

Emerging Areas of Human Rights in the 21st Century

The role of the Universal
Declaration of Human Rights

Edited by

**Marco Odello and
Sofia Cavandoli**



Routledge Research in Human Rights Law

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Introduction

In 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (UDHR) for all people and all nations.¹ Such a proclamation was one of the first collective expressions of an international community. Fifty-six United Nations Member States from different regions around the world affirmed the inherent dignity of humankind and placed the well-being of the individual at the heart of international law.

Born of a shared condemnation of the atrocities committed during the Second World War, the UDHR provided the world with the first universal statement on the basic principles of inalienable human rights. To this day, the Declaration has been translated into 337 different languages; it has affected and shaped national and international legal systems and it has been central in the promotion of political debates and philosophical discussions. The literature in this area is immense, and it is impossible in just one monograph to take into account the vast array of issues, debates and theories concerning the Declaration's effect on the application and enforcement of human rights.²

In 1945 the newly created United Nations had established in the Preamble of its Charter: '... to reaffirm 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 ...'.

In keeping to its word, the United Nations endorsed the task of developing an International Bill of Rights to the Commission on Human Rights which was chaired by Eleanor Roosevelt. The Commission, at its first session in 1947, authorised its members to formulate what it termed 'a preliminary draft International Bill of Human Rights'. Different legal, political and philosophical backgrounds shaped the new international document, which was drafted in only two years.³ Wary of ideological conflicts between Member States, Eleanor Roosevelt purposely formulated the Declaration as a non-binding General Assembly Resolution. By doing so, the declaration passed despite profound disagreements on the nature of certain provisions because it was seen as not creating legal obligations for Member States in international law. Notwithstanding its non-binding status, the Declaration has come to have considerable influence in the international legal arena. Many of the UDHR's provisions are now considered to be binding against Member States because of customary international law.

The UDHR lays down a number of objectives and provides 'a common standard of achievement for all peoples and all nations'. Every 'individual and every organ of society' shall promote 'respect for these rights and freedoms ... by progressive measures ...'. These rights, also, known as first generation rights, include the right to life, to a fair trial, to freedom of expression, opinion and thought. The Declaration condemns torture and slavery and prohibits arbitrary interference with privacy and the family home. The ultimate goal of the Declaration is 'to secure the universal and effective recognition and observance of these rights'. Underlying the entire Declaration is one basic fundamental value. 'All human beings are born free and equal in dignity and rights'.

The adoption of the UDHR in 1948 provided a springboard for the development of international human rights law. The Human Rights Commission, the Human Rights Council,⁴ and other related UN bodies and organs, such as the Sub-Commission on Human Rights,⁵ the Economic and Social Council, the International Law Commission and the High Commissioner for Human Rights have played a central part in promoting a 'universal respect for and observance of human rights'. Other specialised agencies such as the High Commissioner for Refugees, UNICEF and the International Labour Organisation (ILO) have also contributed to the development of an outstanding number of legal and non-legal documents promulgating provisions that were originally laid out in the UDHR. Specialised treaty bodies, such as the Human Rights Committee and the Committee against Torture,⁶ have been created to implement and monitor the application of international human rights law. At the same time, the development of regional organisations such as the Council of Europe, the Organisation of American States and the African Union has led to a further expansion of regional human rights instruments, international human rights courts and supervisory bodies.⁷

These developments have had an unforeseen influence and impact on national legal systems and the concept of state sovereignty.⁸ National law is no longer immune from international influence or scrutiny.⁹ National borders can no longer be considered obstacles for international action in favour of human rights. Constitutional reforms and national legislation have incorporated fundamental rights and principles which connect the international legal system to the national legal order.¹⁰ This process has been facilitated by the fact that international human rights courts, such as the European Court of Human Rights, and supervisory quasi-judicial bodies¹¹ at the international level can address human rights violations that occur in national legal systems. The UDHR has set the stage for a system of international accountability that has been unparalleled in history. International criminal tribunals have brought together countries to judge the war crimes of Germany after the Second World War, and later Rwanda and the former Yugoslavia.

Alongside such extraordinary achievements, the international system of human rights has been the subject of much scrutiny. One example of such criticism is the lack of impartiality in the system, being that some states and governments are almost never scrutinised, whilst others are constantly made the object of international blame and criticism. This criticism does not affect the essence and nature of human rights. But essentially the procedure, impartiality and equity of the effective application of human rights norms and standards.¹²

A more substantive point of criticism has been focusing on the so-called 'relativism' of human rights. This criticism is based on anthropological positions¹³ that refer to the concept of culture and identify a number of problems in establishing a 'universal' set of values enshrined in the human rights concept.¹⁴ From the political, historical and philosophical perspective, several governments have supported the idea that human rights are a creation of the 'Western civilisation'. This means that they do not correspond to the different legal and philosophical traditions of other states and cultures, and that the international system is using a 'colonialist' approach in expanding and imposing human rights values around the world.

Reflecting on this point of criticism, just because human rights have a primarily Western political, philosophical and religious background, does not mean that these same values are not shared by other cultures and peoples. Ironically, it is usually countries with a very poor human rights track record whose voices are the loudest in raising the issue of cultural relativism.¹⁵

The international system of human rights has developed so much since the Declaration's inception and is so widespread in both international and national societies that it would be difficult to say that the human rights movement is only based on ideological and biased grounds. There are, of course, possible forms of ideological motivations and political aims, but in general it can be said that the human rights phenomenon has conquered and convinced the great majority of international public opinion, and enjoys support in most parts of the world. It is the responsibility of human rights experts and movements to find the best ways of incorporating human rights values in legal and social systems.¹⁶

Another aspect of the international human rights system, based on the UDHR, has been the expanding and ever-evolving nature of human rights. Since its adoption, the codification process regarding the definition of new rights and new international principles has never stopped. Universal and regional treaties have been drafted and a considerable number of institutions have been created to enforce and supervise many of the rights included in international agreements.

The 'expanding nature' of human rights is still producing its effects at the beginning of the twenty-first century, more than 60 years after the adoption of the UDHR. Legal developments are based on the codification, application and interpretation of treaties and state practice. Some areas are not fully codified in specific international agreements, but through an expanding interpretation of rights and principles based on the original UDHR new forms of human rights can be identified in the international legal system. Some organisations, governments and scholars believe that the human rights movement must concentrate on ensuring a proper supervision and application of existing rights rather than the creation of new ones. Whilst this is a valid point, one must not forget that with the ever-changing nature of society, the law faces a need for continued evolution and must address new challenges. Not only this but in some situations human rights concerns emerge thanks to the work of civil society and interest groups. Such concerns often require clearer legal provisions in order for them to be dealt with in the form of legal rights. For these reasons, it is important to address the evolution of human rights and look at those emerging in the twenty-first century.

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The significance of the Declaration is more relevant than ever today in a world which is threatened by social, economic, racial and religious divides. Principles of fairness, equality and justice that are underlying foundations of the Declaration should be proclaimed and defended by all. The Declaration is there to protect all individuals and confirms human rights as essential for a life of dignity. It is a living document which is there for us all and for future generations. The evolution and growth of human rights has prospered since the Declaration's inception and the progress has been remarkable.

This book is the outcome of a Colloquium which was organised by the Department of Law and Criminology's *International Law Research Forum* at Aberystwyth University on 10 December 2008 in order to commemorate the sixtieth anniversary of the UDHR.

The theme of the Colloquium, 'Emerging Human Rights in the 21st Century: Sixty Years after the UDHR', was chosen in order to examine and reflect on the main developments in international human rights law since the Declaration's inception. Papers presented at the Colloquium concentrated specifically on issues and areas that were not originally mentioned or foreseen in the Declaration but that have recently emerged in the area of human rights as salient topics. Such topics covered a wide range of fields of research including law, politics and criminology.

Each chapter of this edited collection is dedicated to a specific emerging right or issue in the area of international human rights. The chapters cover a diverse array of topical discussions such as the impact of the internet on human rights; the relationship between human rights and environmental protection; the recognition and protection of indigenous peoples in the democratic state; the implication of human rights in relation to humanitarian aid and corruption; an investigation into the rights of incarcerated offenders with mental health issues; an evaluation on whether an international convention on the rights of older people is necessary; a debate on whether a right to democratic governance has emerged; an analysis of the practice of the UN Security Council in relation to the 'dilemma of intervention'.

This is a limited selection of emerging human rights areas, without the pretention of being exhaustive. Our aim in putting this book together was to make some form of contribution, however small, to the ongoing development of international human rights law and research.

We would like to thank the authors who have contributed to this piece of work and the Department of Law and Criminology at Aberystwyth University for making the Colloquium possible. A special thanks to Khanam Virjee and Routledge for believing in this project and for their patience and understanding.

Marco Odello and Sofia Cavandoli
Aberystwyth, 24 May 2010

Notes

- 1 By its resolution 217 A (III) of 10 December 1948, the General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights with eight nations abstaining from the vote but none dissenting.

- 2 Among others, see L Sohn and T Burgenthal, *International Protection of Human Rights* (Indianapolis, IN: Bobbs-Merrill, 1973); H J Steiner, P Alston and R Goodman, *International Human Rights in Context* (3rd edn, Oxford: Oxford University Press, 2007); T Dunne and N J Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999); D P Forsythe, *Human Rights in International Relations* (2nd edn, Cambridge: Cambridge University Press, 2006); M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: NJ, Princeton University Press, 2001); T Evans (ed), *Human Rights Fifty Years on: A reappraisal* (Manchester: Manchester University Press, 1998); C Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000).
- 3 See M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House, 2001); J Morsink, *The Universal Declaration of Human Rights Origins, Drafting, and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999).
- 4 In 2006 the Human Rights Council replaced the Commission on Human Rights, UNGA Res 60/251 (2006).
- 5 The Sub-Commission on the Promotion and Protection of Human Rights (known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities from 1947 to 1999) has ceased to exist and it was replaced by the Human Rights Council Advisory Committee, composed of 18 experts, in 2007, see UNHRC Res 5/1 (18 June 2007).
- 6 See R Bernhardt and J A Jolowicz (eds), *International Enforcement of Human Rights* (Berlin: Springer-Verlag, 1987); P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992).
- 7 For a collection of human rights documents, see I Brownlie and G Goodwin-Gill (eds), *Basic Documents on Human Rights* (6th edn, Oxford: Oxford University Press, 2010). On regional systems, see D Shelton, 'The Promise of Regional Human Rights Systems', in B Weston and S Marks (eds), *The Future of International Human Rights* (Ardsley, NY: Transnational Publishers, 1999); H Steiner, 'International Protection of Human Rights', in M Evans (ed), *International Law* (2nd edn, Oxford: Oxford University Press, 2006).
- 8 On the issues related to sovereignty and human rights, see S Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999); H Steiner, 'The Youth of Rights' (1991) 104 *Harvard Law Review* 917; R Falk, *On Human Governance: Towards a New Global Politics* (University Park, PA: Penn State Press, 1995); P J Spiro, 'The New Sovereignists: American Exceptionalism and Its False Prophets' (2000) 79 *Foreign Affairs* 9–15; R Goodman and D Jinks, 'Towards an Institutional Theory of Sovereignty' (2003) 55 *Stanford Law Review* 1979.
- 9 R Goodman and D Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621.
- 10 See C Heyns and F Viljoen, *The Impact of The United Nations Human Rights Treaties on the Domestic Level* (Dordrecht: Kluwer Law International, 2002); B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Dordrecht: Kluwer Law International, 1997); K D Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *Modern Law Review* 79; P Alston, *Promoting Human Rights Through Bills of Rights* (Oxford: Oxford University Press, 1999); H Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *NYUJ Int'l L & Pol'y* 501.
- 11 Such as the UN Human Rights Council, the specialised treaty bodies like the UN Committee on Human Rights, the UN Committee on the Rights of the Child and the Committee against Torture.
- 12 See P Alston, 'Promoting the Accountability of Members of the New Human Rights Council' (2005) 15 *J Transnat'l L & Pol'y* 49, 57.
- 13 American Anthropological Association, Statement on Human Rights, (1947) 49(4) *American Anthropologist* 539; Declaration on Anthropology and Human Rights, adopted

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by the AAA membership, June 1999, <www.aaanet.org/stmnts/humanrts.htm> (accessed 17 August 2010).

- 14 See E Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (New York, NY: Columbia University Press, 1983); R Schweder, M Minow and H R Markus (eds), *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York, NY: Russell Sage Foundation, 2002).
- 15 See R Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), p 96.
- 16 See A Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Leiden/Boston, MA: M Nijhoff Publishers, 2004); A A An-Na'im, 'Human Rights in the Muslim World' (1990) 3 *Harvard Human Rights Journal* 13; R Coomaraswamy, *Report on Cultural Practices in the Family that are Violent Towards Women*, Commission on Human Rights, UN Doc E/CN.4/2002/83 (31 January 2002).

1 ‘Virtual world, real rights?’: Human rights and the internet

Diane Rowland

1.1 Introduction

In a world of Facebook, Twitter and YouTube, where millions of people read and write blogs, participate in internet games, sell goods on eBay and find out about the world via Wikipedia, for many people it has become difficult to imagine a world without the internet. Yet, despite its current ubiquity, the internet, and specifically the web, is a comparatively recent development. When the Universal Declaration of Human Rights (UDHR) was signed there could have been no anticipation of the changes which the advent of global computer networks would bring in terms of global interconnectivity and its implications for life some 60 years later. As this chapter is being written, the fortieth anniversary of the internet itself has just been marked¹ and, before embarking on a more substantive discussion, it is useful to reflect on the way in which this medium has changed and has the ability to change communication and human relationships. As with many technological developments, the internet had a slow start; although email, something which is now seen as a basic communication tool, was possible in the early 1970s, it did not really take off until the early 1990s simply because there was not a sufficiently large critical mass of email users. What really changed the face of the medium in terms of its utility as a mass communication device was the advent of what was then called the ‘world wide web’ now referred to merely as ‘the web’. This term is often now used as synonymous with the internet even though in fact it is a specific application, but without it, arguably the internet might not enjoy its current ubiquity as it has enabled easier access, easier navigation and easier location of information. In the current technological environment, it is difficult to appreciate that, only 15 years ago, there were, in total, only some 600–700 websites on the internet, but within only a very few years familiar presences such as Amazon, Google and Wikipedia were established, the number of users increased rapidly and is currently approaching 2 billion. This is the type of phenomenal growth for which the overused word ‘exponential’ is an accurate and apposite description.

The effect of these changes has been of sufficient significance to be described as heralding ‘a new and more democratic information age’.² It is a challenge in a short chapter such as this to convey the impact these developments in information

and communications technology with their 'huge and growing importance ... for facilitating in practice the free flow of information that lies at the heart of the right to freedom of expression',³ have had in relation to the recognition, exercise and development of human rights into the twenty-first century. However, two key words are probably 'enhancement' and 'awareness' – in very simple terms there could be said to be more of all types and usages of information; more information to allow individuals to find out about their own rights, more information about abuse of other's rights, more opportunities to participate, to speak and to listen, but also more opportunities for violations.

Although the example of Jamie McCoy referred to further below shows that Information and Communications Technology (ICT) may have the capacity to be empowering for those previously excluded from society, it is a moot point how representative a picture this paints. The phrase the 'digital divide' reflects the fact that there are sections of global society which are excluded from the 'never-ending conversation' on the internet and despite the relentlessly upbeat messages emanating from summit meetings on the information society,⁴ the small print suggests that the digital divide is still of significant proportions. Nonetheless, it is almost certainly the case that the majority of readers of this collection now conduct many of their relationships, at least partially, online and do this via a range of communication methods which may include email, instant messaging and social networking sites. The relationships fostered in this way may be continuations of relationships in real life but an increasing number are with people who have been encountered in cyberspace – and are rarely if ever met in real life. In addition, the internet provides the functionality via websites, wikis and blogs to publish material to the world at large; material which covers an incredible spectrum of material from inane chat to erudite literary comment. More and more people use MMOGs,⁵ such as *Second Life*,⁶ as a leisure activity. Very few internet users have not also used the internet market place and shopped online. The virtual space denoted by the generic term, the internet, has thus become a massive phenomenon which encompasses a whole range of activities. The significant question in this context is why should a mere communications medium have any impact on the shape, interpretation and application of the law in general or human rights in particular? On the other hand, there is a school of thought which suggests that the internet creates a parallel universe with its own culture and ethos and, if this is an accurate or at least appropriate description, what implications does this have for the application of legal regimes and more specifically human rights?

Ever since the word 'cyberspace' was coined and applied to activities, communications and relationships made possible by the internet there have been discussions about its nature and its manifestation. A number of lawyers, courts and legal commentators have been willing to espouse the notion of a separate space, community or virtual world variously termed cyberspace or metaverse. Interestingly both the terms cyberspace and metaverse were originally coined in works of fiction. 'Cyberspace' appeared in the novel *Neuromancer*⁷ in which it was defined as a 'consensual hallucination experienced daily by billions of legitimate

operators in every nation ... A graphic representation of data abstracted from the banks of every computer ... '. The term 'metaverse' – literally 'beyond the universe' was first used in the novel *Snow Crash*.⁸ Cyberspace has been described judicially as 'a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries'⁹ and as a 'unique medium ... located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet'.¹⁰ Although to date little legal reasoning has depended on the 'existence' of cyberspace or even on the concept of a virtual world, there have been many comments which suggest connotations of space and location; cyberspace is 'its own thriving city' for instance.¹¹ Although some commentators may wish to downplay the implications of this by referring to the 'cyberspace fallacy'¹² or pointing out that 'the internet is merely a simple computer protocol ... ',¹³ the reality is that to most users it is much more than that, if indeed they consciously consider it in those terms at all. As Hunter remarks the 'place may be inchoate and virtual but no less real in our minds'.¹⁴ Whereas it would be quite possible to reject the whole concept of cyberspace as a fantasy or mass delusion, the fact remains that many people talk about cyberspace as if it were real and it is difficult to escape the conclusion that things having both social and political significance and consequences can happen 'out there'. It could legitimately be viewed as merely a pragmatic response to acknowledge that the construction of these so-called 'virtual worlds' within the already virtual environment of cyberspace has the capacity to generate a whole new generation of human rights issues.

The purpose of the following discussion is not to perform an exhaustive analysis of human rights issues on the internet but to focus on the way in which the right to freedom of expression is being shaped by the ongoing developments in ICT (and the potential impact of these developments on other fundamental human rights such as privacy).

1.2 Freedom of expression

Some of the early cases which could be said to relate to human rights issues on the internet resulted in the first judicial consideration of the nature of cyberspace. This was not so much because of any perceived need to understand the technical aspects of the way in which cyberspace manifests itself but rather to appreciate the things that happen there – whether these be the facilitation of personal interactions, the formation of contracts, the perpetration of crime, the playing of games – since the courts have had to adjudicate on disputes concerning such matters. Although decided more than 10 years ago now and so in some ways almost of legal historical significance in relation to internet jurisprudence, the case of *ACLU v Reno*¹⁵ remains an important case in terms of the discussion of the nature of cyberspace. The case was concerned with a challenge to attempts in the US to introduce legislation, known as the Communications Decency Act (CDA), intended to protect minors, which would have had, *inter alia*, the effect of restricting access by adults to material on the internet.

In his judgment, Judge Dalzell made some important points about the removal of barriers to entry to the marketplace of ideas which was facilitated by the internet:

Four related characteristics of Internet communication have a transcendent importance ... First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers ...¹⁶

He went on to conclude that the internet 'has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen'¹⁷ and that it is 'a far more speech-enhancing medium than print, the village green, or the mails'.¹⁸ This apparently rose-tinted view of the internet was tempered by the recognition that:

Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished and unconventional, even emotionally charged, sexually explicit and vulgar – ... But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice. ...

... the Internet may fairly be regarded as a never-ending worldwide conversation. ... the most participatory form of mass speech yet developed ...

The interactive nature of communications forums on the internet, blurring as they do the distinction between 'speakers and listeners' means that, once the initial boundary of entering cyberspace has been crossed, a speaker who might otherwise have had access to only a few local listeners has a potentially global audience and is also able to 'listen' to responses from an equally wide setting. This apparent democratising trend has continued apace with the development of Web 2.0, a rather misleading name which suggests a new version of the web but is instead one which has grown organically from the original, now often denoted as 'Web 1.0'. Web 2.0 is characterised by two-way involvement; participants are simultaneously readers and writers, speakers and listeners. New applications allow and encourage such two-way communication, whether public or semi-public, private or semi-private, by means of wikis, social networking sites, blogs and so on, leading to a proliferation of user-generated content, sometimes described as putting the 'me' back in media. Neither is this participation confined to leisure and pleasure pursuits. The growth of internet auction sites such as eBay has revolutionised informal buying and selling and commercial operators such as Amazon invite user-generated content in the form of customer reviews. There is anecdotal evidence that these are at least as influential in marketing terms as more apparently authoritative reviews in traditional outlets. The interactivity which these applications facilitate all appears to give the average user the opportunity to disseminate his or her thoughts and creative output