1. The history of international human rights law

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1. THE CONCEPT OF INTERNATIONAL HUMAN RIGHTS

The Preamble of the Universal Declaration of Human Rights of 1948 (UDHR) reaffirms the ‘faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women’, and expresses the conviction that ‘human rights should be protected by the rule of law’. Article 1 of the same Declaration proclaims 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.’ The quoted passages highlight the double nature of international human rights (IHR). They are at the same time legal and moral rights.

As legal rights, human rights are entitlements ‘protected by the rule of law’, which implies that they form part of positive law. More precisely, so as to be accurately described as international human rights, they need to be protected by the international legal order. As moral rights, IHR are generally viewed as basic entitlements that belong to every person by virtue of the sole fact of being human. Based on a common, albeit contested classification, they comprise civil and political rights (so-called first generation rights), social, economic and cultural rights (so-called second generation rights) and solidarity rights (so-called third generation rights). According to the traditional view, first generation rights are negative rights, protecting life, bodily and physical integrity and individual freedom against state interference, as well as formal equality and the right to political participation. They comprise mainly classical liberty rights, including, for instance, two of President Roosevelt’s famous four freedoms, ‘freedom of speech and freedom of belief’. Second generation rights, by contrast, are primarily positive rights (or welfare rights), reflecting the concern for substantive equality. They impose on the state the duty to provide for people’s basic needs, satisfying what President Roosevelt called ‘freedom from want’. Contrary to the first and second generation of human rights, third generation rights are conceived not as individual but as group rights. They include, for instance, people’s rights to self-determination, the right to development and to a clean environment, and contribute, through the right to peace, to the realization of President Roosevelt’s fourth freedom, the ‘freedom from fear’. The categorization into three generations is not meant to reflect axiological but temporal priority. Qua moral rights, the first generation is generally considered a child of 17th- and 18th-century liberalism, the second generation of 19th-century socialism, whilst the third generation reflects the vindications of a fairer political and economic world order, voiced by developing countries in the context of decolonization, and with strong vigour since the 1970s. Qua legal rights, the positivation of the first two generations has so far been more successful than the codification of rights belonging to the third generation.
An outline of the history of IHR needs to account for their legal as well as their moral nature. Both dimensions are not self-evident. They have emerged from a long struggle, building on, transforming and challenging existing ideas and power structures of their times. The legal nature of IHR implied a departure from the Westphalian tradition, which conceived international law as a legal order regulating external relations between sovereign and equal states. The protection of human rights through international norms has questioned the assumption that states are the exclusive subjects and sole concern of international law. Moreover, as these rights protect citizens against their own state, the concept of IHR also departs from two other principles of the Westphalian paradigm, the idea of state sovereignty and reciprocity. States can no longer argue that the way they treat their own population pertains to their reserved domain (‘domaine réservé’). Neither can they hold that international law’s concern is limited to protecting reciprocal national interests through contractual arrangements (treaties) setting out duties and rights which states hold vis-à-vis each other.

The concept of human rights as moral rights is no more self-evident than their legal nature. It implies, amongst other things, minimal empathy and identification with fellow beings, rooted in the idea that all humans have certain features in common which transcend other loyalties and identities. Persons are not exclusively defined in terms of gender, or as members of a tribe, a caste, a religious community, or a nation, but form part of ‘the human family’. They share the capacity to reason and are endowed with a conscience, which grounds their freedom and equality. Viewed as autonomous moral agents, all humans have the capacity to know good from evil and to decide for themselves. Based on this vision, it was possible to make, like Rousseau, the counter-factual claim that ‘[m]an is born free, and everywhere he is in chains’.

Linked to moral autonomy and equality is another essential feature of the human rights idea affirmed in the UDHR, the equal worth, that is the equal dignity, of every member of the human family. The conviction that every human being is of equal worth and as such bearer of the same basic rights runs counter to a rivaling perception: the vision that people’s value is dependent on their honor, which is contingent on their social rank and their behavior. Whilst honor, like reputation and merit, strives towards differentiation, is culturally specific, and can be lost, dignity grounds equal basic concern for all human beings, and thus pretends to universality. As it is independent of conduct, dignity can neither be earned nor forfeited.

What exactly the respect of human dignity entails, and what it is grounded on, remains open to debate. Dignity, like the respect for equality and autonomy, is not only an idea but also a cultural practice. It is based both on reason and feeling, intellect and compassion. As often highlighted, our intuitive understanding makes it easier to identify clear violations of human dignity and human rights than to define positively what their precise content is. It comes thus as no surprise that the UDHR was proclaimed against the backdrop of World War II and the ‘barbarous acts which have outraged the conscience of mankind’ whilst not spelling out the exact significance of human dignity and leaving open its foundation. Like dignity, IHR thus remain indeterminate and open to justifications from different cultural, philosophical and religious perspectives. Different people in different places have different ideas on what human rights are for, where they come from, what their precise content is, and whether and in what sense they are universal or relative to a given community.
Human rights remain an ‘incomplete idea’, shaped and evolving through the human suffering that has marked the history of mankind. Based on our experience, ‘our sense of who has rights and what those rights are constantly changes. The human rights revolution is by definition ongoing’.

Any account of where the concept of IHR came from, how it developed in the past and how it may evolve in future will, like the idea itself, be necessarily incomplete and controversial. Written by a European legal scholar, this chapter aims at sketching the history of ‘human rights with modesty’. It will first outline the development of human rights on the national (section 2) and then on the international level (section 3). In both the domestic and international sphere, human rights first crystallized as moral rights which were cast in solemn declarations. At a later stage, they entered the realm of positive law, for example national constitutions and international treaties.

2. THE DEVELOPMENT OF HUMAN RIGHTS ON THE NATIONAL LEVEL

Historical accounts frequently trace the origins of the contemporary human rights idea back to the Enlightenment. Whilst the legacy of the Enlightenment is without doubt crucial for our contemporary understanding of human rights, these did not ‘materialize out of thin air’ in the 17th and 18th centuries but have ‘deep roots’.

2.1 Precursors

Scholars who search for common foundations to underpin the universality of human rights highlight that many values reflected in IHR norms, such as concern for the life and well-being of others, as well as property, can be found in ancient cultures and belief systems. Although these ancient codes of conduct, including, for instance, Hammurabi’s Code from the 18th century BC, or the Ten Commandments of the Old Testament, were framed as duties, and not rights, they provided fertile soil on which human rights have been able to grow. The idea of charity or solidarity, for instance, which underpins social rights, finds support in major religions like Islam, Judaism and Christianity, as well as Confucianism and Buddhism. Taking a second example, religious tolerance, an essential component of one of the best known first generation rights, freedom of thought and belief, was advocated in Mesopotamia as early as in the 6th century BC, when Emperor Cyrus pledged to ‘honor the religion and custom of all nations under [his] kingdom’. On the Indian subcontinent, the Buddhist Emperor Ashoka (304–232 BC) adopted a similar stance. Almost two millennia later, another Indian ruler, the Muslim Mughal Emperor Akbar (1542–1605), defended tolerance of diverse religions, at a time when Europe was ravaged by religious wars and the Reformators’ vindication of religious liberty was far from realized. Akbar’s policy of religious tolerance was not foreign to Islam. The Koran holds: ‘Let there be no compulsion in religion’. In the Western world, Tertullian (ca. 160–ca. 220 AD) vindicated from the Governor of the Roman province of Carthage, for the sake of the Christian community, the ‘right belonging to mankind and the natural power of every person to worship as he thinks best’.
Focusing on the Western precursors more generally,40 the heritage of the Greeks and Romans provided important intellectual strands for the contemporary concept of human rights. They include reason as a distinctive and common feature of all humans, and the related ideas of freedom, equality and universality, as expressed in the Stoic theory of natural law41 and the Roman notion of ‘ius gentium’ (law flowing from human reason and applicable to all people).42 Under the influence of the Stoa, the Roman philosopher Cicero43 grounded the worth (dignitas) of human nature in reason, a feature men shared with the gods.44 In his writings, however, this concept of dignity competed with the status and conduct dependent understanding of dignity as honor.45

Later, the Christian tradition also oscillated between egalitarian and differentiating conceptions. The first line of thought anchored human dignity and equality in the idea that all humans are made in God’s image46 and partake in God’s reason. The second line of thought denied dignity to sinners, heretics and heathens. The perception of the hierarchical structure of the feudal society and the Church as a natural, God-given order further reinforced the differentiating function of dignity. For the emergence of the human rights idea, it was essential that the first conception of human dignity came to prevail over the latter. In addition to acknowledging people’s intrinsic equal worth, it was crucial to affirm another characteristic: their freedom. Humanism, the late Spanish scholastic school, and the Reformation made important contributions to this effect,47 establishing a strong link between freedom, dignity and equality.

The Italian Renaissance scholar Pico della Mirandola’s (1463–1494) influential account of human dignity saw man’s godlike nature in his creative ability.48 He held that unlike all other things, human nature is not fixed. Men, like God, are creators, as they are free to shape and determine their own nature, which founds their dignity. Affirming the freedom and equality of all people within an exclusively European and Christian context was one thing; making the same assertion with regard to ‘barbarous unbelievers’49 was a different matter. Unsurprisingly, the conquest of the Americas led to vivid controversies in Spain about the status and the rights of the Indians. In these lively debates, the Dominican priest and Bishop of Chiapas, Bartolomé de las Casas (1484–1566)50 and Francisco de Vitoria (1483–1546),51 founder of the Spanish late scholastic doctrine (also known as the School of Salamanca), opposed the enslavement and exploitation of natives justified on the basis that the Indians lacked reason and autonomy.52 Their defense of the Indians firmly extended the idea of brotherhood and compassion beyond the Christian community, advocating the notion of a common humanity. Later, the most famous representative of the School of Salamanca, Francisco Suárez (1548–1617) also defended the unity of the human race, which was, in his words, ‘quasi-political and moral’.53 It rested on the conviction that all people of this world, independently of their religion or race, were free by nature and endowed with reason.54 As such, they were entitled to freedom from slavery and from coercion in religious matters, as well as to respect of their property and their family. These entitlements were claimed on the basis of natural law, understood as a set of immutable and universal precepts, which, by virtue of God’s will, are inherent in the rational and free nature of men. Occasionally, and far from systematically, these entitlements were referred to as human rights (‘derechos humanos’).55

Among these rights vindicated for people outside the jurisdiction of Christian princes, freedom of religion, however, was far from being accepted with regard to the
subjects of Christian rulers. Although imposing conditions and limits on the sanctions which could legitimately be imposed on unbelievers, Suárez, for instance, considered that Christian princes could enforce the worship of the true religion within their jurisdiction, as it was in his view an essential condition for the virtues necessary to safeguard peace and justice within the Republic.56 Another movement – the Reformation – fundamentally challenged this view, affirming the central place of religious liberty. The respect for freedom of creed and conscience was vindicated as a condition for the subjects’ duty to obey their rulers.57

The above-mentioned lines of thought paved the way for modern secular natural law doctrines (as set out for instance by Grotius [1583–1645] and Pufendorf [1632–1694]),58 and initiated a gradual shift from a duty-based to a rights-based society, and from a theocentric to an anthropocentric world view. Secularization and an optimistic vision of mankind, emphasizing human capabilities and reason at the expense of sinfulness and fallibility,59 favored the birth of the human rights idea during the Enlightenment.

2.2 The Birth of the Human Rights Idea

During the religious and political struggles in England in the 17th century, the influence of natural law doctrines resulted in the ‘transformation from Christian to political freedom’.60 Human rights emerged as instruments of social and political change, aimed at combating the privileges of the old feudal order and the absolute power of the monarch. John Locke’s ‘Two Treaties of Government’,61 published in 1690, offered a new philosophical justification to the political settlements between Parliament and the King following the Glorious Revolution, reflected in the Bill of Rights (1689). Similar to the famous Magna Carta (1215), the Petition of Rights (1628) and the Habeas Corpus Act (1679), the Bill of Rights did not set out rights derived from natural law and belonging to all human beings. Instead, it vindicated ‘ancient rights and liberties’ of the members of Parliament, the ‘Lords Spiritual and Temporal and Commons’.62 Locke (1632–1704), by contrast, founded his argument firmly on natural law. Like Hobbes (1588–1679),63 he distinguished between the state of nature and political society, grounding the legitimacy of the state not on God but on the consent of naturally free and equal individuals. Imagining a state prior to the political community, both authors adopted a more individualistic vision than preceding scholars, who shared the Aristotelian view of man being by nature ‘a social animal’. This is however to a larger extent true for Hobbes than for Locke. Unlike Hobbes, Locke did not perceive the state of nature as a perpetual war between antagonistic subjects (bellum omnium contra omnes) but as a state governed by natural law which the individuals left not just to insure their survival, but also due to their desire to live in a political community.64 The two authors also differed on another important point: by contrast with Hobbes’s Leviathan, Locke’s writings did not justify absolute state power but limited government. When individuals decided to abandon the state of nature and to found a political community, they entrusted the state with a specific function: to protect ‘life, liberty and property’. These natural rights were bestowed on all men by natural law in the state of nature. It is Locke’s theory of natural rights which has left a major imprint on the human rights movement. Although Locke ground these rights, as will
be shown, also on duties, the emphasis shifted. Natural law ceased to be mainly concerned with the laying down of duties, but became to be seen as a source of individual rights. These rights preceded political society and were inalienable entitlements protecting the citizens against state power. Conceived as a shield against the coercive power of the state, Locke's theory of natural rights justified the right to abolish tyrannical governments.

Locke's concept of rights built on a broad notion of property (dominium), understood as self-ownership. This notion originated in the late Middle Ages and was further developed by natural law thinkers such as Grotius and Suárez. Locke argued that being the property of God, man had a duty and the corresponding right of self-preservation. So as to preserve himself, he is given freedom, in the sense of property over his own body and his actions. The idea of autonomy as self-ownership over one's mind and body is in Locke's writing the foundation of property rights over things, since the ownership of one's body entails the ownership over the fruit of one's labor. The conception of self-ownership was influential in another way. It favored the view of human beings as self-contained, individualized persons whose bodies, previously only held sacred in a spiritual order, became sacred within a secular order. The intangibility of the human body fuelled opposition to torture and similar forms of punishments, previously considered as practices necessary for the redemption and reparation of the religious, political and moral order of the community.

Another sense of autonomy has been more influential for the modern Western human rights idea than that of self-possession: the account of autonomy as moral and political self-legislation, articulated by Rousseau (1712–1778) and Kant (1724–1804). According to the famous German philosopher from Königsberg, humans are autonomous to the extent that they follow the laws dictated by their reason. By contrast with other beings and objects, persons, as rational and therefore autonomous beings, have no instrumental value (a price) but intrinsic worth: dignity. Due to their worthiness, they can never be employed exclusively as objects or means to achieve someone else's ends, but need to be treated likewise as ends in themselves. This notion of autonomy and dignity grounded for Kant the only original, innate right belonging to every individual by virtue of his or her humanity, the right to equal freedom. The latter implies that each person is not entitled to more freedom than is compatible with the same degree of freedom for others, or, conversely, that any limitation of personal freedom needs to be reciprocally applicable to others.

In the 18th century, it was Locke's work which had the biggest political impact. The natural rights to life, liberty and property, and the right to overthrow tyrannical governments, were invoked to justify the revolutionary break of the North American colonies with the English constitutional order. Article 1 of the Virginia Bill of Rights of 12 June 1776, which influenced the American Declaration of Independence drafted by Thomas Jefferson in the same year, clearly echoed Locke. Its first provision stated:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
A decade later, the solemnly declared natural rights became part of positive law. In 1789, Congress adopted the Bill of Rights, consisting of the first ten Amendments to the Constitution of the United States of 1787.

Meanwhile, the revolutionary impulse had spread in France, and fuelled a series of Rights Declarations, starting with the famous Declaration of the Rights of Man and of the Citizens of 26 August 1789. Like its American counterparts, the Declaration proclaimed in Article 1 that ‘Men are born and remain free and equal in rights …’ and affirmed ‘the preservation of the natural and imprescriptible rights of man’ to be ‘[t]he aim of all political association’. ‘These rights are liberty, property, security, and resistance to oppression.’ The subsequent provisions emphasized as ‘natural, unalienable, and sacred rights of man’, and ‘based upon simple and incontestable principles’, the rights to political participation, procedural safeguards, including guarantees of fair trial and against arbitrary detention (habeas corpus), freedom of opinion, including religious ones, and the ‘inviolable and sacred right’ of property.

2.3 Contestation, Positivation and Industrialization

Unsurprisingly, the revolutionary dynamic of the human rights movement fuelled controversy and counter-movements. Among the best-known critiques are those of Edmund Burke, Jeremy Bentham and Karl Marx. Whilst Burke challenged natural rights and the French Revolution in his famous controversy with Thomas Paine from a conservative perspective, Bentham’s critique was grounded on utilitarianism and positivism. Famously deriding the ‘anarchical’ idea of natural rights as ‘rhetorical nonsense, – nonsense upon stilts’, Bentham held that a real right was ‘the child of law’, a natural right being ‘a son that never had a father’. Stripped of their moral dimension, human rights were, pursuant to this view, reduced to instruments of positive law aimed at protecting individual interests with the purpose and within the limits of maximizing overall welfare.

In the 19th century, the rights declared in the previous century were codified in many of the constitutions adopted during that era in Western Europe. To the extent that natural rights became, as fundamental rights, part of positive law, Bentham’s criticism lost some of its practical impact. What, however, if natural law and positive law were in conflict? Did positive law always trump considerations of justice, as expressed by natural law theories? The positivist school, which came to prevail during the 19th century, clearly answered in the affirmative. As we will see later, the breakthrough of the international human rights movement in the 20th century was linked to a revival of natural law and a rediscovery of human rights as moral, for example natural, rights.

Despite the impact of positivism, the transformative force of human rights did not die in the 19th century. The idea of the liberty and equality of all human beings was invoked to challenge the dominant conceptions reducing natural rights to the rights of white, middle-class men. Movements vindicating the rights of women or fighting for the abolition of slavery sought to broaden the sphere of moral concern to classes of people who, for allegedly biological reasons, were considered as lacking the central element for being rights holders: rationality and autonomy. The political struggle for universal suffrage – aimed at decoupling political rights from sex, race and...
wealth—contributed to the contemporary vision of human rights as being not ‘rights of men’, but rights belonging to all human beings.

At the same time, another movement of the 19th century challenged the universal drive of the human rights movement: historicism and nationalism. Questioning the Enlightenment’s rationalism, individualism and cosmopolitanism, nationalist doctrines stressed the importance of the community—the nation—defined by common history, tradition and culture, planting the seeds for the first third generation right, people’s right to self-determination. Under the influence of collectivist doctrines, individual rights came to be viewed as relative to a community, and essentially belonging to its members. According to this vision, the emphasis shifted from ‘rights of men’ to ‘rights of citizens’. The controversy between adherents of universalism and relativism has marked the history of human rights ever since.

Another important factor affecting the debates on human rights in different and diverging ways, was Western imperialism. On the one hand, imperialism, which entailed the discovery of foreign regions and cultures, lent empirical support to the relativist account of human rights. On the other hand, the rule over the colonized people fuelled the vision of Western superiority. Reinforced by theories of Social Darwinism, other cultures were expected to advance towards the higher stages of evolution already reached by Western society.

In addition to the opposition between universalists and relativists, another long lasting debate around human rights originated in the 19th century. Its best-known protagonist was Karl Marx, who rejected the human rights declarations of the previous century as proclaiming ‘rights of egoistic man separated from his fellow men and from the community’, aimed at consolidating the domination of the bourgeoisie over the working class. Whilst Marx rejected the 18th century’s main concern with negative liberty rights and formal equality, socialism emphasized solidarity and the need for positive rights: state intervention was necessary in order to fight economic inequity, protect marginalized and vulnerable members of society, and to alleviate the dire poverty generated by the industrial revolution. Under the banner of labor movements and socialist political parties, rights labeled later as ‘second generation rights’ were born. The vindications of the socialist movement itself showed, however, that first and second generation rights were not clinically isolated but connected: one of the key demands was universal suffrage, which Marx himself heralded as ‘a far more socialist measure than anything which has been honored with that name on the Continent’.

3. THE DEVELOPMENT OF HUMAN RIGHTS ON THE INTERNATIONAL LEVEL

Of the ideologies mentioned in the previous section, it was not the international aspirations of the socialist movement, but nationalism and imperialism that marked international relations by the end of the 19th century. Human Rights remained an essentially domestic concern until the second half of the 20th century. Several developments in international law had prepared the ground for the birth of international human rights in the aftermath of World War II. These precursors helped to shape the
content of future human rights norms, and, more generally, contributed to making human well-being a direct concern of international law.

3.1 Precursors

As mentioned above, the abolition of slavery was an important objective of the human rights movement on the domestic level during the 19th century. During the same period, the abolitionist cause was also addressed on the international level. The slave trade was first denounced at the Congress of Vienna as early as 1815. European powers recognized for the first time in a multilateral statement that this practice was ‘repugnant to the principles of humanity and of universal morality’. In 1885, the General Act of the Berlin Conference affirmed that ‘trading in slaves is forbidden in conformity with the principles of international law’. In the 20th century, endeavors to eliminate slavery were undertaken under the auspices of the League of Nations, founded in the aftermath of World War I at the Paris Peace Conference (1919–1920) with the aim of preventing future war. The Slavery Convention of 1926 committed the state parties to suppressing the slave trade and abolishing slavery. Although the Slavery Convention was not exclusively motivated by humanitarian concerns but also pursued economic objectives, its adoption was a significant step for the purpose of international human rights: international law had become an instrument to protect victims of human rights abuses.

Other international instruments and institutions were also relevant for the protection of certain categories of persons, and are for this reason considered as precursors of international human rights law. Diplomatic protection, international humanitarian law, the mandate system for the administration of colonies set up by the League of Nations, as well as the regimes for the protection of minorities and workers rights created under the auspices of the same organization need to be mentioned.

Diplomatic protection originated before the 19th century as an instrument enabling a state to take diplomatic measures against another state so as to seek redress for the injury inflicted on one of its nationals. It was based on the premise that ‘whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen’. In initiating diplomatic protection, the state of origin enforces its own rights vis-à-vis another state and does not assert the right of its nationals. Nonetheless, via the practice of diplomatic protection, designed as a means of enabling states to protect the interests of their nationals living abroad, minimal standards governing the treatment of aliens emerged. They were derived from general principles of international law recognized by civilized nations. Natural law doctrines and diverse systems of private law served as sources of inspiration for these norms which later helped to shape the content of international human rights norms.

The codification of international human rights could also draw on another body of law, international humanitarian law (IHL). Like human rights, IHL, previously known as the law of war (ius in bello) has ancient roots. Minimal standards emerged so as to limit the atrocities of armed conflict, laying down certain rules on the admissible means and methods of warfare, and, to a lesser extent, on the protection of the victims of war. As compared with IHR, the codification and emergence of contemporary IHL took
place one century earlier. The impetus was provided by the Swiss businessman Henry Dunant (1828–1910), after he witnessed the aftermath of the battle of Solferino in 1859. From his campaigning book, *A Memory of Solferino*, two main ideas emerged: firstly, all the wounded and sick should be protected from hostilities and cared for independently of their allegiance to a party to the conflict; secondly, National Societies should be created to provide assistance to medical personnel on the battlefields. Dunant’s campaign led to the creation of the International Committee for Relief to the Wounded in 1863, later renamed International Committee of the Red Cross (ICRC). Thanks to his endeavor, the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted in the same year, and National Societies were created in many countries, which are today regrouped under the International Federation of Red Cross and Red Crescent Societies (IFRC) established in 1919.

If the ‘law of The Hague’ was historically considered as regulating the conduct of hostilities, contemporary IHL mainly consists of the four Geneva Conventions and their additional protocols, and customary rules. Although classical IHL was conceived as imposing obligations on states and not as conferring subjective rights on individuals, its emphasis on humanitarian concerns, witnessed in the change of terminology from ‘law of war’ to ‘IHL’, and its precise rules applicable to armed conflicts, favored the cause of human rights at the international level. Nevertheless, despite the common humanitarian objective, IHL and IHR are generally considered two separate branches of law. Whilst classical IHL only applied in times of international armed conflict, IHR were mainly conceived to apply in peacetime. These differences have partly been blurred, and the thesis that IHL is a *lex specialis* rule with regard to IHR has come under challenge from scholars stressing the complementarity and the interaction between these two branches of law. From a historical perspective, IHL preceded IHR and helped to shape its content; nowadays, however, there is also a marked influence of IHR on IHL.

Turning to the contribution of the League of Nations to IHR, only moderate progress was made at the Paris Peace Conference following World War I. On the one hand, the victorious powers rejected proposals to include two sets of provisions in the Covenant (the founding document of the League of Nations which formed an integral part of the Treaty of Versailles), firstly, an article on non-discrimination based on race or nationality, and secondly, a provision on state intervention related to religious intolerance which posed a threat to peace. Equal treatment independent of race or nationality failed to galvanize sufficient support at a time when the colonial powers widely practiced inequality, and segregation entailed differentiation and exclusion within the United States. On the other hand, the Covenant contained specific provisions protecting the population within the territories subject to the mandate system established by the Treaty of Versailles. The Allies put in charge of the administration of the former colonies of the defeated powers were held to exercise their mandate in the interest of the population living in the mandated territories. Pursuant to the Covenant of the League, they had to respect freedom of conscience and religion, the prohibition of slave trade, and guarantee humane labor standards. It is important to note that these guarantees only applied to the mandated territories and did not impose any constraints on the Allies as regards their other colonies. Nevertheless, the mandate...
system was significant for the emergence of IHR, as it marked a departure from unlimited territorial sovereignty. The administering powers were no longer free to treat all the people subject to their jurisdiction as they pleased.

The Covenant made another important contribution to the development of IHR in providing for the international protection of workers’ rights. Based on the premise that universal peace was impossible without social justice, and anxious to avoid revolutionary turmoil within the state parties, the drafters of the Covenant decided to commit the members of the League to ‘endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend’, and stated that they ‘will establish and maintain the necessary international organizations’ for that purpose. To achieve these ends, the Treaty of Versailles enshrined a fairly detailed list of ‘methods and principles for regulating labour conditions which all industrial communities should endeavour to apply’, including freedom of coalition, equal pay for men and women, the abolition of child labor, and limitations on working time to 48 hours per week. Moreover, the Treaty created a permanent international organization, the International Labour Organization (ILO), which was to become the first specialized agency of the United Nations. The constitutive articles of the ILO entrusted the newly created organization not only with standard-setting powers but also provided for supervisory systems to secure implementation. These can be viewed as a precursor of the monitoring mechanisms established within human rights regimes.

In addition to workers, the victors of World War I decided to protect another category of persons for the sake of preventing both internal and international conflict: national minorities.

Whilst several prior peace – and bilateral – treaties signed as early as the 16th and 17th centuries contained provisions protecting religious minorities, European countries mainly invoked the protection of minorities in the 19th century to justify (often politically motivated) ‘humanitarian interventions’ in favor of the Christian minorities within the Ottoman Empire. Although the Covenant remained silent on minority rights, the protection of national minorities was an important issue at the Paris Peace Conference. Following the implosion of the Austro-Hungarian monarchy and the Ottoman Empire, a series of new states was created in Central and Eastern Europe in the name of people’s rights to self-determination. These rights figured prominently among President Wilson’s ‘Fourteen Points’ Program which formed the basis of the Peace Conference. For geographic, historical and political reasons, most of the newly created states were not, as suggested by the ideal of national self-determination, ethnically homogeneous nation states but contained important minorities within their territories. In this context, the international protection of minority rights was seen as a condition of political stability and peace. For this reason, a system of minority protection was set up under the auspices of the League of Nation. It was based on a series of protean treaties concluded between the Allies and the newly created states. Based on these treaties, individuals belonging to national minorities were granted rights such as religious freedom, linguistic rights in the private and public sphere including education, and the right to non-discrimination based on race, language or religion. Importantly, these provisions were considered as imposing on the state party ‘obligations of international concern’ that were ‘placed under the guarantee of the League
of Nations’.114 Along the same line of thought, disputes arising with respect to minority rights were considered as being of international character.115 Within the decade following the conclusion of the treaties, a petition procedure was set up. It enabled individuals belonging to national minorities to bring infringements of their rights to the attention of the League. Although not of judicial nature, this petition mechanism was a leap forward and influenced the implementation mechanisms established by future human rights treaties. The substantive provisions of the minority treaties had the same effect as regards the content of future human rights norms.

Based on the evolution traced so far, the international legal order had come to protect nationals, workers, victims of slavery and armed conflict, people living in certain colonies, and national minorities. It did not yet, however, protect human beings simply as human beings. Nor had the view come to prevail that individuals were (partial) subjects of international law. The shield of state sovereignty remained strong. It was however weakened by another and more recent evolution within the international legal order, the emergence of international criminal law.

The idea that perpetrators of large-scale atrocities could be held individually liable and be prosecuted for the commission of international crimes first emerged after the massacres of the Armenians, described as ‘crimes against humanity’.116 The breakthrough in terms of international criminal law took place in the aftermath of World War II, when the Allies established two international courts, the Nuremberg and Tokyo Tribunals, to try Nazi and Japanese leaders for international crimes, including war crimes and crimes against humanity. The importance of these trials for the emergence of IHR was manifold. Firstly, as already mentioned, they contributed to weakening the dogma of state sovereignty, as individuals were denied the right to hide behind the sovereignty shield of their state of origin and were considered as direct addressees of international obligations. From this position, it was a less bold step to acknowledge that individuals could also be holders of rights derived directly from international law. Secondly, the concept of ‘crimes against humanity’, prepared the ground for the recognition of rights belonging to all human beings (instead of certain categories of persons). Thirdly, the fact that these crimes served to prosecute atrocities committed by the Nazi regime against its own people, further relativized state sovereignty and reinforced the idea that the treatment of nationals by their own state had clearly become a matter of international concern. Lastly, the Nuremberg and Tokyo trials favored a revival of natural law theories and the idea that individuals are owed rights because of their intrinsic worth, independently of positive law. On that ground, the perpetrators’ defense based on the legality of their actions under the Nazi regime was rejected. As the legacy of National Socialism had shown, even legitimately elected governments, acting in the name of the majority, could pose a threat to their population and in particular to minorities. Their power needed thus to be constrained not only from within (through domestic constitutions and judicial review) but also from without, by the international legal order. It was in that context – marked by the tragedy of World War II – that IHR were born.
3.2 The Birth of International Human Rights

Before focusing on the breakthrough of IHR, it is worthwhile to briefly sketch the evolution of the human rights movement during the first half of the 20th century. Prior to the outbreak of World War II, voices advocating for the protection of human rights on the international level remained rare. A notable exception was the Declaration of the International Rights of Man, adopted on 12 October 1929 by the International Law Institute in New York. It clearly departed from the traditional conception of international law, making human rights a concern of the international community. In this vein, its Preamble stated ‘that the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the state’. Following the outbreak of World War II, human rights became a rationale to fight Nazi Germany and its allies. The war spawned a vast movement of public opinion which … grew incessantly in force and in scope as the war rolled on. Hundreds of political, scholarly and religious organizations have, by their publications, appeals, manifestations and interventions, spread and impressed the idea that the protection of human rights should be part of the war aims of the Allied Powers, and that the future peace would not be complete if it would not consecrate the principle of international protection of human rights in all States and if it would not guarantee this protection in an effective manner.

One of the most influential human rights advocates was the English author Herbert George Wells (1866–1946). His human rights campaign was initiated with a letter published in *The Times* on 23 October 1939, which contained a Declaration of Rights. An amended version was included in his book *The Rights of Man: or What are We Fighting For?*, published in 1940 and subsequently disseminated not only in the Western World, but also on the Asian and African continents. Among legal scholars, Hersch Lauterpacht proposed ‘An International Bill of the Rights of Man’ in 1943. On the political scene, President Roosevelt invoked human rights to seek support for American involvement in the war in his ‘State of the Union’ address to Congress on 6 January 1941, evoking a future world order founded upon four essential freedoms, the freedom of speech and expression, the freedom of worship, the freedom from want and the freedom from fear. Roosevelt confirmed his vision in a joint declaration issued with Churchill in the same year. By the end of World War II, 26 allied nations and 21 further states had approved the principles of the so-called ‘Atlantic Charter’. These states formed together the core members of the United Nations (UN). Whilst 1945 was the ‘constitutional moment’ of the international society, the founding year of the UN did not yet mark a fundamental breakthrough for the international human rights movement. The UN Charter failed to set out a legally binding catalogue of international human rights. Among the great victorious powers, there was little enthusiasm for the human rights project, as their record was not immune from criticism: ‘the Soviet Union had domestic terror and the Gulag; England and France had colonies; and the United States had racism’. Nevertheless, due to the influence of mainly Latin American countries and non-governmental organizations (most of them from the USA), references to human rights were included in six provisions and the Preamble of the Charter. Against the backdrop of the atrocities committed under the Nazi regime, the
Preamble reaffirmed the ‘faith in fundamental human rights, in the dignity and worth of the human person …’. Articles 1 and 55 elevated the promotion of human rights into a purpose and main task of the United Nations, considering the ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’ as an essential condition for ‘peaceful and friendly relations among nations’. So as to further the protection of human rights, the Charter gave the United Nations General Assembly (UNGA) the mandate to ‘initiate studies and make recommendations’ to that effect, and Article 68 entrusted the Economic and Social Council (ECOSOC) with setting up commissions ‘for the promotion of human rights’. Based on this provision, ECOSOC established the UN Commission on Human Rights (UNCHR) in 1946, which was to become for six decades the main Charter-based institution concerned with the promotion and protection of human rights.

The Commission’s first task was to draft an international bill of human rights. Within less than two years, this mission was accomplished: on 10 December 1948, one day after the adoption of the Genocide Convention, the UNGA adopted the world’s most famous and most cited human rights catalogue, the UDHR. Since 1948, it has been much debated whether the rights proclaimed in the Declaration truly were ‘a common standard of achievement for all peoples and all nations’ or whether they essentially reflected Western values imposed on the rest of the world. Both strands of this argument – the Western (instead of universal) nature of the Declaration and the imposition thesis – are too simplistic from a historical perspective.

Whilst it is true that the text of the UDHR (with references to ‘inherent dignity’, ‘equal and inalienable rights’, freedom and reason) strongly borrows from the language of the Enlightenment and the French Declaration of 1789, the framers deliberately omitted references to natural law or any other philosophy, leaving the moral foundation of human rights undetermined. As regards the ‘imposition thesis’, it is interesting to point out that the Great Western Powers were, as already mentioned, far from ardent supporters of an international Bill of Rights. In addition, during the drafting process of the UDHR ‘[t]he “traditional” political and civil rights – the ones now most often labeled “Western” – were the least controversial of all’. The only exception was Saudi Arabia’s objection to the right to free marriage and to change one’s religion. Moreover, the drafters aimed at avoiding the charge of excessive individualism, often hastily leveled against the tradition of the Enlightenment, without yielding to collectivism. By contrast with the declarations proclaimed in the 18th century, the UDHR contains a general limitation clause (Article 29), enabling rights to be balanced against the public interests (morality, public order, and general welfare) of a democratic society. The same provision also refers to the social nature of human beings in stating that ‘[e]veryone has duties to the community in which alone the free and full development of his personality is possible’. Not only communist states, but also Christian philosophers and Asian thinkers welcomed the reference to duties. The representatives of Latin America adopted the same position, which was hardly surprising. They had adopted in May 1948 the American Declaration of Rights and Duties. The same states and circles also advocated in favor of social, economic and cultural rights, enshrined in UDHR Articles 22 to 27. Based on the experience that economic hardship had prepared the ground for Hitler’s accession to power, many
Western European intellectuals also vindicated these rights. In the United States, supporters of second generation rights invoked the experience of the New Deal and President Roosevelt’s defense of the ‘freedom from want’. However, another favorable factor for the inclusion of social and economic rights in the UDHR was the intensive and successful activity of the ILO. In the period between the two wars, it had adopted nearly one hundred conventions on labor standards. Nevertheless, the UDHR did not place social and economic rights exactly on the same level as civil and political rights. They were not proclaimed as rights inherent to all human beings but as entitlements belonging to ‘everyone, as a member of society’, to be realized ‘in accordance with the organization and resources of each State’. Apart from this qualification, a consensus in favor of the inclusion of social and economic rights also emerged due to two other factors: firstly, the UDHR did not provide for enforcement mechanisms, and secondly, the Declaration’s aspiration was mainly educational. It was conceived as a political document to be cast into positive law at a second stage. Whilst the emerging tensions between West and East had already overshadowed the drafting process, the iron curtain came down shortly after the proclamation of the UDHR, closing the window of opportunity for a timely codification of the Universal Declaration in a legally binding international instrument.

3.3 The Cold War Era

The ideological confrontation between the Eastern and the Western bloc protracted the drafting process of an international treaty to implement the UDHR for more than a decade. Instead of a single Covenant, as initially requested by the UNGA, two instruments emerged from the work of the Commission on Human Rights, epitomizing the split between East and West. While the first Treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR), was supposed to express the view of the Communist countries, the second instrument – the International Covenant on Civil and Political Rights (ICCPR) – was considered to represent Western liberal thought. According to the ‘Western’ view, only the rights and freedoms enshrined in the ICCPR were of primary importance. Once they were realized, the respect of economic and social rights would follow. Pursuant to the ‘Eastern’ view, first generation rights were declared as being contingent on second generation rights. Moreover, it was argued that the effective realization of economic and social rights may require the limitation of first generation rights (the so-called ‘trade-off thesis’).

The decision to split the text of the UDHR into two Covenants was not only of ideological, but also of legal significance, although both treaties share commonalities: both Covenants are similarly structured. They both refer to the inherent dignity of the person as the foundation of the proclaimed rights. Reflecting the legacy of the Nazi regime, they both codify Article 2 UDHR and hold, like all subsequent human rights treaties to be adopted, that all individuals are entitled to the protection of the rights recognized in the Covenants, ‘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’. Moreover, both the ICCPR and the ICESCR innovate with respect to the UDHR in enshrining in their first article a third generation right, people’s right to self-determination. Their second provision reveals, however, a fundamental difference.
Whilst civil and political rights are to be realized with immediate effect, social, economic and cultural rights are to be achieved progressively, to the maximum of the states’ resources, ‘by all appropriate means, including particularly the adoption of legislative measures’. Reflecting the Western view, the wording of Article 2 ICESCR implied that second generation rights were not directly applicable and were to be implemented by the legislative, not the judicial branch. In the same spirit, the supervisory mechanism established by the ICESCR consisted exclusively in a reporting procedure.\textsuperscript{160} By contrast, the ICCPR provided in addition to the mandatory reporting procedure for an optional, quasi-judicial enforcement mechanism. Subject to the consent of each state, the body of independent experts charged with monitoring compliance with the ICCPR (named the Human Rights Committee) was also given the power to receive and consider communications from state parties.\textsuperscript{161} More importantly, the right of individual communications applied to states that had ratified the First Optional Protocol to the ICCPR.\textsuperscript{162} The ICCPR, the ICESCR and the Optional Protocol (which form, together with the UDHR and subsequent Protocols to both Covenants, the so-called ‘International Bill of Rights), were adopted on 16 December 1966. They only entered into force in 1976, once the necessary number of 35 ratifications had been achieved. To date, both Covenants have been ratified by over 150 states.\textsuperscript{163} From a legal point of view, the goal of a legally binding, universally applicable International Bill of Rights has been largely achieved.\textsuperscript{164}

Despite the ideological polarization, four other ‘core’ human rights treaties were adopted during the Cold War in addition to the two Covenants: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 21 December 1965);\textsuperscript{165} the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 18 December 1979);\textsuperscript{166} the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 10 December 1984);\textsuperscript{167} and the Convention on the Rights of the Child (CRC, 20 November 1989).\textsuperscript{168} After the fall of the Berlin Wall, the UNGA adopted another three ‘core’ treaties: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 18 December 1990);\textsuperscript{169} the Convention on the Rights of Persons with Disabilities (CRPD, 13 December 2006);\textsuperscript{170} and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED, 20 December 2006).\textsuperscript{171} All of these instruments established independent expert bodies to monitor state compliance. These bodies form, together with the supervisory committees of the two Covenants, the so-called treaty-based enforcement mechanisms of the contemporary international human rights regime.

During the Cold War era, supervisory systems based on human rights conventions were also set up at the regional level on the European, American and African continents.\textsuperscript{172} In Europe, the main treaty of the regional human rights regime, the European Convention on Human Rights and Fundamental Freedoms (ECHR),\textsuperscript{173} was adopted within the framework of the Council of Europe in 1950, only two years after the proclamation of the UDHR, and with the aim of ‘securing the universal and effective recognition and observance of the Rights therein declared’.\textsuperscript{174} The content of the ECHR presaged the ideological split between first and second generation rights which materialized on the universal level later, during the drafting process of the two
Covenants. The framers only included first generation rights in the European Convention. Second generation rights were codified 11 years later in the European Social Charter (ESC), which provided for a much weaker enforcement mechanism than the ECHR. This affirmation is even more accurate today: the Strasbourg machinery has evolved into the only human rights regime with a compulsory jurisdiction of a judicial authority (the European Court of Human Rights) to decide individual applications.

In the Americas, the regional human rights system was created under the auspices of the Organization of American States (OAS). The Charter of the OAS was adopted on 30 April 1948, the same day the first international Bill of Rights – the American Declaration of the Rights and Duties of Men – was proclaimed. The American Convention on Human Rights (ACHR) was adopted more than two decades later, in 1969, and entered into force in 1978. Drafted after the adoption of the two Covenants, and mainly limited, similarly to its European counterpart, to civil and political rights, the content of the ACHR was partly inspired by the ICCPR. One year after the entry into force of the Convention, the Inter-American Court of Human Rights was created. The Court, which was given both adjudicative and advisory functions, is, together with the Inter-American Commission on Human Rights (established in 1959), the main international institution to uphold human rights on the American hemisphere.

On the African continent, a regional human rights regime emerged in the framework of the Organization of African Unity (OAU), the predecessor of the African Union (AU). As in the Americas, its supervisory machinery consists both of a Commission (the African Commission on Human and Peoples’ Rights, created in 1987) and a Court (The African Court on Human and Peoples’ Rights, which has been operational since 2009). The main task of both institutions is to secure respect for the rights protected in the African Charter on Human and Peoples’ Rights, adopted in 1981 (AChHPR, also known as the Banjul Charter). By contrast with the other two regional human rights treaties, the African Charter protects both first generation and second generation rights. Moreover, as its name implies, it also contains collective rights (e.g. third generation or solidarity rights). Reflecting the legacy of colonialism and the heritage of African culture, the Charter protects, for instance, the right to self-determination, the right to freely dispose of wealth and national resources, the right to development, the right to peace and security and a right to ‘a generally satisfactory environment’. Another distinguishing feature of the AChHPR is that it is not limited to spelling out rights but also sets out individual duties.

Returning to the universal level, another evolution has been of vital importance for the international human rights regime: in parallel to the adoption of treaties establishing their own supervisory bodies, a series of institutions, procedures and mechanisms designed to promote and protect IHR developed which have their source in the UN Charter. The major body of the so-called Charter-based system was the Commission on Human Rights. In addition to its standard-setting activity, the Commission’s mandate was extended to examining, monitoring and reporting on human rights situations, either by country or by specific issue. According to its members, the mandate and functioning of the Commission reflected the philosophical tradition of human rights beyond the traditional border between Eastern and Western states. However, over the years, the Charter body came under growing criticism due to its politicization and the double standards governing its action. The politicization of the Commission was hard
to deny, as well as hard to avoid due to its intergovernmental character. The Cold War, however, exacerbated this problem. In this context, the composition of the Commission led to an ‘inevitable and ideological competition between East and West’. During the Cold War era, both the Western bloc and the Soviet bloc mutually tolerated the fact that human rights violators served as members of the Commission. As will be shown shortly, the end of the Cold War brought about the opportunity for criticism and institutional change.

3.4 The Post Cold War Era

A step towards rapprochement between the Western bloc and Eastern Bloc was taken more than a decade before the fall of the Berlin wall within the framework of the Conference on Security and Co-operation in Europe (CSCE, since 1995 OSCE). The so-called Helsinki process resulted in the adoption of the Helsinki Final Act (also known as Helsinki Accords or Helsinki Declaration), which lays down ten ‘Principles Guiding Relations between Participating States’. Importantly for IHR, they were not limited to affirming the sovereign equality of the signatory states, the inviolability of frontiers, territorial integrity and non-intervention in internal affairs, but also committed the State Parties to ‘promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person …’. Moreover, the Signatories were called upon to ‘respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief …’. The specific reference to this quintessential first generation right was significant, as it helped to bolster dissident movements within the Eastern Blocs. More generally, the Helsinki Accords had the effect of reinforcing civil and political rights in Central and Eastern Europe.

A few months after the breakdown of Communism, the UNGA seized the opportunity to overcome the ideological opposition between East and West and decided to convene a second World Conference on Human Rights to be held in Vienna in 1993. Before the Conference, it became evident that the aim of reaffirming the universality of IHR would be a daunting task. In the meantime, whilst the ‘dialogue of the deaf’ between East and West had abated, another cleavage, running ‘North–South’, had become salient since the 1970s. This challenge to the universal nature of IHR was voiced in four Declarations adopted with a view to the World Conference on the regional level, in South-East Asia, Latin America and the Caribbean, Africa, and in the Arab region. The Bangkok Declaration adopted within the framework of The Association of Southeast Asian Nations (ASEAN), for instance, expressed the ongoing debate on specific ‘Asian values’ to be accommodated within the framework of the international human rights regime. Placing strong emphasis on respect for national sovereignty and non-interference in the internal affairs of States, it urged ‘that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values’, and recognized ‘that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds’. As regards the various
categories of human rights, the Declaration’s focus was clearly on second and third generation rights, for example the fight against poverty and the right to development.202

Against the backdrop of the ‘Southernization’203 of IHR, the Vienna Declaration and Programme of Action,204 adopted by consensus at the second World Conference, was generally considered a success in developed countries.205 The Declaration repeatedly stressed the universality of human rights. Its first point declared that the universal nature of the rights and freedoms guaranteed on the international level was ‘beyond question’. Nevertheless, consensus for this bold statement had been achieved through various concessions. For instance, the Declaration only explicitly refers to the ICESCR and emphasizes the issues of poverty and development. No mention is made of the ICCPR or of the quintessential ‘Western’ liberties of freedom of speech or religious freedom.206 Furthermore, the duty of all states to promote and protect all human rights was clearly affirmed in the fifth paragraph, with the qualification that ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’.

In the same section, the framers of the Declaration intended to put to rest the controversy on the status and relationship between the three generations of IHR, affirming that: ‘[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.’207 The indivisibility, interdependence and interrelatedness of human rights expressed the vision of equal importance, substantive overlap and mutual supportiveness between the different generations of rights, rejecting implicitly the ‘trade-off theory’208 and the claim that one category of rights takes priority over the others.209

This view was in line with a strand of scholarship skeptical of the traditional argument according to which first generation rights imposed on states exclusively negative duties, whilst second and third generation rights required state action. The theory (first articulated by Professor Shue210) that all human rights give rise to both negative and positive duties (the duty to respect, protect and fulfill) has gained significant ground. One of the main practical implications of the ‘indivisibility, interdependence and interrelatedness’ thesis has been sustained advocacy in favor of direct enforceability by domestic courts and treaty bodies of second (and to a lesser extent) third generation rights.211 A milestone in this development was achieved in 2008, when the UNGA adopted an optional protocol to the ICESCR enabling the CESCR212 to receive and consider individual communications alleging the violation of a right protected under the Covenant.213 The truly equal status between the two Covenants will be reached once the necessary number of ratifications (ten) for the entry into force of the Protocol is secured.

The Vienna Conference also made a significant contribution to the global human rights regime from an institutional point of view. Based on The Programme of Action, the position of United Nations High Commissioner for Human Rights (UNHCHR) was created in 1993 with a view to strengthening the United Nations’ human rights mandate.214 A further important institutional change of the Charter-based system was decided 13 years later. On 15 March 2006, after difficult negotiations, the General Assembly established the Human Rights Council.215 This new body was created to replace the Commission on Human Rights, which had, as already mentioned, come
under increasing attack for its over-politicization. The reform did not bring about radical institutional change. Like its predecessor, the Human Rights Council is an intergovernmental body, composed of 47 members (as compared with 53 members of the Commission). With a view to achieving a fairer representation, the reformers opted for a rotation system, which prevents permanent membership of some and constant exclusion of other states. These modest institutional changes were complemented by a true innovation, consisting in a new peer monitoring mechanism: the Universal Periodic Review (UPR). This mechanism was aimed at making a contribution to the overall objective pursued by the creation of the Human Rights Council, ‘ensuring universality, objectivity and non-selectivity … and the elimination of double standards and politicization’. To achieve this objective, the UPR subjects all states to regular scrutiny, which is to be ‘based on a interactive dialogue, with the full involvement of the country concerned’.

Despite this innovation, the Council has so far not lived up to the high hopes and expectations underlying its creation. In particular the objective of depoliticization has not been reached, for two reasons: firstly, the Council is, like its predecessor, a political institution due to its composition; secondly, the newly created body started to operate in a context marked by the ‘War on Terror’. The aftermath of the 9/11 terrorist attack on the United States has been conducive to a new cleavage, with the ‘West’ placed in opposition to Islamic countries. In this context, the Council became repeatedly a forum for antagonistic debates on the occupied territories in Palestine and the thorny issue of defamation of religion.

The ‘War on Terror’ also needs to be mentioned for another reason. Apart from raising the well-known challenge of how to reconcile human rights and security, it has squarely confronted the international community with a series of more recent (but not new) problems. Firstly, the aftermath of 9/11 has emphasized the problem of how to secure effective implementation of IHR. Whilst international human rights law has grown into an impressive body of international norms since the adoption of the UDHR, the effectiveness of these rules is far from guaranteed. As the measures taken in the aftermath of 9/11 have shown, even countries with a long tradition of constitutionalism are prone to disregard the most basic human rights in times of crisis. Secondly, the ‘War on Terror’, including military actions in Iraq and Afghanistan, extraordinary renditions and detentions of terrorist suspects abroad raises the question of the extraterritorial application of IHR and its relationship with IHL. Thirdly, the UN Security Council’s sanctions regime targeting members of terrorist groups – widely criticized on human rights grounds – as well as human rights abuses committed by private military and security contractors in Iraq and Afghanistan have highlighted another problem: in a globalized world where the classical distinctions between public and private, and between the domestic and international sphere, have been blurred, the global human rights regime needs to further extend its reach to non-state actors, including international organizations and corporations. Lastly, so as to prevent violent backlashes against symbols of Western hegemony and exclusionary trends within all nations, IHR need to effectively address problems related to globalization, including, for instance, poverty and environmental degradation.
4. CONCLUSION

Whilst human rights have ancient roots and can be viewed as modern expressions of values common to diverse cultural traditions, their contemporary form can be traced back directly to the Enlightenment. The idea that every human being, by the sole fact of being human, holds equal rights which pre-exist the political community emerged as a powerful conviction to challenge the social stratification of the old feudal order and to protect the population against abuses of coercive state power. Based on the experience that governments pose a formidable threat to their citizens and that oppression breeds both internal and external conflict, human rights became a concern of the international community. The legacy of World War II acted as a catalyst for the consecration of human rights on the global and regional level. The content of these rights has crystallized through the experience of human suffering and injustice. Shaped by history, human rights are dynamic and evolve in order to address new threats to freedom and human well-being. Throughout this process of adaptation and change, two countervailing trends have remained constant. On the one hand, like any powerful vision, the idea of human rights, and the promise of freedom and equality they represent, cannot be taken back\(^{228}\) and fuel demands for social and political change. On the other hand, history has shown that human rights, and the underlying vision of a common humanity, are demanding ideals. The tendency to deny the rights of certain groups of people – be they ‘barbarous non-believers’, Blacks, women, Jews, or terrorist suspects – calls for eternal vigilance\(^{229}\) if the idea of human dignity is to prevail in future.

NOTES

* Maya Hertig Randall is Professor of Constitutional Law at the University of Geneva, Switzerland. I am very grateful to Marc Morel for his valuable research assistance and for his help with finalizing the references.
1. For more details on the Declaration, infra section 3.2.
4. *Infra* section 3.4.
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7. E.g., equal treatment before and under the law, meaning that the law should treat similar situations alike and apply equally to all. Formal equality is to be distinguished from substantive equality, which aims at compensating historical and social disadvantages of marginalized members of society so as to grant equal opportunities to all. Under a more far-reaching understanding, substantive equality goes beyond equality of opportunity and includes equality of outcome. On the distinction between formal and substantive equality, see, e.g., R.L. West, Re-imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law (Aldershot: Ashgate, 2003), 157 et seq.

8. President Franklin Delano Roosevelt famously declared in his annual State of the Union address to Congress in 1941 four essential freedoms: freedom of speech; freedom of worship; freedom from want; and freedom from fear, see also infra section 3.2 and note 122.

9. It is controversial whether solidarity rights have the status of human rights and, if so, whether they are reducible to individual rights. For an insightful analysis of the main arguments, see J. Griffin, On Human Rights (Oxford: Oxford University Press, 2008), 257–276.


11. See the famous admissibility decision of the European Commission of Human Rights, in Austria v. Italy (known as the Pfunders case), Application No. 788/60, Yearbook of the European Convention on Human Rights, 1961, Vol. IV, 138–140, which described the specific nature and purpose of the European Convention on Human Rights as follows: ‘The purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law ... it follows that the obligations undertaken ... are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves; ... [I]t follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission ... is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.’ For a detailed analysis of the specific nature of human rights treaties, with references to other human rights regimes, see Addo, supra note 3, at 468 et seq.

12. The role of empathy is stressed by Hunt, supra note 10, at 28 et seq.

13. See the Preamble of the UDHR: ‘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’ (emphasis added).

15. Dignity is derived from the Latin term dignitas, meaning, among other things, ‘worth’.


17. See Hunt, supra note 10, at 29.

18. The importance of sympathy for the distress of fellow beings as a grounding for human rights is stressed by Clapham, supra note 10, at 9.


20. See the Preamble of the UDHR.

21. Griffin, supra note 9, at 192.


25. Griffin, supra note 9, at 9 et seq. On the indeteminacy of human rights, see also Addo, supra note 3, at 19–81.


27. This expression is inspired from the title of Sajó’s book, Human Rights With Modesty: The Problem of Universalism, supra note 24.


Giving for charitable purposes (dana) is one of the so-called paramitas (perfections) to be respected in Contemporary Human Rights Ideas. Cited in B.G. Ramcharan, Contemporary Human Rights Ideas (London: Routledge, 2008), 2.

30. For a comparison of the Dekanon and the content of the rights protected in the UDHR, see Hilpert, supra note 23, at 156.


32. Almsgiving (zakāt) is one of the five pillars of Islam, based on which a certain percentage of one’s possession (2.5%) shall be given to charity.


34. The Chinese member of the drafting committee of the UDHR, Peng-Chun Chang, held that ‘economic and social justice, far from being an entirely modern notion, was a 2500-year-old Confucian idea’, quoted in M.A. Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (New York: Random House, 2001), 185.

35. Giving for charitable purposes (dana) is one of the so-called paramitas (perfections) to be respected in Buddhist practice.


38. See Sura 2:256 of the Koran; see Griffin, supra note 9, at 298, note 33.


40. For a detailed study, see Girardet and Nortmann, supra note 2.

41. For an evolution of the natural law doctrine from Antiquity to the Enlightenment, see Lohmann, supra note 23, at 165–244.


43. On dignity, see Cicero’s work De Officiis; on natural law and the characteristics of men, De Legibus; for an analysis of the former work, see H. Cancik, ‘Dignity of Man and “Persona” in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107’, in Concept of Human Dignity in Human Rights Discourse, ed. D. Kretzmer and E. Klein (The Hague, London and New York: Kluwer Law International, 2002), 19–39, mentioning the influence of Cicero’s work on later scholars, such as P. della Mirandola and S. Pufendorf; on De Legibus, see, e.g., Lohmann, supra note 23, at 175 et seq.

44. See Lohmann, supra note 23, at 175–177, 424. As this author points out, the resemblance between humans and God can be traced further back, to the Old Testament, Genesis 1:27: ‘So God created man in his own image, in the image of God he created him’. This idea is eloquently expressed in the Talmud, which also highlights the uniqueness of every human being: ‘A man may coin several coins with the same matrix and all will be similar, but the King of Kings, the Almighty, has coined every man with the same matrix of Adam and no one is similar to the other. Therefore, every man ought to say the whole world has been created for me’, quoted in Shestack, supra note 22, at 205. For similar ideas expressed in other religions, see ibid., 205 et seq.

45. See Cancik, supra note 43.

46. See Genesis 1:27, supra note 44; see Hirsch, supra note 23, at 578.

47. Hirsch, supra note 23, at 579 et seq.


55. Ibid., 148. A catalogue of rights was drafted by Vitoria; see Lohmann, *supra* note 23, at 424; Murillo, *supra* note 52, at 145 *et seq.*


64. See Lohmann, *supra* note 23, at 200, footnote 165.

65. As was for example still the case in Pufendorf’s work *De officio hominis et civis iuxta legem naturalem (On the Duty of Man and Citizen According to the Natural Law)* (1673), see Lohmann, *supra* note 23, at 191–196.


68. For more details, see Hunt, *supra* note 10, at 82 *et seq.*

69. Hunt, *supra* note 10, at 82, 94 *et seq.*


72. The Declaration of 4 July 1776 proclaimed ‘...these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.’ It justified secession from the United Kingdom based on ‘the Right of the People to alter or to abolish’ destructive governments.

73. See the Preamble of the Declaration of 1789.

74. Ibid.


76. For an edited version of these authors’ critique of human rights, followed by a critical analysis, see J. Waldrom, *Nonsense Upon Stills: Bentham, Burke, and Marx on the Rights of Man* (London: Methuen, 1987).

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80. Hunt, supra note 10, at 186 et seq.

81. Understood in terms of gender and not in universalist terms.

82. Understood in universalist terms.


84. Ibid.

85. Quoted in Ishay, supra note 10, at 9.


87. Declaration of Congress of Vienna, 1815. For an overview of the struggle against slavery in international law, see Addo, supra note 3, at 102–115.

88. Article 9.

89. Slavery Convention, Geneva, 25 September 1926.

90. Clapham, supra note 10, at 27.


96. Whilst contemporary IHL also extends to internal armed conflicts, there has been a trend for IHR applying increasingly frequently to armed hostilities.


99. See Clapham, supra note 10, at 27.

101. See Article 22 of the Treaty of Versailles.

102. Article 23(a) of the Treaty of Versailles.

103. Bürgenthal and Thürer, supra note 93, at 17.

104. See Part XIII, Section I (Arts 387–399) of the Treaty of Versailles, which, under the heading ‘Labour’, enshrines the Constitution of the International Labour Organization, consisting of a General Conference of Representatives of the Members and an International Labour Office. See Article 388.

105. Article 23(a) of the Treaty of Versailles.

106. Article 427 of the Treaty of Versailles. These principles were not conceived as individual rights but were meant to guide the work of the international organization set up by the Versailles Treaty. See text below and supra note 104.

107. Supra note 106. Article 23 states that in order to reach the goal of maintaining human working conditions, the State parties ‘will establish and maintain the necessary international organisations’.


111. Ibid., 104–108.

112. See the text of the Treaty concluded with Poland (also known as the ‘little Treaty of Versailles’), available at http://www.ucis.pitt.edu/eehistory/H200Readings/Topic5-R1.html (accessed 19 January 2011). This Treaty was the first minority treaty concluded at the Paris Peace Conference, and served as a template for the subsequent minority treaties concluded with the newly created Central and Eastern European States.

113. See ibid., Article 12, emphasis added.

114. Ibid.

115. This implied that the Permanent Court of International Justice (PCIJ) was competent to render opinions and decide disputes arising under the minority treaties; see Rights of Minorities in Upper Silesia (Minority Schools), PCIJ, Series A, No. 12 (1928); Rights of Minorities in Upper Silesia (Minority Schools), PCIJ, Series C, No. 14–II (1928); Minority Schools in Albania, Advisory Opinion, PCIJ, Series A/B, No. 64 (1935); Minority Schools in Albania, PCIJ, Series C, No. 76 (1935).

116. For more details, see Clapham, supra note 10, at 34.


118. See ibid., 452.

119. R. Brunet, La garantie internationale des droits de l’homme (Geneva: Ch. Grasset, 1947), 93–94, quoted in Burger, supra note 117, at 474. The latter text provides an overview of the main initiatives of the human rights movement during World War II, see ibid., 471 et seq. Human Rights had previously also been invoked as a rationale for World War I, see Clapham, supra note 10, at 24.

120. Published in New York: Penguin Books. For an overview of H.G. Wells’s campaign, see Burger, supra note 117, at 464 et seq.

121. Published in 1945 in New York: Columbia University Press.

122. On Roosevelt’s famous four freedoms, see also supra section 1 and note 8; Roosevelt’s address is published in Ishay, supra note 10, at 213.

123. Published in the American Journal of International Law 1941 Supplement: 191.


126. Articles 1, 13, 55, 62, 68 and 76 UN Charter.

127. Article 55(c) UN Charter.

128. Article 55 UN Charter.

129. Article 13 UN Charter.

130. The UNCHR was replaced in 2006 by the Human Rights Council, infra section 3.4.
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133. Preamble UDHR.


136. Preamble UDHR.

137. Preamble UDHR.

138. Article 1, supra section 1.


142. As was shown above in section 2.2, important thinkers of the Enlightenment, such as Locke and Kant, insisted not only on rights but also on duties.

143. Glendon, supra note 34, at 226. The UDHR enshrines the following civil and political rights: the right to life, liberty and security; protection against slavery; protection against torture and cruel, inhuman or degrading treatment or punishment; the prohibition of discrimination; the right to an effective remedy; protection against arbitrary arrest, detention or exile; the right to a fair and public hearing by an independent and impartial tribunal; the presumption of innocence; the respect of privacy; the right to seek asylum; the right to a nationality and the right to change it; the right to family; the right to property; the right to freedom of thought, conscience and religion; the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association; and the right to take part in the government of one’s country. See Articles 3–21, UDHR.

144. Article 29, para. 2, UDHR; the limitation of rights so as to respect the rights and freedoms of others mentioned in the same provision was already well established in the Enlightenment tradition (see Article 4 of the French Declaration of 1789: ‘Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no other limits than those which assure to other members of society the enjoyment of the same rights’).


146. Article 29, para. 2, UDHR; the limitation of rights so as to respect the rights and freedoms of others mentioned in the same provision was already well established in the Enlightenment tradition (see Article 4 of the French Declaration of 1789: ‘Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no other limits than those which assure to other members of society the enjoyment of the same rights’).

147. Article 29, para. 1, UDHR.

148. These provisions protect the right to social security; the right to work; the right to equal pay for equal work; the right to just and favorable remuneration and social protection; the right to form and join trade unions; the right to rest and leisure; the right to an adequate standard of living; and the right to free participation in the cultural life of the community.

Osiatynski, supra note 125, at 45.

See Morsink, supra note 135, at 331–332.

Article 22, UDHR.

Article 22, UDHR.

See Article 26, para. 2, UDHR and the Preamble, which states 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’ (emphasis added); see Osiatynski, supra note 125, at 46.

On the drafting process of the two Covenants, see Whelan, supra note 10, at 59 et seq.


The controversy on the priority of first generation or second generation rights has not yet been entirely overcome. To date, China has not ratified the ICCPR, and the United States is not bound by the ICESCR.

Article 2, para. 1, ICCPR; Article 2, para. 2, ICESCR.

There are 159 states parties to the Covenant on economic, social and cultural rights and 167 parties to its counterpart on civil and political rights.

The two Covenants contain most rights proclaimed in the UDHR. Exceptions are the right to property, the right to asylum and the right to nationality. See Bürgenthal and Thürer, supra note 93, at 33.


Adopted and opened for signature, ratification and accession by A/RES/1386 (XIV), 20 November 1990.


After the end of the Cold War, and following the Second World Conference on Human Rights (see section 3.4), a rudimentary human rights regime has also emerged in Southeast Asia, see infra note 197.

ETS No. 5.


ETS No. 163.

Individual applications to the European Court of Human Rights became mandatory with Protocol 11 (ETS No. 155), which entered into force on 1 November 1998, established a permanent Court and abolished the European Commission on Human Rights, the counterpart of which still exists in the African and American system, see infra the text accompanying notes 177 et seq.


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180. Articles 18–24, AChHPR.

181. See Articles 27–29, AChHPR.


183. On the Commission on Human Rights and its birth, see also supra section 3.2.

184. Ishay, supra note 10, at 17.


191. A prominent vindication of developing countries is the right to development; on this issue, see the Declaration on the Right to Development, adopted on 4 December 1986, A/RES/41/128, 4 December 1986.


197. This expression is inspired by Osiatynski, supra note 125, at 49.

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205. See Pollis, supra note 198, at 329.
206. References to other first generation rights are made in para. 30: ‘The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.’
207. Vienna Declaration, para. 5.
208. supra, text accompanying note 159.
209. For an analysis of the concepts of indivisibility, interdependence and interrelatedness, see Whelan, supra note 10.
A/RES/60/251, 3 April 2006, Preamble.
A/RES/60/251, 3 April 2006, para 5(c).
On this subject, see the contribution by R. Goldman in the present volume.
Among the vast literature on human rights and globalization, see, e.g., Ishay, *supra* note 10, at 246–310.
In that vein, see the famous quote from the play *The Physicists* by the Swiss writer Dürrenmatt, ‘Nothing that has been thought can ever be taken back’.
See the famous quote of Justice Holmes’ Dissenting Opinion in the no less famous free speech case of the United States Supreme Court, *Abrams v. United States*, 250 U.S. 616 (1919) ‘we should be *eternally vigilant* against attempts to check the expression of opinions that we loathe and believe to be fraught with death …’ (emphasis added).