Workshop Paper: The Human Rights Framework: What Does it Offer?

The Modern Development of Human Rights Instruments

During the Second World War, the actions carried out by fascist regimes in Europe created a desire among certain people to put in place an international system to prevent such atrocities from reoccurring. The debate in the United Kingdom was kicked along by HG Wells' publication in 1939 of a draft *Declaration of Rights*. The draft, after contributions and comments by various colleagues of Wells including AA Milne, JB Priestley and Kingsley Martin, was published by Penguin as *The Rights of Man or What We Are Fighting For*. The book became a best seller and was translated into 30 languages.

On 1 January 1942, the protection of human rights became part of the official war aims of the war powers. The influence of Wells' Declaration had been earlier seen in President Roosevelt's famous Four Freedoms Speech delivered, a year earlier, on 6 January 1941. Roosevelt had said:

> "In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.
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> The first is freedom of speech and expression -- everywhere in the world.
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> The second is freedom of every person to worship God in his own way -- everywhere in the world.
>
> The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants -- everywhere in the world.
>
> The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour -- anywhere in the world."

These four freedoms provide leading examples of what became civil and political rights (freedom of speech and expression) on the one hand and economic, social and cultural rights (freedom from want), on the other.

After the war, the international framework began with the establishment of the United Nations.

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The United Nations Charter

The protection of human rights was not the only purpose of forming the United Nations. The maintenance of international peace was, perhaps, a greater priority. Human rights, did, however, get a look in in the drafting of the foundation document, the Charter of the United Nations. The Charter was signed on 26 June 1945. It came into force on 24 November 1945. The Preamble to the document placed significant emphasis on the protection of human rights. The opening words of the Preamble read as follows:

‘‘PREAMBLE

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm 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, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

… “

Most political discourse is about the way in which accepted but competing principles are to be resolved. Not surprisingly, there were competing principles at play in the formation of the United Nations Organization. Some of these competing principles can be seen in article 2 which provides in part as follows:

“Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

…

7. 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 the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

Starting with the Charter, modern international diplomacy has had these two themes. The emphasis on compliance with international obligations under the Charter and other international instruments has always competed with the insistence upon not impinging upon the sovereignty of nation states. Sovereign states, whenever convenient, have been very good at using the undefined area of matters within their domestic jurisdiction to defend the oppression being inflicted within their borders.

The provisions of the Charter which provided for economic and social cooperation also emphasised the need to protect human rights. Article 55 provided as follows:

"**Article 55**

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

It is also worth noting that article 55 refers to the "principle of equal rights and self-determination of peoples" an early pre-echo of the references to self-determination in the United Nations Declaration on the Rights of Indigenous Peoples.

The Universal Declaration of Human Rights ("the UDHR")

The newly United Nations dealt with the aspirations recorded in the Charter to provide for the protection of human rights by adopting ,in the General Assembly, on 10 December 1948,at the Palace de Chaillot in Paris, the Universal Declaration of Human Rights ("the UDHR").

The lobbying; the debates; the compromises; and the drafting involved in the passage of the UDHR is a story which deserves frequent re-telling. It reflects well on the then outward looking nation of Australia whose delegation was led by the President of the General Assembly and Australian External Affairs Minister, Dr Herbert Vere Evatt.

For present purposes, I would note, first, that, among the most beautiful language with which the preamble is written is this concluding paragraph that immediately precedes the first article of the UDHR. It reads:

"**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."

Like later Declarations, the UDHR was not a binding treaty. That came later after much more hard work among the diplomats. However, the paragraph which I have just cited for me says a lot about the way in which international human rights documents speak to us.

First, they are "a common standard of achievement for all peoples and all nations". They provide a standard against we may continually measure our performance in the field of human rights.

Second, they provide an exhortation not just to governments but to every individual and to every organ of society.

Third, it is acknowledged that there are historical, social and economic barriers to meeting all of the standards. What is called for is “progressive measures”, perhaps, in the words of our present Prime Minister, a need to “move forward”.

Fourth, there is no doubt about the object which is sought. The object is “universal and effective recognition and observance”.

As I have already mentioned, the rights protected by the UDHR tend to be divided into two categories now known as civil and political rights on the one hand and economic, social and cultural rights on the other. For example, article 9 specifies that “no one shall be subjected to arbitrary arrest, detention or exile”. This is a civil or political right in that it requires the state to regulate its laws so as to avoid encroaching upon the rights of the citizen.

Article 23, on the other hand, provides that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. The right to remunerated work depends on more than the passage of a law. It requires an economy that can deliver jobs in sufficient numbers and of sufficient different types that everyone can find employment suited to their skills and abilities. It requires more than the passage of a law that says everyone will have a job. The right to work of this kind falls into the category of economic, social and cultural rights.

The UDHR provides in article 29 that “everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms and others”. Article 30 provides that “[no] group or person [has] any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms” set forth in the UDHR. This identifies and acknowledges that everyone’s exercise of rights is necessarily tempered by the need for space in which other people can enjoy their own rights. Drawing the lines that define the compromises which this limitation makes necessary is one of the ongoing challenges of human rights law.

The existence of and need for article 29 reflects the reality that the standards laid down in international human rights instruments (with important exceptions like the prohibitions of torture (article 5 UDHR) and slavery (article 4 UDHR)) are not absolutes. They need to be applied with good sense and an appreciation of the social and historical context to which they are being brought to bear. On the other hand, the instruments do provide universally applicable standards. Accordingly, slogans such as the claim that human rights are a western concept that doesn’t apply to Africans/Asians /Australians are generally used by those who seek to justify their continued oppression of others. When I hear a claim like that, I feel like seeking a second opinion. I feel like asking the person whom the human rights denialist is putting in jail or causing to be tortured whether they also share the ethno-centric view of human rights. I place more value on the second person’s opinion.

The ICCPR and the ICESCR

Since the UDHR was a mere Declaration, a move was soon on foot to develop an enforceable treaty to similar effect. Progress was slow, partially, because the Cold War has soaked up much of the post war passion for the view that "the advent of a world in which human beings shall enjoy freedom of belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people".[1]

The UDHR gave rise to two enforceable Covenants. Although there is overlap between political rights and economic and social rights, the distinction between the two types of rights was used to direct the development of the two separate covenants.

The International Covenant on Civil and Political Rights ("the ICCPR") was settled and became open for signature on 16 December 1966. It gathered enough signatures[2] to come into force on 23 March 1976.

The International Covenant on Economic, Social and Cultural Rights ("the ICESCR") was open for signature from16 December 1966 (the same day as the ICCPR) but came into force on 3 January 1976, beating the ICCPR by nearly three months.

The Offspring

One aspect of the experience of the promotion of human rights protection is that human rights abuses occur not only as general oppression of a populace but in particular problem areas which require their own solutions with focussed effort on the particular issue.

Partially, to address these patterns, particular treaties have been developed to deal with particular human rights issues. Thus, treaties have been developed to combat racism;[3] to promote the rights of children;[4] and to protect women against the particular marginalisation they suffer in many societies[5] to mention three of the more prominent.

A glance at the text of these treaties indicates that they are applying to the particular subject area many of the same protections that are provided for in the ICCPR and the ICESCR. However, the particular problems experienced by children, women or those subject to racial discrimination also require particular forms of protection. As a result, the more specialised treaties, as well as applying the protection from the more general treaties, also make particular provision for the problems faced by those for whom the treaty has been written.

A Funny Thing Happened in the Last Fifty Years

One can see from the dates of the two Covenants that enforceable general human rights instruments have come into existence relatively recently. Considering that short history, human

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1 UDHR, Preamble

2 By article 49, 35 states were required to ratify for the ICCPR to come into force.

3 The Convention on the Elimination of All Forms of Racism preceded both the ICCPR and the ICESCR in coming into force on 4 January 1969.

4 The Convention on the Rights of the Child ("the CRC") came into effect on2 September 1990.

5 The Convention on the Elimination of All Discrimination Against Women ("the CEDAW") came into force 3 September 1991.

rights instruments have obtained remarkable currency both at the domestic level within countries and on the international stage. Human rights violations of the worst kind still occur and, frequently, the perpetrators are not brought to account for those wrongs. However, even those individuals and countries who are responsible for those violations still are forced to acknowledge the authority of the Covenants and to find words of denial that take into account that authority.

I said before that the Cold War soaked up much of the passion for a better world that briefly existed immediately after World War II. However, the fiftieth anniversary that we are celebrating throughout this conference provides a clue why, eventually, protection of human rights by internationally binding treaties and covenants found favour.

For many years after 1948, nation states and their diplomatic servants talked about negotiating binding covenants to follow up on the UDHR without conviction and without any real desire of restricting the freedom of nation states of acting oppressively to their own citizens if and when they so pleased.

However, the formation of Amnesty International in 1961 was an expression of a wider desire and movement among those same citizens. Nation states have felt the pressure of those citizens expressing their views through Amnesty International and many other non-government organisations. I suspect that the formation of Amnesty played an important role in the opening for signature of the two covenants and their coming into force, ten years later.

Amnesty and thousands of other NGOs, including the International Bar Association; the International Crisis Group; and Human Rights Watch, continue to exert large amounts of influence in the development of international human rights law. What is perhaps even more important is the influence of NGOs in promoting the content of human rights law among ordinary citizens. This, in turn, forces governments to show respect for the documents for which they have voted and adopted and to work to continue to develop the provisions of international human rights law.

There is a long way to go for human rights protection. “Disregard and contempt for human rights [continue to result] in barbarous acts that [outrage] the conscience of mankind”.[6] It happens frequently and it happens on a large scale. Significant numbers of people responsible for those barbarous acts are being made accountable but, for many, accountability is not presently a concern.

The provision of economic, social and cultural results across communities, particularly, to groups already suffering disadvantage raises many policy challenges for which solutions continue to be elusive. Many regions of the world continue to experience natural disasters and conflict which, in turn, give rise to displaced persons; further disadvantage; and sometimes are themselves the cause of human rights abuses. Climate change and more general environmental devastation are already causing shortages of food and displacement.

Despite and, particularly because of these continuing challenges, it is a good thing that the development of covenants and treaties to protect human rights is no longer the province of nation states and their diplomatic personnel. While they have done an excellent job in adopting the UDHR and preparing drafts of the ICCPR and the ICESCR, the input of ordinary citizens has taken the

[6] UDHR, preamble

process to another level. It is a good thing because human rights and the challenging of effectively protecting them are far too important to leave to nation states.

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