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Citation

Stephen P. Marks. 2016. The United Nations and Human Rights. In Human Rights in the World Community: Issues and Action, 4th ed, edited by Richard Pierre Claude, Burns H. Weston and Anna Grear. Philadelphia: University of Pennsylvania Press.

Published version

http://www.upenn.edu/pennpress/book/14271.html

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The United Nations and Human Rights

STEPHEN P. MARKS

INTRODUCTION

The principal institutional framework for furthering human rights in the world community is the United Nations (UN), the only intergovernmental structure with a general mandate for realizing all human rights in all countries. The UN is a tool of geopolitics for some and a beacon of hope for others. We begin with some preliminary observations on the place and promise of human rights in and under the UN Charter[1] to set the stage for explaining the UN's strengths and weaknesses as a force for the realization of human rights in the global community.

HUMAN RIGHTS IN THE UN CHARTER

The founders of the UN, not content to treat human rights as merely one among many shared objectives of UN member governments, implicitly articulated a theory of peace according to which respect for human rights and fundamental freedoms is a necessary condition for peace within and among nations. The Charter's Preamble places "faith in fundamental human rights" immediately after its aim "to save succeeding generations from the scourge of war." Yet the Charter does not apply this theory to the relative powers of the UN's main organs. Instead, the human rights provisions are relegated, in the chapter on the purposes of the UN, to achieving international cooperation (art. 1(3)) and, in the chapter on international economic and social cooperation, to promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (art. 55). The UN General Assembly (UNGA) may initiate studies and make recommendations for the purpose of "assisting in the realization of human rights" (art. 13(1)) and the Economic and Social Council (ECOSOC) may make recommendations and draft conventions on human rights (art. 62(2) & (3)) as well as set up commissions, including to promote human rights (art. 68), which it did in 1946 by establishing the UN Commission on Human Rights (replaced in 2006 by the UN Human Rights Council or HRC). The Charter language was deliberately weak, emphasizing "promotion" rather than "protection" by the General Assembly and ECOSOC, while granting to the UN Security Council (UNSC) sole authority to render binding decisions and require states, under the threat of economic, military, or other sanction, to modify their aggressive behaviors.

Articles 55 and 56 of the Charter stipulate that the member states pledge themselves to take joint and separate action in cooperation with the Organization to "promote . . . universal respect for and observance of human rights." This "pledge" (a legally ambiguous

To be published as Chapter 30 in Richard Pierre Claude, Burns H. Weston and Anna Grear (eds.), Human Rights in the World Community: Issues and Action, 4th ed , Philadelphia: University of Pennsylvania, 2015 The research assistance of Erin James is gratefully acknowledged.

[1] Referenced in Documentary Appendix.

term) remains the core human rights obligation of member states. In practice it has meant mainly promotion rather than protection but has nonetheless resulted in an impressive body of international human rights law, as well as studies and public information on a wide range of human rights and related issues. However, the widely recognized principles of territorial sovereignty and non-intervention into "matters which are essentially within the domestic jurisdiction of any state" (art. 2(7)), have prevented the UN from taking decisive action to stop governments from mistreating their populations in violation of their Article 56 pledge.

FRAGILE CONSENSUS ON THE CONTENT OF HUMAN RIGHTS

The Commission on Human Rights was tasked to draft the Universal Declaration of Human Rights (UDHR),[2] adopted by the UNGA on 10 December 1948 and stating in its Preamble that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of [the Charter art. 56] pledge." But this "common understanding" proved a fragile consensus that was challenged throughout the Cold War when the UN became a debating forum of opposing ideologies. Delegates from Western countries denounced the lack of democracy, freedom, and human rights in the Eastern bloc, and Soviet Bloc countries and members of the Non-Aligned Movement criticized the West for its racial discrimination, support of Apartheid, and domination in the global economy in ways that drastically curtailed economic, social, and cultural rights. With the end of the Cold War and a seeming de-linking of human rights and ideology, words took on new meaning and a new, at least partially restored, consensus became possible. Symbolic of this moment was the World Conference on Human Rights, convened by the UN in Vienna in 1993, which adopted the Vienna Declaration and Programme of Action (VDPA),[3] confirming the universality of human rights standards as defined by the UN and largely rejecting the counterclaims of cultural relativism.[4] The consensus reached there was a fragile bridging of the very real divide between perceptions of human rights by different governments and peoples' movements. The governments assembled in Vienna nonetheless agreed that

> [a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. 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.[5]

The claim of universality, indivisibility, interdependence and interrelatedness of human rights is repeated like a mantra in UN instruments, masking many real tensions that still challenge this consensus. Deeply cultural antimonies, disguised as "particularities" and "backgrounds" to be "borne in mind," translate into political wrangling in UN debates over issues of religious intolerance, freedom of expression, sexual orientation and gender identity (SOGI), and reproductive rights, among others. Meanwhile, some perceive the idea of human rights as a Western cause[6] or as a tool of Western imperialism.[7] Whatever political

[2] Referenced in Documentary Appendix.

[3] Referenced in Documentary Appendix.

[4] On the tension between the universality of human rights and cultural relativism, see Chapter 1, Reading 4 (Weston) in this volume.

[5] Vienna Declaration and Programme of Action (VDPA), referenced in Documentary Appendix.

[6] *See,* for example, Arvind Sharma, *Are Human Rights Western? A Contribution to the Dialogue of Civilizations* (New York: Oxford University Press, 2006).

interpretations countries or groups of countries may wish to give to a particular human rights issues under debate, there is little disagreement that the UN is the forum where the legitimacy of claims of universality of human rights are tested.

PROMOTING AND PROTECTING HUMAN RIGHTS THROUGH THE UNITED NATIONS

The space for UN action in a wide range of human rights concerns has been opened over that last thirty years owing to a political willingness to limit the scope of Charter Article 2(7) (domestic jurisdiction) and expand that of the Article 56 (cooperation with the UN to achieve human rights). The UN does much today that would have been deemed "intervention" by most states a few decades ago, e.g., investigation of abuse, adoption of resolutions by the UNGA and Human Rights Council explicitly denouncing countries by name, sending special envoys and rapporteurs, receiving complaints from individuals, addressing urgent appeals to governments, and conducting inquiries. Indeed, the range of UN action to realize its Charter mandate to promote and protect human rights covers at least three means of preventing harm (education and information, standard-setting and interpretation, and institution building within Member States) and five tools to respond to human rights situations and protect human rights (monitoring through reporting and fact-finding, adjudication, political supervision, humanitarian action, and coercive action). Taken together, these means and methods for promoting and protecting human rights describe what the UN can do to move from the lofty words of the UDHR to action that affect peoples lives.

PROMOTION AND PROTECTION THROUGH UN HUMAN RIGHTS MECHANISMS

Originally, the principal body responsible for human rights in the UN was the Commission on Human Rights. It carried out the bulk of the standard-setting activity of the early years following the adoption of the UDHR. In the 1950s and early 1960s, the first human rights treaties adopted by the UN related to trafficking and prostitution, the political rights of women, the nationality of married women, and consent to marriage, minimum age for marriage, and registration of marriages. A major milestone was the adoption in 1966 of the two international covenants—International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)—which together transformed the aspirational rights of the UDHR into binding treaty law. A second milestone was the systematic advancement of women's rights in the Declaration on the Elimination of Discrimination against Women of 1967, followed by the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In the 1970s and 1980s the UN adopted other core human rights treaties on racial discrimination, torture, children's rights, and, in the 1990s and 2000s, rights of migrant workers and persons with disabilities. For all their shortcomings, the expansion of the thirty articles of the UDHR into a considerable body of treaty law, with an impressive amount of interpretative work by nine treaty-monitoring bodies is an undeniable UN accomplishment.[8]

The Commission, consisting of 53 governments elected by ECOSOC to which it reported, was replaced in 2006 by the Human Rights Council, consisting of 47 governments elected by

[7] *See*, for example, Jean Bricmont, *Humanitarian Imperialism: Using Human Rights to Sell War* (Monthly Review Press,2007): 35-90; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia, PA: University of Pennsylvania Press, 2002): 39-70.

[8] All treaties and declarations noted in this paragraph are referenced in the Documentary Appendix

the UNGA, to which it reports. Before and following the 2006 reform, there has arisen an array of mechanisms based either on the Charter and applicable to all UN member states or on treaties binding only states that have ratified them and which are administered by the Office of the High Commissioner for Human Rights (OHCHR). It has thus become traditional to distinguish Charter-based procedures and treaty-based procedures.

Promoting and Protecting Human Rights through Charter-Based Procedures

Most of our discussion of the Charter-based procedures relates to the principal UN organs with responsibility over human rights, namely, the UNGA (especially its subsidiary body the UNHRC), ECOSOC, and the Secretariat (principally the OHCHR). However, other units of the UN secretariat have significant human rights responsibilities, such as Office for the Coordination of Humanitarian Affairs (OCHA), Department of Political Affairs (DPA) and Department of Peacekeeping Operations (DPKO). Moreover, other main organs of the UN occasionally address human rights, such as the International Court of Justice (ICJ) and the Security Council (discussed below in relation to use of coercive force for human rights purposes). In addition, there are funds and programs of ECOSOC and the UNGA, which engage in human rights work, such as the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Fund for Population Activities (UNFPA), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women). Among the 14 Specialized Agencies, which are autonomous organizations coordinated by ECOSOC and the UNGA, the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization (WHO) contribute in various ways to human rights. OHCHR and six other agencies (UNDP, UNICEF, UNFPA, UNESCO, WHO and FAO) adopted in 2003 the "Common Understanding among UN Agencies on a Human Rights-Based Approach to Development Cooperation," which defined a number of criteria for a UN standard Human Rights-Based Approach (HRBA).[9] These agencies will not be further reviewed as we proceed with some background on the OHCHR and the UNHRC, followed by brief discussion of the various procedures that function under the UNHRC.

The High Commissioner for Human Rights

The post of UN High Commissioner for Human Rights, whose origins may be traced to a proposal from René Cassin of France to create a position of "Attorney-General for Human Rights," was established, as recommended by the VDPA in 1993. The UNGA resolution creating the post[10] stipulates that the High Commissioner be appointed for four years (renewable once) by the UN Secretary-General, be approved by the UNGA, and be tasked with promoting and protecting the effective enjoyment by all people of all civil, cultural, economic, political and social rights, including the right to development. The first High Commissioner functioned as a senior official promoting human rights alongside the Secretariat's Centre for Human Rights in Geneva. The second High Commissioner, former President of Ireland Mary Robinson, merged the Centre into the OHCHR and considerably

[9] UNDP, *Report from the Second Inter-Agency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform,* held at Stamford, CT, USA, 5-7 May 2003.

[10] General Assembly resolution 48/141 of 20 Dec 1993, *reprinted in* III Weston & Carlson.

expanded its role. Four others have served in this capacity as of this writing, with a seventh High Commission to be selected in 2014.[11]

The stature of the OHCHR has grown, as has its size. Half of the staff of over 1,100 is located in the Geneva Headquarters, 2% in the New York Office, and the rest deployed in 58 field offices (12 country or stand-alone offices, 13 regional offices or centers, 15 human rights components of UN peace missions and 18 human rights advisers to UN Country Teams). The country offices engage in monitoring, public reporting, and technical assistance,[12.] In humanitarian or other crises, OHCHR staff may be deployed in the field by the Rapid Response Unit for fact-finding missions and commissions of inquiry.[13]

The Human Rights Council (UNHRC)

As explained above, the UNHRC was created by UNGA resolution 60/251 in 2006 to replace the Charter-based Commission on Human Rights. After a review, its working methods were set out in Council Resolution 16/21 of 25 March 2011.[14] It meets in regular session at least three times a year, for a total of at least ten weeks and can meet at any time in special session to address human rights violations and emergencies if one third of the Member States so request. By early 2014, it had held 20 special sessions, dealing with such issues as the Palestinian Occupied Territories, the war in Lebanon, the situation in Darfur, Myanmar, Sri Lanka, the Democratic Republic of Congo, Haiti, Côte d'Ivoire, Libya, Syria, and the Central African Republic, as well as the food and financial crises. The major innovations of the reform are the Council's Advisory Committee (18 experts, functioning as a think-tank for the Council) and the Universal Periodic Review (UPR).

Complaints Procedures

Since the late 1960s, the UN has had two non-treaty procedures for receiving complaints ("petitions") to review alleged human rights violations. The first is the so-called "public" procedure, established in 1967 by ECOSOC Resolution 1235 (XLII), according to which the former Commission could "make a study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid . . . and racial discrimination . . . and report, with recommendations thereon, to the Economic and Social Council."[15] Although conceived as a means of attracting attention to *apartheid* in South Africa and other situations characterized by colonialism and racism, the "1235 procedure" was used to examine all types of situations and usually involved appointing a Special Rapporteur to visit the country under scrutiny. The Rapporteurs' reports of relevant findings are the basis for the Commission's resolution on that country. The political willingness of the UNHRC to create thematic and country mandates described in the next section and that of

[11] Chronologically, the High Commissioners have been Mr. José Ayala Lasso (1994-1997), Ms. Mary Robinson (1997-2002), Mr. Sergio Vieira de Mello (2002-2003), Mr. Bertrand G. Ramcharan (Acting High Commissioner from 2003-2004), Ms. Louise Arbour (2004-2008), and Ms. Navanethem Pillay, South Africa, 2008-2014.

[12] This information is available as of September 2011 in OHCHR, *OHCHR Management Plan 2012-2013. Working for Results* (Geneva: OHCHR, 2011): 11-15.

[13] Since 2006, the Rapid Response Unit has deployed for these purposes in Timor-Leste, Western Sahara, Sudan, Liberia, Lebanon, Beit-Hanoun, (Occupied Palestinian Territories), Kenya, Togo, Guinea, three times in OpT (Goldstone, Committee of high level expert to follow Goldstone and Israeli attack on humanitarian flotilla). It has also conducted human rights assessment missions in Togo, Sierra Leone, Bolivia, Somalia and Madagascar. Information available at http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx (accessed 13 Apr 2014).

[14] Both resolutions 60/251 and 16/21 are referenced in the Documentary Appendix

[15] Adopted 6 June 1967, referenced in Documentary Appendix.

the mandate holders to receive complaints and take urgent actions by alerting government to concerns brought to their attention has made the 1235 procedure unnecessary.

In 1970, ECOSOC adopted a confidential complaints procedure—called the "1503 procedure" after the ECOSOC resolution number—under which the Commission examined in closed session complaints alleging "a consistent pattern of gross and reliably attested violations of human rights."[16] Although it was a cumbersome procedure (involving closed meetings of a working group in a sub-commission, then a working group of the Commission before it reaching the Commission), the possibility of the situation being placed on a public list or transferred to a public procedure was a source of pressure on governments complained against. Such pressure does not change a regime but contributes to efforts to alter abusive practices. On 18 June 2007, the UNHRC, in its resolution 5/1 on institution-building, replaced the 1503 procedure with a new confidential complaint procedure to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstance. These complaints—between 11,000 and 15,000 annually[17]—may be submitted by individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. It has been claimed that 94% of countries respond to complaints relating to human rights situations.[18] Of course, a response does not mean the situation is corrected, only that the government sees fit to provide its views and explanations and may—while not necessarily admitting that it has been prodded by the procedure—correct the situation to avoid a Council or UNGA resolution denouncing its violations. Communications are screened by a Working Group on Communications, which may decide to submit them for further action to the Working Group on Situations, which then may dismiss the communication, keep it under consideration or report to the Council with recommendations. Since 2006 the Council has taken up and eventually discontinued consideration of human rights situations in Kyrgyzstan, Iran, Uzbekistan, Turkmenistan, the Maldives, the DRC, Guinea, Tajikistan, and Iraq.[19] Regarding Eritrea, it decided in 2012 to take up public consideration of the situation.[20] A more meaningful and public form of scrutiny of human rights violations and other issues is provided by, the "special procedures" described in the next section.

Special Procedures of Thematic and Country Rapporteurs

Beginning in 1980, the Commission on Human Rights appointed numerous working groups or Special Rapporteurs, Representatives, and Experts, either through "thematic mandates," which examine a general problem of particular significance to ensuring respect for human rights, or through "country mandates," focused on a country whose human rights performance has convinced the Council that monitoring is necessary.

[16] Adopted 27 May 1970, referenced in Documentary Appendix.

[17] Jane Connors and Markus Schmidt, "United Nations," in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *Textbook on International Human Rights Law* (Oxford University Press, 2d edition, 2013): 371.

[18] *Id*.

[19] List Of Situations Referred To The Human Rights Council Under The Complaint Procedure Since 2006, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf

[20] Human Rights Council Resolution 21/1, *26* September2012; Situation of human rights in Eritrea, 26 September 2012.

As of 2014, there were some 37 "thematic mandates" covering a whole litany of contemporary human rights issues, including housing, child prostitution, involuntary disappearances, extreme poverty, food, freedom of opinion and expression, the independence of judges and lawyers, migrants, environmentally sound management and disposal of hazardous substances and wastes, contemporary forms of racism, safe drinking water and sanitation, transnational corporations, older persons, foreign debt, terrorism, violence against women, and health. The thematic mechanisms include special procedures to collect information directly from victims and to communicate with governments. Dialogue with governments serves not only to request a clarification of the situation concerning the alleged victim but also to apply an "urgent action" or "prompt intervention" procedure when necessary to protect the victim, her or his family, witnesses, or NGOs involved, and to facilitate on-site visits. The reports of the special rapporteurs constitute a mode of accountability that many governments take quite seriously.

In the case of "country mandates," the country rapporteurs communicate with victims, their representatives, NGOs, and governments. In 2014 a total of 14 countries were under scrutiny by Special Rapporteurs or Independent Experts (Belarus, Cambodia, Central African Republic, Côte d'Ivoire, Eritrea, North Korea, Haiti, Iran, Mali, Myanmar, OPT, Somalia, Sudan and Syria).

The effectiveness of these special procedures has been enhanced since 1993 by annual meetings of the special rapporteurs, representatives, experts, and chairpersons of working groups and the recommendations they adopt. A legitimate concern with efficiency and effectiveness was reflected in a major 2007 reform in which the UNHRC defined the following general criteria of "paramount importance while nominating, selecting and appointing mandate-holders," namely: "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity."[21] The process has become more transparent as a result of a review of the procedures completed in 2011.[22] In particular, the Council affirmed that "[t]he integrity and independence of the special procedures and the principles of cooperation, transparency and accountability are integral to ensuring a robust system of the special procedures that would enhance the capacity of the Council to address human rights situations on the ground."[23] It also stated that it "strongly rejects any act of intimidation or reprisal against individuals and groups who cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights, and urges States to prevent and ensure adequate protection against such acts."[24]

The innovation of the special procedures stands as one of the most valuable human rights achievements of the political organs of the UN and the NGOs that have lobbied them. Equally innovative in the 2007 reform was the Universal Periodic Review, next.

[21] Human Rights Council Resolution 5/1 of 18 June 2007, Institution-building of the United Nations Human Rights Council**,** Annex**,** para. 39. Referenced in Documentary Appendix.

[22] Human Rights Council Resolution 16/21, of 25 March 2011, Annex. Referenced in Documentary Appendix.

[23] Id., para. 24.

[24] Id., para. 30.

Universal Periodic Review (UPR)

The UPR was created at the same time as the Human Rights Council, which adopted its modalities in 2007.[25] It allows the Council to review the human rights records of all the UN Member States (193 as of this writing) on the basis of information provided by the reporting government, UN treaty bodies and special procedures, and stakeholders, including non-governmental organizations, national human rights institutions, human rights defenders, academic institutions, research institutes, and regional organizations. The process got off to a disappointing start, however, as governments would line up friendly countries to make positive comments on the reports, taking up the available time for discussion. The process has become much more probing, and the recommendations that emerge from the consideration of country reports include follow-up by treaty bodies and of the UPR by the Human rights Council. By October 2011, all countries had been reviewed once.

Members of the Council address recommendations to the government, which are often specific and penetrating. For example, the UPR of the United States in 2010 resulted in 228 recommendations, including such issues as torture and the closing of the Guantanamo Bay facility.[26] Recent setbacks include Israel's refusal to attend its own UPR and the successful effort by the Russian Federation to remove two recommendations by Georgia and have them relegated to footnotes. Similarly, Uzbekistan, Egypt and Singapore rejected recommendations addressed to them because they were allegedly "factually wrong" or "based on incorrect assumptions or premises." These are dangerous precedents for an otherwise positive evolution of the UPR process.

Promoting and Protecting Human Rights through Treaty-Based Procedures

Nine of the UN human rights treaties have functioning monitoring committees, called "treaty bodies," that examine states parties' reports on progress made and problems encountered, and formulate their observations on what needs to be done to comply with the obligations of the treaty in question: the 1966 ICESCR and ICCPR, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child (CRC), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the 2006 International Convention on the Rights of Persons with Disabilities (CPRD), and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED).[27] A tenth treaty body, the Subcommittee on Prevention of Torture, monitors places of detention under CAT.

The effectiveness of the treaty system depends on (1) universal ratification without crippling reservations (2) timely presentation and proper consideration of reports with follow-up on recommendations, (3) judicious use of the capacity to issue general comments, and (4) availability of complaints and inquiry procedures. Endorsed as a major objective of the High Commissioner, universal ratification would mean convincing all countries to ratify

[25] UN General Assembly Resolution 60/251 of 15 March 2006, para. 5(e). Referenced in Documentary Appendix.

[26] Report of the Working Group on the Universal Periodic Review. United States of America, UN Doc A/HRC/16/11, 4 January 2011.

[27] All the treaties noted in this paragraph are referenced in the Documentary Appendix.

or accede[28] to the current 9 core human rights treaties and 3 optional protocols. One of the problems is that some countries, such as the US, insist on reservations, understandings, and declarations to weaken the obligations so as not to contradict domestic law, or, as many Islamic countries do, to interpret respect for equality of men and women, so as not to contradict Islamic law. Others ratify for public relations purposes without the intent to implement the provisions of the treaty. On final analysis, the effectiveness of the treaty system depends on what use the ratifying countries make of the treaty, if any, to make genuine progress in human rights. Social science research shows that, under certain conditions, once a treaty has been ratified, improvements in human rights performance tend to occur even "where there is a minimal incentive for local actors to mobilize, where national courts are minimally competent to render independent judgments, and where the state has at least some capacity to address the rights issues at stake."[29]

On the second issue of the effectiveness of the reporting process[30] the High Commissioner reported in 2012 that only 16% of the reports are received on time.[31] She described the problems faced by the treaty body system and proposed a series of changes to strengthen it, including a comprehensive reporting calendar; a simplified and aligned reporting process; strengthening the individual communications procedures, inquiries and country visits; strengthening the independence and expertise of treaty body members; strengthening the capacity to implement the treaties; and enhancing the visibility and accessibility of the treaty bodies.[32] An intergovernmental process considered reform of the treaty body system in 2012-2014 without achieving radical reform. The process called for a simplified reporting procedure and use of common core documents, as well as capacity-building for reporting states[33] and the General Assembly approved these modest reforms in a 2014 resolution, in which it encouraged treaty bodies to achieve "greater efficiency, transparency, effectiveness and harmonization through their working methods," and urged states to eliminate "all acts of intimidation and reprisals against individuals and groups for their contribution to the work of the human rights treaty bodies."[34] In the meantime, however, the treaty bodies have demonstrated a willingness to draw on the expertise of their members and "shadow reports" from civil society, typically revealing major human rights deficiencies. After considering states' reports, civil society inputs and engaging in a dialogue with the reporting government representatives, the treaty body issues "concluding observations" that often raise concerns and make recommendations touching on the real human rights problems faced by the states parties.

[28] Accession is the process of joining for countries that did not sign when a treaty was first opened for signature.

[29] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics,* (Cambridge: Cambridge University Press, 2009): 363.

[30] The reader is here referred to Reading 29 (Cole) in this volume, which explores this subject- matter in extensive detail.

[31] United Nations reform: measures and proposals, Note by the Secretary-General, UN Doc. A/66/860, 26 June 2012, p. 21. *See also* http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx (accessed 13 Apr 2014).

[32] United Nations reform: measures and proposals. Note by the Secretary-General, UN Doc. A/66/860 (26 June 2012): 37-95.

[33] See UN General Assembly Resolution 68/2 of 20 September 2013, referenced in the Documentary Appendix.

[34] UN General Assembly Resolution 68/268, adopted 9 April 2014.

The third feature of the human rights treaty system is the capacity of the treaty bodies to issue general comments judiciously clarifying the normative content of their respective treaties and providing guidance to states and civil society as to what is expected to fulfill their obligations. While not technically binding on the states parties, many of these statements have acquired considerable interpretive authority.[35]

The fourth dimension is the complaints and inquiry procedures. Seven of the human rights treaties (or optional protocols to them) provide for individuals to bring complaints alleging a violation, namely, the ICCPR, ICERD, CAT, CEDAW, CRPD, CED, CMW, CESCR and CRC. As of 2014, the individual complaint mechanisms had not yet entered into force for the CMW and the CRC. For the others, a considerable body of case law is emerging.[36] Complaints from one State party which considers that another State party is not giving effect to the provisions of the treaty may be considered under the CAT, CMW, CED, ICESCR and the CRC. However, this provision for state-to-state complaints has never been used. In addition, ICERD and the ICCPR provide for an inter-state dispute settlement procedure. Six of the treaty bodies (CAT, CEDAW, CRPD, CED, CESCR and CRC, once the relevant protocol is in force for the latter) may, on their own initiative, initiate confidential inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party that has recognized the competence of the committee to initiate inquiries. Such inquiries have been conducted in eight states by CAT and one by CERD. Under its optional protocol, CAT implements a system of regular visits to places of detention.

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IN SUM, the Charter-based and treaty-based procedures have evolved to the point of forcing governments to address a remarkable range of human rights problems, sometimes with real results. The prospects of making real progress through the UN diminish as governments face national security emergencies and or engage in massive human rights violations, each of which call for the UN to use other mechanism—primarily through the Security Council—to seek human rights-conforming behavior.

PROMOTING AND PROTECTING HUMAN RIGHTS THROUGH PEACE OPERATIONS

A humanitarian emergency and intense diplomatic pressure is required before the Security Council will use its enforcement powers, and occasionally has used those powers for human rights purposes. The UNSC is much more willing to support deployment of UN personnel in the context of a comprehensive political settlement to a long-festering conflict, and the doctrine applicable in such cases has been called "second generation" or "expanded" peacekeeping. The setting up and running of peacekeeping operations (PKOs) is the responsibility of the Department of Peacekeeping Operations (DPKO), which functions out of UN headquarters in New York. Human rights components have been part of PKOs in Angola,

[35] All the general comments of all the treaty bodies are available at http://www2.ohchr.org/english/bodies/treaty/comments.htm (accessed 25 Apr 2014)..

[36] Since its inception in 1976, the Human Rights Committee established under the ICCPR has examined over 2,000 complaints pursuant to the ICCPR's first protocol. *See* Jakob Th. Möller & Alfred de Zayas, *The United Nations Human Rights Committee Case Law 1977–2008: A Handbook (*Engel, 2009). For the emerging jurisprudence of the general comments and State-specific concluding observations of the CESCR, see Malcolm Langford and Jeff A. King, "Committee on Economic, Social and Cultural Rights: Past, Present and Future," in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge Univ. Press, 2008): 477-516,

Burundi, Cambodia, Central African Republic, El Salvador, Guinea Bissau, Haiti, Kosovo, Iraq, Rwanda, Sierra Leone, Somalia, and Timor-Leste. As of this writing, there are human rights components in most UN peacekeeping operations, including the Democratic Republic of the Congo (MONUSCO), Darfur (UNAMID), South Sudan (UNMISS), Liberia (UNMIL), Côte d'Ivoire (UNOCI), Haiti (MINUSTAH) and Afghanistan (UNAMA). The OHCHR provides expertise, and support to the human rights components of PKOs and the head of a component is the OHCHR representative in-country.

When consent is given by the territorial state to a multicomponent peace operation, the UN role is couched in terms of "cooperation" with whatever is left of a sovereign state rather than of "intervention." But the form of action, despite consent to the agreement and to the international military and civilian presence, is clearly an intrusive one. The potential impact of the UN's efforts is considerable, whether through an explicit human rights program or through the promotion of the rule of law and good governance. At the same time, however, the UN itself has been accused of human rights violations[37] and of responsibility for major public health disasters.[38]

Thus, "intervention" by the UN in human rights situations, where normal rules of state sovereignty would otherwise preclude it, has been resorted to, and in such a manner, as Richard Falk put it a generation ago, that the "basic social contract between States and the United Nations is . . . being rewritten."[39] Acceptance by the international community of these encroachments constitutes a major shift in international relations that enhances considerably opportunities for the UN to investigate and improve human rights situations inside member states.

Beyond the investigative and educational tasks of human rights components of peacekeeping, UN field operations are called upon to contribute to the institutionalization of key democratic institutions, without which progress to ensure human rights during a peace operation will be short-lived. Judicial reform, constitution drafting, professionalization and demilitarization of the police—all are tasks that the UN has been given and in respect of which its capacity to produce lasting results has not been adequately tested.

The UN's role in this area has to be seen also in a broader context of trends towards democratization, during the window of opportunity provided by UN multicomponent peace operations. Since the mid-1990s, many of these human rights tasks have been pursued by field operations under the responsibility of OHCHR, whose field offices operate under difficult conditions with inadequate resources. In other situations democratization is rendered impossible by acts of aggression, genocide, crimes against humanity, and other mass violations of human rights. Only coercive economic and/or military action, preferably multilateral, can make a difference under such circumstances.

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[37] Frédéric Mégret & Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities," 25 *Hum. Rts. Q.* (2003): 314-42.

[38] *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti,* note d, p 29. The independent expert on the situation of human rights in Haiti, noting the rejection by the United Nations of responsibility for the outbreak as accused in a class action law suit filed with a court in New York in October 2013, recommended that full reparation for damages will be provided and that "those responsible for the tragedy should be punished." Report of the independent expert on the situation of human rights in Haiti, Gustavo Gallón, UN Doc. A /HRC/25/71, 7 February 2014, para. 77.

[39] Richard A. Falk, "The United Nations and the Rule of Law," 4 TLCP 611 (1994), at 630.

CORRECTIVE ACTION THROUGH PEACE ENFORCEMENT AND THE RESPONSIBILITY TO PROTECT

If and only if the Security Council, acting under Chapter VII of the UN Charter, determines by nine votes out of fifteen, including a concurring vote of all five permanent members (art. 27), that there is a "threat to the peace, breach of the peace, or act of aggression," (art. 39) may it adopt economic sanctions or authorize military force to restore peace. The practice of the UNSC has been uncertain about using this power for human rights purposes. For example, under Resolution 688 (1991),[40] it demanded the end of repression and respect for human rights of the Kurds in Northern Iraq, followed by the UK and the US establishing no-fly zones to protect humanitarian operations, although not specifically authorized by the resolution. Acting explicitly under Chapter VII in Resolution 940 (1994),[41] the UNSC declared that "the situation in Haiti continues to constitute a threat to peace and security in the region" and authorized the use of military force to restore the legitimately elected President and Government of Haiti following the overthrow of Aristide, but felt the need to refer to the "unique character of the present situation in Haiti . . ., requiring an exceptional response."

However, in 1994 the UN failed to act to halt the genocide perpetrated in Rwanda, resulting in 800,000 deaths. The UN Force Commander concluded, "the only solution to this unacceptable apathy and selective attention is a revitalized and reformed international institution charged with maintaining the world's peace and security, supported by the international community and guided by the founding principles of its Charter and the Universal Declaration of Human Rights."[42] Efforts to obtain Chapter VII authorization for military intervention also failed in Kosovo in 1999, resulting in NATO's military intervention without Security Council authorization in order to protect Kosovar Albanians against Serbian atrocities.[43] Echoing the view of the UN Secretary-General, the Independent International Commission on Kosovo concluded that the NATO military intervention was illegal but legitimate.[44] In response to the Kosovo intervention, the International Commission on Intervention and State Sovereignty (ICISS) was created in 2000 to address this gap between legality and legitimacy, and sought "to strengthen the prospects for obtaining action, on a collective and principled basis, with a minimum of double standards, in response to conscience-shocking situations of great humanitarian need crying out for that action" and recommended "[t]hat the General Assembly adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect."[45] By the time of the 2005 UN World Summit meeting, which brought together heads of state and government to take stock five

[40] Referenced in Documentary Appendix.

[41] Referenced in Documentary Appendix.

[42] Roméo Dallaire, *Shake Hands with the Devil* (Toronto: Random House, 2004): 520.

[43] It has also been argued that "The Kosovo Liberation Army committed human rights abuses against Serbian civilians and personnel in order to trigger reprisals, which would in turn force the international community to intervene on their behalf, Michael Ignatieff, *I. Human Rights as Politics, The Tanner Lectures on Human Values* Delivered at Princeton University April 4–7, 2000: 317.

[44] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000). For further discussion on the Kosovo intervention, see *infra* Reading 32 (Falk) in this volume.

[45] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission Intervention and State Sovereignty*, (2001). p. 74. See also Nicholas Tsagourias, "Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception Or Self-Consciousness?," 13 LEIDEN J. INT'L. L. 11-32 (2000); Stephen P. Marks and Nicholas Cooper, "The Responsibility to Protect: Watershed, or Old Wine in a New Bottle," 2 *Jindal Global Law Review* (India), (2010) 86-130.

years after the United Nations Millennium Declaration, the moment seemed ripe for the international community to address the conclusion of the ICISS by committing to the doctrine of the responsibility to protect ("R2P"), by which they seek to ensure that their populations are shielded from genocide, war crimes, crimes against humanity, and ethnic cleansing.[46]

The need for such a new doctrine is based also on the unacceptability for many states of the 19th century doctrine of "humanitarian intervention," which was a controversial exception to the prohibition of intervention in the domestic affairs of states used primarily by the European powers to intervene in the Ottoman Empire to protect Christian populations.[47] By stressing prevention and rebuilding, with military intervention being a last resort requiring UNSC approval, R2P shifts the debate from the conventional "right to intervene" to the needs of those seeking or needing support and to the primary role of states in guaranteeing the protection of the rights of their own population.[48] Yet, after accepting it in 2005, the UN has been reluctant to invoke R2P in recent conflicts, in spite of the commitment of states "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[49] The doctrine has been referred to in Security Council Resolutions concerning the Great Lakes region, Sudan, Libya, Côte d'Ivoire, Yemen, Mali, South Sudan, Central African Republic, and Syria,[50] but only in Darfur[51] and Libya[52] was it used to authorize enforcement action. The way R2P was applied in Libya explains in part the reluctance to use it for enforcement action in the civil war in Syria.[53] The Special Adviser on the Prevention of Genocide (a position created in 2004) stated on 20 December 2012: "The Government of Syria is manifestly failing to protect its populations. The international community must act on the commitment made by all Heads of State and Government at the 2005 World Summit to protect populations from genocide, war crimes, ethnic cleansing and crimes against

[46] G.A. Res. 60/1, UN DOC. A/RES/60/1 (Sept. 15, 2005) [Hereinafter 2005 World Summit Outcome], ¶ 138 and 139. The doctrine was endorsed by the Security Council in its unanimous Resolution 1674 of 28 April 2006 on the Protection of Civilians in Armed Conflict, The question of genocide is addressed in Reading 5 by Diane Orentlicher in chapter 2.

[47] The question of humanitarian intervention is addressed in Reading 30 by Richard Falk in Chapter 7 of this volume. See also Barry M. Benjamin, Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities, 16 Fordham Int. Law J. 120-158.

[48] See Implementing the Responsibility to Protect. Report of the Secretary-General, A/63/677, (Jan. 12 2009).

[49] 2005 World Summit Outcome, ¶ 139.

[50] References to Responsibility to Protect (RtoP or R2P) in Security Council Resolutions, http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/5221--references-to-the-responsibility-to-protect-in-security-council-resolutions (accessed 25 Apr 2014).

[51] Security Council Resolution 1706 of 31 August 2006, fully referenced n Documentary Appendix.

[52],Security Council Resolution 1970, of 26 February 2011, and Security Council Resolution 1973 of 17 March 2011, each fully referenced in Documentary Appendix.

[53] See Spencer Zifcak, "The Responsibility to Protect after Libya and Syria," 13 *Melbourne J. Int'l .L.* (2012): 2-35.

humanity, including their incitement."[54] It should also be noted that the Special Adviser on the Responsibility to Protect, who is charged with the refinement of R2P and dialogue with Member States and other stakeholders on its implementation, works with the Special Adviser on the Prevention of Genocide to operationalize these two mandates.

A final observation on the human rights dimensions of the UN's mandate in international peace and security is the use of enforcement powers for the prosecution of individuals responsible for genocide, crimes against humanity, and war crimes. Using the authority of Chapter VII, the Security Council innovated in the 1990s by establishing a mechanism for trying those accused of genocide, war crimes and crimes against humanity, through two *ad hoc* UN criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in 1991 and the International Criminal Tribunal for Rwanda ("ICTR") in 1994. In 1998, governments adopted the Rome Statute creating the International Criminal Court ("ICC"), which came into force in 2002, establishing a permanent tribunal, independent of the UN, with jurisdiction to investigate and bring to justice individuals who commit the most serious crimes of international concern, specifically genocide, war crimes, and crimes against humanity.

CONCLUSIONS

This essay only scratches the surface of the complex web of UN institutions and bodies and their vast potential to contribute, through multilateral diplomacy and action, to the realization of human rights. It should be clear that state sovereignty is less than ever an insurmountable obstacle to UN action to pursue the Charter objective of universal respect for human rights. The traditional limitations based on Article 2(7) are receding. As a result, the margin for action by the UN has expanded. Treaty bodies have demonstrated considerable vigor by drawing governments' attention to failures to meet human rights obligations and by expanding the power to respond to individual complaints. Mandate holders in special procedures have enhanced their independence and expertise. They have provided extensive documentation of thematic and country problems, addressing specific recommendations to governments and political bodies (specifically, the Human Rights Council and the General Assembly).

Transitions to democracy in former communist-party states and in existing and former dictatorships across the Middle East have released the potential for the participation of civil society in transformative processes of governance. The UN's human rights institutions, principally the OHCHR, have been supportive and have provided technical assistance for building human rights institutions. However, massive violations continue to occur in the course of internal armed conflict, especially when fed by xenophobic nationalism and religious fanaticism. The UN provides support to the International Criminal Court (ICC) and other prosecutorial mechanisms to hold perpetrators and their commanders criminally responsible. Preventive diplomacy, peacemaking, and peacekeeping functions have demonstrated the value of integrating the human rights dimension into comprehensive peace agreements, with the support of OHCHR.

[54] Statement by the Special Adviser of the Secretary-General on the Prevention of Genocide, Adama Dieng, on the situation in Syria, UN News Centre, available at http://www.un.org/apps/news/infocus/Syria/press.asp?sID=44# (accessed 25 Apr 2014). For further commentary on R2P, see *infra* Reading 32 (Falk) in this volume.

These are but a few of many challenges facing the UN in its human rights program. Despite frustrations with the UN as a large bureaucracy that moves slowly and sometimes is unresponsive to urgent human rights problems, or is constrained by the conflicting interests of the member states that provide political supervision, the UN has sought to promote and protect human rights in ways that increasingly redefine the pledge of member states "to take joint and separate action in co-operation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."