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]

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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.

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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;

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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.

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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.

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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 committees[35] 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 committees[36] 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

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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]

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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.

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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.