

# **International Human Rights Law**

## **Six Decades after the UDHR and Beyond**

Edited by Mashood A. Baderin  
and Manisuli Ssenyonjo

# International Human Rights Law

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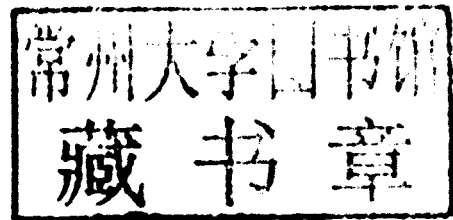
*Edited by*

MASHOOD A. BADERIN

*School of Oriental and African Studies (SOAS), University of London, UK*

MANISULI SSENYONJO

*Brunel University, UK*



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# Foreword

The Universal Declaration of Human Rights is one of the most important documents in human history. Quite apart from its moral and political impact, in international law it has been the catalyst for most later developments in human rights protection and it has been instrumental in abandoning the idea that the treatment of nationals is a matter within a state's sovereignty, or, in Lord Palmerston's words, that nationals can be 'boiled in oil' without this being the proper concern of other states. The Declaration has also been incorporated into national constitutions and extensively applied by national courts, and remains an inspiration for those subject to oppression.

Quite remarkable is the foresight of the drafters in formulating a list of human rights that has fully stood the test of time. With very few exceptions, all human rights are there. Even later third generation human rights such as the rights to development, to the environment and to peace can, in Mr Justice Douglas's phrase in the *Griswold* case, be found at least in the Declaration's 'penumbra'. What was not so clearly anticipated was the current emphasis upon the positive obligations of states and the related endeavours to bring non-state actors within the reach of international human rights law. It also took later treaty developments to provide measures, however imperfect, for the enforcement of international human rights law. If the division in the two Covenants between civil and political rights and economic, social and cultural rights held back the provision of enforcement mechanisms for some kinds of rights, this was not the fault of the Declaration, which includes both groupings of rights on an equal footing.

All of these are matters that are impressively considered in the chapters of the present book. There are nearly thirty chapters on key rights and issues, written by leading human rights authors, containing many valuable insights and reflections. Particularly notable is the book's critical emphasis, examining realistically both what has been achieved since 1948, and remains to be achieved, and the prospects for the future. It is this critical dimension that will give the book lasting value.

David Harris  
Professor Emeritus and Co-Director  
Human Rights Law Centre  
School of Law  
University of Nottingham

# List of Contributors

**Dr Tawhida Ahmed** is Lecturer in Law at the University of Sheffield, UK. She holds the degrees of LL M and Ph.D. from the University of Nottingham, UK. Her research interests lie in doctrinal and normative questions on EU law, international human rights and minority rights law. She has written on the EU's linguistic and cultural policy, as well as on the rights of religious minorities. She is the author of *The Impact of EU Law on Minority Rights* (Hart Publishing, 2010).

**Dr Olufemi Amao** is a graduate of University College Cork, Ireland (Ph.D. and PG Cert 2009); University of Warwick, UK (LL M, 2005); University of Ibadan, Nigeria (LL M, 2003); Obafemi Awolowo University, Nigeria (LL B, 1997); and University of Ilorin, Nigeria (BA, 1991). He was called to the Nigerian Bar in 1999. Formerly a Lecturer at University College Cork, he joined the Brunel Law School, London, UK, in September 2009. He has published widely on current human rights issues in academic journals.

**Professor Mashood A. Baderin**, LL B, BL, LL M, Ph.D., is Professor of Law and Head of the School of Law, School of Oriental and African Studies (SOAS), University of London. He is an expert in international human rights and Islamic law. His publications include *International Human Rights and Islamic Law* (Oxford University Press, 2003, 2005), *Economic, Social and Cultural Rights in Action* (co-edited with Robert McCorquodale (Oxford University Press, 2007), *International Law and Islamic Law* (Ashgate, 2008), and *Islam and Human Rights: Selected Essays of Abullahi An-Na'im* (Ashgate, 2010). He is a founding co-editor of the *Muslim World Journal of Human Rights*.

**Professor Ilias Bantekas**, LL B (Athens, Greece), LL M (Liverpool, UK), Ph.D. (Liverpool), Dip. Theology (Cambridge, UK), is Professor of International Law at Brunel University School of Law, UK. In 1998–2006, he was an Associate Professor and Director of the International Law Unit at Westminster Law School, UK, and during 2003–04 he was a Fellow at Harvard Law School, USA. He is Head of International Law and Arbitration at Mourgelas and Associates Law Firm (Athens), where he specializes also in renewable energy and implementation of the Kyoto Protocol. His publications include *International Criminal Law* (4th edition, Hart, 2010), *Oil and Gas Law in Kazakhstan: National and International Perspectives* (Kluwer, 2004), and *Trust Funds in International Law* (Asser/Cambridge University Press, 2009). He has published widely in leading international journals, including the *American Journal of International Law*, *International and Comparative Law Quarterly*, and others.

**Dr Danwood Mzikenge Chirwa** is Head of the Public Law Department and an Associate Professor at the University of Cape Town, South Africa. He has published widely on various aspects of human rights. The founder and editor-in-chief of the *Malawi Law Journal*, Dr Chirwa is a contributing editor to the *South African Journal of Criminal Justice* and an editor of the *ESR Review*, and he currently serves on the advisory boards of the *Constitutional Court Review* and the *City of Hong Kong University Law Review*.

**Professor Jack Donnelly** is Professor at the Graduate School of International Studies, University of Denver, USA. He is the author of several articles and books including *International Human Rights* (3rd edition, Boulder, CO: Westview Press, 2006); *Universal Human Rights in Theory and Practice* (2nd edition, Ithaca, NY: Cornell University Press, 2003); and *Realism and International Relations* (Cambridge: Cambridge University Press, 2000).

**Dr Todd Howland** is a human rights lawyer with over 20 years of experience. He is presently the director of the Joint UN Human Rights Office in the Democratic Republic of Congo (High Commissioner for Human Rights/MONUC – Peacekeeping Operation). His work experience includes UN, non-governmental organization, and academic posts spanning a number of countries. He has published numerous scholarly pieces and commentaries.

**Professor Sarah Joseph** is Professor of Law and the Director of the Castan Centre for Human Rights Law, at Monash University, Melbourne, Australia. She is the co-author of *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (Oxford University Press, 2004), co-editor of *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives* (Edward Elgar, 2009), and co-editor of *Research Handbook on International Human Rights Law* (Edward Elgar, 2010). Her many other publications concern a wide range of human rights issues such as corporate accountability, interactions with trade law, poverty, terrorism, self-determination, extraterritoriality, and human rights institutions.

**Professor Robert McCorquodale** has been Director of the British Institute of International and Comparative Law since January 2008. He is also Professor of International Law and Human Rights, and former Head (Dean) of the School of Law, at the University of Nottingham, UK. His research and teaching interests are in the areas of public international law and human rights law. He has published widely on these areas. His books include *Cases and Materials on International Law* (with Martin Dixon) (4th edition, Oxford, Oxford University Press, 2003); *Economic, Social and Cultural Rights in Action* (edited with Mashood Baderin) (Oxford, Oxford University Press, 2007); *Human Rights* (Ashgate, 2003); and *Self-Determination in International Law* (Ashgate, 2000).

**Professor Alastair Mowbray** read law as an undergraduate at Warwick University, UK, and then completed his doctorate in public law at the University of Edinburgh, UK. Since 2003, he has been Professor of Public Law at the University of Nottingham, UK. He has published books on the *European Convention on Human Rights* for academics, students and practitioners; together with numerous articles in a variety of leading journals. For over 20 years, he has taught both postgraduate and undergraduate courses on the Convention.

**Professor Rachel Murray** is Professor of International Human Rights Law at the University of Bristol, UK. Her specialist areas are human rights in Africa, particularly the African Charter and its Commission on Human and People's Rights and the Organization of African Unity/African Union. She has written widely in this area, including books such as *Human Rights in Africa, from Organization of African Unity to African Union* (Cambridge: Cambridge University Press, 2004); *The African Charter on Human and People's Rights. The System in Practice, 1986–2006*, with Malcolm Evans (Cambridge, Cambridge University Press, 2008); *The African Commission on Human and People's Rights and International Law* (Oxford, Hart Publishing, 2000), and articles in leading legal human rights journals.

**Dr Gerd Oberleitner** is Lecturer at the Institute of International Law and International Relations at the University of Graz, Austria. From 2002 to 2004, he was Lecturer in Human Rights at the Centre for the Study of Human Rights, London School of Economics. He is a board member of the European Training and Research Centre for Human Rights and Democracy in Graz. His latest book is *Global Human Rights Institutions: Between Remedy and Ritual* (Cambridge: Polity, 2007).

**Dr Paul O'Connell** is Lecturer in Law at the University of Leicester, UK. His research to date has focused on the protection of socio-economic rights, in particular the right to health, and on the relationship between globalization and law. His most recent published work problematizes the relationship between prevailing economic and political orthodoxies, neo-liberalism or 'the Washington consensus', and commitment to the realization of human rights.

**Dr Robert L. Ostergard, Jr.** is Assistant Professor of Political Science and Faculty Associate of the Gender, Race and Identity Program at the University of Nevada, Reno, USA. His research focuses on the impact of intellectual property on human security and the impact of HIV/AIDS on issues of national and human security in Africa. His latest research is focused on the impact of women's rights and the HIV/AIDS epidemics in Africa.

**Professor Dianne Otto** is Director of the International Human Rights Law Program of the Institute for International Law and the Humanities (IILAH) and inaugural Convener of the University of Melbourne Human Rights Forum, Australia. She teaches and supervises higher-degree research candidates in the areas of human rights law and international law. She has edited Special Editions of *Third World Legal Studies* (1998–99) on 'Postcolonialism and Law' and the *Australian Journal of Human Rights* (2004) on 'Housing, Homelessness and Human Rights'. Recent publications include chapters in Vanessa Munro and Carl F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (2007), and Anne Orford (ed.), *International Law and Its Others* (2006), and 'A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325', *Michigan Journal of Gender and Law*, 13 (2006), pp. 113–75.

**Professor Jo M. Pasqualucci** is Professor of Law at the University of South Dakota, USA. She earned her JD at the University of Wisconsin, USA, and her SJD in International and Comparative Law at George Washington University Law School, USA. She clerked at the Inter-American Court of Human Rights and is the author of *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: 2003) and several articles on the Inter-American Human Rights System.

**Dr Jona Razzaque** is a barrister and Reader in Law at the University of the West of England (UWE), Bristol, UK. Her research interests include environmental governance and access to environmental justice. She was a member of the UNEP/OHCHR Expert Panel on Human Rights and the Environment (2002). She is the Consultant Editor of the *Journal of Human Rights and the Environment* and serves on the Board of Editors of the *Journal of Environmental Law*.

**Professor John Gerard Ruggie** is the Berthold Beitz Professor in Human Rights and International Affairs at Harvard's Kennedy School of Government, and Affiliated Professor in International Legal Studies at Harvard Law School, USA. He also serves as the United Nations Secretary-General's Special Representative for Business and Human Rights. A Fellow of the American Academy of Arts and Sciences, he has been identified by *Foreign Policy* magazine as among the 25 most influential international relations scholars in North America.

**Professor Arjun Sengupta** graduated with a Ph.D. from Massachusetts Institute of Technology, USA. He is one of India's leading economists, who moved between economic research and teaching and policymaking at the highest level. He is currently Member of Parliament and Chairperson of the Inter-governmental Working Group on the Right to Development, UN Human Rights Commission, Geneva, and was formerly Chairman, National Commission for Enterprises in the Unorganized Sector, Government of India, and Adjunct Professor of Development and Human Rights, at the François-Xavier Bagnoud Center of Harvard School of Public Health, USA. He is also a former Professor in the School of International Studies, Jawaharlal Nehru University, India, and served as an Executive Director of the *International Monetary Fund* and the Head of the Technical Team and Administration of the Indian Planning Commission as its Member Secretary.

**Professor Rhona Smith** is Professor of International Human Rights at Northumbria University, UK, and RWI Visiting Professor in Human Rights at Peking University Law School, Beijing University, China. She has authored and edited various articles and books on International Human Rights including *Textbook on International Human Rights* (4th edition, Oxford University Press, 2009) and *Text and Materials on International Human Rights* (2nd edition, Routledge Cavendish, 2009). She has undertaken human rights capacity-building work in various countries.

**Dr Manisuli Ssenyonjo** is Senior Lecturer in Law at Brunel University, London. He is the author of *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009). His many other publications concern a wide range of human rights issues such as extraterritorial application of human rights treaties, accountability of non-state actors, human rights of women, international crimes, and reservations to human rights treaties.

**Professor Sonja B. Starr** is a Professor at the University of Michigan Law School, USA. She specializes in US and international criminal procedure and human rights law, with a focus on developing effective remedies for rights violations. Other research interests include sentencing law and policy and re-entry of former offenders. She earned her JD from *Yale Law School*, USA, where she served as senior editor of the *Yale Law Journal* and was awarded the American Bar Association's annual Ross Student Writing Prize. She is the author of numerous articles and books.

**Dr Shawna E. Sweeney** is an Assistant Professor at the University of Massachusetts, Dartmouth Public Policy Department, and Senior Research Associate at the University of Massachusetts Dartmouth Center for Policy Analysis, USA. She specializes in comparative politics, globalization policies, women's public policy issues, and human rights. Her research focuses on cross-national variations in governments' protection of women's economic, social and political rights. Her current research is centred on gender inequality and the HIV/AIDS epidemic in Africa.

**Professor Nsongurua J. Udombana** is Professor of International Law and Dean, Faculty of Law, University of Uyo, Nigeria. He is also Visiting Professor in Hungary (Central European University), Italy (International University College of Turin), and South Africa (University of Pretoria). He divides his research interest and time between international law and transitional justice, with a focus on Africa, and publishes globally on these themes. He is a member of several professional bodies, including the Nigerian Bar Association, the Nigerian Society of International Law, and the American Society of International Law.



**Dr Anastasia Vakulenko** is a Lecturer in Law at the University of Birmingham, UK. Her research is in the areas of human rights, religion and secularism studies, and critical and feminist research theory. Her forthcoming monograph, *Understanding the Islamic Veiling Controversy* (Routledge), examines the topical Islamic dress issue for what it reveals about western perceptions of human rights, gender, autonomy and religion. Her other research explores various ways in which freedom of religion in international and domestic human rights law is configured by a particular secular understanding of religion and its place in society, which does not always reflect the reality of religious experience.

**Professor Frans Viljoen** obtained the LL B, MA and LL D degrees from the University of Pretoria, South Africa, and the LL M degree from Cambridge University, UK. He is the Director of the Centre for Human Rights, Faculty of Law, University of Pretoria; Professor of International Human Rights Law; and the academic co-coordinator of the LL M programme (Human Rights and Democratisation in Africa), presented by the Centre, in collaboration with seven partner law faculties across Africa. He is the author of numerous articles, especially dealing with human rights issues, and the book *International Human Rights Law in Africa*. He is also editor-in-chief of the *African Human Rights Law Journal* and co-editor of the English and French versions of the *African Human Rights Law Reports*.

**Mr Vernor Muñoz Villalobos** has been the United Nations Special Rapporteur on the Right to Education since July 2004. He is also a Director of the Human Rights Education Department at the Costa Rican Ombudsman Office, Professor of Civil Rights in the Latina University of Costa Rica, and adviser on human rights education for the Communication School of the University of Costa Rica and other non-governmental organizations. He completed advanced studies in philology, law, human rights, philosophy and education. He is experienced as lecturer, researcher and promoter of human rights education, as well as in informal processes of conflict resolution.

**Dr Gentian Zyberi** is a senior researcher of the Dutch School of Human Rights Research. His book *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* was published by Intersentia in 2008. He has worked for the Defense at the Tribunal for the former Yugoslavia and has acted as Legal Adviser for Albania in the Kosovo case before the International Court of Justice.

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# PART I

## Introduction



# Chapter 1

## Development of International Human Rights Law Before and After the UDHR

Mashood A. Baderin and Manisuli Ssenyonjo

[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.<sup>1</sup>

### 1. Introduction

The international legal protection of human rights has undergone dramatic growth and evolution since the end of the Second World War, the founding of the United Nations (UN) in 1945, and the subsequent adoption, by the UN General Assembly, of the Universal Declaration of Human Rights (UDHR)<sup>2</sup> on 10 December 1948.<sup>3</sup> Although the historical origins of the concept of human rights are often linked with the idea of natural rights<sup>4</sup> and there had been legal instruments adopted earlier in different states aimed at acknowledging and ensuring the protection of human rights by the rule of law,<sup>5</sup> the proclamation and adoption of the UDHR on 10 December 1948 marked the real beginning of the momentous international journey towards ensuring that human rights are protected universally by the rule of law.<sup>6</sup> Thus, the UDHR is considered today as the legal baseline for modern international human rights law, and 10 December 2008 marked the 60th anniversary of the setting of that legal baseline.

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1 Universal Declaration of Human Rights G.A. res. 217A (III), UN Doc. A/810 at 71 (1948), Preamble, para. 3.

2 *Ibid.*

3 On the history and evolution of human rights, see e.g. M.R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, CA: University of California Press, 2004); T. Buergenthal, 'The Evolving International Human Rights System', *American Journal of International Law*, 100(4) (2006), pp. 783–807; and M. Mutua, 'Standard Setting in Human Rights: Critique and Prognosis', *Human Rights Quarterly*, 29 (2007), pp. 547–630.

4 See e.g. J. Porter, 'From Natural Rights to Human Rights: Or, Why Rights Talk Matters', *Journal of Law and Religion*, 14 (1999), pp. 77–96.

5 E.g. Magna Carta Libertatum (1215), the French Declaration of the Rights of Citizens (1789), and the American Declaration of the Rights and Duties of Man (July 1948). In her speech at the UN General Assembly at the adoption of the UDHR, Eleanor Roosevelt, chairperson of the Human Rights Commission, stated, famously: 'We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This Declaration may well become the international Magna Carta for all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation in 1789 [the French Declaration of the Rights of Citizens], the adoption of the Bill of Rights by the people of the US, and the adoption of comparable declarations at different times in other countries'.

6 M.A. Glendon, 'The Rule of Law in the Universal Declaration of Human Rights', *Northwestern Journal of International Human Rights*, 2 (2004), p. 5 [online]. Available from: <http://www.law.northwestern.edu/journals/JIHR/v2/5>.

Although not intended as a legally binding instrument at the time of its adoption, the UDHR clearly acknowledged in its preamble, as quoted at the beginning of this chapter, the essential need to protect human rights through the rule of law. The UN General Assembly then proclaimed the Declaration to be

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>7</sup>

From that humble beginning in 1948, international human rights law has evolved tremendously in different perspectives over the last six decades. Commemorating the 60th anniversary of the UDHR in 2008, the former UN High Commissioner for Human Rights, Louise Arbour, observed that ‘it is difficult to imagine today just what a fundamental shift the Universal Declaration of Human Rights represented when it was adopted 60 years ago’.<sup>8</sup> Over those years there have been substantive developments in the theoretical, normative and legal perspectives of international human rights law, including debates on several conceptual issues regarding the scope and content of human rights generally. There has also been significant growth in the jurisprudence of different bodies and tribunals responsible for the interpretation and implementation of human rights law, and the human rights role of non-state entities such as non-governmental organizations (NGOs) has increased tremendously. New perspectives have also evolved regarding responsibilities and remedies for human rights violations relating to individual criminal responsibility for serious human rights violations, among others. This tremendous evolution of international human rights law in the past six decades calls for in-depth reflective analyses on the subject. The chapters in this volume, contributed by established human rights scholars and experts from different parts of the world, provide this much needed reflective analyses of the developments in the different areas of international human rights law over the past six decades since the adoption of the UDHR. This chapter provides an introductory background to these chapters.

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7 UDHR, Preamble, para. 8. On the UDHR, see B.G. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration*. Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights (The Hague and Boston: Martinus Nijhoff, 1979); A. Eide *et al.* (eds), *The Universal Declaration of Human Rights: Commentary* (Oslo: Scandinavian University Press, 1992); United Nations, *The Universal Declaration of Human Rights* (New York: United Nations, 1998); B. van der Heijden and B. Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (The Hague and London: Martinus Nijhoff, 1998); Y. Danieli, E. Stamatopoulou, and C.J. Dias (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, NY: Baywood, 1999); G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999); W. Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine* (New York: Palgrave, 2001); and W. Sweet (ed), *Philosophical Theory and the Universal Declaration of Human Rights* (Ottawa, ON: University of Ottawa Press, 2003).

8 United Nations, *Universal Declaration of Human Rights: Dignity and Justice for All of Us*. 60th Anniversary Special Edition (United Nations Department of Public Information, 2009), p. v.



## 2. The UN Charter and the Development of International Human Rights Law

The UN has been the major international institution that has consistently promoted, within the context of its Charter, the protection of international human rights through the rule of law. The drafting and adoption of the UDHR was itself undertaken within the context of the UN Charter. Thus, the significance of the UDHR as the baseline for international human rights law would be better appreciated with a brief analysis of the UN Charter in relation to the background and development of international human rights law prior to the adoption of the UDHR.

Prior to the creation of the UN after the Second World War in 1945, earlier attempts at including specific human rights provisions in the Covenant of the League of Nations after the First World War in 1919 were unsuccessful. The only substantive human rights provision in the Covenant was on labour rights in its Article 23, stating that members of the League 'will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend'<sup>9</sup> and 'undertake to secure just treatment of the native inhabitants of territories under their control'.<sup>10</sup> However, there emerged separate minority protection treaties and state declarations guaranteeing the protection of the rights of minorities, with the League of Nations performing a supervisory role over the obligations created, which were considered of international concern.<sup>11</sup>

Nevertheless, private endeavours continued both within and outside the League of Nations for the realization of an international human rights legal regime. In 1929, the Institute of International Law, a private body of distinguished authorities on international law in Europe, the Americas and Asia, adopted the Declaration of the Rights of Man,<sup>12</sup> in which it considered that it was the duty of every state to recognize, *inter alia*, the equal rights of every individual to life, liberty and property. The Institute also considered that every state had a duty to accord to everyone within its territory the full and entire protection of these rights without distinction as to nationality, sex, race, language or religion. Although the Declaration was not a legally binding document, it contributed to the popularization of the idea of an international human rights legal regime in the years immediately after its adoption. Commenting on the Declaration, Marshall Brown, writing in 1930, observed:

This declaration ... states in bold and unequivocal terms the rights of human beings, 'without distinction of nationality, sex, race, language and religion,' to the equal right to life, liberty and property, together with all the subsidiary rights essential to the enjoyment of these fundamental rights. It aims not merely to assure to individuals their *international* rights, but it aims also to impose on all nations a standard of conduct towards all men, *including their own nationals*. It thus repudiates the classic doctrine that states alone are subjects of international law. Such a revolutionary document, while open to criticism in terminology and to the objection that it has not juridical value, cannot fail, however, to exert an influence on the evolution of international law. It marks a new era which is more concerned with the interests and rights of sovereign individuals than with the rights of sovereign states.<sup>13</sup>

9 Covenant of the League of Nations, Art. 23(a).

10 *Ibid.*, Art. 23(b).

11 See e.g. Article 12 of the Polish Minorities Treaty (1920). See also A. Cassese, *Human Rights in a Changing World* (Cambridge: Polity Press, 1990), pp. 17–21.

12 See G.A. Finch, 'The International Rights of Man', *American Journal of International Law*, 35 (1941), pp. 662–5.

13 P.M. Brown, 'The New York Session of the Institut De Droit International', *American Journal of International Law*, 24 (1930), pp. 126–8, at p. 127 (emphasis in original).