SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

Dr. Satish Chandra,
Associate Professor,
Faculty of Law, University of Lucknow

The modern human rights era can be traced to struggles to end slavery, genocide, discrimination, and government oppression. Atrocities during World War II made clear that previous efforts to protect individual rights from government violations were inadequate. Thus was born the universal declaration of human rights (UDHR) as part of the emergence of the United Nations (UN).the UDHR was the first international document that spelled out the "basic civil, political, economic, social and cultural rights that all human beings should enjoy." The declaration was ratified without opposition by the UN General Assembly on December 10, 1948.

When it was adopted, the UDHR was not legally binding, though it carried great moral weight. In order to give the human rights listed in the UDHR the force of law, the UN drafted two treaties, the international covenant on civil and political rights (ICCPR) and the international covenant on economic, social and cultural rights (ICESCR). The division of rights between these two covenants is artificial, reflecting the global ideological divide during the cold war. Though politics prevented the creation of a unified treaty, the two covenants are interconnected, and the rights contained in one covenant are necessary to the fulfillment of the rights contained in the other. Together, the UDHR, ICCPR, and ICESCR are known as the international bill of human

rights. They contain a comprehensive list of human rights that governments must respect, protect, and fulfill[1].

1-UNIVERSAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS

Human rights had already found expression in the Covenant of the League of Nations, which led, *inter alia*, to the creation of the International Labour Organisation. At the San Francisco Conference in 1945, held to draft the Charter of the United Nations, a proposal to adopt a 'Declaration on the Essential Rights of Man' was put forward but was not examined because it required more detailed consideration than was possible at the time. Nonetheless, the UN Charter clearly speaks of 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' (Article 1, para. 3). The idea of promulgating an 'international bill of rights' was developed immediately afterwards and led to the adoption in 1948 of the Universal Declaration of Human Rights (UDHR)[2].

The UDHR, adopted by a resolution of the United Nations General Assembly (UNGA), although not a treaty, is the earliest comprehensive human rights instrument adopted by the international community. On the same day that it adopted the Universal Declaration, the UNGA requested the UN Commission on Human Rights to prepare, as a matter of priority, a legally binding human rights convention. Wide differences in economic and social philosophies hampered efforts to achieve agreement on a single instrument, but in 1954 two draft conventions were completed and submitted to the UNGA for consideration. Twelve years later, in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted, as well as the First Optional Protocol to the ICCPR, which established an individual complaints procedure. Both Covenants and the Optional Protocol entered into force in 1976. A Second Optional Protocol to the ICCPR, on the abolition of the death penalty, was adopted in 1989 and entered into force in 1991.

The 'International Bill of Human Rights' consists of the Universal Declaration of Human Rights, the ICESCR and the ICCPR and its two Optional Protocols. The International Bill of Rights is

[1] https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/sources-of-international-law (visited on 27 September 2020 at 10.45 am)
[2] https://www.un.org/en/about-un/ (visited on 27 September 2020 at 10.15 am)

the basis for numerous conventions and national constitutions. The ICESCR and the ICCPR are key international human rights instruments. They have a common Preamble and Article 1, in which the right to self-determination is defined. The ICCPR primarily contains civil and political rights. The supervisory body is the Human Rights Committee. The Committee provides supervision in the form of review of reports of states parties to the Covenant, as well as decisions on inter-state complaints[3].

2. REGIONAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS

The UN Charter encourages the adoption of regional instruments for the establishment of human rights obligations, many of which have been of crucial importance for the development of international human rights law. The Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, supplemented by the European Social Charter in 1961, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987 ,and the Framework Convention on National Minorities in 1994

The American Convention on Human Rights was adopted in 1969, under the auspices of the Organisation of American States). This Convention has been complemented by two protocols, the 1988 Protocol of San Salvador on economic, social and cultural rights and the 1990 Protocol to abolish the death penalty. Other Inter-American Conventions include the Convention to Prevent and Punish Torture (1985), the Convention on the Forced Disappearances of Persons (1994), the Convention on the Prevention, Punishment and Eradication of Violence against Women (1995) and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (see II§3.B).

3-INTERNATIONAL CUSTOM

[3] ibid

Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to ‘general practice accepted as law’. In order to become international customary law, the ‘general practice’ needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (opinio juris et necessitatis). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that customary law may, under certain circumstances, lead to universal jurisdiction or application, so that any national court may hear extra-territorial claims brought under international law. In addition, there also exists a class of customary international law, jus cogens, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which noderogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

4-GENERAL PRINCIPLES OF LAW

In the application of both national and international law, general or guiding principles are used. In international law they have been defined as ‘logical propositions resulting from judicial reasoning on the basis of existing pieces of international law’.

At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified. Why are general principles used? No legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the

other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases[4].

5- SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF LAW

According to Article 38 of the Statute of the International Court of Justice, *judicial decisions and the teachings of the most qualified publicists* are 'subsidiary means for the determination of rules of law'. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law.

As for the judicial decisions, Article 38 of the Statute of the International Court of Justice is not confined to international decisions (such as the judgements of the International Court of Justice, the Inter-American Court, the European Court and the future African Court on Justice and Human Rights); decisions of national tribunals relating to human rights are also subsidiary sources of law.

The writings of scholars contribute to the development and analysis of human rights law. Compared to the formal standard setting of international organs the impact is indirect..

6-Every year, the UNGA and the Human Rights Council adopt dozens of resolutions and decisions dealing with human rights. Organisations such as the ILO and the various political organs of the Council of Europe also adopt such resolutions. Some of these resolutions, sometimes called declarations, adopt specific standards on specific human rights that complement existing treaty standards. Prominent examples include the Declaration on the Human Rights of Individuals Who Are Not Nationals of the

7-DECISIONS OF POLITICAL ORGANS

Decisions of political organs involving political obligations play a special role and can have an impact on human rights standard setting, e.g., certain documents of the Organisation on Security

[4] SUPRANOTE 2

and Co-operation in Europe (OSCE) (Conference on Security and Co-operation in Europe until 1995).

8-DECISIONS OF SUPERVISORY ORGANS

Numerous human rights supervisory mechanisms have been established to monitor the compliance by states with international human rights standards. Within the UN context, these supervisory bodies are often called 'treaty bodies'. They interpret international treaties, make recommendations and, in some cases, make decisions on cases brought before them. These decisions, opinions and recommendations may not be legally binding *per se*, but their impact on international human rights law (standards) is significant.

9-CONCLUDING REMARKS

Most states are bound by numerous international instruments guaranteeing a broad range of human rights. What happens when a state is bound by two international instruments setting out diverging levels of protection of a particular human right? The general rule is that when a state is bound by numerous instruments, it is to implement the most far-reaching obligation or highest standard. Most human rights conventions contain special provisions to this effect. For instance, Article 5(2) ICCPR and Article 5(2) ICESCR state that 'There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any state party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.'

10-GENERAL COMMENTS AND GENERAL RECOMMENDATIONS

UN treaty monitoring bodies have begun the practice of preparing General Comments or Recommendations on the provisions of their respective treaties.

The General Comments or Recommendations are useful tools to clarify the normative content of the Covenants because they are general in nature and provide an abstract picture of the scope of the obligations. General Comments and Recommendations enable the Committees to announce their interpretations of the different provisions of the treaties, and the interpretations of the

normative scope of the treaties set out in the General Comments/ Recommendations have achieved a significant degree of acceptance by states parties.

ORIGINS OF THE LEAGUE OF NATIONS

The central, basic idea of the movement was that aggressive war is a crime not only against the immediate victim but against the whole human community. Accordingly it is the right and duty of all states to join in preventing it; if it is certain that they will so act, no aggression is likely to take place. Such affirmations might be found in the writings of philosophers or moralists but had never before emerged onto the plane of practical politics. Statesmen and lawyers alike held and acted on the view that there was no natural or supreme law by which the rights of sovereign states, including that of making war as and when they chose, could be judged or limited. Many of the attributes of the League of Nations were developed from existing institutions or from time-honoured proposals for the reform of previous diplomatic methods. However, the premise of collective security was, for practical purposes, a new concept engendered by the unprecedented pressures of World War I[5].

When the peace conference met, it was generally agreed that its task should include the establishment of a League of Nations capable of ensuring future peace. U.S. Pres. Woodrow Wilson insisted that this should be among the first questions to be dealt with by the conference. The work proceeded with far greater speed than that of territorial and military settlement, chiefly because the subject had been exhaustively studied during the war years. Unofficial societies in the United States, Great Britain, France, and some neutral countries had drawn up many plans and proposals, and in doing so they in turn had availed themselves of the efforts of earlier thinker

Over many years lawyers had worked out plans for the settlement of disputes between states by legal means or, failing these, by third-party arbitration, and the Hague conferences of 1899 and 1907 had held long debates on these subjects. The results had been unimpressive; the 1907 conference tried in vain to set up an international court, and though many arbitration treaties

[5] https://www.history.com/topics/world-war-i/league-of-nations (visited on 28 September 2020 at 10.45 am)

were signed between individual states, they all contained reservations which precluded their application in more dangerous disputes.

UNITED NATION ORGANISATION

The United Nations is an international organization founded in 1945. It is currently made up of 193 Member States[6]. The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter[7].

The Charter was signed on 26 June 1945 by the representatives of the 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States.

Each of the 193 Member States of the United Nations is a member of the General Assembly. States are admitted to membership in the UN by a decision of the General Assembly upon the recommendation of the Security Council.

The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. United Nations Day is celebrated on 24 October each year.

ORGAN OF UNITED NATION

The main organs of the UN are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the UN Secretariat. All were established in 1945 when the UN was founded.

General Assembly

The General Assembly is the main deliberative, policymaking and representative organ of the UN. All 193 Member States of the UN are represented in the General Assembly, making it the only UN body with universal representation. Each year, in September, the full UN membership

[6] https://www.un.org/en/about-un/ (visited on 28 September 2020 at 10.45 am)
[7] UN CHARTER 1945

meets in the General Assembly Hall in New York for the annual General Assembly session, and general debate, which many heads of state attend and address. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority of the General Assembly. Decisions on other questions are by simple majority. The General Asse[8]mbly, each year, elects a GA President to serve a one-year term of office.

Security Council

The Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security. It has 15 Members (5 permanent and 10 non-permanent members). Each Member has one vote. Under the Charter, all Member States are obligated to comply with Council decisions. The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. In some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security. The Security Council has a Presidency, which rotates, and changes, every month.

- Daily programme of work of the Security Council
- Subsidiary organs of the Security Council

Economic and Social Council

The Economic and Social Council is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as implementation of internationally agreed development goals. It serves as the central mechanism for activities of the UN system and its specialized agencies in the economic, social and environmental fields, supervising subsidiary and expert bodies. It has 54 Members, elected by the General Assembly for overlapping three-year terms. It is the United Nations' central platform for reflection, debate, and innovative thinking on sustainable development.

[8] SUPRA NOTE

Trusteeship Council

The Trusteeship Council was established in 1945 by the UN Charter, under Chapter XIII, to provide international supervision for 11 Trust Territories that had been placed under the administration of seven Member States, and ensure that adequate steps were taken to prepare the Territories for self-government and independence. By 1994, all Trust Territories had attained self-government or independence. The Trusteeship Council suspended operation on 1 November 1994. By a resolution adopted on 25 May 1994, the Council amended its rules of procedure to drop the obligation to meet annually and agreed to meet as occasion required -- by its decision or the decision of its President, or at the request of a majority of its members or the General Assembly or the Security Council.

International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations. Its seat is at the Peace Palace in the Hague (Netherlands). It is the only one of the six principal organs of the United Nations not located in New York (United States of America). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

Secretariat

The Secretariat comprises the Secretary-General and tens of thousands of international UN staff members who carry out the day-to-day work of the UN as mandated by the General Assembly and the Organization's other principal organs. The Secretary-General is chief administrative officer of the Organization, appointed by the General Assembly on the recommendation of the Security Council for a five-year, renewable term. UN staff members are recruited internationally and locally, and work in duty stations and on peacekeeping missions all around the world. But serving the cause of peace in a violent world is a dangerous occupation. Since the founding of the United Nations, hundreds of brave men and women have given their lives in its service.