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International Human Rights Law in a Global Context



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International Protection of Human Rights

Felipe Gómez Isa

Summary: 1. Precedents for the international protection of human rights: 1.1 The work of the League of Nations. 1.2 Human rights in the inter-war period. 1.3 Human rights during the Second World War. 2. The United Nations and human rights: 2.1 The San Francisco Conference. 2.2. Human rights in the United Nations Charter. 2.3. Post-1945 legal developments. 2.4. Indivisibility and interdependence of all human rights. 2.5. The emergence of third-generation human rights. 2.6. The Vienna World Conference on Human Rights. 3. Conclusions.

The concept of human rights based on the notions of the human dignity and the limitation on the power of the State is a phenomenon which has been present, albeit in many different manifestations, practically throughout modern history. The struggle to recognise people's dignity has been continuous throughout recent history from the tentative recognition of the rights of Native Americans during the time of the Spanish conquest of America to the modern expression of the rights of man and the citizen following the French Revolution. We are currently in a phase of internationalisation of human rights, in other words now that most domestic legal systems have started to recognise fundamental rights and freedoms, a new phase has begun in which human rights have been proclaimed in both universal and regional international organisations. In this progressive and ongoing internationalisation process the promotion and protection of all human rights has gone from being an issue which fell within the exclusive competence of the States to becoming "a legitimate concern of the international community" as stated in the Vienna Declaration from the World Conference on Human Rights[1]. As we will see below, this internationalisation process has not however been simple and has in fact been, and indeed continues being, riddled by obstacles and problems making a real and universal culture of human rights still more of a desire than the reality.

[1] *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, from 14 to 25 June 1993, A/CONF.157/23, 12 July 1993, Part I, para. 4.

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1. **Precedents for the international protection of human rights**

The key date on which we begin to witness the internationalisation of human rights is 1945, after the Second World War and on the creation of the United Nations Organisation. However during the inter-war period, and mainly through the League of Nations, there was an upsurge of a broad movement in favour of the international recognition of human rights which, as we shall see, united both academics and public opinion and eventually come to the attention of politicians once the fight against fascism had begun in 1939[2].

Classic International Law (i.e. pre-1945) was conceived as the legal system which exclusively regulated relations between States; only States were subjects of International Law and, as such, only States were capable of holding rights and obligations within the international sphere. Following the First World War and the creation of the first general international organisation, the League of Nations, the definition of the subjects of International Law began to undergo a tentative expansion with the recognition of a certain amount of legal personality for the international organisations. Individuals however had no rights; they were not subjects of International Law, but its objects[3]. This meant that the way in which States treated their nationals was a question which fell exclusively within each State's domestic jurisdiction. This principle denied other States the right to intercede or intervene so as to help nationals of the State in which they were being mistreated[4]. The only exception was the institution of *humanitarian intervention*: the theory of humanitarian intervention is based on the assumption that States are internationally obliged to guarantee certain basic rights for their nationals. These rights are so fundamental, and of such intrinsic value to the human being, that their violation by one State cannot be ignored by the other States. In the event of very serious, large-scale or brutal violations of those basic human rights, the

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[2] An in-depth analysis of the significance of the inter-war period for the process of internationalisation of human rights can be found in BURGERS, J.H.: "The Road to San Francisco: the Revival of the Human Rights Idea in the Twentieth Century", *Human Rights Quarterly*, Vol. 14, 1992, pp. 447-477.

[3] An interesting analysis of the position of the individual within Classic International Law and its later "historical rescue" can be found in CANÇADO TRINIDADE, A.A.: *El acceso directo del individuo a los Tribunales Internacionales de derechos humanos*, Universidad de Deusto, Bilbao, 2001, particularly pp. 19 ff.

[4] On the relationship between State sovereignty and human rights see CARRILLO SALCEDO, J.A.: *Soberanía de los Estados y Derechos Humanos en Derecho Internacional Contemporáneo*, Tecnos, Madrid, 2001.

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use of force by one or more States was permitted so as to put an end to said violations[5]. Hence limitations began to be imposed on the absolute sovereignty of States.

Even before the internationalisation of human rights, Classic International Law did have some institutions which protected certain groups of people and which can therefore be cited as close precedents for such international protection of human rights. On this issue, apart from the aforementioned institution of humanitarian intervention, we could mention the following:

—The area of the international responsibility of States for the treatment of aliens: a State would incur liability if its treatment of a national of another State fell below a minimum standard of civilisation and justice;

—Certain 19th century international treaties were aimed at protecting Christian minorities in the Ottoman Empire, while other Conventions were aimed at prohibiting of slavery and the slave trade. The most significant of these were the Brussels General Agreement (1890), the Saint-Germain-en-Laye Convention (1919) and the International Convention for the Abolition of Slavery and the Slave Trade (1926)[6];

—International Humanitarian Law, which arose chiefly out of the Conventions of Geneva of 1864 and The Hague of 1899 and 1907, and which seeks to protect the victims of armed conflicts, has also been considered as one of the most significant precedents for the current international protection of human rights[7]. International Humanitarian Law ultimately seeks to safeguard the most basic human rights of individuals in situations of conflict.

Notwithstanding this, the most important event which paved the way for a progressive internationalisation of human rights was the foundation of the League of Nations, which as we shall see below was an international organisation which performed crucial work in order to generalise the protection of human rights.

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[5] ROUGIER, A.: "La Théorie de l'Intervention d'Humanité", *Revue Générale de Droit International Public*, 1910, pp. 468-526.

[6] On the process of the abolition of slavery and the slave trade see GANJI, M.: *International Protection of Human Rights,* Librairie E. Droz, Geneve-Librairie Minard, Paris, pp. 88-110.

[7] DOSWALD-BECK, L. and VITE, S.: "International Humanitarian Rights and Human Rights Law", *International Red Cross Review*, Vol. 18, March-April 1993, pp. 99-126.

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1.1. *The Work of the League of Nations*

Despite the fact that the Covenant of the League of Nations does not once expressly mention "human rights", there are many provisions which one way or another served as a basis for the Organisation's human rights-related work[8]. Firstly, Article 22, which establishes the system of *tutelages* "for those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them", stipulates the prohibition in these territories of "abuses such as the slave trade" and establishes conditions which "will guarantee freedom of conscience and religion". Furthermore, Article 23 of the Covenant states that members of the League of Nations:

> a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children…, and, for that purpose will establish and maintain the necessary international organisations;
>
> b) undertake to secure just treatment of the native inhabitants of territories under their control;
>
> c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children…;
>
> f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

A direct consequence of this Article was the creation, within the framework of the League of Nations, of the International Labour Organisation (ILO) which performed and continues to perform unprecedented work in the area of employment rights, ensuring equality between men and women at work, preventing the exploitation of child labour and ensuring the protection of indigenous peoples, etc.[9].

The Peace Treaties which brought an end to the first great military conflict of the last century established a system for protecting national minorities which would remain under the protection of the League of

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[8] BRUNET, R.: *La Garantie Internationale des Droits de l'Homme d'après la Charte de San Francisco*, Ch. Grasset, Geneva, 1947, pp. 35 ff.

[9] The ILO's work protecting human rights can be consulted in VALTICOS, N.: «La Organización Internacional del Trabajo (OIT)», in VASAK, K. (Editor General): *Las dimensiones internacionales de los derechos humanos*, Serbal-UNESCO, Barcelona, 1984, pp. 504-551; SAMSON, K.: "The Standard-Setting and Supervisory System of the International Labour Organization", in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights. A Textbook*, Abo Akademi University-Institute for Human Rights, Turku, 1998, pp. 149-180.

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Nations. This legal framework for the protection of minorities, based on the principles of equal treatment and non-discrimination, granted minorities broad rights as regards the conservation of their language, their religion, their schooling system and even envisaged certain political rights[10]. As Professor Carrillo Salcedo stated regarding this legal framework for the protection of the rights of minorities, "despite its deficiencies and limits (...) it nevertheless constituted a mechanism for safeguarding and protecting human rights"[11]. It is very significant that neither in the United Nations Charter (1945) nor in the Universal Declaration of Human Rights (1948) were the rights of minorities given as much recognition as they were in the period of the League of Nations.

To sum up, we could state that Classic International Law developed various doctrines and institutions with the aim of protecting various groups of people: slaves; religious, ethnic and cultural minorities; indigenous peoples; aliens; victims of massive human rights violations; combatants in wars etc. These institutions and doctrines have influenced the creation of International Human Rights Law given that, at their most basic levels, they recognised that individuals had rights as human beings and that those rights should be protected by International Law. However, what they did not establish was a general and systematic protection of human rights; they only protected the rights of certain categories of people and not those of human beings per se. This global protection of human rights was to come after the Second World War on the passing of the United Nations Charter and the Universal Declaration of Human Rights.

All these contributions from the League of Nations towards the internationalisation of human rights were to create an ideal environment for the growth of a strong movement in favour of the international recognition of human rights in the inter-war period.

1.2. *Human Rights in the Inter-War Period*

Motivated by the advances which were being brought about by the League of Nations many different organisations began to launch initiatives inspired by the need to internationally guarantee human rights and

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[10] An interesting contribution concerning the system for the protection of minorities established by the peace treaties can be found in MANDELSTAM, A.: *La protection internationale des minorités*, Sirey, Paris, 1931.

[11] CARRILLO SALCEDO, J.A.: *El Derecho internacional en perspectiva histórica*, Tecnos, Madrid, 1991, p. 57.

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freedoms. Proposals of this type came about at the International Diplomatic Academy, the International Legal Union, the International Law Association, the Grotius Society, the Inter-American Conference of Jurists, the American Institute of International Law etc[12]. As Jan Herman Burgers, one of the people who has studied the evolution of human rights following the First World War, states, "while in the period between the First and the Second World Wars most governments were unwilling to accept obligations under International Law regarding the treatment of their own citizens, a far more positive attitude developed among the scholars of International Law"[13].

One of the most serious initiatives was launched by the International Law Institute when in 1921 it created a Commission chaired by André Mandelstam to study the protection of minorities and human rights in general. The result of the Commission's work was a project on the Declaration of Human Rights which was presented at the session held by the Institute in New York in 1929. Eventually, following various debates, the *Declaration of the International Rights of Man*[14] was passed on 12 October 1929 with 45 votes in favour, 11 abstentions and only one vote against. In this very important Declaration the International Law Institute considered that "the juridical conscience of the civilised world demands the recognition for the individual of rights preserved from all infringement on the part of the State", and that "it is necessary to extend international recognition of human rights across the whole world"[15]. Likewise, in the regulatory part of the Declaration, which is not incidentally very long, rights are established to life, freedom, property, and the principle of non-discrimination (Article 1); freedom of religion (Article 2); the right to a nationality (Article 6) etc. In the words of its most signifi-

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[12] These and other views have been collected in CASSIN, R.: "La Déclaration Universelle et la mise en ouvre des droits de l'homme", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1951 – II, p. 272.

[13] BURGERS, J.H.: "The Road to San Francisco: the Revival of the Human Rights Idea...", *op. cit.*, p. 450.

[14] *Annuaire de l'Institut de Droit International*, New York session, October 1929, vol. I, pp 730-732.

[15] This idea had been put forward one year previously, in 1928, by the International Diplomatic Academy, presided over by an ardent defender of the internationalisation of human rights, A.F. Frangulis. In a resolution approved on 8 November 1928, the Academy stated that international protection of human rights "responds to the legal feelings of the contemporary world" and that, as such, "a generalisation of the protection of the rights of man and of the citizen is highly desirable". The text of this resolution can be found in MANDELSTAM, A.: "La protection international des droits de l'homme", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1931-IV, p. 218.

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cant mentor, the aforementioned Mandelstam, this Declaration of the International Rights of Man meant "the starting point of a new era…, a solemn challenge to the idea of the absolute sovereignty of States and, at the same time, the enshrinement of the legal equality of all members of the international community"[16]. The most relevant feature of this Declaration was not its content, which was not revolutionary, but the fact that it opened the door to an irreversible process of internationalisation of human rights. As of this moment, and based on this New York Declaration, many different initiatives arose with a single objective: to remove all the issues related to human rights and freedoms from the sovereignty of States[17].

1.3. *Human Rights during the Second World War*

From the start of the Nazi regime in Germany in the 1930s, the international community began to be aware of the fact that this was not a regime which respected even the most basic human rights[18]. These suspicions were resoundingly confirmed with the start of the war in 1939. The result was that human rights became one of the objectives of the Allies in their battle against fascism, and also became one of the centres of the attention for both intellectuals and public opinion. According to the very appropriate words of René Brunet:

> "a strong movement of public opinion, born in Great Britain and the United States at the beginning of hostilities, grew incessantly in both strength and influence as the war progressed. Hundreds of political, academic, and religious organisations, through publications, requests, protests and interventions, spread the idea that the protection of human rights should be one of the objectives of the Allies"[19].

This was the background against which Franklin Delano Roosevelt made his famous State of the Union speech[20] to the US Congress on 6

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[16] MANDELSTAM, A.: "La protection internationale…", *op. cit.*, p. 206.

[17] Some of these initiatives can be found in BURGERS, J.H.: "The Road to San Francisco", *op.cit.*, pp. 453 ff.

[18] MORSINK, J.: "World War Two and the Universal Declaration", *Human Rights Quarterly*, Vol. 15, 1993, p. 360. A very interesting analysis of the collusion of German society with the excesses of Nazism can be found in GELLATELY, R.: *No sólo Hitler. La Alemania nazi entre la coacción y el consenso*, Crítica, Barcelona, 2002.

[19] BRUNET, R.: *La Garantie Internationale des Droits de l'Homme...*, *op. cit.*, pp. 93-94.

[20] A very comprehensive review of Franklin D. Roosevelt's and Eleanor Roosevelt's contributions to discussions on human rights can be found in JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *Human Rights Quarterly*, Vol. 9, 1987, pp. 19-48.

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January 1941. In his speech[21] the President of the United States identified the fundamental freedoms which should be guaranteed for every human being. There are four such freedoms: freedom of speech and thought; freedom of worship; freedom from want, and freedom from fear. And the fact is that "Roosevelt was personally convinced that the internationalisation of the care for human rights was the proper idea for uniting the American people against the forces of totalitarianism"[22]. It is undeniable that this speech by Roosevelt constituted "the driving force which was to set in motion the proclamation of human rights on a world-wide level and, afterwards, the development of the Universal Declaration of Human Rights"[23].

A few months later, on 14 August 1941, the *Atlantic Charter* expressed the desire to reach a peace which "will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want". Similarly incorporating human rights as objectives of the war, on 1 January 1942 the Allied countries, in the *United Nations Declaration*, stated that "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands"[24]. What is crystal clear in this statement is that human rights burst onto the political scene at a fairly early stage of the war as there was the clear conviction that peace necessarily came from the establishment of political regimes which protected human rights.

In September and October of 1944 when the so-called 'Big Four' (China, United States, Great Britain and the Soviet Union) met at Dumbarton Oaks to plan the structure of international society once the war had finished, and decided on the creation of the United Nations Organisation, human rights were one of the main issues being discussed. The debate was fierce with passionate disputes between the Big Four. The strongest opposition against human rights featuring in the Dumbarton Oaks Proposal on the creation of the United Nations came from the British delegate, Sir Alexander Cadogan. He was of the opinion that it could "open up the

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[21] This speech has been reproduced in GOOD, M.H.: "Freedom from Want: the Failure of United States Courts to protect Subsistence Rights", *Human Rights Quarterly*, Vol. 6, 1984, pp. 384 and 385.

[22] BURGERS, J.H.: "The Road to San Francisco…", *op. cit.*, p. 469.

[23] CASSESE, A.: *Los derechos humanos en el mundo contemporáneo*, Ariel, Barcelona, 1991, p. 37.

[24] Extracts from these important international statements, together with a brief analysis of them, appear in RABOSSI, E.: *La Carta Internacional de Derechos Humanos*, EUDEBA, Buenos Aires, 1987, pp. 10 ff.

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possibility that the Organisation could criticise the internal organisation of Member States", clearly referring the colonial issue which was particularly sensitive for the British. As can be seen, the issue of sovereignty is always present when it comes to human rights commitments. Nor was the Soviet Union very much in favour of human rights occupying a privileged position among the principles of the new organisation although it did not put up insurmountable hurdles[25]. Faced with these problems the United States had to lower its expectations and as a result the Dumbarton Oaks Proposal eventually only included "a vague reference to human rights"[26]. In the section dealing with international economic and social cooperation, one of the objectives of the United Nations was to "facilitate solutions to international economic, social and other humanitarian problems and to promote respect for human rights and fundamental freedoms". Despite the fact that human rights were only a superficial element in the Dumbarton Oaks Proposal, they were nevertheless to play a far more important role at the San Francisco Conference. It was at this Conference that those involved adopted the United Nations Charter, the constituent document of the international organisation created following the Second World War, the United Nations Organisation.

2. **The United Nations and Human Rights**

The phenomenon of the internationalisation of human rights following World War Two can be attributed to the monstrous abuses which took place during Hitler's time in power, and to the belief that many of those abuses could have been avoided had there been an effective international system for the protection of human rights while the League of Nations was in existence. However the horrors of the Second World War are not the only factor, albeit perhaps the most important, behind this process to internationally enshrine human rights[27]. As was seen in the

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[25] It is interesting to note the fact that, at this time, the attitude of the Soviet Union towards human rights was fairly moderate. This attitude is in contrast to that expressed at the United Nations from 1945, when the Cold War was intensifying. As of this time, human rights became an ideological weapon in the conflict between the United States and the Soviet Union.

[26] SAMNOY, A.: *Human Rights as International Consensus*. *The Making of the Universal Declaration of Human Rights, 1945–1948*, CHR. Michelsen Institute, Bergen–Norway, 1993, p. 12.

[27] BURGERS, J.H.: "The Road to San Francisco…", *op. cit.*, p. 448. On the other hand, for Manfred Nowak, the recognition which is made of human rights in the Universal Declaration of Human Rights "can only be completely understood as a reaction to the

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previous chapter, a far-reaching movement in favour of human rights was developing. The human rights tragedy experienced during World War Two served as a catalyst for all these forces which were calling for human rights to be recognised in the international sphere. This resulted in human rights being very high on the agenda of those present at the San Francisco Conference.

2.1. *The San Francisco Conference*

The San Francisco Conference was to play a fundamental role in including human rights in the United Nations Charter. As an expert on the Charter preparation process at San Francisco said:

> "there was great interest, particularly among the lesser powers and the host of private organizations which had consultant status with the US delegation, in broadening and strengthening the proposed organization's role in economic and social matters, including the area of human rights"[28].

In this matter various Latin American delegations played incredibly significant roles at the San Francisco Conference, which has become known as the "Latin American activism"[29]. Some of these delegations wanted a *Bill of Rights* in the Charter, in other words a Declaration of Human Rights as an appendix. Countries such as Mexico, Chile, Cuba, Panama and Uruguay, encouraged by the Chapultepec Conference[30], made very advanced proposals on this issue. While Mexico and Panama were proposing a Declaration within the text of the United Nations Charter, Uruguay and Cuba were satisfied with the General Assembly passing

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atrocities committed by the Nazi government and its absolute attack on human rights and human dignity", NOWAK, M.: "The Significance of the Universal Declaration 40 years after its adoption", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop held from 8 to 10 December 1988 on the occasion of the 40th anniversary of the Universal Declaration, p. 67.

[28] JHABVALA, F.: "The Drafting of the Human Rights Provisions in the UN Charter", *Netherlands International Law Review*, Vol. XLIV, 1997, p. 4.

[29] SAMNOY, A.: *Human Rights as International Consensus…*, *op. cit.*, p. 15.

[30] At the *Inter-American Conference on Problems of War and Peace*, Chapultepec Conference (Mexico, March 1945), the Latin American States declared that the future United Nations Organisation should take on responsibility for the international protection of human rights through a catalogue of rights and duties in a declaration which would take the form of a convention. See GARCIA BOWER, C.: *Los Derechos Humanos. Preocupación Universal*, Editorial Universitaria, Guatemala, 1960, especially pp. 25 ff., where there is analysis of the development of human rights in Latin America.

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a Declaration of Human Rights as soon as possible after the creation of the UN. Panama's proposal was, without doubt, the most audacious as it introduced a proposal to embody a "Declaration of Essential Rights of Man"[31] as an amendment. This included both civil and political rights, and also economic, social and cultural rights, and was to form an integral part of the United Nations Charter.

These proposals were however completely rejected by the Superpowers present in San Francisco. There were various reasons for this rejection. Firstly, an aspect which worried all the big powers was that human rights should not interfere with their internal matters particularly due to the fact that at that time they all had serious problems with some of the inhabitants of their territories. The United States was facing the issue of racial discrimination against the people we now know as African Americans; the Soviet Union, for its part, continued to have its *Gulags*, where human rights were starkly conspicuous in their absence; finally, both the United Kingdom and France continued enjoying their colonial empires, where it could hardly be said that human rights were scrupulously respected. Secondly, it would have been very difficult to produce a Declaration of Human Rights at an international conference that lasted several weeks like the one in San Francisco which also had many other problems to solve such as delicate issues related to international peace and security. Finally, another issue which present throughout the entire San Francisco Conference was "the spectre of the U.S. Senate's refusal to give its 'advice and consent' to the ratification of the League Covenant"[32] which, among other factors, contributed to the relative failure of the organisation created after the First World War. Forcing the United States to accept a United Nations Charter including a Declaration of Human Rights would perhaps have again led to its "international isolation" which was to be avoided at all costs.

Despite the fact that in the end it was not possible to include a Declaration of Rights in the United Nations Charter, important references to human rights were included in provisions which were much stronger than those included in the Dumbarton Oaks Proposals[33]. The relative force of the human rights related provisions in the United Nations Charter is basically down to the lobbying of certain smaller countries, such as those in Latin America, and of the NGOs which were a

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[31] This Declaration had been produced by jurists from 24 Latin American countries between 1942 and 1944, under the auspices of the American Law Institute.

[32] JHABVALA, F.: "The Drafting of the Human Rights Provisions…", *op. cit.*, p. 11.

[33] BURGERS, J.H.: "The Road to San Francisco…", *op. cit.*, p. 475.

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part of the U.S. delegation at the San Francisco Conference[34]. As John P. Humphrey, Director of the Human Rights Division of the United Nations at the time of the writing of the Universal Declaration, has said on this matter:

> "the relatively strong human rights provisions of the Charter were largely, and appropriately, the result of determined lobbying by non-governmental organizations and individuals at the San Francisco Conference. The United States Government had invited some forty-two private organizations representing various aspects of American life – the churches, trade unions, ethnic groups, peace movements, etc. – to send their representatives to San Francisco, where they acted as consultants to its delegation. These people, aided by delegations of some of the smaller countries, conducted a lobby in favour of human rights for which there is no parallel in the history of international relations, and which was largely responsible for the human rights provisions of the Charter"[35].

On the other hand, Panama, when faced with the rejection of its initiative to include a Declaration of Human Rights in the United Nations Charter, proposed that the report produced by the Committee which drafted the Charter should recommend that once the United Nations Organisation had been created it should immediately embark on the production of a Declaration of Human Rights. This proposal was accepted[36] because all the different delegations present in San Francisco wanted one of the first tasks of the recently created organisation to be the adoption of a human rights related instrument in accordance with the provisions of the Charter.

2.2. *Human Rights in the United Nations Charter*

In the Preamble of the Charter the countries of the United Nations had already reaffirmed their "… faith in fundamental human rights, in

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[34] On the role of NGOs at the San Francisco conference, see KOREY, W.: *NGOs and the Universal Declaration of Human Rights*, St. Martin's Press, New York, 1998, especially pp. 29 ff.

[35] HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, Transnational Publishers, New York, 1984, p. 13.

[36] The proposal reads as follows: "The Committee received the idea [of a Bill of Rights] with sympathy, but decided that the present Conference, if only for lack of time, could not proceed to realize such a draft in an international convention. The Organization, once formed, could better proceed to consider the suggestion, and to deal effectively with it (…). The Committee recommends that the General Assembly consider the proposal and give it effect", quoted in JHABVALA, F.: "The Drafting…", *op. cit.*, p. 13.

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the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…". It should be noted, as has been done by some of the main commentators on the United Nations Charter, that together with maintaining international peace and security, the other key point of this Preamble was the respect for human rights[37]. In the final paragraph of this Preamble the countries of the United Nations reaffirm their resolve "to promote social progress and better standards of life in *larger freedom*" (emphasis added). This statement which as we shall see also appears in the Preamble to the Universal Declaration of Human Rights, was to be of exceptional importance in widening the traditional concept of human rights. This traditional concept was focused exclusively on civil and political rights stemming from the 18th century liberal revolutions; with the statement regarding *larger freedom* the United Nations Charter, influenced by Roosevelt's 'Four Freedoms' speech, opens up to second generation rights: economic, social and cultural.

With this in mind, Article 1.3 of the Charter indicates that one of the purposes of the Organisation is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". As we can see, the programmatic section of the United Nations Charter assumes a crystal clear commitment to the human rights cause. In addition, the *principle of non-discrimination* is enshrined as a basic principle in this instrument. The inclusion of this principle in such an important section of the Charter, namely the section in which the aims of the new international organisation are established, was not at all easy and generated intense debate, mainly between the United States and the Soviet Union. Although the Cold War had not started yet, some of its most destructive effects could already be felt and greatly influenced the way in which human rights were dealt with in the United Nations Charter. Finally, following lengthy discussions, the United States, which had significant racial problems, accepted the inclusion of the principle of non-discrimination on the condition that the Soviet Union relinquish its desire to include in the Charter a clear reference to the right to work and the right to education which were particularly important rights for the socialist concept of human rights. Great Britain, which was

[37] COT, J-P. and PELLET, A.: "Préambule", in COT, J-P. and PELLET, A. (sous la direction de): *La Charte des Nations Unies, Commentaire article par article,* Economica, Paris, 1985, p. 7.

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still concerned that references in the Charter to human rights could interfere with its internal affairs, had no choice but to agree with the consensus which had been reached between the United States and the Soviet Union[38].

The obligations accepted by States in order to achieve the objectives set out in the aforementioned Article 1.3 of the Charter are contained in its Articles 55 and 56 which open chapter IX of the Charter dedicated to "International Social and Economic Cooperation". In Article 55 the Organisation again takes on the commitment to promote universal respect for human rights without any type of distinctions, seeking to ensure their effectiveness at all times. In addition, Article 55 also establishes the principle of self-determination of peoples which, as we shall see, is not even mentioned in the Universal Declaration of Human Rights[39]. In accordance with Article 55:

> "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> … c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Although the mandate entrusted to the UN in this Article 55 is extensive, it confers very limited powers. The task is assigned to the General Assembly (Article 13.1.b[40]) and to the Economic and Social Council (Article 62.2[41]), although these bodies' decisions on these issues are not legally binding. It must be said that based on this Article the United Nations, through the Commission on Human Rights and the General

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[38] Details of all these discussions can be found in SAMNOY, A.: *Human Rights as International Consensus…, op. cit*., pp. 19 ff.

[39] A thought-provoking analysis of the inclusion of the principle of self-determination of peoples in the United Nations Charter can be found in DOEHRING, K.: "The Right of Self-Determination as Expressly Mentioned in the United Nations Charter", in SIMMA, B. (Ed.): *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford, 1995, pp 56-72.

[40] As Article 13.1.b of the United Nations Charter states, "the General Assembly shall initiate studies and make recommendations for the purpose of:… promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

[41] According to what is set out in Article 62.2, the Economic and Social Council "may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all".

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Assembly, has performed incredibly significant work in relation to the promotion of and respect for human rights[42].

While this Article 55 is aimed at the United Nations Organisation, setting out its responsibilities with regards to human rights, the aim of Article 56 however is to order States to commit, in cooperation with the United Nations, to the cause of human rights. In this Article 56, "all Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".

In view of the above we can currently without any doubt confirm that the obligations of Articles 55 and 56 of the United Nations Charter set out *genuine legal obligations* with regards to human rights, both for the Organisation itself and for each and every one of its Member States and not therefore merely programmatic recommendations as certain States have chosen to believe. Nevertheless, right from the very start of the United Nations both the doctrine and different States have questioned the point to which human rights are an issue which can be classed as matters "which are essentially within the domestic jurisdiction of any State" (Article 2.7 of the Charter) and that therefore interventions are not to be permitted, either from the United Nations, or from other States of the international community. Although at first there were doubts on the topic, these doubts were very soon cleared up and human rights entered into a process of internationalisation which was to progressively move them away from the internal jurisdiction of Member States[43]. As Jean-Bernard Marie and Nicole Questiaux have said on this matter, Article 2.7 of the Charter is a regulation with "evolutionary geometry", which means that human rights have gradually escaped from the dominion of States and have now become issues "of international concern"[44]. This same line of argument has been maintained in Spain by Professor Carrillo Salcedo for whom "practice has clearly confirmed this interpretation of Article 2.7 of the United Nations Charter, in accordance with which human rights have ceased to belong to the category of

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[42] Marie, J-B. and Questiaux, N.: "Article 55: alinéa c", in Cot, J-P. and Pellet, A. (sous la direction de): *La Charte des Nations Unies…op. cit.*, pp. 870 ff. In addition, a detailed description of the main developments, both normative and institutional, which have taken place at the United Nations with regards human rights can be found in Villan Duran, C.: *Curso de Derecho Internacional de los Derechos Humanos*, Trotta, Madrid, 2002.

[43] Ganji, M.: *International Protection of Human Rights, op. cit.*, pp. 133 ff.; Cassin, R.: "La Déclaration Universelle et la mise en ouvre des droits de l'homme", *op. cit.*, p. 253.

[44] Marie, J-B. and Questiaux, N.: "Article 55: alinéa c", *op. cit.*, p. 870.

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matters which are essentially under the internal jurisdiction of States"[45]. A similar position is held by a relevant resolution of the International Law Institute at its session in Santiago de Compostela, which took place in September 1989, which confirms that no State which violates its international obligation to protect human rights "will be able to avoid its international responsibility on the pretext that this issue is essentially one that falls under its internal jurisdiction"[46]. The culmination of this process came about due to the Vienna Declaration of 1993 which stated that human rights are the "legitimate concern of the international community"[47].

One should not however overlook the fact that there are serious and important gaps in the generic references to human rights found in the United Nations Charter. First of all, there is no definition of what we should understand by human rights. Secondly, the Charter does not include even a minimal list of these rights, except with its express reference to the principle of non-discrimination. And finally, it does not establish any specific mechanisms for guaranteeing human rights. Despite these deficiencies, "the inclusion of human rights provisions in the Charter changed the parameters of the debate and introduced radical new principles into world politics and International Law"[48]. In 1945 the United Nations Charter became the legal and conceptual framework of the process for the internationalisation of human rights.

A final relevant provision in the Charter regarding human rights, which should not be overlooked, is Article 68. This provision[49] allows the Economic and Social Council of the United Nations (ECOSOC) to create all the commissions necessary for the performance of its functions. The really significant fact for our purposes is that this Article 68 expressly states that ECOSOC "shall set up commissions in economic and social fields and *for the promotion of human rights*…" (emphasis added). The italicisation of the previous words is due to the fact that the phrase appears to give the impression that the Economic and Social Council

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[45] Carrillo Salcedo, J.A.: *Soberanía de los Estados y Derechos Humanos*..., *op. cit.*, p. 42.

[46] "La protección internacional de los derechos humanos y el principio de no intervención en los asuntos internos de los Estados", *Annuaire de l'Institut de Droit International*, vol. 63-II, 1990, pp. 338 ff.

[47] *Vienna Declaration and Programme of Action …, op. cit.*, Part I, para. 4.

[48] Jhabvala, F.: "The Drafting of the Human Rights Provisions of the United Nations Charter", *op. cit.*, p. 2.

[49] A reflection on the problems and contents of this Article can be found in Partsch, K-F.: "Article 68", in Simma, B. (Ed.): *The Charter of the United Nations*…, *op. cit.*, pp. 875-892.

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should establish a commission for the promotion of human rights. The fact is that the inclusion of this phrase in Article 68 was the result of a huge amount of intense pressure in favour of the creation of a human rights commission. Here again the 42 NGOs with consultative status in the U.S. delegation at the San Francisco conference played a determining role. Their pressure finally bore fruit, given that they had to persuade the U.S. delegation to overcome the reticence shown by Great Britain, the Soviet Union and China, who were not in favour of such an explicit provision which would facilitate the creation of a human rights commission[50]. In addition, it was understood that this human rights commission which would be set up by ECOSOC would be entrusted with drawing up a Declaration of Human Rights which would specify the Charter's human rights provisions[51]. Everything went according to the script and one of the first acts of the Economic and Social Council was to create the *Commission on Human Rights* in February 1946 which would have as its first main task to draft the Universal Declaration of Human Rights and other international human rights instruments.

2.3. *Post-1945 legal developments*

Once the activities of the new Organisation which had risen from the ashes of the Second World War had started, it became clear that its initial period was to be dedicated to specifying the somewhat vague and generic human rights provisions that appeared in the United Nations Charter. Hence the Commission on Human Rights was entrusted with the task of approving a document including the most fundamental human rights together with their protection mechanisms. However progress was slow because by then the Superpowers were completely absorbed by the Cold War and only a Universal Declaration of Human Rights was passed in 1948[52]. The problem facing the Universal Declaration was that it was passed by a resolution of the General Assembly of the United Nations. Such resolutions are only recommendations for Member States and are not legally binding obligations. It was therefore vital to pass of a number of human rights instruments which were fully legal in character and binding on those States which ratified them. However, like the passing of the Universal Declaration of Human Rights, this was to be a hugely complicated task. The East-West conflict was again

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[50] See on this subject see SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration…, op. cit.*, pp. 23 ff.

[51] HUMPHREY, J.P.: *Human Rights and United Nations…, op. cit.*, p. 13.

[52] On this topic, see Jaime Oraá's work, also in this volume.

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to influence the preparation of international human rights treaties[53]. To form a better picture, it had initially been envisaged to pass only one human rights covenant, in other words a single covenant which would include the full gamut of fundamental rights and freedoms. Eventually, due to the conflict between the Western bloc and the Socialist bloc, two human rights covenants were approved. This means that at present we have the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which were both paradoxically passed on the same day and at the same session of the General Assembly of the United Nations, on 16 December 1966. Notwithstanding this, a further ten years were necessary, until 1976, for these Covenants to come into force. These three basic United Nations human rights instruments, namely the Universal Declaration and the two Covenants, constitute what is known as the *International Bill of Human Rights*.

In addition to the adoption of these three documents, the United Nations has played a crucial role in the process of codifying and progressively developing International Human Rights Law[54] by passing a whole range of instruments on topics as diverse as children's rights, discrimination against women, the fight against torture, etc. The most significant instruments will be specifically examined in other chapters of this book.

We should not overlook the progress in the international protection of human rights through the developments within the framework of regional international organisations such as the Council of Europe, the Organisation of American States, and the Organisation for African Unity[55]. In these areas we have seen not only exemplary regulatory development, but also the appearance of sufficiently perfected jurisdictional mechanisms for the protection of human rights, such as the European Court of Human Rights, the Inter-American Court of Human Rights[56], or the recently established African Court on Human and Peoples' Rights.

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[53] Regarding this issue, see Alvarez Molinero, N.: "La evolución de los derechos humanos a partir de 1948: hitos más relevantes", in Instituto de Derechos Humanos: *La Declaración Universal de Derechos Humanos en su cincuenta aniversario*, Universidad de Deusto, Bilbao, 1999, pp. 93–178.

[54] Fernandez de Casadevante Romani, C.: "El Derecho Internacional de los Derechos Humanos", in Fernandez de Casadevante Romani, C. (Coord.): *Derecho Internacional de los Derechos Humanos*, Dilex, Madrid, 2000, pp. 49–73.

[55] From July 2002 the OAU has become the *African Union*. See the contribution by Heyns and Killander in this volume.

[56] An in-depth study appears in Cançado Trinidade, A.A.: *El acceso directo del individuo…, op. cit.*

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2.4. *Indivisibility and Interdependence of all Human Rights*

Despite the fact that historically there have been two different categories or generations of human rights, civil and political rights on the one hand and economic, social and cultural rights on the other, and that as we have seen they have conventionally been recognised as two separate entities, these two types of rights do not fit into watertight compartments as two completely autonomous categories; both categories are deeply inter-related[57]. This overlap between civil and political rights and economic, social and cultural rights was already made manifest at the First International Conference on Human Rights held in Teheran in 1968. The Final Declaration of this Conference[58] pronounced the indivisibility and interdependence of both types of rights. This idea, one of enormous importance in putting human rights into practice, was reiterated in Resolution 32/130 of the General Assembly of the United Nations on 16 December 1977. Said Resolution confirmed that

> "all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of both civil and political, and economic, social, and cultural rights; the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development…".

This indivisibility and interdependence of all human rights was again pronounced at the Second World Conference on Human Rights, held in Vienna from 13 to 24 June 1993. The Final Declaration confirms that "all 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".

As such, despite the fact that this distinction between, on the one hand, civil and political rights, and on the other, economic, social and cultural rights, still makes some sense in this day and age, it should be looked at in the light of the provisions mentioned above regarding the

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[57] Regarding this, see MEYER-BISCH, P.'s in-depth study: *Le corps des droits de l'homme. L'indivisibilité comme principe et de mise en oeuvre des droits de l'homme*, Editions Universitaires Fribourg, Fribourg, 1992.

[58] *Proclamation of Teheran,* ST/HR/1Rev. 5 (Vol. I, Part 2).

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profound inter-relationship that must exist between the two types. The defence of human dignity needs both types of rights. This means that "under no circumstances can States hide behind the promotion and protection of a certain category of rights to avoid the promotion and protection of another category…; we should pay the same level of attention and urgency to both types of rights"[59].

We must however acknowledge that economic, social and cultural rights have been "rhetorically praised but never truly dealt with at the United Nations, where the topical and the commonplace is to emphatically proclaim the indivisibility of human rights when it would really be more appropriate in accordance with the facts, as Professor Philip Alston has critically proposed, to talk of the *invisibility* of economic, social, and cultural rights"[60].

2.5. *The Emergence of Third Generation Human Rights*

Since the 1970s a set of new human rights has been emerging which seeks to deal with the most urgent challenges facing the international community[61]. The following are among the human rights proposed to form part of this "new frontier in human rights": the right to development[62]; the right to peace[63]; the right to the environment[64], the right to benefit from the Common Heritage of Mankind[65], or the right to humanitarian assistance[66].

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[59] BLANC ALTEMIR, A.: "Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal", en BLANC ALTEMIR, A. (Ed.): *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal*, Tecnos, Madrid, 2001, p. 33.

[60] CARRILLO SALCEDO, J.A.: *Soberanía de los Estados…, op. cit.*, p. 24.

[61] RODRIGUEZ PALOP, M.E.: *La nueva generación de derechos humanos. Origen y justificación*, Dykinson, Madrid, 2002.

[62] On the growth of this new right, see, among others, M'BAYE, K.: "Le droit au développement comme un droit de l'homme", *Revue des Droits de l'Homme*, 1972, pp. 505-534.

[63] *See* the *Declaration on the right of peoples to peace*, adopted by the General Assembly in its resolution 39/11, of the 12th of November 1984.

[64] FRANCO DEL POZO, M.: "El derecho humano a un medio ambiente adecuado", *Cuadernos Deusto de Derechos Humanos*, n.º 8, 2000.

[65] On the innovative concept of the Common Heritage of Mankind, see: KISS, A. CH.: "La notion de patrimonie commun de l'humanité", *RCADI*, t. 172, 1982-II, pp. 99-256; BLANC ALTEMIR, A.: *El Patrimonio Común de la Humanidad. Hacia un régimen jurídico internacional para su gestión*, Bosch, Barcelona, 1992; GOMEZ ISA, F.: "Patrimonio Común de la Humanidad", *Estudios de Deusto*, Vol. 41/2, julio-diciembre 193, pp. 119-192.

[66] Concerning this problematic right see ABRISKETA, J.: "El derecho a la asistencia humanitaria: fundamentación y límites", in UNIDAD DE ESTUDIOS HUMANITARIOS: *Los desafíos de la acción humanitaria*, Icaria, Barcelona, 1999, pp. 71–100.

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And the truth is that, as Karel Vasak states, "the list of human rights is not, nor will it ever be, a finished list"[67]. Similar opinions are expressed by Philip Alston when he states that this new generation of human rights represents "the essential dynamism of the human rights tradition"[68].

There are many different factors which have brought about, and continue to bring about, the appearance of these new human rights. Firstly the 1960s decolonisation process led to a revolution in international society and, as a result, in the legal order called to regulate it, namely International Law. This change also influenced human rights theory which increasingly tends towards the specific problems and needs of the new category of countries that appeared on the international scene, namely the developing countries[69]. If it was the bourgeois and socialist revolutions which gave rise to the first and second generations of human rights respectively, according to Stephen Marks it will be this anti-colonialist revolution which will give rise to the emergence of third generation human rights[70].

Another factor which has had a notable impact on the emergence of these solidarity rights is international society's interdependence and globalisation since the 1970s. States are becoming more and more aware of the fact that there are global problems which require coordinated responses. They require, in short, processes of international cooperation[71]. As a consequence of this global change, third generation rights are rights which emphasise the need for international cooperation which basically have a bearing on the collective aspects of these rights; to use Gros Espiell's expression, they are "*community-oriented rights*"[72]. Rights in other words which reveal the urgent need to make decisions and take joint actions within the framework of the international community, not only in the sphere of nation-States.

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[67] VASAK, K.: "Les différentes catégories des Droits de l'homme", in *Les dimensiones universelles des Droits de l'homme*, UNESCO–Bruylant, Brussels, 1990, p. 297.

[68] ALSTON, P.: "A third generation of solidarity rights: progressive development or obfuscation of International Human Rights Law?", *Netherlands International Law Review*, 1982, p. 314.

[69] With this in mind, it is no surprise that the right to development had its origins in Africa, and that jurists from the Third World have been its most ardent defenders.

[70] MARKS, S.: "Emerging Human Rights: a new generation for the 1980s?", *Rutgers Law Review*, Vol. 33, 1981, p.440.

[71] As such, there has been talk of the emergence of an International Law of Cooperation: FRIEDMANN, W.: *La nueva estructura del Derecho Internacional*, Ed. Trillas, Mexico, 1967, p. 90.

[72] GROS ESPIELL, H.: "Introduction" in BEDJAOUI, M. (Ed.): *International Law: Achievements and Prospects*, UNESCO- Martinus Nijhoff Publishers, Dordrecht, 1991, p. 1167.

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The key word as regards these new rights is *solidarity*[73] which does not mean that these rights are the only vehicles for promoting solidarity. Human rights of the first two generations should also serve to give expression to this value which is so necessary in an international society as divided as the one in which we live today. But what certainly *is* true is that "perhaps third generation rights require a higher degree of solidarity"[74].

However, this new generation of human rights has caused a series of intense debates. In the words of Angustias Moreno:

> "new trends pose sufficient risk to the international protection of human rights that we have to approach them with great care; it might even, perhaps, be more profitable for us to consolidate what we have already achieved with regards to respecting human rights, before crossing new frontiers"[75].

A similar opinion is held by Professor Kooijmans for whom the introduction of the idea of third generation human rights "does not only muddy the issue, it also constitutes a danger to what was at the root of the internationalisation of human rights, viz., strengthening the protection of the individual from breaches of his most fundamental human rights by the State"[76].

One of the most common objections to these rights is that the excessive proliferation of human rights may weaken the protection offered to already existing human rights. This criticism has been countered by those supporting these new rights. Gros Espiell, amongst others, argues that this risk of weakening previous generations' rights does not exist, but rather, solidarity rights "are a prerequisite for the existence and exercise of all human rights"[77]. In other words, rather than weakening or diluting these human rights, they would strengthen the indivisibility and interdependence of all human rights. But the truth is that, as rightly stated by Alston, "the challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and, on the other hand, the need

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[73] Marks, S.: "Emerging Human Rights…", *op. cit.*, p. 441.

[74] Gros Espiell, H.: *op. cit.*, p. 1169.

[75] Moreno Lopez, A.: "Los derechos humanos de la solidaridad", in *IV jornadas de profesores de Derecho Internacional y Relaciones Internacionales*, 4th-6th July 1979, Universidad de Granada, 1980, p. 50.

[76] Kooijmans, P.H.: "Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation", *Netherlands International Law Review*, 1990, p. 329.

[77] Gros Espiell, H.: *op. cit.*, p. 1168.

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to adopt a dynamic approach that fully reflects changing needs and perspectives, and responds to the emergence of new threats to human dignity and well-being"[78].

Another common criticism of these third generation rights is that the term "generation" seems to imply that previous generations' rights are already out-of-date or antiquated; in a word, bettered. This criticism has also been answered. On this issue Karel Vasak agrees that these new rights are *synthesis rights*, in other words rights which "cannot be realised unless other human rights, which are, in some way, their constituent parts, have been set in motion"[79]. And the truth is that one of the essential parts of these rights is to protect and safeguard of individual rights which they complement.

One criticism which has been fairly justified is that the demand for these solidarity rights can, on occasion, serve to justify massive violations of civil and political rights, mainly in the Third World. This situation has occurred frequently across Africa where there are many countries suffering under cruel dictatorships. Many African leaders saw in the defence of solidarity rights, mainly the right to development, a way of lengthening their period in power, ignoring individuals' rights and defending the principle of non-interference in internal affairs[80]. The truth is that if we really want these new rights to be credible and accepted by the international community then they must entail scrupulous respect for individual human rights, and in particular the civil and political rights.

However without doubt the main objection which can be levelled against these emerging rights is the fact that, apart from the right to benefit from the Common Heritage of Humankind[81], none of the other new rights has been recognised by a universal convention, in other words by an international treaty binding on those States which have

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[78] ALSTON, P.: "Conjuring up new Human Rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, p. 609.

[79] VASAK, K.: "Les différentes catégories des Droits del'homme", in *Les dimensions universelles…, op. cit.*, p. 305.

[80] This "perversion of solidarity rights" has been discussed by many different writers, among them: MAHMUD, S.S.: "The State and Human Rights in Africa in the 1990s: perspectives and prospects", *Human Rights Quarterly*, Vol. 15, nº 3, 1993, pp. 488 ff.; HOWARD, R.E.: *Human Rights in Commonwealth Africa*, Rowman and Littlefield Publishers, New Jersey, 1986.

[81] The concept of the Common Heritage of Mankind has been expressly dealt with in two international treaties. The first of these is the *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 14 December 1979. The second is the *UN Convention on the Law of the Sea*, signed in Montego Bay on 30 April 1982, which has come into force on November 1994.

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ratified it. These new rights have mainly been recognised through resolutions of the General Assembly of the United Nations, which brings us to the thorny issue of the legal value of such resolutions[82].

Some of the international doctrine, mainly in the West, considers the legal value of the resolutions of the General Assembly of the United Nations as "relative", depending on the circumstances under which each individual resolution was adopted (whether it was unanimously approved, whether its terms are sufficiently precise and concrete, States' opinions regarding the issue etc). Often the norms contained in these resolutions become what is known as *soft-law*, or regulations which cannot be classed as fully legal[83].

However some doctrine, more committed to transforming the international legal order, purports to give such resolutions full legal effect[84].

We are therefore facing new human rights which are still in the process of being formed, or human rights in *statu nascendi*, given that States, the main creators of international law, are reluctant to recognise these new rights in any other instrument than a resolution of the General Assembly of the United Nations.

We should however bear in mind that older human rights were also up against fierce resistance when they were first proclaimed as rights. This should encourage us to redouble our efforts regarding these new solidarity rights which seek to respond to the main challenges faced by the international community: development, peace, the environment, humanitarian catastrophes etc.

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[82] There exists abundant literature on this topic. Among the most significant pieces are: VIRALLY, M.: "La valeur juridique des recommandations de Organisations Internationales", *Annuaire Française de Droit International,* 1956, pp. 66-95; PEREZ VERA, E.: "Algunas consideraciones sobre el valor jurídico de las Resoluciones de a Asamblea General en el 26 aniversario de la ONU", *Boletín de la Universidad de Granada*, no. 105, Vol. V, 1973, pp 37 52; CASTAÑEDA, J.: "La valeur juridique des résolutions des Nations Unies", *RCADI*, 1970-I, t. 129, pp. 205-332.

[83] On the notion of *soft-law*, see: WEIL, P.: "Vers une normativité relative en Droit International?", *Revue Générale de Droit International Public*, 1982, pp. 6 ff.; ISA, R.: "Formation des normes internationales dans un monde en mutation: critique de la notion de *Soft-law*", in *Le Droit International au service de la paix, de la justice et du développement. Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 334 ff.

[84] BEDJAOUI, M.: *Hacia un Nuevo Orden Económico Internacional*, UNESCO- Sígueme, Salamanca, 1979, pp. 157 ff; BEKHECHI, M.A.: "Les résolutions des Organisations Internationales dans le processus de formation de normes en Droit International", in FLORY, M.; MAHIOU, A. and HENRY, J-R.: *La formation des normes en Droit International du Développment*, Table Ronde franco-maghrébine Aix-en-Provence, October 1982, Office des Publications Universitaires, Alger et Centre National de la Recherche Scientifique, Paris, 1984, pp. 181-196.

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2.6. *The Vienna World Conference on Human Rights*

The Vienna Conference on Human Rights was the second world conference on the issue and took place 25 years after the first world conference held in Tehran in 1968. There were high expectations that this conference would become a turning point towards the universal respect for human rights. However, the results of the Conference left a bittersweet taste in the mouths of those attending it, both for governmental delegations and for the many non-governmental organisations which took part in the debates[85], although there are some who are not so pessimistic and even consider that the Vienna Conference "was a huge success for the human rights cause"[86].

Many issues were discussed at Vienna with varying degrees of success. For our purposes the most important aspects were the issue of the universality of human rights; the relationship between human rights, democracy and development; the incorporation of women's rights onto the international human rights agenda; and finally the increasing role of non-governmental organisations in the defence and promotion of human rights.

The central theme of the Vienna Conference without doubt concerned the issue of whether human rights are universal, namely applicable to all countries in the international community, or whether on the other hand they must be considered in the light of different circumstances, whether historical, cultural, religious etc. There were two conflicting theories on this issue: the universalist theory and the theory of cultural relativism. The two positions were quite far apart. While Western countries defended the universality of human rights, the Islamic countries and a significant proportion of third world countries were staunch supporters of cultural relativism, viewing the theory of universality as a new form of colonialism. The truth is that following the debates concerning this thorny issue the conclusions which were reached were not particularly satisfactory given that, as we shall see below, the Final Declaration of the Vienna Conference is extremely ambiguous on the universality

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[85] More than 3,500 NGOs working in the field of human rights took part in a *Parallel Conference* which took place in Vienna for the duration of the official conference. It should also be noted that the discussions which took place at the parallel conference had an influence on the final declaration of the official conference.

[86] These are the words of Julián Palacios, Director of the Office of Human Rights of the Spanish Ministry for Foreign Affairs at the time of the official conference, in PALACIOS, J.: "Más luces que sombras en la Conferencia Mundial de Derechos Humanos", *Tiempo de Paz*, nº. 29-30, Autumn 1993, p. 6.

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of human rights[87]. The Conference's Final Declaration reaches a type of consensus which, in my opinion, has still not resolved the problem because the Vienna Declaration states, after its first paragraph in which it declares that the universal nature of these rights and freedoms "is beyond question":

> "… the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind"[88].

Clearly this ambiguous paragraph does not openly take the side of either the universality of human rights or of the theory of cultural relativism; insofar as possible it aims to please the advocates of both views. This is because as already mentioned the sessions of the World Conference on Human Rights clearly demonstrated that the two opinions were very much opposed and that any kind of consensus was still far from possible[89]. The only possible way, and providing that there is sufficient political will on the part of the States, to achieve universality for at least the most fundamental human rights will be to open up a sincere and open intercultural dialogue[90] between the Western States and those supporting cultural relativism. Both groups of States will need to put aside dogma and preconceived ideas and be prepared through said dialogue to make some concessions in their aims. This is one of the main

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[87] Clear proof of the fact that the two positions were separated by a considerable distance can be found if the final documents of the preparatory Regional Meetings are compared with those of the Vienna World Conference. The first of these regional meetings was the African Regional Meeting, which took place in Tunisia from 2 to 6 November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, 24 November 1992. The second meeting was the Regional Meeting for Latin America and the Caribbean, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15, 22 January 1993. The third was the Regional Meeting for Asia, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, 7 April 1993. The European Union, for its part, also held a preparatory meeting prior to the conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, 23 April 1993.

[88] *Vienna Declaration and Programme of Action, op. cit.*, Part 1, para. 5.

[89] On the issue of the universality of human rights at the Vienna Conference and in its Final Declaration, see VILLAN DURAN, C.: "Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena", *Revista Española de Derecho Internacional*, Vol. XLVI, no. 2, 1994, pp. 505–532.

[90] ETXEBERRIA, X.: "El debate sobre la universalidad de los derechos humanos", in INSTITUTO DE DERECHOS HUMANOS: *La Declaración Universal…*, *op. cit.*, p. 385.

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problems currently facing us and the future evolution of human rights in a world of conflict will greatly depend on an adequate response to this problem.

The second question dealt with at the Vienna Conference was the growing link between human rights, democracy, and development. This is one of the most developed aspects of human rights theory. The indivisibility and interdependence between human rights, democracy, and development have been openly defended in recent times. In other words, in order to effectively defend human rights and fundamental freedoms, it is vital that people live in a democratic State and that the State has achieved reached minimum levels of economic, social, cultural and political development.

This aspect was not as controversial as the issue of universality as reflected in the Conference's Final Declaration. Paragraph 8 of the Vienna Declaration states that:

> "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing… The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world".

An issue that is closely related to this link between human rights, democracy and development is the recognition in the Vienna Declaration of the right to development. This recognition is very important given the fact that, as we have already shown, this right met with across-the-board opposition from Western countries at the time when it was first suggested. It is significant that years later, in 1993, all of the countries present in Vienna agreed to recognise the right to development. As the Final Declaration states, "the World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a *universal and inalienable right and an integral part of fundamental human rights*"[91] (emphasis added). Hence the right to development occupies a relatively important position in the Vienna Declaration, a fact which encouraged the already-quoted Julián Palacios to State that "the recognition of the principle of the right to development… constitutes an unprecedented success which, *ab initio*, it appeared impossible to achieve"[92].

Another issue discussed in Vienna, and which finally managed to be included in the Final Declaration, was the international community's

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[91] *Vienna Declaration and Programme of Action, op. cit.*, Part 1, para. 10.

[92] PALACIOS, J.: "Más luces que sombras…", *op. cit.*, p. 8.

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acceptance of a firm commitment to make the human rights of women one of the priorities of the international human rights agenda. The fact is that the lobbying of movements in favour of the rights of women in Vienna certainly made its presence felt throughout the conference and achieved a very significant recognition in the Final Declaration. As the Vienna Conference states regarding this issue:

> "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights (…) The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women"[93].

A final aspect dealt with at the Vienna Conference is the importance given to the non-governmental organisations working in the area of human rights. Firstly, as we have already mentioned, the NGOs participated very actively in the discussions, both at the official Conference and at the parallel Conference of NGOs. Additionally, the Final Declaration of the Vienna Conference recognises the important role which NGOs must play with regards the protection and promotion of human rights. On this matter, paragraph 38 of the Final Declaration states that:

> "the World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms…".

3. **Conclusions**

As we have seen the 20th century was very significant in evolving the protection of human rights on the international legal scene. Both the League of Nations and, above all, the United Nations worked intensively both in the regulatory ambit and in the institutional ambit in order to seek to protect the most basic human dignity. Although the progress is laudable, we are forced to recognise that there is plenty of work still to be done at the beginning of this rather uncertain 21st century.

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93 *Vienna Declaration…, op. cit.*, Part 1, para. 18.

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