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THE INTERNATIONAL BILL OF HUMAN RIGHTS

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1.1 INTRODUCTION

The *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are commonly referred to as the International Bill of Rights, and seen as constituting the definitive contemporary statement of human rights.¹ Those documents, supplemented by others such as treaties, comments and views,² set out the rights, freedoms and responsibilities which together comprise ‘human rights law’, but they offer only a limited explanation of what, conceptually, human rights are.

The widespread adoption of the International Bill of Rights by countries of diverse cultures, histories and politics gives a deceptive appearance of substance, suggesting that, precisely because they have been so widely recognised, human rights are what they say they are: fundamental, universal and integral to the dignity and worth of the human person.³ But anyone working with human rights must be able to explain the idea of a ‘human right’, beyond merely relying on the fact that such rights are set out in United Nations (UN) documents. Understanding the conceptual bases for human rights is necessary to defend the claim that human rights have universal value, or to assert that human rights can take priority over other rights, or to explain why some claims are not recognised as human rights.

The focus of this chapter is the UDHR: what led up to it, how it was formulated, and how it has evolved. As background to the process of formulating contemporary human rights, the chapter outlines the various cultural, political, philosophic and religious sources which were brought together—‘institutionalized’⁴—in the UDHR. As the source of contemporary human rights, however, the UDHR—and the subsequent, related treaties—need to be understood in the context of international law, which is explained in Chapter 5. Simma and Alston argue that ‘reliance upon treaties alone provides an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many States largely untouched’. They suggest that:

prospects for developing an effective and largely consensual international regime depend significantly on the extent to which those institutions are capable of basing their actions upon a coherent and generally applicable set of human rights norms ... [t]here is thus a strong temptation to turn to customary law as the formal source which provides, in a relatively straight-forward fashion, the desired answers.⁵

1 See Chapter 3 for detailed discussion of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]; and Chapter 4 for the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

2 Discussed in detail in Chapter 7.

3 *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (1948) (UDHR).

4 M Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, 2nd edn, University of California Press, Berkeley, 2008, ch 4.

5 B Simma and P Alston, ‘Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988–1989) 12 *Australian Year Book of International Law* 82, 82–83.

1.2 HISTORY OF THE UDHR

The contemporary conception of human rights, set out in the International Bill of Rights, can be traced directly to the political aftermath of the Second World War, in the mid to late 1940s. The Second World War was a major catalyst for reorganisation of the international legal system, perhaps most of all in the area of human rights. The horrors and sheer scale of the war prompted reorganisation of international relations in an attempt to prevent such a world war from ever occurring again, trying to succeed where the League of Nations had failed after the First World War.

Samuel Moyn has gained some notoriety —his ‘Warholian fifteen minutes’⁶—with his attack on this historical account of human rights. He dismisses the Second World War as a driver for the formulation of human rights: ‘there was no widespread Holocaust consciousness in the post-era, so human rights could not have been a response to it.’⁷ Rather, he says, after the UDHR was passed in 1948 ‘[t]he world looked up for a moment ... [t]hen it resumed its post-war agendas’,⁸ and the Cold War took over until human rights gained political relevance in the 1970s. But in making this argument Moyn conflates an account of the rise of human rights with an account of their origins. As Alston points out,⁹ ‘human rights’ can be thought of in many ways—an idea, an elaborated discourse, a social movement, a practice, a legal regime, or a system—and ‘each of these categories would constitute a plausible focus for analysis’ and each will produce different causal accounts.

Because Moyn fails to distinguish different ways of thinking of human rights, his insights into the emergence of human rights as a social movement in the 1970s unnecessarily and inaccurately re-characterise the historical development of human rights in the 20th century. McCrudden suggests that a ‘much more moderate, and careful version of [Moyn’s] underlying thesis’—that something important did occur to human rights in the 1970s—would be shared by human rights practitioners.¹⁰

Alston explains why Moyn is ‘wrong ... in the basic assumptions of his “big bang” theory that sees human rights emerging almost out of nowhere in 1977’,¹¹ and accuses Moyn of ‘heavily discount[ing] the significance of the ebb and flow of rights discourse across the centuries, and of the often long and bitter struggles that have helped to shape today’s complex and multifaceted human rights endeavors’; Chapter 2 of this book gives an overview of that ebb and flow and those struggles.

6 R Wilson, ‘Book Review: The Breakthrough: Human Rights in the 1970s’ (2014) 36(4) *Human Rights Quarterly* 915, 918.

7 S Moyn, *The Last Utopia*, Harvard University Press, Cambridge MA, 2010, 7; see also S Moyn, *Human Rights and the Uses of History*, Verso, London, 2014. For a summary of Moyn’s ‘discontinuity’ thesis, and an extensive critique of it, see C McCrudden, ‘Human Rights Histories’ (2015) 35(1) *Oxford J Legal Studies* 179, 183–86.

8 Moyn, *The Last Utopia*, above n 7, 2.

9 P Alston, ‘Book Review: Does the Past Matter? On the Origins of Human Rights’ (2013) 126 *Harvard Law Review* 2043, 2078–79.

10 McCrudden, above n 7, 209.

11 Alston, above n 9, 2074. See also Wilson, above n 6; J Frank, ‘Human Rights Regimes and The Lost Utopia’ (2013) 22(1) *Qui Parle* 49; P Cheah, ‘Human Rights and the Material Making of Humanity: A Response to Samuel Moyn’s *The Last Utopia*’ (2013) 22(1) *Qui Parle* 55; A Anghie, ‘Whose Utopia? Human Rights, Development, and the Third World’ (2013) 22(1) *Qui Parle* 63; S Benhabib, ‘Moving Beyond False Binarisms: On Samuel Moyn’s *The Last Utopia*’ (2013) 22(1) *Qui Parle* 81.

Alston characterises Moyn as ‘conjur[ing] up a parody of the human rights movement with shallow and unconvincing roots, defined almost exclusively from an America-centric vantage point’.¹² This chapter offers a documented account of the roots of the UDHR, resisting a neat lineal descent from earlier rights conceptions and accepting Moyn’s argument that ‘contemporary human rights are qualitatively different from their fin de siècle French revolutionary forebears’.¹³ Moyn’s claim that ‘[p]eople too often present human rights ... as if they were the exclusive and necessary inheritance from idealism’s history’¹⁴ is a straw man argument, which Moyn sets up only to easily knock it down. Some people may indeed too readily see contemporary human rights as a direct historical descendant of earlier rights claims,¹⁵ but it is widely acknowledged that, as Alston says, ‘there are crucial continuities as well as discontinuities’ in the history of human rights,¹⁶ and Chapter 2 outlines those continuities and discontinuities.

The UDHR and its related treaties and jurisprudence anchor the study of contemporary human rights law. The account in this chapter of the history of the UDHR explains only how the documented human rights came to take their current form in response to the inhuman conduct of the immediately preceding years. The UDHR did not continue an established tradition of human rights or invoke previously described human rights, but was a new articulation of an idea which was familiar from centuries of politics, philosophy and religion: the idea that there is an essential moral value in our being human, discussed in Chapter 2.

1.2.1 DEVELOPING CONSTRAINTS ON STATE SOVEREIGNTY

The League of Nations

Australia was among the 20 founding member countries of the League of Nations, established in 1920 as an outcome of the 1919 Paris Peace Conference.¹⁷ In hindsight, many of the League’s activities can be seen as important steps towards the new international legal framework of human rights that emerged after the Second World War.

The League, for example, oversaw distribution of former German colonies, with an approach that was characterised by a sense of duty to accord minimum entitlements to all. The League created a system of mandates under which the former colonies were governed as trust territories, on the principle ‘that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant’.¹⁸ More broadly, members of the League covenanted to address issues which would now be recognised as human rights concerns, such as securing ‘fair and humane conditions of

12 Alston, above n 9, 2081.

13 B Golder, *Foucault and the Politics of Rights*, Stanford University Press, Redwood City, 2015, 158.

14 S Moyn, *The Continuing Perplexities of Human Rights* (2013) 22(1) *Qui Parle* 95, 100.

15 See, eg, Alston’s critique of Martinez, above n 9.

16 *Ibid* 2078.

17 On the League of Nations see generally E Bendiner, *A Time for Angels: The Tragicomic History of the League of Nations*, Knopf, New York, 1975; D S Birn, *The League of Nations Union, 1918–1945*, Clarendon Press, Oxford, 1981.

18 *Covenant of the League of Nations*, 28 April 1919, art 22. See also J F Engers, ‘From Sacred Trust to Self-Determination’ (1977) 24 *Netherlands International Law Review* 85.

labour’, ensuring ‘just treatment of the native inhabitants of territories under [members’] control’, and supervising traffic in women, children and drugs.¹⁹

Another contribution of the League of Nations to international responsibility for human rights was a series of bilateral treaties among European states to protect the rights of minorities, including protection of life, liberty and equality before the law. Although they were specific to certain states and formed part of the postwar settlement, these treaties were an important step towards states’ accepting that international law can protect human rights within a state, even when to do so is to challenge a state’s sovereignty: ‘For the first time, international law imposed on the sovereign states concerned certain obligations to treat their inhabitants in certain ways—a stark contrast to the ‘blank canvas’ position’ that prevailed before the First World War.²⁰

Despite its respect for the rights of indigenous peoples, the universal aims of the League were compromised at the outset by the refusal of some founding members, including Australia, to include in its Covenant a commitment to non-discrimination on the basis of race; a significant factor in the development of contemporary human rights was the brutal discrimination of people on the basis of race in the Second World War.

The International Labour Organization

Another outcome of the 1919 Paris Peace Conference was the establishment of the International Labour Organization (ILO); the structure of the ILO and some of its key conventions are discussed in more detail in Chapter 18. In light of the Russian Revolution in 1917, the establishment of the ILO reflected a desire to improve living standards of workers, but perhaps as well a desire to avoid similar anti-bourgeois revolutions elsewhere. Whatever the motivations of the founding member states may have been, the formation of the ILO was significant in the development of international human rights law and, looking ahead to developments later in the 20th century, it emphasised the importance of economic rights such as labour rights to the maintenance of long-term peace and stability.

By ratifying the standards promulgated by the ILO, states agree to subject their sovereignty in the area of labour rights to those standards, not as part of any interstate bargain, but as a transcending commitment to workers’ entitlements. The system of ILO conventions was the first comprehensive system in which states assumed obligations towards the treatment of their own people, and made themselves accountable to the international community under international law.

1.2.2 THE CHARTER OF THE UN

The *Charter of the United Nations* (UN Charter) was the culmination of a relatively brief and very intense period of negotiation among nation states—principally, the world powers at the

19 *Covenant of the League of Nations*, 28 April 1919, art 23(c). Three other areas were also specified in paragraphs (d)–(f) of that article: trade in arms and ammunition, freedom of communications and commerce, and the prevention and control of disease.

20 E Bates, ‘History’, in D Moeckli, S Shah, S Sivakumaran and D Harris (eds), *International Human Rights Law*, 2nd edn, Oxford University Press, Oxford, 2014, 27.

time—during and at the end of the Second World War, at which time the contemporary idea of fundamental and universal human rights was developed.

The Second World War had seen the systematic state targeting of minority groups: citizens were humiliated, brutalised and murdered, not as the incidental victims of war, but as explicit state policy. The dehumanising nature of the Holocaust atrocities—which the UDHR later declared ‘outraged the conscience of mankind’²¹—was undoubtedly influential in convincing states that a sovereignty-dominated model of international law needed to be reconsidered. The protection of people against mistreatment by the state became a legitimate concern of international law, even when directed to a state’s intra-territorial treatment of its own people. The new thinking was that, if necessary, state sovereignty would need to yield to international standards of ‘human rights’.

The Atlantic Charter

In an address to the United States (US) Congress on 6 January 1941, US President Franklin D Roosevelt stated his vision of a world ‘founded upon four essential human freedoms’: freedom of speech, freedom to worship, freedom from want and freedom from fear.²² In August of that year Roosevelt and British Prime Minister Winston Churchill issued a ‘joint declaration’ that has since become known as the Atlantic Charter.²³

ATLANTIC CHARTER

The President of the United States of America and the Prime Minister, Mr Churchill, representing His Majesty’s Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

- First, their countries seek no aggrandizement, territorial or other;
- Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
- Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;
- Fourth, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;
- Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security;

21 UDHR, above n 3.

22 In his 1944 State of the Union address, Roosevelt took the idea of ‘freedom from want’ further, proposing an ‘Economic Bill of Rights’, discussed further in Chapter 4.1.1.

23 North Atlantic Treaty Organisation, *The Atlantic Charter* <www.nato.int/cps/en/SID-2788FECD-8FACF71E/natolive/official_texts_16912.htm> accessed 5 October 2016.

- Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;
- Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;
- Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

The Atlantic Charter refers in the sixth point to only two of Roosevelt's four freedoms: freedom from fear and freedom from want, but Roosevelt attempted to clear up any confusion over the status of all four freedoms when he reported back to the US Congress: 'the [Atlantic Charter] declaration of principles includes of necessity the world need for freedom of religion and freedom of information ... which are a part of the whole freedom for which we strive'.²⁴ Later the same year, H V (Doc) Evatt 'quoted [the four freedoms] in the Australian Parliament as one of the guiding principles for post-war redevelopment'.²⁵

Despite its almost passing reference to human rights, the Atlantic Charter exerted remarkable influence: its simple effect was to make human rights a legitimate part of international discussions about peace and postwar institutional arrangements. Roosevelt referred explicitly to human rights when, on the Atlantic Charter's first anniversary, he published a statement promoting the Charter as a 'common programme of purposes and principles' which 'nations and groups of nations in all the continents of the earth' were united in realising. These nations, he said, had 'faith in life, liberty, independence, and religious freedom, and in the preservation of human rights and justice in their own as well as in other lands'.²⁶

The Dumbarton Oaks Proposals

After the Atlantic Charter, important steps were taken towards establishing a basis for the international cooperation which underpinned the formulation of international human rights law.

24 R Russell, *A History of the United Nations Charter: The Role of the United States 1940–1945*, The Brookings Institution, Washington, 1958, 41–2, quoting F D Roosevelt, *Public Papers and Addresses of Franklin D Roosevelt; 1941: Call to Battle Stations*, Harper, New York, 1950, 334.

25 A Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966*, The Federation Press, Sydney, 2005, 14, citing Commonwealth of Australia, *Hansard*, House of Representatives, 27 November 1941, 978. Note that at the time of the debate Evatt was Attorney-General and Minister for External Affairs.

26 W F Kimball (ed), *Churchill and Roosevelt, Volume 1: The Complete Correspondence*, Princeton University Press, Princeton, 2015, 559.

Between 1941 and 1944, 26 allied nations signed a *Declaration by United Nations* which explicitly evoked the Atlantic Charter, and stated the signatories' conviction that victory in the war was 'essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands'.²⁷ In October 1943 the US, Soviet Union, United Kingdom (UK) and China signed the *Moscow Declaration on General Security*, in which they recognised 'the necessity of establishing at the earliest practicable date a general international organisation ... for the maintenance of international peace and security'.²⁸ At the Bretton Woods (US) Conference of July 1944, 44 allied states planned for postwar global economic relations, resolving to establish the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), which is now part of the World Bank. But it was the Dumbarton Oaks Conversations in 1944 that represented '[t]he first concrete step toward the creation of a general international organisation'.²⁹

The Dumbarton Oaks Conversations, which took place in Washington DC between August and October 1944, resulted in the *Dumbarton Oaks Proposals*, in which the US, UK, Soviet Union and China agreed to establish 'an international organisation under the title of the United Nations', a General Assembly of which would, among many other things, establish an Economic and Social Council to 'facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms'.³⁰

Reference to human rights and fundamental freedoms was the subject of dispute and debate. It was proposed by the US but was initially opposed by the UK because of concerns about international intervention in the internal affairs of states, and by the Soviet Union because the proposed organisation was concerned not with human rights but with international security. The UK and the Soviet Union agreed with the final wording as it did no more than authorise the promotion of respect for human rights.³¹

Early the following year Roosevelt, Churchill and the Soviet leader Joseph Stalin met at Yalta in Crimea and announced that a conference would be held in San Francisco 'to prepare the charter' of the proposed 'general international organization'.³² At the 1945 San Francisco Conference—officially the UN Conference on International Organization—the states that had signed the *Declaration by United Nations* were invited, along with non-governmental organisations (NGOs),³³ to meet to finalise the details of the new organisation.

27 *Yearbook of the United Nations* 1946–47, 1.

28 *The Moscow Declaration on General Security*, art 4, in *ibid*, 3.

29 *The Dumbarton Oaks Conversations*, Chapter IX, para 1, in *Yearbook of the United Nations*, above n 27, 4.

30 *Ibid*.

31 Russell, above n 24, 423–4.

32 *Yearbook of the United Nations*, above n 27, 9.

33 The presence of non-governmental organisations was significant, and led to their being recognised in the UN Charter as integral to addressing and resolving international issues. See generally C J Snider, 'The Influence of Transnational Peace Groups on US Foreign Policy Decision-Makers During the 1930s: Incorporating NGOs into the UN' (2003) 27(3) *Diplomatic History* 377. See further the detailed discussion of non-governmental organisations in Chapter 7.4.

The San Francisco Conference

The San Francisco Conference took place between April and June 1945. The Australian delegation to the San Francisco Conference was led by the Deputy Prime Minister, Frank Forde, and H V Evatt, and included one woman, Jessie Street.

The text of the *Dumbarton Oaks Proposals* was the basis of discussions at the Conference, but NGOs and states other than the major powers called for stronger recognition of human rights in the text.³⁴ The San Francisco Conference established a number of technical committees to make recommendations on different parts of the text for what would become the UN Charter.

Recommendations from these technical committees³⁵ resulted in the purpose of the proposed international organisation being revised to include ‘international cooperation in the ... promotion and encouragement of respect for human rights and for fundamental freedoms without distinction as to race, language, religion or sex’, and the functions and powers of the proposed UN General Assembly being revised to include the power to ‘initiate studies and make recommendations ... to assist in the realisation of human rights and basic freedoms for all, without distinction as to race, language, religion or sex’. Similarly, the powers of the proposed Economic and Social Council were extended to include making ‘recommendations for promoting respect for human rights and fundamental freedoms’.

It was the work of the smaller states and NGOs in the technical committees³⁶ that succeeded in including in the Preamble to the Charter a statement that ‘reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’. Indeed, that the UN Charter addresses the issue of human rights at all is credited to the NGOs that were present; in the face of opposition by the UK, the US and the Soviet Union, it was NGOs’ ‘persistent pressure [which] led the governments to incorporate the promotion of human rights into the Charter.’³⁷ As a result, the San Francisco Conference agreed to insert throughout the UN Charter reference not only to the UN’s promoting respect for human rights and fundamental freedoms, but also to its doing so ‘for all without distinction as to race, sex, language, or religion.’³⁸ Inclusion in the UN Charter of an international statement of rights, which had been under development for some years in the US State Department,³⁹ was seen as a possible barrier to acceptance of the UN Charter itself.⁴⁰

The phrase ‘human rights’ appears seven times in the UN Charter, usually in the phrase ‘human rights and fundamental freedoms’ and in terms that assert that such rights are held by ‘all’, that

34 The smaller states included Latin American countries, particularly Chile, Cuba and Panama, as well as Australia, New Zealand, India and the Philippines; NGOs included the American Jewish Committee, the World Trade Union Congress, the Provisional World Council of Dominated Nations, the West Indies National Council, the Sino-Korean People’s League, the Council of Christians and the National Association of the Advancement of Colored People.

35 *Yearbook of the United Nations*, above n 27, 14.

36 Ishay, above n 4, 215.

37 Z F K Arat, *Human Rights Worldwide: A Reference Handbook*, ABC-CLIO, Santa Barbara, 2006, 13, citing W Korey, *NGOs and the Universal Declaration of Human Rights: ‘A Curious Grapevine’*, St Martin’s Press, New York, 1998, 29–41.

38 UN Charter arts 1(3), 13(1)(b), 55(c).

39 E A Lang, ‘The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism’ (1989–90) 26 *Williamette Law Review* 113, 124–8; Russell, above n 24, 323–7.

40 Russell, above n 24, 327–9.

is, are universal. References to human rights were inserted, however, only after diplomatic debate about the implications of using different terms such as ‘assure’, ‘protect’, ‘promote’ and ‘encourage respect for’, and about whether ‘cultural’ issues included ‘educational’ issues (it was decided that they did).⁴¹ In article 55 of the UN Charter, when describing the UN’s role in relation to economic and social cooperation, the reference to human rights is different from, and arguably stronger than, the usual formulation of ‘promoting’ human rights, saying instead that the UN ‘shall promote ... universal respect for, and the observance of, human rights and fundamental freedoms ...’.⁴²

Russell attributes this wording to a proposal by the Australian delegation,⁴³ whose principal advocate was H V Evatt, and who is credited with significant influence over the terms of the UN Charter.⁴⁴ Australia was responsible, too, for article 56, in which UN member states ‘pledge themselves to take joint and separate action’ to achieve the UN’s economic and social purposes, including those relating to human rights. The wording reflects ‘the Australian Pledge’, a demand that the Australian delegation had made for a strong commitment to achieving economic and social goals, which bind states not only to cooperate internationally but also to commit to act domestically.⁴⁵

The UN Charter and Human Rights

The UN Charter was approved unanimously on 26 June 1945 by the 50 states at the San Francisco Conference, and came into effect on 24 October 1945.⁴⁶

Without recognition of human rights in the UN Charter, the UN may not have gone on to develop our contemporary conception of human rights. The UN Charter today plays a quasi-constitutional role in international law. This is in part because article 103 provides that the Charter obligations of UN member states prevail over obligations deriving from any other international agreement, and in part because the UN Charter laid out a framework for the conduct of international relations in the envisaged postwar world order, including the mechanics of how such relations would work and the purposes to be served by such interaction.

In a 1948 report to the International Law Association, Hersch Lauterpacht was of the view that the UN Charter itself imposed binding human rights obligations on UN member states.⁴⁷

41 Ibid, 780–1.

42 UN Charter art 55(c).

43 Russell, above n 24, 783.

44 See M Dee, ‘Dr H V Evatt and the Negotiation of the United Nations Charter’, in G Robin (ed), *8e Conférence Internationale des Éditeurs de Documents Diplomatiques: des états et de l’ONU*, Peter Lang, Brussels, 2008, 137; K Buckley, B Dale & W Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter & Scholar*, Longman Cheshire, Melbourne, 1994; Devereux, above n 25, 206–9; Ashley Hogan, *Moving in the Open Daylight: Doc Evatt, an Australian at the United Nations*, Sydney University Press, Sydney, 2008, Chapter 2.

45 Russell, above n 24, 786–8.

46 *Yearbook of the United Nations*, above n 27, 33.

47 H Lauterpacht, *Report to the International Law Association: Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man*, UN Doc E/CN.4/89 (1948) para 6. In 1993 the World Conference on Human Rights, *Vienna Declaration and Programme of Action*, GA Res 421(v), UN Doc.A/CONF.157/23 (1993), recognised that the UN Charter contained legally binding obligations for states to protect and promote human rights.

This view, however, has to be reconciled with the apparently contradictory preservation, in article 2(7) of the UN Charter, of state sovereignty over domestic matters:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Lauterpacht's explanation is that 'by having been included among the principal purposes of the United Nations and by having become a persistent theme of the Charter, [the question of respect for and observance of human rights and fundamental freedoms] has become one which, far from being essentially within the domestic jurisdiction of States, is essentially of international concern'.⁴⁸ He concludes that '[t]he legal character of [the Charter's] authority and obligations is not decisively affected' by article 2(7). He says as well that 'questions bearing upon the respect for and observance of human rights and fundamental freedoms are not 'solely within the domestic jurisdiction of any State' inasmuch as, by virtue of the Charter, they have become matters essentially of international concern', and that article 2(7)

does not in any case affect the right and the obligation of the United Nations to implement the provisions of the Charter in the matter of human rights and fundamental freedoms by means falling short of intervention as understood in international law. These means include study, enquiry, investigation, and recommendation either of a general character or addressed specifically to individual Members of the United Nations.⁴⁹

Despite the many international human rights agreements which have followed, the UN Charter's recognition of human rights remains important because of its binding nature on all UN member states. The Charter-based authority enables the operation of the many established universal human rights mechanisms, discussed in detail in Chapter 6. Even if a state had not ratified a single human rights treaty (which is not actually the case for any state) it would nevertheless be bound by the general obligation to respect human rights that arises from the UN Charter.

1.2.3 THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

In August 1945, as the Second World War came to a close and, just a few weeks after the signing of the UN Charter, the *Charter of the International Military Tribunal* was concluded by the four major allies—the UK, US, France and the Soviet Union. The categories of crime provided for under the *Charter of the International Military Tribunal* were crimes against peace, war crimes and crimes against humanity.⁵⁰ The formation of the Tribunal and its proceedings, as well as subsequent international criminal tribunals, are discussed in detail in Chapter 10.

⁴⁸ Lauterpacht, *Report to the International Law Association*, above n 47, para 9.

⁴⁹ *Ibid* para 16.

⁵⁰ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, London, 8 August 1945, 82 UNTS 280, Annex, art 6.

The creation of an international criminal tribunal was significant in international law because it provided an avenue for the direct accountability of individuals for violations of international law, as opposed to placing responsibility solely on states. For the development of international human rights law, the creation of the category of crimes against humanity ahead of the Nuremberg trials was a significant advance. After the trials, it was clear that state conduct causing serious harm to people is the legitimate concern of international law, even when occurring within a state's own borders. The balance between state sovereignty and international concern for the protection of people had shifted irrevocably, and the stage was set for the development of a new statement of the rights of people.

1.3 THE UDHR

By its terms, the UN Charter treats human rights as a concept which was pre-existing and understood. The UN Charter does not purport to create a concept of human rights; the preamble, for example, speaks of the determination 'to *reaffirm* faith in fundamental human rights',⁵¹ indicating that member states both understood the concept and agreed to subject themselves to its standards as rules of international law.

At the time of the UN Charter, however, the term 'human rights' had strong rhetorical power but no clearly defined scope. In light of the state-sanctioned brutality and discrimination in the recent war, a call for human rights was a call generally for respect for minority communities and a constraint on state power. It was in the three years after the UN Charter that the UN developed the UDHR and gave defined meaning to 'human rights'. The history of our contemporary conception of human rights is primarily the history of the development of the UDHR in the period 1945–48.

1.3.1 DRAFTING BY THE UN COMMISSION ON HUMAN RIGHTS

The signatories to the UN Charter in 1945 agreed to interim arrangements that established a Preparatory Commission of the UN, the Executive Committee of which recommended that the Economic and Social Council (ECOSOC) establish a Commission on Human Rights at its first meeting.⁵² Under article 68 of the UN Charter, which empowered the UN to set up 'commissions in economic and social fields and for the promotion of human rights', ECOSOC established a Commission on Human Rights at its first session in 1946. The Commission, at its first meeting in February 1947, immediately set about drafting what it called an International Bill of Rights.⁵³

The Drafting Committee

The Commission appointed a drafting committee, initially comprising Eleanor Roosevelt, wife of the US President and the only woman on the committee; Habib Charles Malik, a Lebanese

⁵¹ Ibid, Preamble, para 2 (emphasis added).

⁵² *Yearbook of the United Nations*, above n 27, 38.

⁵³ Lang, above n 39, 141.

philosopher and diplomat; and Peng-Chun Chang, a diplomat, writer and philosopher representing the Chinese Nationalist Government.⁵⁴ The committee was later expanded to include Colonel William Hodgson, an Australian soldier and diplomat; Hernán Santa Cruz, a Chilean judge; René Cassin, a French judge; Alexander Bogomolov, a Russian diplomat; Geoffrey Wilson, an English civil servant; Charles Dukes, an English trade unionist; and John Humphrey, a Canadian lawyer and director of the Human Rights Division of the UN Secretariat.⁵⁵

There is no doubt that the horrors of the Second World War loomed large in the minds of the drafting committee. Geoffrey Wilson is reported to have said at the first session of the drafting committee that ‘Germany and other enemy countries during the war had completely ignored what mankind had regarded as fundamental human rights and freedoms.’⁵⁶ The committee met, he said, ‘as a first step toward providing the maximum possible safeguard against that sort of thing in the future.’⁵⁷

The committee delegated the task of drafting a declaration to John Humphrey, but was divided on the approach to take in formulating human rights. Humphrey wrote that ‘Chang and Malik were too far apart in their philosophical approaches to be able to work together on text’;⁵⁸ Malik, a devout Christian, took a natural law approach while Chang was a pragmatist and pluralist, opposed to basing human rights on natural law.⁵⁹ During March 1947 Humphrey worked on a draft declaration, based primarily on the 20 or so drafts that had been submitted; he later wrote that ‘with two exceptions, all these texts came from English-speaking sources, and all of [those texts] came from the Democratic West.’⁶⁰

The UNESCO Survey

In March 1947, while Humphrey was involved in his drafting, the UN Educational, Scientific and Cultural Organization (UNESCO) surveyed about 150 ‘individual thinkers’, asking them for a ‘statement on the subject [of human rights] or a particular aspect of it.’⁶¹ The UNESCO Committee on the Philosophic Principles of the Rights of Man, which oversaw the survey, comprised principally ‘intellectuals from the Western Democracies because of their proximity to UNESCO headquarters in Paris ... [and] on the basis that consistency of philosophy was

54 Chang’s presence was ‘repeatedly protested’ by the Soviet Union, which supported the communists who would come to take power in China in 1949: Devereux, above n 25, 17.

55 See, eg, United Nations, *The Universal Declaration of Human Rights: An Historical Record of the Drafting Process* <<http://research.un.org/en/undhr>> accessed 6 October 2016.

56 J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999, 36, quoting G Wilson from the record of the first session of the UDHR Drafting Committee of the Commission on Human Rights, UN Doc E/CN.4/AC.1/SR.7 (1947).

57 Ibid.

58 J P Humphrey, *Human Rights and the United Nations: A Great Adventure*, Transnational Publishers, New York, 1984, 23, 29, cited in A G Danilovic, *Pragmatism, Philosophy and International Politics: The UNESCO Committee on the Philosophic Principles of the Rights of Man and the Drafting of the Universal Declaration of Human Rights* (Masters Thesis, University of British Columbia, 2002) 9 <<http://hdl.handle.net/2429/12439>> accessed 6 October 2016.

59 Ibid.

60 Ibid 11.

61 *Memorandum on Human Rights*, UN Doc UNESCO/Phil./1/1947 (1947) quoted in Danilovic, above n 58, 13.

required if agreement on a coherent solution to the philosophical problems in issue was to be achieved expeditiously.⁶²

The UNESCO Committee 'decided that its task was to explore the philosophic bases of human rights for the purpose of clarifying grounds of possible agreement underlying divergent philosophical approaches and ... facilitating the removal of differences due to the variety of possible philosophic interpretations.'⁶³ It was not actually the case, as Ishay claims, that the modern conception of human rights 'look[ed] to all the world's great religions and cultures for ... universal notions of the common good.'⁶⁴ Rather, the Committee drew together those arguments that would 'secure agreement concerning fundamental human rights',⁶⁵ and those arguments were from the Western philosophical tradition.

Many of the survey replies rejected the possibility of synthesising philosophical views. A socialist perspective, expressed not only by a Russian expert but also by Western socialists, insisted that achieving human rights was impossible under liberal capitalism; at the same time, liberal democratic experts rejected the possibility of reconciling a natural law approach of inalienable rights with a historical view that rights accrue according to class and power.⁶⁶

One of the survey respondents, Jacques Maritain, anticipated this impasse. He thought 'it would be possible to establish a common formulation of ... the different rights recognised as pertaining to the human being in his (sic) personal and social existence', but that 'it would be quite hopeless to look for a *rational justification* ... of those rights.'⁶⁷ He proposed leaving 'on one side as far as possible ... pre-occupation with theoretical justifications', and proceeding⁶⁸

by consultation and co-operation between representatives of the different schools of thought and ways of civilisation into which men today are grouped, who should first of all be asked, each in turn, to formulate the articles of a Declaration of rights, as each conceives it. The practical conclusions of the disciples of Locke, Rousseau or Tom Paine, Roman Catholicism, Marx-Leninism, Humanitarian Socialism, Existentialism, Rationalism, Greek orthodoxy, Calvinism, Ghandism, Confucianism, etc, would thus be formulated (without their ideological context) ...

62 Danilovic, above n 58, 24. Huxley is quoted as saying 'all of them should be from Western Europe as the matter is urgent'.

63 *Report of the Meeting of the UNESCO Committee on the Philosophic Principles of the Rights of Man*, UN Doc UNESCO/Phil./9/1947 (1947) 1.

64 Ishay, above n 4, 17.

65 *The Grounds of an International Declaration of Human Rights: Report of the UNESCO Committee on the Philosophic Principles of the Rights of Man to the Commission on Human Rights of the United Nations*, UN Doc UNESCO/Phil./10/1947 (1947), quoted in Danilovic, above n 58, 26.

66 UNESCO, *Human Rights: Comments and Interpretation*, Alan Wingate, London, 1949, cited in Danilovic, above n 58.

67 *Communication with Regard to the Draft World Declaration on the Rights of Man*, UN Doc UNESCO/Phil./5/1947 (1947) 1 <<http://unesdoc.unesco.org/images/0012/001243/124341eb.pdf>> accessed 6 October 2016 [emphasis in original]; see also A Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights' (2006) 8(2) *Journal of the History of International Law* 245.

68 *Communication with Regard to the Draft World Declaration on the Rights of Man*, above n 67, 2.

... we could thus arrive at a new and enlarged Declaration of the Rights of Man ... In particular, the conception which holds the field of classic individualism, of human rights and liberties as being concerned with man's personal destiny, and the conception which holds the field of Marxist perspectives, of his [sic] rights and liberties as being involved in the historical mission of the communities to which he belongs, would as the [memorandum prepared by the Philosophy Sub-Section of UNESCO] rightly suggests, end by completing and co-ordinating with each other—within ... the sphere of practical assertions and conclusions formulated in the articles of the Charter ... But I do not think it is reasonable to hope for more than this practical convergence. If a reconciliation of theories and an ideological synthesis are to be aimed at, this could only come about as a result of vast philosophical labour of investigation and purification which would involve superior institutions, a new process of systematisation and the radical criticism of a large number of errors—a labour which ... would remain one doctrine among many accepted by some and rejected by others, and could not claim to establish, in actual fact, universal ascendancy over men's minds.

The UNESCO Committee's final report, *The Grounds of an International Declaration of Human Rights*,⁶⁹ observed that '[t]he history of the philosophic discussion of human rights, of the dignity and brotherhood of man, and of his (sic) common citizenship in the great society is long; it extends beyond the narrow limits of the Western tradition, and its beginnings in the West as well as in the East coincide with the beginnings of philosophy'.⁷⁰ Reflecting Maritain's view, the Committee avoided trying to reconcile those philosophies, and in fact avoided even giving an account of them. Instead it relied on the various ways those philosophies had been implemented—the practical realisation of the theorised rights—to justify its identification of contemporary human rights.

An international declaration of human rights was seen as 'a foundation for convictions universally shared by men, however great the difference of the circumstances and their manner of formulating human rights'.⁷¹ The UNESCO Committee was 'convinced that the philosophic problem involved in a declaration of human rights is not to achieve doctrinal consensus but rather to achieve agreement concerning rights ... which may be justified on highly divergent doctrinal grounds'.⁷² The Committee's intention was 'not to set up an intellectual structure to reduce [the theories] to a single formulation, but rather to discover the intellectual means to secure agreement concerning fundamental rights and to remove difficulties in their implementation such as might stem from intellectual differences'.⁷³

69 *The Grounds of an International Declaration of Human Rights: Report of the UNESCO Committee on the Philosophic Principles of the Rights of Man to the Commission on Human Rights of the United Nations*, above n 65.

70 *Ibid.* 2.

71 *Ibid.* 1.

72 *Ibid.* 4.

73 *Ibid.* 5.

The Humphrey-Cassin Draft

Humphrey's draft, which set the course of contemporary human rights, was a carefully constructed and pragmatic attempt to reconcile a range of different approaches, principally, as he said himself, 'to combine humanitarian liberalism with social democracy'.⁷⁴ His draft was referred by the drafting committee to a working group made up of Malik, Cassin and Wilson, and it was Cassin who took on the task of redrafting the text 'in light of the Committee's discussions' and proposing 'a logical re-arrangement of the articles'.⁷⁵ Cassin's redraft relied substantially on Humphrey's but gave it a new structure and an explicit philosophy.

The structure of Cassin's draft had the symbolism of classical architecture, built on four pillars: dignity, liberty, equality and brotherhood. Cassin subsequently said that 'for learning purposes, the structure of human rights can be visualised as a temple (or Asian pagoda, or African meeting hut) founded on four pillars'.⁷⁶ Ishay describes the design, which was maintained in the final declaration, in this way:

The first pillar covered in the first two articles of the declaration stands for human dignity shared by all individuals regardless of their religion, creed, ethnicity, religion, or sex; the second, specified in articles 3–19 of the declaration, invokes the first generation of civil liberties and other liberal rights fought for during the Enlightenment; the third, delineated in articles 20–26, addresses the second generation of rights, i.e. those related to political, social and economic equity and championed during the industrial revolution; the fourth (articles 27–28) focuses on the third generation of rights associated with communal and national solidarity, as advocated during the late 19th century and early 20th century and throughout the postcolonial era.⁷⁷

Cassin saw the three remaining articles, 28–30, as the 'pediment of the temple', which are 'harmonising provisions designed to hold the structure together and calling upon governments to make arrangements in support of human rights'.⁷⁸

The explicit philosophical basis that Cassin gave to human rights was human dignity, discussed in greater detail in Chapter 2.4.1. For example, the terms of article 1 of the final Declaration—'All human beings are born free and equal in dignity and rights. They ... should act towards one another in a spirit of brotherhood'—essentially reflect Cassin's draft, which read: 'All men, being members of one family, are free, possess equal dignity and rights, and shall regard each other as brothers'.⁷⁹

74 Ibid 19.

75 Ibid 19–20.

76 R Cassin, 'Historique de la Déclaration Universelle de 1948', in *La Pensée et l'Action*, Centre Nationale de la Recherche Scientifique, Paris, 1981, 109–21, 114, quoted in R P Claude and B H Weston (eds), *Human Rights in the World Community: Issues and Action*, 3rd edn, University of Pennsylvania Press, Philadelphia, 1992, 162.

77 Micheline R. Ishay, 'What are human rights? Six historical Controversies', [2004] 3(3) *Journal of Human Rights*, 359, 359.

78 Claude and Weston, above n 76, 162.

79 M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, 2001, 276, cited in Danilovic, above n 58, 20.

Humphrey and Cassin shared a view that acceptance of declared human rights as a new international norm would require very careful phrasing, but they differed in their approach. Humphrey aimed for a straightforward statement of what human rights are, avoiding what he thought would be distracting references to philosophical justifications that would invite dispute. In taking this approach Humphrey showed both his diplomatic pragmatism and a positivist legal philosophy where the authoritatively stated word was itself ‘law’, without the need for reference to an external rationale.

Cassin, on the other hand, felt it was necessary not only to declare a norm, but to offer a reason for it beyond the authority of the declaration. Mindful of the political need to negotiate wide acceptance of a declaration, Cassin’s ‘dignitarian’ philosophy⁸⁰ was a ‘synthesis [that] was bringing something new into the world’, one which avoided ‘the extremes of [both] capitalist individualism and socialist collectivism.’⁸¹

1.3.2 THE FINAL DRAFT OF THE UDHR

The UN Commission on Human Rights, ostensibly basing its work on the Humphrey-Cassin document produced by the drafting committee, completed the declaration and unanimously adopted it.⁸² The Commission had been highly critical of the UNESCO Committee’s report,⁸³ although it seems that the report’s ‘feasible and practicable’ approach to human rights did influence the Commission’s final formulation.⁸⁴

A Convergence of Perspectives

The final draft of what was to become the UDHR was a statement of new principle which asserted universally held truths without necessarily being tied to a particular philosophical source: ‘a composite synthesis, the like of which has never before occurred in history ... While fully allowing for man’s material requirements and for his (sic) duties to society, the balance in the present synthesis is decidedly in favour of man’s inner freedom, and his natural and inalienable rights.’⁸⁵

Although the UDHR was a new statement of human rights, it represented Maritain’s ‘practical convergence of views, whatever the differences of theoretical perspectives’. It was built substantially on the Western liberal tradition—arguably an ‘exemplar of the Natural Law tradition’⁸⁶—drafted in terms that were accepted at the time by nations of all cultures. Clearly the principles that were articulated were not foreign or objectionable outside Western Europe; Tierney points out that the

⁸⁰ Ibid 20.

⁸¹ Ibid 22.

⁸² A Trindade, *Universal Declaration of Human Rights: Paris, 10 December 1948*, United Nations, Audiovisual Library of International Law, 2008 <<http://legal.un.org/avl/ha/udhr/udhr.html>> accessed 6 October 2016.

⁸³ *Commission of Human Rights*, UN Doc E/CN.4/SR.26 cited in A Danilovic, above n 58, 46–7.

⁸⁴ Danilovic offers various examples of how the Commission’s own debates were resolved by reference to the pragmatic approach of the UNESCO Committee’s report: Danilovic, above n 58, 44–7. See also Morsink, above n 56, 318.

⁸⁵ H C Malik, *The Challenge of Human Rights: Charles Malik and the Universal Declaration*, Charles Malik Foundation and Centre for Lebanese Studies, Oxford, 2000, 132, quoted in Danilovic, above n 58, 47.

⁸⁶ Woodcock, above n 67, 266.

one necessary basis for a theory of human rights is a belief in the value and dignity of human life ... all the great world religions have taught respect and compassion for the human person. And the human needs to which human rights respond are not characteristic only of Western people. Surely in all societies, humans have preferred life to death, freedom to servitude, sufficiency of food to starvation, dignity to humiliation. The rights language that grew up in Western culture was one way of addressing such universal concerns.⁸⁷

The two principal theoretical perspectives which converged to become the practical synthesis of the UDHR follow from the two principal Western political traditions that informed the postwar formulation of human rights described in Chapter 1.3.1. One was a liberal tradition, whose history is traced back through centuries of European politics and philosophy, and whose essential feature is the recognition and defence of the rights of an individual against the oppressive exercise of state power; these are the rights called ‘civil and political rights’. The other was a socialist tradition, whose history is in the struggle of organised labour against capital, and which recognises the right of a community to the protection of the state—rights called ‘economic, social and cultural rights’.

In the second half of the twentieth century, these two groups of rights were set up in contrast with each other, a consequence of the extensive political and military hostility between democratic and socialist states. But at the time of the postwar formulation of human rights, these two groups of rights were seen as together forming the whole of the collection of human rights. Although the dominant Western liberal powers more readily recognised civil and political rights, and the powerful Western socialist powers promoted economic, social and cultural rights, there was strong sympathy for the latter group of rights from some Western liberal states.

As described in more detail in Chapter 2.2, there had been statements of the ‘rights of man’ well before the UDHR. The novel claim made for such rights in the UDHR and the documents and debates that preceded it was that those rights were enjoyed equally by all, regardless of race, language, religion or sex. A positive characterisation of this genesis of contemporary human rights is that they are ‘the result of a cumulative historical process that takes on a life of its own, *sui generis*, beyond the speeches and writing of progressive thinkers, beyond the documents and main events that compose a particular epoch,’⁸⁸ but both the claim to universality and the philosophical basis of human rights remain contested.

There are many ways of explaining the claim for universality, and whether some or any of them are accepted is a matter of preference and belief. As the account at Chapter 1.3.1 illustrates, there was no single or comprehensive philosophical basis for human rights at the time they were articulated in the 1940s—their formulation was an avowedly pragmatic exercise, drawing on different philosophies. Whether and how human rights can be given philosophical coherency is a continuing debate.

87 B Tierney, *The Idea of Natural Rights*, Scholars Press, Atlanta, 1997, 347.

88 Ishay, above n 4, 2.

Adoption of the Draft

The UN Commission on Human Rights reported its draft to the Economic and Social Council, which transmitted it to the UN General Assembly. The UN General Assembly referred the draft to the Third Committee which, in 81 meetings between September and December 1948,⁸⁹ considered 168 resolutions for amendments to the draft. The Third Committee finally adopted the draft Declaration by a vote of 29 to none, with seven abstentions, and reported to the UN General Assembly.

Resolution 217 (III), ‘International Bill of Human Rights’, was adopted by the UN General Assembly on 10 December 1948, by a vote of 48 to none, with eight abstentions.⁹⁰ Australian H V Evatt, who was President of the UN General Assembly at the time, welcomed the Declaration as a ‘step forward in a great evolutionary process.’⁹¹

1.3.3 THE TEXT OF THE UDHR

UNIVERSAL DECLARATION OF HUMAN RIGHTS

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

⁸⁹ Ibid.

⁹⁰ UDHR, above n 3. Abstaining states were the Belorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukrainian Soviet Socialist Republic, and Yugoslavia.

⁹¹ Devereux, above n 25, 1, quoting the UN text quoted in N Harper & D Sissons, *Australia and the United Nations*, Manhattan Publishing Co, New York, 1955, 289.

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

After the Preamble, the UDHR sets out 30 articles which enumerate substantive rights. Article 1 declares that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ Article 2 then declares that everyone is entitled to all the rights set out in the Declaration ‘without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ... [or] on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.’ The list of substantive rights then follows:

- Right to life, liberty and security of person
- Freedom from slavery and servitude
- Freedom from torture and cruel, inhuman or degrading treatment or punishment
- Right to recognition as a person before the law
- Freedom from discrimination under law
- Right to effective remedy for violation of human rights
- Freedom from arbitrary arrest, detention or exile
- Right to a fair trial
- Presumption of innocence and prohibition on retroactive criminal law
- Right to privacy
- Freedom of movement and the right to leave any country and return to one’s own country
- Right to asylum
- Right to a nationality
- Right to marry and found a family, including equal rights in marriage, and to protection of the family
- Right to own property
- Freedom of thought, conscience and religion
- Freedom of opinion and expression
- Freedom of assembly and association
- Right to political participation
- Right to social security
- Right to work, fair conditions of work and the right to join a trade union
- Right to rest and leisure
- Right to an adequate standard of living including rights to food, clothing, housing, medical care, social services and social security and special protection for mothers and children
- Right to education
- Right to participate in cultural life, and balance between public benefit and authors’ rights of intellectual property

Articles 28–30 stipulate the right to a society and community in which these individual rights are to be enjoyed, and set out corresponding duties to the community, and permissible limitations on the rights.

The UDHR was not intended to be binding, but rather to provide the standards against which the obligations contained elsewhere could be applied. The 30 substantive articles in the UDHR both expanded on the human rights provisions of the UN Charter and the customary international law which preceded it, and paved the way for the binding human rights treaties that were to follow. In Morsink's view, '[t]he fact that the Declaration is itself not intertwined with any piece of ... machinery of implementation gave it from the start an independent moral status in world affairs and law'.⁹²

1.3.4 THE LEGAL STATUS OF THE UDHR

At the time it was adopted by the UN General Assembly, Eleanor Roosevelt, then the chair of the UN Commission on Human Rights, famously proclaimed that the UDHR 'is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms ... to serve as a common standard of achievement for all peoples of all nations'.⁹³

René Cassin insisted that the UDHR would be 'an authoritative interpretation of the *Charter of the United Nations*', even though it would not directly have 'coercive legal force'.⁹⁴ Indeed, Sohn relies on Cassin in concluding that not only the UDHR, but also subsequent treaties such as the *Convention on the Elimination of All Forms of Racial Discrimination*, constitute a restatement and refinement of the principles contained in the UN Charter.⁹⁵

As a mere resolution of the UN General Assembly, the UDHR is not legally binding. However, if it could be considered a restatement of customary international law in whole or part, or an elaboration on the obligations set out in the UN Charter, its terms would be considered legally binding in international law.

Egon Schwelb, who was the Deputy Director of the UN Division of Human Rights when the UDHR was drafted, has said that it 'would have been a rather daring statement to assert then [in 1948] that the Declaration was a legally binding instrument'.⁹⁶ He observed, however, that at the time he was writing, in 1964, states were treating the UDHR as legally binding; he noted that it was 'used as a yardstick to measure the compliance by Governments

92 Morsink, above n 56, 20.

93 H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 *Georgia Journal of International and Comparative Law* 287, 318.

94 R Cassin at the deliberations of the third session of the Commission of Human Rights in May–June 1948, quoted in Morsink, above n 56, 295.

95 L Sohn, 'The Human Rights Law of the Charter' (1977) 12 *Texas International Law Journal* 12; L Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1, 16.

96 E Schwelb, *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948–1963*, Quadrangle Books, Chicago, 1964, 36–7.

with the international standards of human rights.⁹⁷ Citing the terms of the 1961 *Declaration on the Granting of Independence to Colonial Countries and Peoples*⁹⁸ and the ILO *Abolition of Forced Labour Convention of 1957*,⁹⁹ Schwelb concluded that as at 1964, ‘it can no longer be maintained, whatever the position may have been in 1948, that the Declaration has “only moral force”’.¹⁰⁰

In a comprehensive survey of scholarly opinion, national and international judicial decisions and government pronouncements on the legal status of the UDHR,¹⁰¹ Hannum points to a consensus that, ‘under whatever list of criteria one adopts, the Universal Declaration constitutes at least significant evidence of customary international law’,¹⁰² although he notes the difficulties of applying traditional criteria for identifying norms of customary international law to a human rights instrument which is focused on human rights rather than on reciprocal state obligations. The opinions Hannum canvasses run the spectrum, from the entire UDHR constituting norms of *jus cogens*¹⁰³ to its having no more than moral force, with an intermediate position that some or all of its provisions are customary norms.

Simma and Alston reject the characterisation of the UDHR as customary international law on the ground that the prerequisite of consistent state practice is not evident for many of the rights it sets out.¹⁰⁴ Indeed, evidence of states acting in violation of the human rights set out in the UDHR—thereby evidencing a lack of customary status—is all too easy to come by. However, their alternative characterisation of the rights in the UDHR as ‘general principles of law recognized by civilized nations’,¹⁰⁵ within the meaning of the Statute of the International Court of Justice,¹⁰⁶ supports an argument that the UDHR constitutes a source of binding international law.

McCorquodale notes that the Human Rights Council’s Universal Periodic Review of the human rights performance of states (see Chapter 6.9.5), requires states to report not only against the human rights obligations they have consented to by ratifying treaties, but also against those contained in both the UN Charter and the UDHR. This, he argues, ‘implies that states have accepted that the UDHR is a legitimate and lawful basis for binding customary international obligations of all states’.¹⁰⁷

97 Ibid 38.

98 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN Doc A/4684 (1961) art 7.

99 ILO *Convention Concerning the Abolition of Forced Labour* (No 105), opened for signature 25 June 1957, 320 UNTS 291 [entered into force 17 January, 1959], Preamble, para 6.

100 See Schwelb, above n 96, 47.

101 Hannum, above n 93, 287.

102 Ibid 322.

103 For an explanation of *jus cogens* see Chapter 5.

104 Simma & Alston, above n 5, 96–100.

105 Ibid 104.

106 *Statute of the International Court of Justice* art 38(1)(c).

107 R McCorquodale, ‘A Future for Human Rights law’, in M Ssenyonjo and M A Baderin (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond*, Routledge, London, 2016, 541, 542.

1.4 THE INTERNATIONAL COVENANTS

1.4.1 THE DEBATE OVER CATEGORISING RIGHTS

The delay in the legally binding treaties that were intended to follow the UDHR—detailing the list of declared human rights into obligations for states—was due in large part to the significant and continuing debate about the differences, if any, between civil and political rights on the one hand and economic, social and cultural rights on the other.

As is detailed in Chapter 3, the rights that are generally designated civil or political rights protect a broad range of aspects of life. Generally speaking, they tend to be directed towards the protection of the physical integrity of a person, and can be contrasted with economic, social and cultural rights, described in Chapter 4, which address mainly a person's standard of living and economic well-being. The considerable overlap between many of these rights, and the many other ways one could categorise them, highlight the artificiality of a stark division between civil and political rights on the one hand and economic, social and cultural rights on the other.

Although the UN has maintained the rhetoric of the 'interdependence and indivisibility'¹⁰⁸ of all rights, the following account of the drafting shows that recognition of and accountability for human rights have tended to favour civil and political rights over economic, social and cultural rights. Violations of the former set are treated as both justiciable and capable of immediate enforcement, while violations of the latter are more often viewed as social injustices rather than rights violations.

1.4.2 DRAFTING THE INTERNATIONAL COVENANTS

After the adoption by the UN of the UDHR in 1948, the UN Commission on Human Rights had the task of drafting a treaty that would detail the human rights that had been declared. The drafting was slow, partly because of a decision by the Commission to split the rights into two separate covenants which would be developed and presented to the UN General Assembly simultaneously.¹⁰⁹ Eide explains:

Underlying this decision were several assumptions, not all of them well founded. It was argued and subsequently often repeated that the two sets of rights were of a different nature and therefore needed different instruments. Civil and political rights were considered to be 'absolute' and 'immediate', whereas economic, social and cultural rights were held to be programmatic, to be realized gradually, and therefore not a matter of rights. A related assumption was that civil and political rights were 'justiciable' in the sense that they could easily be applied by courts and similar judicial bodies, whereas economic, social and cultural rights were more of a political nature. It was further believed that civil and political rights were 'free' in the sense that they did not cost much. Their main contents

¹⁰⁸ World Conference on Human Rights, above n 47.

¹⁰⁹ V Pechota, 'Development of the Covenant', in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 39.

were assumed to be obligations of states not to interfere with the integrity and freedom of the individual. The implementation of economic, social and cultural rights, in contrast, was held to be costly since they were understood as obliging the state to provide welfare to the individual. Thus, the arguments centred around the issue of the differences in state obligations arising from the two sets of rights. For this reason, it was expected that states who did not want to undertake the obligations arising from economic, social and cultural rights would be willing to ratify an instrument which contained only civil and political rights.¹¹⁰

Henkin notes that in the international negotiation of the Covenants, ‘it was necessary to accommodate, bridge, submerge, and conceal deep divisions and differences, especially between democratic-libertarian and socialist-revolutionary states—differences in fundamental conceptions about the relation of society to the individual, about his (sic) rights and duties, about priorities and preferences among them.’¹¹¹

Western countries favoured civil and political rights but were loath to recognise binding legal obligations for economic, social and cultural rights, and communist states of the former Soviet bloc, along with most developing countries in other parts of the world, prioritised economic, social and cultural rights. The Cold War context in which these discussions occurred exacerbated the divide. The result of these differences was the creation of separate treaties: for civil and political rights, the ICCPR; and for economic, social and cultural rights, the ICESCR.

Pechota sees that ‘[i]n practical terms, the decision to prepare two instruments had both advantages and disadvantages’, and says that:

On the positive side, the separation made it possible to maintain the absolute character of civil and political rights and to strengthen their international implementation while encouraging a bolder approach than might otherwise have been feasible toward the formulation of economic, social, and cultural rights, notably by omitting that they could be implemented progressively. On the negative side, the division created uncertainty about the equal standing of the two categories of rights and led to duplication of a number of provisions in the covenants, raising problems of interpretation. However, the common ground and the identity of purpose, as well as the similarity of many provisions in the final drafts, make the covenants complementary and mutually reinforcing.¹¹²

The ICCPR and ICESCR were finally adopted by the UN General Assembly, and were opened for signature in December 1966.¹¹³ The ICESCR came into force on 3 January 1976, with Australia, the UK, Germany and four Scandinavian countries the only original Western states parties. Today this ostensible ideological divide has disappeared: the US is the only significant

110 A Eide, ‘Economic, Social and Cultural Rights as Human Rights’, in A Eide, C Krause & A Rosas (eds), *Economic, Social and Cultural Rights*, 2nd edn, Martinus Nijhoff, Dordrecht, 2001, 9, 10.

111 L Henkin, ‘Introduction’, in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 9.

112 Pechota, above n 109, 43.

113 ICCPR, above n 1; ICESCR, above n 1.

Western state not to have ratified the ICESCR.¹¹⁴ The ICCPR came into force on 23 March 1976, with the Soviet Union and several Eastern bloc countries among the original states parties. Despite the expectation that states would choose between ratifying a treaty on economic, social and cultural rights and one which contained only civil and political rights,¹¹⁵ the overwhelming majority of states have ratified both.¹¹⁶

Drafting Differences Between the International Covenants

Even though most states are party to both treaties, the history of the Covenants' drafting led to distinct differences between them, resulting in a perceived hierarchy of rights that continues to affect the human rights system today.

Among the differences, contrasting phrasing is used in the two treaties: the ICCPR employs classic and more rigid rights terminology focused on individual rights, such as 'Every human being has the inherent right to life' (article 6) or 'No one shall be held in slavery' (article 8), while the more flexible language of the ICESCR focuses on the obligations of the state, such as 'The States Parties to the present Covenant recognise the right to work' (article 6) or 'The States Parties to the present Covenant recognise the right of everyone to education' (article 13). Beyond their phrasing, the actual operation of the treaties differs: while the ICCPR states in article 2(1) that the scope of the treaty is limited to the territory and jurisdiction of the state party, the ICESCR does not contain any express limitations. In addition, the ICESCR does not provide for a monitoring body to ensure state compliance;¹¹⁷ nor, until recently, was there a mechanism (such as the *First Optional Protocol* to the ICCPR) for reviewing individual complaints. Another important difference is that while article 2(3) of the ICCPR requires states to provide effective remedies for violations of rights, the ICESCR has no such requirement; rather, the ICESCR requires states only to achieve full realisation of rights 'progressively' (article 2).

The division between civil and political rights and economic, social and cultural rights has waned in the decades since the adoption of the two covenants. More recent treaties, such as the *Convention on the Rights of the Child* (CRC), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *International Convention on the Rights of Persons with Disabilities* (ICRPD) and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW) have returned to the vision of the UDHR and have incorporated economic, social and cultural rights alongside civil and political rights. *The African Charter on Human and Peoples' Rights* is the first regional human rights treaty to incorporate certain economic, social and cultural rights alongside civil and political rights in a single document. Significantly, Western human rights NGOs,¹¹⁸ which have been more likely to

114 The United States signed the ICESCR in 1977, but as at late 2016 has not ratified it. See United Nations Treaty Series <<https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed>> accessed 6 October 2016.

115 Eide, above n 110.

116 As at late 2016, the ICESCR has 164 states parties while the ICCPR has 168.

117 Note, however, that the Economic and Social Council (ECOSOC) carries out this task. See Chapter 7.3.

118 See further Chapter 7.4.

focus primarily on civil and political rights, have recognised a growing need to draw economic, social and cultural rights within their ambit, even though some of them still struggle with what they claim is a lack of clarity around violations of such rights and possible remedies, which can pose difficulties in advocating on behalf of victims.¹¹⁹

The work of the Human Rights Committee (in relation to the ICCPR) and the Committee on Economic Social and Cultural Rights (with respect to the ICESCR)¹²⁰ has helped to define the content of the rights set out in the treaties. Although international and domestic jurisprudence that pertains to economic, social and cultural rights is far more limited than that pertaining to civil and political rights, a burgeoning body of cases (of which examples are discussed in Chapter 4) relating to issues such as the rights to housing, health and food, is fostering litigation that was simply unknown 20 or 30 years ago. Such cases are helping change the perception of economic, social and cultural rights, from aspirational and vague to real and enforceable.

The formal position under international law is that civil, political, economic, social and cultural rights all form part of the same indivisible body of international human rights law and cannot be given effect to selectively. In 1993 the *Vienna Declaration and Programme of Action* declared, 'All human rights are universal, indivisible and interdependent and interrelated'.¹²¹ In 2006 the UN General Assembly resolution establishing the Human Rights Council reaffirmed 'that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis'.¹²² The Universal Periodic Review process¹²³ made a concrete step towards ensuring that human rights are treated as indivisible, by subjecting states to review all their obligations under all treaties to which they are a party, as well as the UN Charter and the UDHR, in a single process.

Nevertheless, civil and political rights continue to enjoy something of a privileged position in practice compared with economic, social and cultural rights. This is particularly true at the domestic level. Constitutional or other entrenched protection of human rights in domestic law invariably covers at least a core group of civil and political rights; provisions to recognise and protect economic, social and cultural rights, by comparison, are significantly less common. One of the main reasons for that is the difficulty that economic, social and cultural rights are sometimes said to pose for the allocation of resources and for the justiciability of complaints, discussed in detail in Chapter 4.5.

119 See K Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' [2004] 26(1) *Human Rights Quarterly* 63; L S Rubenstein, 'How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth' [2004] 26(4) *Human Rights Quarterly* 845.

120 See Chapter 7.3 for a discussion of these committees.

121 World Conference on Human Rights, above n 47.

122 GA Res 60/251, *Human Rights Council*, UN Doc A/Res/60/251 [2006] Preamble, para 3.

123 See Chapter 6.9.5.

1.5 CONTINUING EXPOSITION OF THE INTERNATIONAL BILL OF RIGHTS

In a remarkably short time—about 70 years since the UDHR and 40 years since the Covenants came into force—the international system of human rights law has become not merely established, but pervasive in global and national life. As described at 1.3.1, the rights in the UDHR were agreed on and declared with remarkable speed and consensus, so it is unsurprising that their full meaning and potential continue to be explored.

1.5.1 POST-COLONIALISM AND THE INFLUENCE OF NEWLY INDEPENDENT STATES

The changing complexion of the international community and membership of the UN was a significant influence on the development of international human rights law after the adoption of the UDHR. The process of decolonisation, particularly in Asia and Africa, which accelerated through the 1950s and 60s, resulted in a large number of newly independent states becoming UN members within a short time. From 1956 to 1968, 49 new states became members of the UN, all but Japan being the result of decolonisation. Total UN membership at the time of adoption of the UDHR in 1948 was 56, but within 20 years the number had more than doubled, to 123.

The newly independent states often shared the priorities of pre-existing developing countries such as those in Latin America, and on ideological issues they were often supported by established socialist states. Their emerging weight of numbers culminated in the formation among developing countries of the Non-Aligned Movement (NAM) in 1961, an alternative to allegiance with one of the two Cold War blocs. It enabled newly independent and developing states to assert their priorities within the UN, including in the development of human rights; NAM continues to exist, and now commands a majority of the UN General Assembly.

The changing balance of colonial and post-colonial states raises challenging issues for the international community. The colonial/post-colonial split can be characterised in terms of developed/developing states, and West/East political cultures. This has precipitated international debate about whether human rights are truly universal or are in some way ‘relative’ (discussed in Chapter 2.4.2), about whether civil and political rights are of greater relevance and are more valued in Western and developed states than in Eastern and developing states, and about whether the converse is true of economic, social and cultural rights.

A Right to Self-Determination

Chief among the early priorities of NAM was support for decolonisation of countries which remained under colonial rule, as well as legal recognition of the independence of the new states, including not only territorial sovereignty but also sovereignty over resources. These concerns of the newly independent states were the driving force behind the inclusion in both the ICCPR and the ICESCR of the right to self-determination, a right which had not been included in the UDHR.

The origins of the right to self-determination lie clearly in the concern of the UN with the rights of ‘peoples under colonial and alien domination.’¹²⁴ Western states, particularly those such as the UK, France and Belgium, which still had colonial possessions at the time that the ICCPR and the ICESCR were being negotiated, opposed the inclusion of the right to self-determination.¹²⁵ Henkin observes that ‘Western states resisted [a right of self-determination], arguing that both [covenants] are at best rights of a “people”, not of any individual, and surely not—like human rights generally—rights of individuals against their own society. They argued, too, that content of these norms was highly uncertain and controversial. ... But the arguments of the Western states did not prevail, and identical provisions on self-determination now head both covenants.’¹²⁶

Article 1 of both covenants recognises the right of all peoples to self-determination, including the rights for all peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’,¹²⁷ and ‘for their own ends, [to] freely dispose of their natural wealth and resources’.¹²⁸ The right to self-determination was recognised by the Vienna World Conference on Human Rights, and is today considered a primary rule of international law (see Chapter 3.2.1).¹²⁹ Although some Western states revisited their opposition to a right of self-determination during the negotiation of *Declaration on the Rights of Indigenous Peoples* in the early twenty-first century, discussed in Chapter 14, there is less concern now that a people’s right to self-determination poses a challenge to the social and political integrity of the state of which they are a part. The UN offered a noticeably conditional reassurance in this regard in 1995, stating that reaffirmation of the right of self-determination of all peoples ‘shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind*’.¹³⁰

124 See, eg, H G Espiell, Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self Determination: Implementation of United Nations Resolutions*, UN Doc E/CN.4/Sub.2/405/Rev.1 (1980).

125 At the Commission stage, the article on self-determination in the draft ICCPR was adopted by a vote of 13:4, with Australia, the United Kingdom, France and Belgium the only states to oppose it.

126 See Henkin, above n 111, 9–11. Extending the right to control over natural resources was particularly objectionable to some Western states as a potential obstacle to foreign investment: see A Cassese, ‘The Self-Determination of Peoples’, in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 93.

127 ICCPR, above n 1, art 1(1); ICESCR, above n 1, art 1(1). See Human Rights Committee, *General Comment No 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples*, 21st sess (1984); CERD Committee, *General Recommendation No 21: Right to Self-Determination*, 48th sess (1996).

128 ICCPR, above n 1, art 1(2); ICESCR, above n 1, art 1(2). For further discussion of the right to self-determination see Chapter 3.2.1.

129 *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90 [29]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [88], [155–6].

130 GA Res 50/6, *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc A/RES/50/6 (1995) para 1 (emphasis added).

A Right to Development

A further influence of the NAM group of developing countries in the post-colonial era, particularly countries in Africa,¹³¹ has been the emergence of the right to development as a human right. In the *Declaration on the Right to Development*, adopted by the UN in 1986,¹³² article 1 declared the right to development as both an individual right, and a collective right of peoples:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The right to development has in its various iterations been expressed as a right in itself, as well as an approach to development and a process for approaching all the other human rights in the context of development.¹³³ The latter characterisation has been criticised for being overly ambitious, addressing ‘almost all of the world’s economic and social problems.’¹³⁴ Nevertheless, its recognition by the Vienna World Conference on Human Rights, and its persistence in statements of international human rights law, clearly reflect the priorities of developing countries and their influence in the formation of human rights norms since the period of rapid decolonisation. In particular, the right focuses on outcomes, processes and the availability of the means for the realisation of rights, rather than on the traditional Western concern with the prohibitions against oppression and infringements of liberty.

Even though the right to development has attained general acceptance as a human right at the rhetorical level,¹³⁵ there is a continuing inquiry as to its precise content, and consequently, questions as to precisely what states are required to do to comply. This is the business of the Human Rights Council’s Intergovernmental Working Group on the Right to Development, established by the UN Economic and Social Council¹³⁶ to monitor, review and report on progress made in the promotion and implementation of the right.¹³⁷

1.5.2 EMERGENCE OF HUMAN RIGHTS AS A MAINSTREAM LEGAL, SOCIAL AND POLITICAL ISSUE

In 1993, the World Conference on Human Rights was convened in Vienna in an attempt to achieve and record a consensus on the state of international human rights law in the post-Cold

131 C Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edn, Oxford University Press, Oxford, 2014, 149.

132 GA Res 41/128, *Declaration on the Right to Development*, UN Doc A/RES/41/128 (1986) art 1.

133 See World Conference on Human Rights, above n 47, paras 10–12, for an example of the right to development expressed in terms of a process for fulfilling other human rights.

134 See Tomuschat, above n 131, 150.

135 See, for example, the resolution establishing the Human Rights Council, which makes repeated reference to ‘all human rights, civil, political, economic, social and cultural rights, including the right to development’: above n 122.

136 ECOSOC, *The right to development*, UN Doc E/DEC/1998/269 (1998).

137 GA Res 67/171, *The right to development*, UN Doc A/RES/67/171 (2012); Human Rights Council, *The right to development*, UN Doc A/HRC/24/L.6 (2013).

War era. The Conference was attended by 171 states and hundreds of NGOs, and the resulting document, the *Vienna Declaration and Programme of Action* (Vienna Declaration), provides an excellent snapshot of the perception of the international community of the status and content of international human rights law at that time.

Among the key statements in the Vienna Declaration were a reaffirmation of human dignity, inherent in the birth of every human being, as the source of human rights; recognition that the UN Charter contained legally binding obligations for states to protect and promote human rights; recognition of the universal nature of human rights and the interdependence and inseparability of civil and political and economic, social and cultural rights; and the reaffirmation of the rights to self-determination and to development.

Further attempts to strengthen the human rights framework of the UN followed, with the creation of the Office of the High Commissioner for Human Rights and, through the UN Secretary-General's blueprint for UN reform, *In Larger Freedom*, the creation of the Human Rights Council and the Universal Periodic Review.¹³⁸ Meanwhile, regional systems developed in Europe, the Americas and Africa have added another layer of accountability for human rights.¹³⁹

Forty-five years after the UDHR, the Vienna Conference demonstrated that the legitimacy of human rights as a mainstream concern for the international community, and the status of human rights as legal rights with corresponding international obligations, were beyond question. The continuing questions for contemporary debate thus relate not to the existence of human rights or their status as law, but to the scope of human rights and obligations—for example, questions about the extraterritorial reach of human rights obligations and the conditions in which they may be invoked, discussed in Chapter 19.4—and questions about the actors to which those obligations might apply—for example, non-state actors such as multinational corporations, discussed in Chapter 13.

138 See Chapter 6.9 for discussion of *In Larger Freedom* and the formation of the Human Rights Council.

139 See Chapter 8.