



Concise Handbook of International Human Rights Law

国际人权法概论

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前言

人权是每个人所享有的或应享有的基本权利。作为一个专有的名词，人权从提出到现在，已有近千年的历史。在 13 世纪的文艺复兴时代，诗人但丁第一次明确提出了“人权”，将人权规定为一个国家应当遵循的基本法则。¹近代人权观念源于 17、18 世纪欧洲资产阶级启蒙运动中洛克、卢梭等思想家提出的“天赋人权”。1789 年法国的《人权与公民权宣言》首次在宪法文件中使用人权，它和美国独立战争中通过的《独立宣言》共同标志着人权从思想观念开始走上政治舞台。1947 年，在时任联合国人权委员会主席的罗斯福夫人的提议下，正式确定“Human Rights”一词，并在《世界人权宣言》中正式使用。²如今，人权成为全球化进程的重要组成部分。

What are human rights?

“All human rights are universal, indivisible and interdependent and interrelated.”³

Human rights are difficult to define, notwithstanding that the term is used extensively and frequently. Generally human rights are regarded as those

¹ 意大利诗人但丁在《论世界帝国》中写有“帝国的基石是人权”，“不能做任何反人权的事”。参见但丁：《论世界帝国》，商务印书馆 1985 年版，第 76 页。

² A.S.Rosebaum: “人权的哲学导言”（沈宗灵译），载沈宗灵等主编：《西方人权学说》下，四川人民出版社 1994 年版，第 27—28 页。

³ Pt 1, para.5 of the Vienna Declaration and Programme of Action, adopted following the UN World Conference on Human Rights, Vienna, June 1993.

fundamental and inalienable rights which are essential for life as a human being. There is, however, an absence of consensus as to what human rights are intended to achieve rather than they are, i.e. protection of the individual from an abuse of state authority. Human rights have escaped a universally acceptable definition, presenting a problem to international regulation. Human rights more than any other issue highlight the distinction between universalism and cultural relativism. Universalism reflects the position endorsed by the UN World Conference on Human Rights in June 1993 (The Vienna Conference). The relativist theory maintains human rights differ from State fashioned by a State's values, cultural and religious traditions. Adherence to the relativist theory frequently criticize international human rights instruments as simply reinforcing Western concepts and values in the guise of universal rights. At its simplest, the difference between the universality approach and that of the relativist is the emphasis on the individual. The emphasis in universalism is on the individual, whereas relativists place the emphasis on the State. Relativists accept the rights pertaining to individuals but emphasise that individuals are defined in terms of their relations with others and as a part of society. As with all theories there are varying degrees of observance. At its strictest cultural relativists maintain human rights are inapplicable to non-Western societies whereas others accept human rights are universal but that differences in society should be reflected within international human rights instruments. The debate between universalism and cultural relativism has increased in intensity with the development of human rights and the "chipping away" at State sovereignty and domestic jurisdiction.

Cultural diversity is not defined and universalism and cultural diversity are not mutually exclusive. The 1993 Vienna Conference concluded:

"While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless, of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

An international instrument which highlights sensitivity to cultural diversity is the UN Convention on the Rights of the Child.⁴Article 20 para.3 identifies Kafala in Islamic law as an alternative care system along side foster care and adoption, thereby acknowledge that adoption is not recognized within every society.

Traditionally human rights have been sub-divided into three classifications: “first, second and third generation” rights. According to this classification “first generation” rights are those which may be characterized as civil and political rights; economic, social and cultural rights, as “second generation” and group rights as “third generation” or “solidarity” human rights.

The distinguishing feature of the latter being the particular focus on collective rights as opposed to the emphasis on individual rights of the first and second generation classifications. The right to development and the right to self-determination are two of the principal examples of “third generation” rights. The Vienna Conference affirmed the right to development as a fundamental human right. This was endorsed by the UN Secretary General, Boutros Boutro Ghali, who pledged his personal commitment to development in his “Agenda for Development”.⁵The concept of “third generation” rights originated in the 1970s and remains controversial with the primary protagonists being the developing States. The definition and enforcement of third generation rights has given rise to considerable academic debate⁶with, for example, a denial of such rights as human rights to their acceptance as a sub-category of human rights. The classification of human rights by generations is highly contested as it perpetrates a difference as a sub-category of human rights. The classification of human rights by generations is highly contested as it perpetrates a difference between rights, which should be avoided. For instance, the classification of rights even as political, civil, economic, social and cultural has

⁴ 1989 28 I.L.M.1448.

⁵ Report of the Secretary General A/48/935, May 6, 1995. In response to the Secretary General's Agenda, the General Assembly adopted a resolution, which created an ad hoc open-ended working group with the specific purpose of “elaborating further an action-oriented comprehensive agenda for development”. A/Res/49/126, January 20, 1995.

⁶ See Harris for further discussion of the position of Sieghart and Crawford, p.770-772.

prompted debate, and a recurring theme has been the normative relationship between the various suggested categories of rights as to whether both categories merit characterization as rights proper. One view is that civil and political rights alone merit the term human rights, whereas social, economic and cultural rights are only aspirations. An alternative argument is that social, economic and cultural rights are rights proper as they alone are vehicles of social change, whereas civil and political rights only maintain the status quo. A further distinction frequently made is that civil and political rights only require a State to abstain from doing something whereas economic, social and cultural rights demand positive action. However, if a right is a right it remains a right, irrespective of how it is to be achieved. Such a distinction further fails to recognize that all rights involve a cost/responsibility. It is erroneous to argue that civil and political rights do not involve a cost whereas economic, social and cultural rights do. For instance, the abolition of the death penalty is an example in point. Not only is there the cost of maintaining high security prisons there is also the cost of educating prison personnel. Notwithstanding the foregoing, any distinction between civil and political rights and economic, social and cultural rights is at odds with the position of the Committee on Economic Social and Cultural Rights and in particular General Comments No.20, where it is stated "…efforts to promote one set of rights should also take full account of the other. The United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights.⁷In other words the civil and political rights and economic, social and cultural rights are indivisible and interdependent. However, it is true that different conditions prevail and different priorities in respect of human rights is inevitable—inevitable because the world's resources are not perfectly distributed. States have and will have different priorities. Societies at different stages in their development will emphasise the realization of certain rights as being more

⁷ February 2, 1990, para.6. See HRI/GEN/1/Rev.7(ESC) May 12, 2004.

important than others. However, in light of this certain rights still remain core, inherent in all human beings because of their humanity and transcending all boundaries—geographical, historical, cultural, religious, political and economic. These core rights would be those from which no derogation is allowed even in times of public emergency.⁸

⁸ It is suggested these core rights can be identified in Art.4 para.2 of the International Covenant on Civil and Political Rights, see below.

自序

本书第一章介绍了国际人权法的概念、种类以及“三代人权”的划分；以第二次世界大战为分水岭，介绍了此前和此后的国际人权法发展历程；分析了联合国对国际人权保护的推动及《联合国宪章》的意义。

第二章概括介绍了《世界人权宣言》、《经济、社会与文化权利国际公约》、《公民权利与政治权利国际公约》、《防止及惩治灭绝种族罪公约》、《消除一切形式种族歧视国际公约》、《消除对妇女一切形式歧视公约》、《禁止酷刑和其他残忍、不人道和有辱人格的待遇和惩罚公约》、《儿童权利公约》、《保护所有移徙工人及其家庭成员权利国际公约》、《残疾人权利公约》、《保护所有人免遭强迫失踪国际公约》等核心国际人权文书。

第三章介绍了联合国大会、联合国安理会、联合国经社理事会、联合国秘书处等根据《联合国宪章》而建立的承担人权保护职能的联合国机构；人权委员会、联合国促进和保护人权小组委员会、联合国妇女地位委员会、联合国预防犯罪和刑事司法委员会、人权理事会和联合国人权事务高级专员办事处等专门性人权机构；国际法院、国际刑事法院、前南斯拉夫国际刑事法庭、卢旺达国际刑事法庭、塞拉利昂问题特别法庭国际司法机构；以及缔约国报告制度、国家间指控制度、个人来文制度、国际调查制度等国际人权条约体系下的监督机制和各人权公约的条约机构；联合国人权会议和国家和人权机构。

第四章介绍了欧洲、美洲和非洲等区域性人权机制。

第五章介绍了国际人权法与国际人道法、国际刑法等国际法其他部门法的关系。

第六章介绍了国际人权法在当前所面临的挑战，如“人道主义干涉”、“保护的责任”和“人的安全”等有关人权与主权的争论；全球化、私有化、国家的碎片化和女性主义等非国家行为主体；及恐怖主义、贫困和环境恶化等。

第七章介绍了中国在人权领域的主张和实践。

其重点是以《联合国宪章》和各人权公约为基础建立的人权保护机制，以及欧洲、美洲、非洲三大区域性人权保护机制。

在建构普世人权范畴之历史过程中，其实面临三重考验。首先，是否要在《联合国宪章》中放入人权概念，使得人权成为此国际组织的核心价值之一。其次，是否应该直接订定普世接受之国际人权条约，或是先以宣言方式声明所欲追求之权利范畴，待条件更成熟时，才签订国际人权条约。最后，因为各国对于权利理念之不同，是否可能将所有权利放在同一人权条约，或是必须依据权利类型，而作不同条约之安排。

在实践中，这三种路径都曾在不同程度上被付诸实施。普遍性的人权标准和区域性的人权机制在总体上是相互影响、共同进步。而经过二战后的数十年发展，国际人权法已经基本实现“有法可依”，正在向“有法必依”的阶段推进。联合国将人权与和平、发展并列为其三大支柱，国际社会通过政治、法律、经济等一系列的机制在世界范围加大了对各国人权状况的监督和严重侵犯人权行为的惩治，作为其工作的组成部分，人权教育也在世界各地引起越来越多的重视。

作为国际人权法的概论性教材读物，本书侧重于介绍一般性的人权知识，如基础理论、基本文件、重点案例，等等。在论述相关的问题时，在其后附录了若干资料，供读者研习；并有选择性地采纳一些英文内容，以帮助读者提高英语水平。总之，希望本书能够增强读者对国际人权法的总体性认识。

本书的出版获得东南大学校级教材立项资助；并承蒙武汉格鲁伯教育出版文化研究院董事长银新力先生及方晴编辑提供友情支持和协助，在此一并鸣谢！

本书是编者多年来学习和讲授国际人权法的一次总结和尝试，其中难免有有待改进和完善之处。欢迎各位慷慨赐教，以便今后再版时能够更加完善。本人邮箱：Wkx025@163.com。

目 录

第一章 国际人权法的发展历程	1
第一节 国际人权法的概念	1
一、国际人权的种类	1
二、“三代人权”的划分	2
第二节 二战之前的国际人权法	5
一、废除奴隶和禁止强迫劳动	5
二、保护少数者权利	7
三、保护难民和无国籍者权利	8
第三节 二战对国际人权法的影响	23
第四节 联合国对国际人权保护的推动	25
一、《联合国宪章》	28
二、《联合国宪章》的意义	31
第二章 核心国际人权文书概述	35
第一节 《世界人权宣言》	35
第二节 《经济、社会与文化权利国际公约》	44
第三节 《公民权利与政治权利国际公约》	52
第四节 《防止及惩治灭绝种族罪公约》	66
第五节 《消除一切形式种族歧视国际公约》	70
第六节 《消除对妇女一切形式歧视公约》	73
第七节 《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》	82

第八节 《儿童权利公约》	92
第九节 《保护所有移徙工人及其家庭成员权利国际公约》	106
第十节 《残疾人权利公约》	108
第十一节 《保护所有人免遭强迫失踪国际公约》	125
 第三章 国际人权保护与监督机制	128
第一节 根据《联合国宪章》建立的人权机制	128
一、承担人权保护职能的联合国机构	129
二、专门性人权机构	131
三、国际司法制度	139
第二节 根据国际人权条约建立的人权机制	146
一、国际人权条约体系下的监督机制	146
二、条约机构	150
第三节 联合国人权会议	153
第四节 国家人权机构	156
 第四章 区域性人权机制	158
第一节 欧洲人权机制	158
一、欧洲理事会	158
二、欧洲联盟	164
三、欧洲安全与合作组织	166
第二节 美洲人权机制	178
第三节 非洲人权机制	199
 第五章 国际人权法与国际法其他部门法的关系	205
第一节 国际人权法与国际人道法的关系	206
第二节 国际人权法与国际刑法的关系	220

第六章 国际人权法所面临的挑战	224
第一节 人权与主权的争论.....	224
一、“人道主义干涉”(Humanitarian Intervention).....	224
二、“保护的责任”(Responsibility to Protect).....	227
三、“人的安全”(Human Security).....	230
第二节 非国家行为主体.....	242
一、全球化(Globalization).....	243
二、私有化(Privatization).....	244
三、国家的碎片化(Fragmentation of States).....	245
四、女性主义(Feminization).....	245
第三节 国际人权法的其他挑战.....	247
一、恐怖主义.....	247
二、贫困(Poverty).....	249
三、环境恶化(Environmental Degradation).....	252
第七章 中国的人权主张与实践	254
第一节 中国的人权主张.....	255
第二节 中国的人权实践.....	256
第三节 中国参与国际人权合作.....	258

第一章 国际人权法的发展历程

第一节 国际人权法的概念

国际人权法，通称为人权的国际保护，是国际法主体之间有关规定和保护人的基本权利和自由的国际法原则、规则和制度的总称。迄今为止，国际人权法已形成以联合国及其专门机构和区域性国际组织作为国际人权保护的主要组织形式、以国际人权公约为基石的国际人权保护体系。根据《国际法院规约》第 38 条，国际人权法的渊源也是由国际条约、国际习惯和一般法律原则等构成。

一、国际人权的种类

国际人权法范畴的人权主要包括公民权利、政治权利、经济权利、社会权利和文化权利，其中公民权利和政治权利包括：生命权(right to life)、人道待遇权(right to human treatment)、表达自由(freedom of expression)、人身自由与安全权(right to liberty and security of person)、禁止奴隶制和强迫劳动(prohibition of slavery and forced labor)、公平审判权(right to a fair trial)、尊重隐私和家庭生活权(right to respect for privacy and family life)、思想、良心和宗教自由(freedom of thought, conscience and religion)、集会和结社自由(freedom of assembly and association)、迁徙自由(right to the liberty of movement)、禁止歧视(non-discrimination)、有效救济权(right to an effective remedy)；经济、社会和文化权利包括：工作权(right to work)、公正、公平和满意的劳动条件(just, equitable

and satisfactory conditions of work)、工会权(right to trade union)、社会保障权(right to social security)、适当生活水准权(right to an adequate standard of living)、食物权(right to food)、健康权(right to health)、环境权(right to environment)、家庭权(right to family)、老年人的保护(protection of the elderly)、残疾人的保护(protection of the handicapped)、受教育权(right to education)、文化生活权(right to cultural life);¹以及发展权(right to development);保护被拘禁人(Humane treatment when deprived of liberty)、难民、无国籍人、外国人、儿童(Protection of children)及妇女的权利(Women's rights)等。

二、“三代人权”的划分

1979年,时任联合国教科文组织人权与和平处处长的卡雷尔·瓦萨克(Karel Vasak)提出“三代人权”理论:第一代人权形成于美国和法国大革命时期,主要指公民权利和政治权利;第二代人权形成于俄国革命时期,主要指经济、社会及文化权利;第三代人权是对全球相互依存现象的回应,主要包括和平权、环境权和发展权。有学者进一步指出,这三种人权源于个人主义、社会主义或集体主义、国家主义三种不同的传统,三代人权因此必然反映这三种传统:第一代人权是个人人权,第二代人权是集体人权,第三代人权是国家整体人权。²

(一) 个人人权

公民权利和政治权利原是完成市民革命的西欧各国人民由专制君主中所获得的权利,乃为不受国家干涉而由国家取得之个人自由为基础的权利。从本质上看,它们属于政府不得干预即可实现的人权,不论思想言论自由、宗教信仰自由、出版自由,还是禁止酷刑或奴役等,皆为消极性人权,只要政府不作为,这种人权即可实现,所以这种消极性人权对于政府的限制就是不作为的义务。美国宪法修正案第一条关于国会不得制定“关于确立国教或禁止信仰自由、剥夺言论或出版自由……的法律”的规定就是该模式的典型表述。³经济、社会与

¹ 邵沙平主编:《国际法》,中国人民大学出版社2007年版,第527—532页。

² 程晓霞、张文彬:“关于国际人权法的几个理论问题”,《中国国际法年刊》北京:法律出版社,1993年版,第85页。

³ 范进学:“人权三论”,《当代法学》,2005年第5期,第76页。

文化权利是 19 世纪自由主义及资本主义发展过程中，社会被扭曲而形成阶级，为矫正上述情形时而产生的权利。它们属于政府必须积极干预和帮助其实现的人权，无论是劳动权或工作权、社会保障权，还是受教育权、生存权，都是积极性人权。上述人权单靠个人是无法实现的，必须依赖于政府的积极作为，所以，这种积极性人权对于个人而言，就是请求国家政府帮助其实现的权利。

（二）集体人权

新兴的人权，如发展权、和平权、环境权、共同利用人类共有资源权、人道主义援助权、通信权、民族自决权、语言或文化保护权等，亦称集体人权或第三代人权，它们成立的基础是人类或某一共同体的共性。这种集体性权利与人权盛行的观念、即作为一种建立在它们共同从属基础上、并作为个人所主张的人权不一样。

The term “human rights” is defined, the issue of human rights is high on many agendas, there is an increasing plethora of international instruments guaranteeing wide-ranging rights and the provisions of these instruments have ramifications far beyond the political arena. The challenges posed by globalization for the promotion and protection of human rights were assumed as general goals for the United Nations in the last decade of the twentieth century. The Secretary General, Kofi Annan, in his Millenium Report⁴ calls for the international community to adopt as global challenges the distribution of the benefits of globalization and organization of the opportunities it offers to the service of the individual.⁵ This brings on to the international stage actors other than States and international organizations with the responsibility for the protection of human rights. Such actors include financial and economic institutions, the private sector and civil society.⁶ Human rights are now firmly established in the vocabulary of international business, with an increasing number of business being called upon to demonstrate corporate social accountability.

⁴ “We the Peoples: The role of the UN In the 21st Century” UN Doc.A/54/2000, March 27, 2000.

⁵ Ibid.

⁶ Ibid. p.46 or Resolution of the Human Rights Commission Globalisation and its Consequences for the Effective Enjoyment of Human Rights 2002/28, 22nd April 2002.

This is not to say that businesses have become altruistic and are now invested with philanthropy. The truth lies in greater availability and transparency of corporation documents, a greater accessibility of shareholders who can be, and frequently are, the target of pressure groups, and intense media exposure. Expansion in the marketplace demands global competitiveness, of which social accountability is a critical dimension.⁷

In addition to definition, a major contributing difficulty has been that many States regard human rights as falling within domestic jurisdiction and, therefore, not a matter to be tackled by international law. In other words, treatment of one's own nationals should not, according to those States, be the focus of external review. The international law position is that severe violations of human rights can no longer fall within the exclusive jurisdiction of States.⁸

Human rights is a subject of contemporary international law and the efforts to regulate human rights at international level only gained momentum after World War II. It should be noted that human rights are not a static concept, as was highlighted by the European Court of Human Rights in the decision of 'Selmouni', regarding the characterization of treatment as torture, which previously would have escaped such a label.⁹ The importance of human rights on the political agenda is reflected, e.g. in the United Kingdom by the publication, since 1998, of an annual report on Human Rights. This report is undertaken by the Government and published by the Foreign and Commonwealth Office.

【资料一】

国际人权宪章所保障之权利范畴，可以分为三类，第一类是《世界人权宣言》有规定但两公约没有，其中包括《世界人权宣言》第一条：人皆生而自由，在尊严及权利上均各平等、第八条：基本权救济(Legal remedy)、第十四条：庇护权(Asylum)、第十五条：国籍权

⁷ See guidelines for Cooperation between the United Nations and the Business Community, issued by the Secretary-General of the UN, July 17, 2000.

⁸ See pp.262 et seq.

⁹ Selmouni v France, European Court of Human Rights, 25803/94, July 28, 1999.

(Nationality)、第十七条：财产权(Property)、第二十八条：人人有权要求本宣言所载权利与自由可得全部实现之社会及国际秩序。第二类是《世界人权宣言》及《公民与政治权利国际公约》与《经济、社会与文化权国际公约》均有保障，而两公约作进一步详细规范，包括平等权、生命权(Life)、人身自由及安全(Liberty and Security of the Person)、禁止奴隶(Protection against slavery and servitude)、禁止酷刑(Protection against torture)、法律主体之权利(Legal personality)、法律之前人人平等(Equal protection of the law)、禁止无理逮捕、拘禁或放逐(Protection against arbitrary arrest, detention, or exile)、公平与公正之审判(Access to independent and impartial tribunal)、无罪推定(Presumption of innocence)、罪刑法定(Protection against ex post facto laws)、隐私权(Privacy)、迁徙自由(Freedom of movement and residence)、家庭权(Protection and assistance of families)、思想良心和宗教自由(Freedom of thoughts, conscience and religion)、表达自由(Freedom of opinion and expression)、集会结社自由(Freedom of assembly and association)、参与选举及公共事务之权利(Participation in government and Access to public service)、工作权(Work)、职业自由、组织工会(Trade unions)、合理工作条件(Just and favorable conditions of work)、受教育权(Education)、参与社会文化生活(Participation in cultural life)之权利等。第三类则是《公民与政治权利国际公约》与《经济、社会与文化权国际公约》特有之规定，其中只包含自决权(right to self-determination)及少数民族之权利。

第二节 二战之前的国际人权法

二战以前，国际人权法主要局限于某些特定领域，如宗教自由、禁止奴隶制度、保护少数人、国际劳工保护以及国际人道法。

宗教自由问题成为最早进入国际法视野的人权问题，宗教自由也成为国际法承认的第一项人权。在三十年战争后会议通过的《亚琛条约》和1878年缔结的《柏林条约》都规定宗教信仰自由、各宗教团体和个人的政治权利平等。

一、废除奴隶和禁止强迫劳动

自19世纪开始，国际社会就已经逐渐形成废除奴隶买卖的各种条约。现代国际法更认定禁止奴隶制度为强制规范，各种与其抵触的条约均无效。同时，