The concept of human rights, based on the notions of the dignity of the human being and the limitation of the power of the State, is a phenomenon that has, although in many different manifestations, been present practically throughout the whole of history. The fight for the recognition of the dignity of people has been a constant throughout historical evolution, from the tentative recognition of the rights of Indians 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 experiencing a phase of internationalisation of human rights; in other words, once the majority of internal legal instruments have proceeded towards the recognition of fundamental rights and freedoms, a period has begun in which human rights have been objects of discussion within international organisations, both worldwide and regional. In this process, which is progressive, and which we are still undergoing, the promotion and protection of all types of human rights has moved from being an issue which is part of the sphere of responsibility that belongs exclusively to States, and has become “a legitimate concern of the international community”, as is stated in the Vienna Declaration resulting from the second World Conference on Human Rights. In any case, as we will analyse below, this process of internationalisation has not in any way been a simple process, but rather has been, and continues to be, plagued by obstacles and difficulties, which makes the achievement of a true culture of human rights even more of a desire than a reality.

1. Antecedents of international protection of human rights

The key date on which we can base our witnessing of the internationalisation of human rights is 1945, after the end of the Second World War and the creation

---

of the Organisation of the United Nations. However, during the inter-war period and principally at the hands of the League of Nations, we witnessed the upsurge of a significant movement in favour of the international recognition of human rights, a movement which, as we shall see, united both academics and public opinion, so as to eventually capture the attention of politicians once the fight against fascism had begun in 1939².

Classic International Law (that is, International Law prior to 1945) was conceived as those legal norms which regulate relations between States exclusively; only States were subjects of International Law and, as such, only States were capable of being subject to laws and rules 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 objects³. This meant that the way in which States treated their nationals was a question which fell exclusively under the internal jurisdiction of each State. This principle denied other States the right to intercede or intervene so as to help nationals of the State in which they were being mistreated⁴. The only exception made was the institution of humanitarian intervention: the theory of humanitarian intervention is based on the assumption that States have an international obligation to guarantee certain basic rights to their nationals. These rights are so fundamental, and of such value to the human being, that violations of them by one State cannot be ignored by other States. If it was believed that very serious, large-scale, or brutal violations of those basic human rights had taken place, the use of force by one or more States was permitted so as to bring them to an end⁵. As we can see, there were beginning to be limits to the absolute sovereignty of States.

It is also true that even before the internationalisation of human rights, classic International Law did encounter some institutions which protected certain groups of people and which, as a result of this, can be cited as close antecedents of the aforementioned international protection of human rights. With regards to this, and also taking into account the above-mentioned institution of humanitarian intervention, we can mention the following:

---
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.
— The area of the international responsibility of States for the treatment of aliens: a State was deemed not to have been responsible if its treatment of a national of another State fell below a minimum standard of civilisation and justice.

— Certain international treaties from the XIXth century aimed at the protection of Christian minorities in the Ottoman Empire, while other instruments, also of a related nature, were leading towards the prohibition of slavery and the traffic of slaves; the ones which, of many, most stand out, are 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

— In turn, *International Humanitarian Law*, which arose chiefly because of the Conventions of Geneva of 1864 and The Hague of 1899 and 1907, and which deals with the protection of the victims of armed conflicts, has also been considered as one of the most significant antecedents of current international protection of human rights.7 Ultimately, International Humanitarian Law seeks to preserve the most basic human rights of individuals in situations of conflict.

In any case, the most important factor in the creation of conditions which made a progressive internationalisation of human rights possible was the foundation of the League of Nations, an international organisation which, as we shall see below, performed a task which was crucial in the generalisation of the protection of the rights of the person.

1.1. *The Work of the League of Nations*

Despite the fact that the Covenant of the League of Nations does not once explicitly mention “human rights”, there exist many provisions which, one way or another, served as a basis for the relevant work which the organisation performed in the field of human rights.8 Firstly, Article 22, when it 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”. As such, Article 23 of the Covenant states that members of the League of Nations:

\[\text{a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children...},\text{ and, for that purpose will establish and maintain the necessary international organisations;}\]


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 foundation, within the framework of the League of Nations, of the International Labour Organisation (ILO), which performed a task, and continues to do so, which was unprecedented in the area of workers’ rights, equality between men and women at work, the exploitation of child labour\(^9\), the protection of indigenous peoples\(^10\)…

The Peace Treaties which brought an end to the first great military conflict of the last century established a system of protection of national minorities, a system which would remain under the protection of the League of Nations. This legal regulation for the protection of minorities, based on the principles of equality of treatment and lack of discrimination, afforded ample rights to minorities with regards the conservation of their language, their religion, their schooling system, and even foresaw certain political rights\(^11\). As Professor Carrillo Salcedo states regarding these legal standards for the protection of the rights of minorities, “despite its deficiencies and limits (…) it nevertheless constituted a mechanism for the safeguard and protection of human rights”\(^12\). 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, a fact which was to become one of the principle failings of the Universal Declaration.

In conclusion, we should 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; foreigners; 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 deal with was a general and systematic protection of human rights; it was only the rights of certain categories of people that were protected, and not those of human beings in general. This global protection of human rights was to come once

---


\(^11\) 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.

the Second World War had finished, on the approval of the United Nations Charter and the Universal Declaration of Human Rights.

All these contributions from the League of Nations to the internationalisation of human rights were to create an ideal environment for the growth of a strong movement in favour of 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 for an international guarantee of the rights and freedoms of the human being. 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.13 As Jan Herman Burgers, one of the people who has studied the evolution of human rights following 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”14.

One of the most serious initiatives was set in motion by the International Law Institute, which in 1921 created a Commission presided over by André Mandelstam, for the study of the protection of minorities and of human rights in general. The fruit of this work by the Commission was the elaboration of a project on the Declaration of Human Rights, which was presented to a meeting held by the Institute in New York in 1929. Eventually, following various discussions, the Declaration of the International Rights of Man15 was approved on the 12th of October 1929, with 45 votes in favour, 11 abstentions, and only one vote against it. 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”16. Likewise, in the concluding 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.

13 These and other views have been collected in Cassin, R.: “La Déclaration Universelle et la mise en œuvre des droits de l’homme”, Recueil des Cours de l’Académie de Droit International de La Haye, 1951 - II, p. 272.


16 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 the 8th of 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.
In the words of its most significant 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 consecration of the legal equality of all members of the international community”\(^{17}\). 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 with one sole objective arose: to remove all the issues related to human rights and freedoms from the sovereignty of States\(^{18}\).

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 conscious of the fact that this was not a regime which respected the most basic human rights\(^ {19}\). These suspicions were resoundingly confirmed with the start of the war in 1939. This all meant that human rights became one of the objectives of the Allies in the battle against fascism, as well as coming to be one of the centres of the attention of both intellectuals and the general public. 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”\(^ {20}\)

This was the background against which Franklin Delano Roosevelt’s famous State of the Union speech\(^ {21}\) to the North American Congress took place on the 6\(^{th}\) of January 1941. In this speech\(^ {22}\), the President of the United States outlined which were the fundamental freedoms which should be guaranteed for every human being. There are four such freedoms: freedom of speech and expression; freedom of worship; freedom from want, and freedom from fear. And the truth is that Roosevelt “was


\(^{18}\) Some of these initiatives can be found in BURGERS, J.H.: “The Road to San Francisco”, op.cit., pp. 453 ff.


\(^{22}\) 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.
personally convinced that internationalization of the care for human rights was the proper idea for uniting the American people against the forces of totalitarianism”23. What is undeniable is that this speech of 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”24.

A few months later, on the 14th of August 1941, the Atlantic Charter expressed the desire to arrive at 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”. Along the same lines, also incorporating human rights as objectives of the war, on the 1st of 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”.25 What is crystal clear in this statement is that human rights burst onto the political scene in a fairly early stage of the war, as there existed 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 objects of discussion. The debate was fierce, with passionate disagreements between the superpowers. The strongest opposition to the fact that human rights were to figure in the Dumbarton Oaks Proposal on the creation of the United Nations came from the British delegate, Sir Alexander Cadogan. In his opinion, it could “open up the possibility that the Organisation could criticise the internal organisation of Member States”, a clear allusion to the colonial question, a particularly sensitive issue for the British. As we can see, the question of sovereignty will always be present when coming to compromises regarding human rights. Nor was the Soviet Union in favour of human rights occupying a privileged position among the principles of the organisation that was to be founded, although it did not put up insurmountable hurdles26. Faced with these problems, the United States had to lower its hopes, as a result of which the Dumbarton Oaks proposal eventually only came to include “a vague reference to human rights”27. In the section dealing with international economic and social co-operation, one of the objectives of the United Nations was to be “to facilitate

---

25 Extracts from these important international statements, together with a brief analysis of them, appear in RABOSSI, E.: La Carta Internacional de Derechos Humanos, EUBEBA, Buenos Aires, 1987, pp. 10 ff.
26 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.
solutions of 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 moved towards the adoption of the United Nations Charter, the constituent document of the international organisation created following 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 conviction that many of these 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, although they are perhaps the most important, in bringing about the existence of this process of international consecration of human rights. As we saw in the previous chapter, a far-reaching movement in favour of human rights was developing. The tragedy experienced with regards human rights during World War Two served as a catalyst for all these forces which were calling for recognition of human rights in the international sphere. All this means that human rights were at the forefronts of the minds 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 the inclusion of human rights in the United Nations Charter. As an expert on the process of the production of the Charter 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”.

In this respect, various Latin American delegations played incredibly significant roles at the San Francisco Conference, which have come to be known as “Latin

28 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 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 8th to 10th December 1988 on the occasion of the 40th anniversary of the Universal Declaration, p. 67.

American activism. Some of these delegations wanted a Bill of Rights in the Charter (that is, a Declaration of Human Rights as an appendix). Countries such as Mexico, Chile, Cuba, Panama, and Uruguay, encouraged by the Chapultepec Conference, made very advanced proposals with regards this. While Mexico and Panama were proposing a Declaration within the text of the United Nations Charter, Uruguay and Cuba were content with the General Assembly approving a Declaration of human rights as soon as possible after the creation of the UN. Panama’s proposal was, without doubt, the most audacious, introducing as it did the “Draft Declaration of Essential Rights of Man” as an amendment, which 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.

However, these proposals were completely rejected by the Superpowers that were present in San Francisco. There were various reasons for this. Firstly, an aspect which worried the big powers was that human rights should not interfere with internal matters, an issue which mattered to them because of the fact that at that time they all had serious problems with some of the inhabitants of their territories. The United States was having to face up to 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, in which human rights were starkly conspicuous in their absence; finally, both the United Kingdom and France continued to benefit from 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 that of San Francisco where, in addition, there were many other problems to solve, such as delicate questions related to peace and international security. Finally, another issue which was dealt with throughout the entire San Francisco Conference was “the ghost of the US Senate’s refusal to give its “advice and consent” to the ratification of the League Covenant,” which, among other factors, contributed to the relative failure of the organisation created after First World War. The fact that the United States had been forced to accept a United Nations Charter with a Declaration of Human Rights at its heart would perhaps have given more strength to its desire for “international isolation”, a situation which it was desirous to avoid at all cost.

Despite the fact that, in the end, it was impossible 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 that had been included

31 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 convention. See. GARCIA BOWER, C. with regards this: Los Derechos Humanos. Preocupación Universal, Editorial Universitaria, Guatemala, 1960, especially pp. 25 ff., where there is analysis of the growth of human rights in Latin America.
32 This Declaration had been produced by jurists from 24 Latin American countries between 1942 and 1944, under the auspices of the American Law Institute.
in the Dumbarton Oaks Proposals. This relative force regarding human rights which was a part of the United Nations Charter is basically due to the lobbying of certain smaller countries, such as those in Latin America, and of the NGOs which were a part of the North American delegation at the San Francisco Conference. 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,

"the relatively strong human rights provisions of the Charter were largely, and appropriately, the result of determined lobbying by nongovernmental 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."

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 had written 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, as it was the wish of all the different delegations present in San Francisco that one of the first tasks of the recently created organisation should be the adoption of a human rights related instrument which was 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 stated their support for the reaffirmation of “… faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...”. It should be noted, as has been done by one of the principal commentators on the United Nations Charter, that, together with maintaining peace and international security, the other key point
of this preamble was the respect of human rights\textsuperscript{38}. In the final paragraph of this preamble, the countries of the United Nations reaffirm their determination “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, will be of exceptional importance in the widening of the traditional concept of human rights. This traditional concept was centred exclusively on civil and political rights, support for which arose as a result of the liberal revolutions of the XVIII\textsuperscript{th} century; with the statement regarding larger freedom, the United Nations Charter, influenced up to this point by the “Four Freedoms” speech of Roosevelt, began to open up to second generation rights: economic, social, and cultural.

With this in mind, Article 1.3 of the Charter signals that one of the proposals of the organisation was “to achieve international co-operation 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 confirm from looking at the programmatic section of the United Nations Charter, a crystal clear commitment is being made with regards human rights. In addition, the principle of non discrimination is being confirmed as a basic principle in this instrument. The inclusion of this principle in such an important section of the Charter, as it is the section in which the aims of the new international organisation are established, was not at all peaceful, generating intense debate, mainly between the United States and the Soviet Union. Although the Cold War was yet to begin, some of its most destructive effects could already be felt, a situation which had a great deal of influence on the way which human rights were dealt with in the United Nations Charter. Finally, following lengthy discussions, the United States, where racial problems continued to be harshly significant, accepted that the principle of non discrimination be included, on the condition that the Soviet Union retract its desire for the inclusion in the Charter of a clear reference to the right to work and the right to education, rights which were particularly important to the socialist concept of human rights. Great Britain, which continued to express suspicions motivated by fears 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 arrived at by the United States and the Soviet Union\textsuperscript{39}.

The duties taken on by States for the achievement of the objectives stated in the aforementioned Article 1.3 of the Charter are brought together in Articles 55 and 56 of the same legal instrument, provisions which begin chapter IX of the Charter, given the title of “International Social and Economic Co-operation”. In Article 55, the Organisation again takes on the commitment of promoting universal respect for human rights without making any type of distinctions. In addition, the principle of self-determination of peoples is also established in Article 55, a principle which, as


\textsuperscript{39} Details of all these discussions can be found in SAMNOY, A.: Human Rights as International Consensus..., op. cit., pp. 19 ff.
we shall see, is not even mentioned in the Universal Declaration of Human Rights. 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 taken on by the UN in this Article 55 is extensive, the powers conferred to it are very limited. The task of moving ahead with the commitment is assigned to the General Assembly (Article 13.1.b) and to the Economic and Social Council (Article 62.2), bodies whose decisions concerning these issues are not legally binding. It must be said that on the basis of this Article of the United Nations Charter, incredibly significant tasks with regards the promotion of and respect for human rights were assigned to the Commission on Human Rights and the General Assembly.

While Article 55, which we have just finished analysing, is aimed at the United Nations Organisation, setting out which are its responsibilities with regards human rights, the aim of Article 56, however, is to order States to commit, in cooperation with the United Nations, to human rights. In this Article 56, “all Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55”.

Having briefly analysed these norms, we can now, without any doubt, confirm that the obligations of Articles 55 and 56 of the United Nations Charter set out actual legal obligations with regards human rights, both for the Organisation and for each and every one of its Member States, and not merely programmatic recommendations, as certain States have chosen to believe. Nevertheless, right from the very start of the United Nations, both from doctrine and from different States, questions have arisen concerning 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, as a result of this, interventions are not to be permitted, either from the United Nations, or from other States that are part of the international community. Although at first there existed 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\(^{44}\). As Jean-Bernard Marie and Nicole Questiaux have said regarding this, 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”\(^{45}\). 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 matters which are essentially under the internal jurisdiction of States”\(^{46}\). Nor does the opinion of a relevant resolution of the International Law Institute at its session in Santiago de Compostela, which took place in September of 1989, differ, confirming 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”\(^{47}\). 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”\(^{48}\), as we saw earlier.

However, it should not escape our notice that there exist serious and important gaps in the generic references to human rights which can be found in the United Nations Charter. In the first place, there is no definition of what we should understand by human rights. Secondly, nor does the Charter include a list of these rights, except with its express reference to the principle of non discrimination. And, finally, concrete mechanisms for the guarantee of human rights are not established. But, despite these deficiencies, “the inclusion of human rights provisions in the Charter changed the parameters of the debate and introduced radically new principles into world politics and International Law”\(^{49}\). In 1945, the United Nations Charter became the legal and conceptual basis for the process of the internationalisation of human rights.

A final relevant provision in the Charter regarding human rights, which should not be forgotten, is Article 68. This Article\(^{50}\) allows the Economic and Social Council of the United Nations (ECOSOC) the power to create all the commissions necessary


\(^{46}\) Carrillo Salcedo, J.A.: *Soberanía de los Estados y Derechos Humanos…*, op. cit., p. 42.

\(^{47}\) “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.

\(^{48}\) Vienna Declaration and Programme of Action…, op. cit., Part I, para. 4.


\(^{50}\) Thoughts 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.
for the performance of its functions. The really significant fact with regards what we are considering is that in this Article 68 it is expressly stated 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 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 formation of a human rights commission. Here again the 42 NGOs which played a consultative function in the North American delegation at the San Francisco Conference played a determining role. Their pressure finally bore fruit, given that they had to persuade the North American 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 commission51. In addition, it was understood that this human rights commission which was to be created on behalf of ECOSOC would take on the task of drawing up a Declaration of Human Rights which was to specify the regulations concerning human rights that appear in the Charter52. And so everything developed as has been described and planned, and one of the first acts of the Economic and Social Council was to create the Commission on Human Rights in February 1946, a body which would have as the main task of the first few years of its existence the production of 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 that had risen from the ashes of the Second World War started, it became clear that its first moments were to be dedicated to making concrete the somewhat vague and generic provisions concerning human rights that appeared in the United Nations Charter. With this aim, the Commission on Human Rights was entrusted with the task of passing a document including the most fundamental human rights, along with appropriate mechanisms for their protection. However, given the fact that the Superpowers at that time were completely occupied with the Cold War, it was not possible to proceed on this matter as much as was desirable, and only the Universal Declaration of Human Rights was approved in 194853. The problem that the Universal Declaration had to face up was that it was approved as a result of a resolution of the General Assembly of the United Nations; such resolutions are only recommendations for Member States, and not legally binding obligations. As such, it was vital to proceed to the approval of a number of human rights instruments which were fully legal in character, and binding to those States which had ratified them. However, as was to occur with the approval of the Universal Declaration of Human Rights

53 On this topic, see Jaime Oraá’s work, also in this volume.
Rights, this was to be a hugely complicated task. The East-West conflict was again to influence the production of international treaties concerning human rights. To give a better idea of the issue, it had initially been foreseen that only one human rights covenant would be approved, a sole covenant which would include the full gamut of rights and fundamental freedoms. Eventually, due to the conflict between the Western bloc and the Socialist bloc, two human rights covenants were approved. This means that, at the current moment in time, we have the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, both, paradoxically, approved on the same day and in the same session of the General Assembly of the United Nations, on the 16th of December 1966. Nevertheless, a wait of another ten years, until 1976, was necessary for these covenants to come into force following ratification by a sufficiently large number of States. And so, these three basic instruments of the United Nations with regards human rights, the Universal Declaration and the two Covenants, make up what is known as the International Bill of Human Rights.

In addition to the adoption of these three documents, the United Nations Organisation has played a crucial role in the process of codification and progressive development of the International Human Rights Law, approving 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 object of more specific study in other chapters of this book.

Nor should we forget to analyse the advance of international protection of human rights and the developments that have occurred within the framework of regional international organisations, such as the Council of Europe, the Organisation of American States, and the Organisation for African Unity. In these areas we have seen not only an exemplary regulatory development, but also the appearance of jurisdictional mechanisms which are sufficiently perfected as to be able to protect human rights, such as the European Court of Human Rights, the Inter-American Court of Human Rights, or the recently established African Court on Human and Peoples’ Rights.

2.4. Indivisibility and interdependence of all human rights

Despite the existence and historical appearance of two different categories or generations of human rights, on the one hand, civil and political rights, and, on the other, economic, social, and cultural rights, and the fact that these have conventionally been recognised as two separate entities, as we have just seen, these two types of rights do not go into watertight compartments as two completely autonomous

54 Regarding this issue, see ÁLVAREZ 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.
56 From July 2002 the OAU has become the African Union.
57 An in-depth study appears in CANÇADO TRINDADE, A.A.: El acceso directo del individuo..., op. cit.
categories; both categories are extensively inter-related\textsuperscript{58}. This inter-relationship between civil and political rights and economic, social, and cultural rights had already been made manifest at the First International Conference on Human Rights, which took place in Teheran in 1968. In the Final Declaration of this Conference\textsuperscript{59}, the indivisibility and interdependence of both types of rights was stated. 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 the 16\textsuperscript{th} of December 1977. In this resolution it was 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 has again been stated at the Second World Conference on Human Rights, held in Vienna from the 13\textsuperscript{th} to the 24\textsuperscript{th} of June 1993. In the Final Declaration, it is confirmed 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 we have already mentioned regarding the profound inter-relationship that should exist between the two types. The defence of human dignity needs both types of rights. It supposes that "in no case should States be able to hide behind the promotion and protection of a certain type of rights and be able to avoid the promotion and protection of others,…; we should pay the same level of attention and urgency to both types of rights"\textsuperscript{60}.

However, we should 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"\textsuperscript{61}.


\textsuperscript{59} \textit{Recopilación de instrumentos internacionales}, ST/HR/1Rev. 5 (Vol. I, Part 2).

\textsuperscript{60} \textit{Blanc Altermir}, A.: "Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal", en \textit{Blanc Altermir}, A. (Ed.): \textit{La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal}, Tecnos, Madrid, 2001, p. 33.

2.5. The emergence of third generation human rights

Since the 1970s, we have been witnessing the appearance of a set of new human rights, new rights which try to deal with the most urgent challenges that the international community finds itself faced with\(^{62}\). Among the human rights which have been suggested for forming a part of this “new frontier in human rights” we can find the following: the right to development\(^{63}\); the right to peace\(^{64}\); the right to the environment\(^{65}\), the right to benefit from the Common Heritage of Mankind\(^{66}\), or the right to humanitarian assistance\(^{67}\).

And the truth is that, as Karel Vasak tells us, “the list of human rights is not, nor will it ever be, a finished list”\(^{68}\). Along the same lines are the opinions of Philip Alston, an expert on human rights, when he states that this new generation of human rights represents “the essential dynamism of the human rights tradition\(^{69}\)”.

There are many different factors which have brought about, and continue to bring about, the appearance of these new human rights. In the first place, the decolonisation process of the 1960s meant that a revolution occurred in international society and, as a result, in the legal order called to regulate it, the International Law. This change also made its influence felt on human rights theory, which every day leans more towards the concrete problems and needs of the new category of countries that have appeared on the international scene, the developing countries\(^{70}\). If it was the bourgeois and socialist revolutions which gave rise to the first and second generations of human rights respectively, it will be this anti-colonialist revolution which will, according to Stephen Marks, give rise to the appearance of third generation human rights\(^{71}\).

---


\(^{64}\) 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.


\(^{67}\) 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.


\(^{70}\) 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.

Other factors which have been notable in their influence on the growth of these rights dealing with solidarity are the interdependence and globalisation which have been a part of international society since the 1970s. States are becoming more and more conscious of the fact that there exist global problems whose solutions require coordinated responses; they require, in short, participation on processes of international cooperation. As a consequence of this global change, third generation rights are rights which emphasise the need for international cooperation, and which basically have a bearing on the collective aspects of these rights; they are “community-oriented rights,” to use Gros Espiell’s expression—in other words, they are rights 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.

The key word with regards these new rights is solidarity, but this does not mean simply that these rights are the vehicles for the promotion of solidarity. Human rights of the first two generations should also serve to give expression to this value which is so needed 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.”

However, this new generation of human rights has not been accepted peacefully either by scholars or by the States themselves, which has caused a series of intense debates. In the words of Angustias Moreno, “new currents 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 respecting human rights, before crossing new frontiers.”

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 internationalization of human rights, strengthening the protection of the individual from breaches of his most fundamental human rights by the State.”

One of the most frequent objections to these rights is that the excessive proliferation of human rights can weaken the protection offered to already existing human rights. This criticism has been countered by those who support these new rights. Gros Espiell, among others, argues that this risk of weakening previous gen-

---

72 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.
75 GROS ESPIELL, H.: _op. cit._, p. 1169.
erations’ rights does not exist, but rather solidarity rights “are a prerequisite for the existence and exercise of all human rights”\textsuperscript{78}. In other words, more than weakening or diluting, these human rights hope to strengthen the indivisibility and interdependence of all human rights. But the truth is that, as Alston correctly states, “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 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”\textsuperscript{79}.

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; they have been bettered. This criticism has also been contested. With regards this, Karel Vasak agrees that these new rights are synthesis rights, or rights which “cannot be realised unless other human rights, which are, in some way, their constituent parts, have been set in motion”\textsuperscript{80}. And the truth is that one of the essential parts of these rights is the protection and safeguarding of all individual rights, of which they form a part.

One criticism which has been fairly justified, though, 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 dangerous dictatorships. Many African leaders came to the defence of solidarity rights, mainly the right to development, as a way of lengthening their period in power, ignoring individuals’ rights, and defending their desire to not have internal affairs “interfered” with\textsuperscript{81}. The truth is that if we truly do want these new rights to be credible and accepted by the international community, they should entail a scrupulous respect for individual human rights, especially those that are civil and political.

However, the main objection which can be levelled against these emerging rights is, without doubt, the fact that, apart from the right to benefit from the Common Heritage of Mankind\textsuperscript{82}, none of the new rights has been recognised by a conventional instrument with universal scope; in other words, by an international treaty that is binding to those States which have ratified it. Recognition of these new rights has mainly been brought about as a result of the General Assembly of the United

\textsuperscript{78} GROS EPELL, H.: op. cit., p. 1168.
\textsuperscript{82} 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, 14th December 1979. The second is the UN Convention on the Law of the Sea, signed in Montego Bay on the 30th of April 1982, and which has only recently come into force in November of 1994.
Nations, which brings about the need for consideration of the thorny issue of the legal value of such resolutions.

For one part of international lawyers, mainly in the West, the legal value of the resolutions of the General Assembly of the United Nations is “relative”, depending on the circumstances in which each individual resolution is adopted (whether it is unanimously approved, whether its terms are sufficiently precise and concrete, States’ opinions regarding the issue, etc). On many occasions, the norms contained in these resolutions become what is known as soft-law, or regulations which cannot be classed as fully legal.

However, other scholars, more committed to the transformation of the international legal order, believe that such resolutions have full legal effect.

As such, we find ourselves facing new human rights which are in the process of being formed, or are human rights in statu nascendi, given that States, main creators of international law, are showing themselves to be wary of the recognition of these new rights within any instrument that is not a resolution of the General Assembly of the United Nations.

However, we should bear in mind the fact that older human rights were also up against fierce resistance when they were first proclaimed as rights. This should serve as an encouragement to us to redouble our efforts regarding these new solidarity rights, rights which try to reply to the main challenges the international community has to face: development, peace, the environment, humanitarian catastrophes etc.

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 later than the first world conference, which was held in Tehran in 1968. High hopes had been placed on this conference regarding the extent to which it could become a turning point for issues concerning 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 were taking part in the conference.


in the discussions\textsuperscript{86}, although there are some who express views which are not so pessimistic, even coming to the conclusion that the Vienna Conference “was a huge success for the human rights cause”\textsuperscript{87}.

The central theme of the Vienna Conference without doubt concerned consideration of whether human rights are universal, or applicable to all countries in the international community, or whether, conversely, they must be understood in the light of different circumstances, be these historical, cultural, religious, etc. There were two theories battling it out 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 being a new form of colonialism, but this time in the form of human rights.

What is true 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 with regards the problem of the universality of human rights\textsuperscript{88}. In the Final Declaration of the conference, a special consensus was reached which, in my opinion, has still not yet solved the problem. As 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”\textsuperscript{89}.

It is easy to see how this ambiguous paragraph does not openly take the side either of the universality of human rights or of the theory of cultural relativism; it aims to please, as far as it is possible, the defenders of both views. And, as has already been commented on, it was clearly shown at the World Conference on Human Rights that the two opinions were very much opposed, and that those involved were far from

\textsuperscript{86} 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.

\textsuperscript{87} 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, n.º. 29-30, Autumn 1993, p. 6.

\textsuperscript{88} 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 the 2\textsuperscript{nd} to the 6\textsuperscript{th} of November 1992, Report of the Regional Meeting for Africa of the World Conference on Human Rights, A/CONF.157/AFRM/14, of the 24\textsuperscript{th} 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, of 22nd 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, of 7th 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, of 23rd April 1993.

\textsuperscript{89} Vienna Declaration and Programme of Action, op. cit., Part 1, para. 5.
reaching any kind of consensus\textsuperscript{90}. The only “middle road” through which it will be possible, if there is sufficient political will on the part of the States, to achieve universal-ity for at least the most fundamental human rights, will be to open up an intercultural dialogue\textsuperscript{91}, which is sincere and open between the Western States and those which have shown their support for cultural relativism. Both groups of States will need to put aside dogma and preconceived ideas in order to be prepared, as of the beginning of this dialogue, to make some concessions in their aims. And the fact is that we find ourselves facing one of the principal problems which are currently being faced by those who deal with the theory of human rights. 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 aspects of human rights theory that has most developed. The indivisibility and interdependence between human rights, democracy, and development have been openly defended in recent times. The fact is that in order for there to be active defence of human rights and fundamental freedoms, it is vital that people be living in democratic States, and that these States should have reached minimum levels of economic, social, cultural, and political development (thus, the fact that people live in democratic States, and that these States have reached certain minimum level of economic, social, cultural and political development constitutes a necessary condition for the existence of an active defence of human rights).

This aspect did no give rise to as many discussions as the issue of universality, and this is reflected in the Final Declaration of the conference. It is paragraph 8 of the Vienna Declaration which 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 intimately 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 the countries present in Vienna came to an agreement concerning recognition of 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”\textsuperscript{92} (emphasis added). Through this

\textsuperscript{90} On the issue of the universality of human rights at the Vienna Conference and in its Final Declaration, see \textsc{Villan Duran}, C.: “Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena”, \textit{Revista Española de Derecho Internacional}, Vol. XLVI, no. 2, 1994, pp. 505-532.

\textsuperscript{91} \textsc{Etkeberria}, X.: “El debate sobre la universalidad de los derechos Humanos”, in \textsc{Instituto de Derechos Humanos: La Declaración Universal…}, op. cit., p. 385.

\textsuperscript{92} \textit{Vienna Declaration and Programme of Action}, op. cit., Part 1, para. 10.
relevant reference, we can see how 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 “recognition of the principle of the right to development…constitutes an unprecedented success which, ab initio, it appeared impossible to achieve”93.

Similarly, another of the questions which was discussed in Vienna, and which at the end of discussions achieved the success of being included in the Final Declaration, was the taking on by the international community of a firm commitment to make the human rights of women one of the priorities of the international human rights agenda. What is true is that the lobbying of movements in favour of the rights of women in Vienna certainly made its presence felt for the duration of the conference, achieving 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”94.

A final aspect of the dealings of the Vienna Conference which should be noted is the importance given to the non-governmental organisations which work in the sphere 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 NGO parallel conference. 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. With respect to this, 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. Human rights under the current process of globalisation

The current process of globalisation is characterised by the fact that it is a process which generates exclusion and huge inequalities, resulting in very serious consequences for the protection of human rights, both those which are civil and political, and, above all, those which are economic, social, and cultural95. This fact had already been verified by the Heads of State and Heads of Government who met at the

---

94 Vienna Declaration…, op. cit., Part 1, para. 18.
United Nations headquarters in New York at the famous Millennium Summit, which took place in September of 2000. In their opinion,

“the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable”96.

As we can see, the General Assembly itself is clamouring for a globalisation that is “fully inclusive and fair”, which makes it clear that the current process of globalisation is not progressing down that road. We find ourselves faced with a process of globalisation which is having such consequences that we have come to the point where we refer to a biased globalisation97, given that it is dramatically accentuating disparities, both within countries98 as well as between them. What is true is that global inequality is increasing at a rate “which has never before been known”99. Clear proof of this growing inequality can be found in the figures of the United Nations Development Programme (UNDP), which states that “the difference in income between the fifth of world population that lives in the richest countries and the fifth that lives in the poorest countries was 74 to 1 in 1997, higher than the figures of 60 to 1 in 1990 and 30 to 1 in 1960”100. As we can see, during the passing of 30 years, from 1960 to 1990, the gap between the fifth of world population living in the developed countries and the fifth living in the most underdeveloped countries doubled, and the figures continue to move towards an even further increase of this gap. Continuing down this road puts us at risk of the world becoming a stage for a true Global Apartheid101, where rich people, on the one hand, and poor people, on the other, live every day more separated by a real barrier of poverty, with few possibilities for finding common areas and space for cooperation.

98 A very interesting analysis of the effects of globalisations within countries themselves, with a special mention of what is the case in Spain, can be found in NAVARRO, V.: Globalización económica, poder político y Estado del Bienestar, Ariel, Barcelona, 2000. Similar analysis relating to Latin America can be found in RUIZ VARGAS, B.: “Globalización de la economía y ampliación de la pobreza”, El Bordo, Universidad Iberoamericana, Tijuana, 20, pp. 41-50; URQUIDI, V. (Coord.): México en la globalización. Condiciones y requisitos de un desarrollo sustentable y equitativo, FCE, Mexico, 1997.
99 This growing inequality does not limit itself to macro-economic figures, but also affects issues such as schooling, the percentage of scientists and technicians, and investment in research and development while, however, “life expectancy, nutrition, infant mortality, access to drinking water have got worse…”; see BERZOSA, C.: “El Subdesarrollo, una toma de conciencia para el siglo XXI”, in Derechos Humanos y Desarrollo, Mensajero-Alboan, Bilbao, 199, pp. 22 ff.
As well as the main consequence that we have analysed, which is the vertiginous increase of inequality both on an internal level and on an international panorama, which has become a characteristic feature that is inherent to the current process of neo-liberal globalisation, we should also note other consequences which also have the potential to have significant repercussions as regards the enjoyment of human rights. I am referring to, in the first place, the reduction of the role played by the State which is part and parcel of globalisation, and, secondly, to the roles which transnational corporations are beginning to play in the current globalisation process.

With reference to the reduction of the role of the State, it is clear that the liberalisation and deregulation supported by neo-liberal globalisation have had as their main objective the aim of reducing the role of the State with regards economic and social systems, leaving sectors which until then had been fundamentally controlled by the public sector in the hands of the private sector. We can see that one of the consequences of this process has been a progressive debilitation of the protection of human rights in many States, basically affecting economic, social, and cultural rights. As we know, these rights depend mainly on the State for their effective realisation. They are rights which demand the provision of services by the State: rights such as the right to health, education, food and clothing, basic social services, a public social security system, etc. At the same rate as that at which States have begun to cease to be involved in certain sectors, surrendering their duties, economic, social, and cultural rights have been suffering. This true “privatisation of human rights” has had harmful consequences for the effective protection of many of them. This shrinking of the role of the State has been especially intense in many developing countries, due to the Structural Adjustment Programmes imposed by the World Bank and the International Monetary Fund, which has contributed still further, if this is possible, to the situation faced by economic, social, and cultural rights in these countries, and also has had an influence on the fulfilment of civil and political rights. The indivisibility and interdependence of all human rights means that when one category of right suffers, the others are also affected. The repercussions of these plans devised by the Bretton Woods institutions have been very important from the point of view of the satisfaction of human rights.

Secondly, transnational corporations have become one of the most significant vehicles for the current process of globalisation, taking part in activities which are beginning to raise serious doubts from those involved in human rights, especially those involved in economic, social, and cultural rights, and the right to development. As

---

102 On the impact privatisation can have on the enjoyment of basic human rights see De Feyter, K. and Gómez Isa, F. (Eds.): *Privatisation and Human Rights in the Age of Globalisation*, Intersentia, Antwerp-Oxford, 2005.


105 On this topic, the following, among others, can be consulted: Gómez Isa, F.: “Las Empresas Transnacionales y sus obligaciones en materia de derechos humanos”, *Cursos de Derechos Humanos de Donostia-San Sebastián*, Servicio Editorial de la UPV, Bilbao, 2005, pp. 171-201; Ratner,
Mary Robinson, former UN High Commissioner for Human Rights, has stated when presenting a report on *Business and Human Rights*, “business should support and respect the protection of internationally proclaimed human rights within their sphere of influence and make sure they are not complicit in human rights abuses”\(^{106}\). Not unrelated to this preoccupation are certain scandals in which particular multinational companies have been involved, where proof of abuse of even the most basic workers’ rights, exploitation of child labour, interference in the internal affairs of certain States, serious environmental consequences as a result of the companies’ production etc. has been obtained\(^{107}\). In response to all this, there have been various United Nations initiatives since the 1970s, which have attempted to adopt a code of conduct for multinational companies, in which certain principles to which these companies should be subject to will be set out\(^{108}\). In one of the last versions of this draft code of conduct\(^{109}\), (which has, unfortunately, not yet been approved due to the opposition of the industrialised countries where the majority of these multinational companies have their headquarters), Article 14 sets out that “transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate...”. Against all this background, the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities\(^{110}\) has decided to set up a working group, charged with the task of examining the working practices and activities of multinational companies so as to see the impact they have on the extent to which people enjoy human rights. This working group has already held several periods of sessions since August 1999, and has confirmed that there are some serious dangers to human rights caused by certain working practices and activities of particular multinational companies\(^{111}\).

On the other hand, the Sub-Commission has just adopted in August 2003 a *Project on Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*\(^{112}\), in which it proclaims the princi-

---


\(^{107}\) One of a great many examples is the fact that Amnesty International has, at various times, denounced various multinational petrol companies for the incredibly serious human rights violations which were occurring in Sudan. These companies were even benefiting from these human rights violations, as they were opening the way for the exploitation of oil; see *Amnesty International: Sudan: The Human Price of Oil*, AFR 54/04/00, 3rd May 2000.

\(^{108}\) Two Codes of Conduct of a general nature have been adopted so far: the *OECD Declaration on International Investment and Multinational Enterprises* (21 June 1976), and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (16 November 1977). On these initiatives, see A. KOLK; R. VAN TULDER AND C. WELTERS, “International Codes of Conduct and Corporate Social Responsibility: can transnational corporations regulate themselves?”, *8 Transnational Corporations* N.º 1, April 1999, pp. 143-180.


ple of co-responsibility. The Preamble of the Project of Norms recognizes that “even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights…” (emphasis added). This idea of co-responsibility is developed with much more precision in Part A of the Project, devoted to General Obligations. According to Article 1, “… within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups”. As we can see very clearly, transnational corporations and other enterprises assume the obligation to respect and ensure basic human rights within their spheres of influence, paying special attention to vulnerable groups like indigenous peoples. The main problems that this Project will have to face in the near future is the question of its legal nature and means of implementation, aspects that still are not totally defined in the text. Unfortunately, the Commission on Human Rights, in its decision 2004/116 of 20 April 2004, expressed the view that while the Norms contained “useful elements and ideas” for its consideration, as a draft proposal had no legal standing. Instead of insisting in continuing working in the development of the Norms, the Commission requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises113. The special representative has submitted an interim report to the Commission at its sixty-second period of sessions in which the Draft Norms are considered having incurred in “doctrinal excesses” and comes to the conclusion that “the flaws of the Norms make that effort a distraction from rather than a basis for moving the special representative’s mandate forward”114 (emphasis added). As we can see, the future of the Norms is quite uncertain.

Up until now, we have focussed on the detrimental effects of globalisation on human rights. However, globalisation can also provide possibilities and opportunities for the universal extension of human rights. This means that not only markets and communications are globalised, which is what has happened until now, but also elemental human rights, thus contributing to their true universalisation.

Firstly, a truly universal culture of human rights would demand the globalisation of all human rights, not only those which are civil and political, but also those of an economic, social, or cultural nature. The seed of this globalisation of human rights was already planted in the Universal Declaration of Human Rights of 1948, where Article 28 states that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. As we can see, this Article sets out what has been called the structural approach to human rights, or the need for structural changes, both internal and international, in order

---

113 Resolution 2005/69. On 25 July 2005, the ECOSOC adopted decision 2006/273 approving the Commission’s request and, three days later, on 28 July 2005, the Secretary-General appointed John Ruggie, Professor of International Affairs at Harvard University, as his special representative.

that all human rights might be fully effective. An extension of this structural focus, which has been the safest bet for the globalisation of solidarity, development, and human rights, has been the fact that the General Assembly of the United Nations proclaimed the right to development in 1986. As Article 1 of the Declaration on the right to development states, “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. In addition, it will be the States which have “the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development” (Article 3.1). The basic problem with which this attempt at universalising and globalising human rights and development has met is a lack of political will to recognise this right to development on the part of the main developed countries, and, even more important, a lack of desire to carry out concrete measures which would lead to its realisation. This is one of the main faults of Western discourse regarding the universality of human rights. When the majority of these countries fight for universality, they are thinking exclusively of the universality of civil and political rights, completely forgetting the fact that the dignity of the human being also demands the universality of economic, social, and cultural rights, and the right to development.

Another of the aspects onto which globalisation can breathe fresh air is the progressive introduction of the principle of universal jurisdiction to the international protection of human rights. Since the Peace of Westphalia (1648) the principle of territorial jurisdiction has been an undisputed issue in international law; in other words, the exercise of jurisdiction by a State was absolutely limited by the limits of State borders. As a result of growing interdependence and globalisation, this principle has been eroding and giving way, at the moment still in a very limited manner, to the principle of universal jurisdiction, in accordance with which certain crimes which disgust humanity as a whole (genocide, torture, terrorism, etc.) could be pursued not only in the country in which they took place, but also in other countries. This


116 Taking this into consideration, we should not forget that the Declaration on the right to development is only a resolution of the General Assembly of the United Nations, which means that its legal force is only that of a recommendation. We should also remember that this resolution gained a negative vote from the United States, and abstentions from Denmark, the Federal Republic of Germany, the United Kingdom, Finland, Iceland, Sweden, Japan, and Israel. A detailed analysis of the issues of the right to development and its main obstacles can be found in GÓMEZ ISA, F.: El derecho al desarrollo como derecho humano en el ámbito jurídico nacional, Universidad de Deusto, Bilbao, 1999.

117 A radical criticism of this Western suggestion of universality is made by Ignacio Ellacuria, for whom “the offer of humanisation and freedom which rich countries make to poor countries is not universalisable, and consequently not human… The practical ideal of Western society is not universalisable, not even materially, as there are not sufficient resources on Earth for all countries to reach the same levels of production and consumption…”, in ELACURIA, I.: “Utopía y profetismo”, in Mysterium Liberationis, Trotta, Madrid, 1991, pp. 393 ff.

118 The National Audience, the highest Spanish Court holding jurisdiction in cases of genocide and terrorism, is based on Article 23.4 of the Organic Law on Judiciary (1985) to request the extra-
is exactly what happened at the attempt to prosecute Augusto Pinochet in Spain on behalf of the Audiencia Nacional during his time in power in Chile. Despite the fact that, for “humanitarian” reasons, the British Home Office Minister prevented his extradition to Spain, the fact of the matter is that the decisions of the House of Lords backing his extradition leave no doubt as to the fact that this case has meant a great deal for the advancing of the principle of universal jurisdiction, and even of International Law itself. As has been said as regards this, “Pinochet’s arrest was a clear indicator of the fact that the process of globalisation, until that time restricted to issues of international trade, the Internet, and the freedom of multinational companies to eliminate barriers to their international activities, could also be extended to other areas of life”119. Other cases have followed in the wake of that of Pinochet and, for the sake of example, the Rigoberta Menchú Foundation has attempted to ask the Audiencia Nacional for justice regarding the genocide, torture, and State terrorism that took place in Guatemala in the 1980s, a request which has so far been denied by the latter body. The other representative case is the Mexican government’s decision to agree to the extradition of Ricardo Miguel Cavallo, for him to be tried in Spain for the crimes of genocide, torture, and terrorism, which he was accused of committing during the dictatorship in Argentina120. As we can see, globalisation is also linking itself with universal justice and the fight against impunity, and has now borne its first fruits, fruits which will be consolidated when the International Criminal Court comes fully into operation, once the Rome Statute entered into force in July of 2002.

In conclusion, following the brief analysis which has been conducted we can say that the current process of neo-liberal globalisation is raising serious doubts from the point of view of human rights, although, on the other hand, we should also allow that we are beginning to see some lights at the end of the tunnel, and hopes that allow us to firmly belief that another form of globalisation is possible, that of the universal culture of human rights.

---
120 As regards this, see the Mexican Ministry of External Affairs’ (Ministro de Asuntos Exteriores) analysis of the repercussions of this case on the future of the international protection of human rights in CASTAÑEDA, J.G.: “La extradición de Cavallo a España. Un precedente internacional”, EL PAÍS, 21st March 2001, p. 4.