was established to hear complaints from minorities, and a Mandates Commission was put in place to deal with individual petitions of persons living in mandate territories. However, these attempts had not been very successful and came to an abrupt end when the Second World War erupted. It took the trauma of that war, and in particular Hitler's crude racially-motivated atrocities in the name of national socialism, to cement international consensus in the form of the United Nations as a bulwark against war and for the preservation of peace.

The core system of human rights promotion and protection under the United Nations has a dual basis: the UN Charter, adopted in 1945, and a network of treaties subsequently adopted by UN members. The Charter-based system applies to all 192 UN Member States, while only those States that have ratified or acceded to particular treaties are bound to observe that part of the treaty-based (or conventional) system to which they have explicitly agreed.

Charter-based system

This system evolved under the UN Economic and Social Council, which set up the Commission on Human Rights, as mandated by article 68 of the UN Charter. The Commission did not consist of independent experts, but was made up of 54 governmental representatives elected by the Council, irrespective of the human rights record of the States concerned. As a consequence, States earmarked as some of the worst human rights violators served as members of the Commission. The main accomplishment of the Commission was the elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights, adopted in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the latter two adopted in 1966. As the adoption of those two separate documents indicates, the initial idea of transforming the Universal Declaration into a single binding instrument was not accomplished, mainly due to a lack of agreement about the justiciability of socio-economic rights. As a result, individual complaints could be lodged, alleging violations by certain States of ICCPR, but not so with ICESCR.

The normative basis of the UN Charter system is the Universal Declaration of Human Rights, adopted on 10 December 1948, which has given authoritative content to the vague reference to human rights in the UN Charter. Although it was adopted as a mere declaration, without a binding force, it has subsequently come to be recognized as a universal yardstick of State conduct. Many of its provisions have acquired the status of customary international law.

Faced with allegations of human rights violations, particularly in apartheid South Africa, the Commission had to devise a system for the consideration of complaints. Two mechanisms emerged, the "1235" and "1503" procedures, adopted in 1959 and 1970, respectively, each named after the Economic and Social Council resolution establishing them. Both mechanisms dealt only with situations of gross human rights violations. The difference was that the "1235" procedure entailed a public discussion while "1503" remained confidential. In order to fill the gap in effective implementation of human rights, a number of special procedures were established by the Commission. Unique procedures take the form of special rapporteurs, independent experts or working groups looking at a particular country (country-specific mandate) or focusing on a thematic issue (thematic mandate).

Leapfrogging a few decades to 2005, in his report In Larger Freedom: Towards Development, Security and Human Rights for All, the former UN Secretary-General, Kofi Annan, called for the replacement of the Commission by a smaller, permanent and human rights-compliant Council, able to fill the credibility gap left by States that used their Commission membership "to protect themselves against criticism and to criticize others".[1] The major reason for replacing the Commission was the very selective way in which it exercised its country-specific mandate, due mainly to the political bias of representatives and the ability of more powerful countries to deflect the attention away from themselves and those enjoying their support. In 2006, the General Assembly decided to follow the Secretary-General's recommendation, creating the Human Rights Council as a replacement to the Commission on Human Rights.[2]

There are some important differences between the former Commission on Human Rights and the current Human Rights Council. As a subsidiary organ of the General Assembly, the Council enjoys an elevated status compared to the Commission, which was a functional body of the Economic and Social Council. It has a slightly smaller membership (47 States) and its members are elected by an absolute majority of the Assembly (97 States). To avoid prolonged dominance by a few States, members may be elected only for two consecutive three-year terms. The Council serves as a standing or permanent body, which meets regularly, not only for annual "politically charged six-week sessions" as the Commission did. Following the more human rights-sensitive selection criteria, the list of States elected by the Assembly contrasts with countries which, in 2006, served on the Commission. The Assembly may, by a two-thirds majority vote, suspend a member that engages in gross and systematic human rights violations.

The Human Rights Council retained most of the special procedures, including the confidential "1503" (now called the "compliant procedure"), and introduced the Universal Peer Review (UPR). Starting in April 2008, one third of UN Member States has undergone this process. The UPR sUPR hows similarities with the African Peer Review Mechanism which has been set up under the New Partnership for Africa's Development (NEPAD). Apart from the Universal Declaration on Human Rights, the General Assembly adopted numerous other declarations. When sufficient consensus emerges between States, declarations may be transformed into binding agreements. It is revealing that the required level of agreement is lacking on crucial issues, such as the protection of non-hegemonic citizenship. The two relevant declarations – the Declaration on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, adopted in 1992, and the Declaration on the Rights of Indigenous Peoples, adopted in 2007, have not been translated into binding instruments. The same is true of the Declaration on the Right to Development, which was adopted in 1986.

Treaty-based system

The treaty-based system developed even more rapidly than the Charter-based system. The first treaty, adopted in 1948, was the Convention on the Prevention and Punishment of the Crime of Genocide, which addressed the most immediate past experience of the Nazi Holocaust. Since then, a huge number of treaties have been adopted, covering a wide array of subjects, eight of them on human rights – each comprising a treaty monitoring body – under the auspices of the United Nations.

The first, adopted in 1965, is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), followed by ICCPR and ICESCR in 1966. The international human rights regime then started to move away from a generic focus, shifting its attention instead to particularly marginalized and oppressed groups or themes: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and the Convention on the Rights of Persons with Disabilities (2006). The latest treaty is the International Convention for the Protection of All Persons from Enforced Disappearances (ICED), also adopted in 2006 but yet to enter into force. With the adoption of an Optional Protocol to ICESCR in 2008, allowing for individual complaints regarding alleged violations of socio-economic rights, the UN treaty system now also embodies the principle that all rights are justiciable. **Office of the UN High Commissioner**

Twenty years after the adoption of the Universal Declaration, the first International Conference on Human Rights was held in 1968 in Teheran. As the world was at that stage caught in the grip of the cold war, little consensus emerged and not much was achieved. The scene was very different when the second world conference took place in Vienna in 1993. The cold war had come to an end, but the genocide in Bosnia and Herzegovina was unfolding. Against this background, 171 Heads of State and Government met and adopted the Vienna Declaration and Programme of Action. It reaffirmed that all rights are universal, indivisible and interdependent. Several

resolutions adopted there were subsequently implemented, including the adoption of an Optional Protocol to CEDAW and the establishment of the Office of the United Nations High Commissioner for Human Rights, with the first High Commissioner (José Ayala Lasso) elected in 1994. The High Commissioner has the major responsibility for human rights in the United Nations. The increasingly important human rights field presence in ratcheted countries also falls under this Office.

Other conferences have also highlighted important issues, such as racism and xenophobia, which were discussed at the 2001 World Conference Against Racism, held in Durban, South Africa. This culminated in the adoption of the Durban Declaration and Programme of Action. A review conference to assess progress in the implementation of the Declaration took place in April 2009.

Regional level

Since the Second World War, three regional human rights regimes – norms and institutions that are accepted as binding by States – have been established. Each of these systems operates under the auspices of an intergovernmental organization or an international political body. In the case of the European system – the best of the three – it is the Council of Europe, which was founded in 1949 by 10 Western European States to promote human rights and the rule of law in post-Second World War Europe, avoided a regression into totalitarianism and served as a bulwark against Communism. The Organization of American States (OAS) was founded in 1948 to promote regional peace, security and development. In Africa, a human rights system was adopted under the auspices of the Organization for African Unity (OAU), which was formed in 1963 and transformed in 2002 into the African Union (AU).

In each of the three systems, the substantive norms are set out in one principal treaty. The Council of Europe adopted its primary human rights treaty in 1950: the European Convention of Human Rights and Fundamental Freedoms. Incorporating the protocols adopted thereto, it includes mainly "civil and political" rights, but also provides for the right to property. All 47 Council of Europe members have become party to the European Convention. OAS adopted the American Convention on Human Rights in 1969, which has been ratified by 24 States. The American Convention contains rights similar to those in the European Convention but goes further by providing for a minimum of "socio-economic" rights. In contrast to these two treaties, the African Charter, adopted by OAU in 1981, contains justiciable "socio-economic" rights and elaborates on the duties of individuals and the rights of peoples. All AU members are parties to the African Charter.

The way in which the principal treaty is implemented or enforced differs in each region. In an evolution spanning many decades, the European system of implementation, operating out of Strasbourg, France, developed from a system where a Commission and a Court co-existed to form a single judicial institution. The European Court of Human Rights deals with individual cases. A dual model is in place in the Americas, consisting of the Inter-American Commission, based in Washington, D.C., and the Inter-American Court of Human Rights, based in San José, Costa Rica. Individual complainants have to submit their grievances to the Inter-American Commission first; thereafter, the case may proceed to the Inter-American Court of Human Rights. The Commission also has the function of conducting on-site visits. After some recent institutional reforms, the African system now resembles the Inter-American system.

Fledgling Arab and Muslim regional systems have also emerged under the League of Arab States and the Organization of the Islamic Conference (OIC). According to the Islamic world view, the Koran and other religious sources play a dominant role in the regulation of social life.

The League of Arab States was founded in terms of the Pact of the League of Arab States of 1945. Its overriding aim is to strengthen unity among Arab States by developing closer links between its members. The Pact emphasizes the independence and sovereignty of its members, but no mention is made in its founding document of either the contents or principles of human rights.

At the Teheran World Conference in 1968, some Arab States managed to have the position of Arabs in the territories occupied by Israel included in the agenda and successfully articulated it as a human rights issue. This created awareness of human rights among the Arab States in the aftermath of a number of defeats at the hands of Israel in 1967. However, at the Teheran Conference and thereafter, the commitment of the Arab League to human rights was primarily on directing criticism against Israel over its treatment of the inhabitants in Palestine and other occupied areas. In 1968, a regional conference on human rights was held in Beirut, where the Permanent Arab Commission on Human Rights (ACHR) was established. Since inception, the ACHR has been a highly politicized body, with its political nature accentuated by the method of appointment. The Commission does not consist of independent experts, as in many other international human rights bodies, but of government representatives. On 15 September 1994, the Council of the League of Arab States adopted the Arab Charter on Human Rights, whose entry into force, which required seven ratifications, was reached in 2008.

OIC, established in 1969, aims at the promotion of Islamic solidarity among the 56 Member States and works towards cooperation in the economic, cultural and political spheres. The major human rights document, adopted in Cairo in 1990 under this framework, is the Cairo Declaration on Human Rights in Islam, which is of a declamatory nature only. As its title indicates, and given the aims of OIC, the declaration is closely based on the principles of the Shari'ah. In 2004, OIC adopted a binding instrument with a specific focus: the Covenant on the Rights of the Child in Islam. This Convention is open for ratification and will enter into force after 20 OIC member States have ratified it. Although the Convention provides for a monitoring mechanism – the Islamic Committee on the Rights of the Child – its mandate is only vaguely drafted.

Overlapping to some extent with the Muslim world, the heterogeneous Asian region stretches from Indonesia to Japan, comprising a diverse group of nations. Despite some efforts by the United Nations, no supranational human rights convention or body has been established in the Asia-Pacific region. In the absence of an intergovernmental organization serving as a regional umbrella that unites all the diverse States in this region, a regional human rights system remains unlikely.

Subregional level

In more recent times, the subregional level has emerged as another site for human rights struggle, particularly in Africa. As a result of a weak regional system under the African Union, a number of African sub-Regional Economic Communities (RECs) emerged from the 1970s: most prominently, the Economic Community of West African States, the Common Market for Eastern and Southern Africa, the Southern African Development Community (SADC) and the East African Community (EAC). Although these RECs are primarily aimed at subregional economic integration, and not at the realization of human rights, there is an inevitable overlap in that their aims of economic integration and poverty eradication are linked to the realization of socio-economic rights. In a number of the founding treaties of RECs, human rights are given explicit recognition as being integral to the organizations' aims. By creating subregional courts with an implicit, or sometimes explicit, mandate to deal with human rights cases, it is apparent that these economic communities have become key role-players in the African regional human rights system.

Two decisions of subregional courts illustrate the growing significance of RECs to human rights protection. In a case brought against Uganda, it was contended that Uganda violated the EAC Treaty when it re-arrested 14 accused persons after they had been granted bail.[3] The Court, in 2007, held that Uganda had violated the rule of law doctrine, as enshrined among the fundamental principles governing EAC.

In its first decision on the merits of a case, delivered in November 2008,[4] the SADC Tribunal held that it had jurisdiction, on the basis of the SADC Treaty, to deal with the acquisition of agricultural land by the Zimbabwean Government, carried out under an amendment to the Constitution (Amendment 17). The Tribunal further found that, as it targeted white farmers, the Zimbabwean land reform programme violated article 6(2) of the SADC Treaty, which outlaws discrimination on the grounds of race, among

other factors. As to the remedial order, the Tribunal directed Zimbabwe to protect the possession, occupation and ownership of lands belonging to applicants and pay fair compensation to those whose land had already been expropriated.

Promising developments towards subregional human rights protection have also recently occurred in the Association of Southeast Asian Nations (ASEAN), bringing together the founding States of Indonesia, Malaysia, Singapore, Thailand and the Philippines. Although ASEAN was established in 1967, a formal founding treaty (the ASEAN Charter) was adopted only in 2007. The Charter envisages the establishment of an ASEAN human rights body – a process that is still underway.

Not by States Alone

Advances in human rights are not dependent only on States. Non-governmental organizations have been very influential in advancing awareness on important issues and have prepared the ground for declarations and treaties subsequently adopted by the United Nations.

The role of civil society is of particular importance when the contentiousness of an issue inhibits State action. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity is a case in point. Although it was adopted in November 2006 by 29 experts from only 25 countries, the 29 principles contained in the document – related to State obligations in respect of sexual orientation and gender identity – are becoming an internationally accepted point of reference and are likely to steer future discussions.

The international human rights law landscape today looks radically different from 60 years ago when the Universal Declaration was adopted. Significant advances have been made since the Second World War in expanding the normative reach of international human rights law, leading to the proliferation of human rights law at the international level. Over the last few decades, however, attention has shifted to the implementation and enforcement of human rights norms, to the development of more secure safety nets and to a critical appraisal of the impact of the norms. Greater concern for human rights has also been accompanied with greater emphasis on the individual liability of those responsible for gross human rights violations in the form of genocide, crimes against humanity and war crimes. The creation of international criminal tribunals, including the International Criminal Court in 1998, constitutes a trend towards the humanization of international law. The further juridification of international human rights law is exemplified by the establishment of more courts, the extension of judicial mandates to include human rights, and the unequivocal acceptance that all rights are justiciable. With the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, there is much clearer acceptance of the principle of indivisibility under international human rights law. However, the constant evolution of the international human rights regime depends greatly on non-State actors, as is exemplified by their role in advocating for and preparing the normative ground for the recognition of the rights of "sexual minorities". There is no doubt that the landscape is to undergo dramatic changes in the next 60 years.

Notes

1. In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc A/49/2005, 21 March 2005.

2. UN Doc. A/RES/60/251 (para 13), 3 April 2006, recommending to the Economic and Social Council to "abolish" the Commission on Human Rights on 16 June 2006.

3. James Katabazi and Others v Secretary-General of the EAC and Attorney-General of Uganda, Reference 1 of 2007, East African Court of Justice, 1 November 2007.

4. Mike Campbell (Pvt) Limited and Others v Republic of Zimbabwe, Case SADCT 2/07, SADC Tribunal, 28 November 2008.

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