

**W.A. SCHABAS ET D. TURP,
DROIT INTERNATIONAL CANADIEN ET QUÉBÉCOIS DES DROITS ET
LIBERTÉS: NOTES ET DOCUMENTS, 2^e ÉD.,
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The purpose of this book is to provide the readers with a general overview of the historical development of human rights law as applied in the Canadian and international context, together with some of its philosophical and theoretical bases. These issues are summarized in a compilation of the most important international and national documents which concern rights and freedoms. Professor Schabas and Turp examine the nature and content of human rights, and the possibilities of their implementation by the means of

...note qui présente succinctement le contenu de l'instrument et met en lumière certaines dispositions particulièrement pertinentes. Les notes de présentation sont également utilisées pour situer plus particulièrement l'instrument international dans son application au Canada et au Québec et pour signaler en outre l'existence de rapports périodiques préparés par le Canada en application de divers traités et examinés par des comités d'experts des Nations Unies.¹

From a methodological point of view, there are two different questions one has to bear in mind:

1. The problem of interpretation of legal norms: In this point, the text expounds several instances in which such problems can occur, and even though it does not provide an answer to it, its exposition is very clever and it addresses the matter in a clear way. Some remarks made in the *Notes* are very helpful in relation to the theoretical problems mentioned above. In that context, the issue in the compilation is how to characterize the relevant facts in order to apply a determined set of rules. The problem arises when the specific nature of the events regulated by a given norm is not clear. A given situation may be characterized in different manners, and all of those characterizations may be validly asserted as regulated by the same legal rule. Therefore, there could be a situation in which, even though there is an agreement among the interested parties on the facts and on the content of a given rule, there could be disagreement on the interpretation of those facts in order to apply such rule. In relation to this, Professor Provost of McGill University says: «Indeterminacy means that, where a situation falls within the significant gray zone in the definition of

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¹ W.A. Schabas et D. Turp, *Droit international canadien et québécois des droits et libertés: notes et documents*, 2^e éd., Cowansville (Qc.), Yvon Blais, 1998, à la p. VII.

armed conflicts, several conclusions about the nature of that situation can be lawfully derived from the norms»². As Professor Provost explains, legal norms are not static and clear, they have a gray zone (apart from their core meaning) which always requires an interpretation: «Indeterminacy and the need for characterization are of course not peculiar to humanitarian law. The problem is inherent in to all legal norms. Such norms have a fluid content, or open texture, and an act of classification of the event, action, institution, or legal relationship is needed in every case in order to determine which legal regime is applicable»³. On the point regarding the «open texture» of legal norms, I will quote H.L.A. Hart's *The Concept of Law*, in order to understand that concept: «Whichever device, precedent legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture»⁴. There is also a recognition, not only of the important role of the judge in interpreting the norms, but also of the unavoidable influence of the political, economical and moral environment in which said judge lives, upon his or her interpretation: «That these rules [the norms defining the conditions for applicability of humanitarian law to national-liberation conflicts] can become applicable automatically is out of question. Intervention by an agent is required to characterize the factual and legal nature of the situation»⁵.

2. The form by which Schabas and Turp present the issues treated in the text: They begin explaining a specific problem and the purpose of discussing it, then they use examples to clarify the explanation and the choice of documents, afterwards they expound the possible solutions that has been proposed by the international and national instruments to resolve that problem, and finally they criticize those solutions in order to achieve a deeper understanding of the issue in discussions. This general structure of the text is reflected in each part of it. This form of exposition can be very helpful, since it gives clarity to the document treated, whatever such document may be.

I. International human rights: definition and content

It is a common observation that human beings everywhere demand the realization of diverse values to ensure their individual and collective well being. It also is a common observation that these demands are often painfully frustrated by social as well as natural forces, resulting in exploitation, oppression, persecution, and other forms of deprivation. Deeply rooted in these twin observations are the beginning of what today are called «human rights» and the legal processes, national and international, associated with them.

² R. Provost, «Problems of Indeterminacy and Characterization in the Application of Humanitarian Law» (1999) 17 September 1999, *Speech given in Prof. Lametti's class* «Theoretical Approaches to the Law» McGill University, Faculty of Law.

³ *Ibid.* at 72.

⁴ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 127-28.

⁵ *Supra* note 2 at 157.

Today, the vast majority of legal scholars, philosophers and moralists agree, irrespective of culture or civilization, that every human being is entitled, at least in theory, to some basic rights. Heir to the Protestant Reformation and to the English, American, French, Mexican, Russian and Chinese Revolutions, the last half of the 20th century has seen, in the words of human rights scholar Louis Henkin, «essentially universal acceptance of human rights in principle» such that «no government dares to dissent from ideology of human rights today.» Indeed, except for some essentially isolated 19th century demonstrations of international humanitarian concern, the last half of the 20th century may fairly be said to mark the birth of the international as well as the universal recognition of human rights. In the treaty establishing the United Nations (UN), all the members pledged themselves to take joint and separate actions 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.» In the *Universal Declaration of Human Rights*, representatives from many diverse cultures endorsed the rights therein set forth «as a common standard of achievement for all peoples and all nations.» And in 1976, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, each approved by the UN General Assembly in 1966, entered into force and effect.⁶

To say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope- that is to say, their definition. Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness, whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content- these are matters of ongoing debate and likely will remain so as long as there exists contending approaches to public order and scarcities among resources.

It cannot be disputed that, like all normative traditions, the human rights tradition is a product of its time. It necessarily reflects the processes of historical continuity and change that, at once and as a matter of cumulative experience, help to give it substance and form. Therefore, to better understand the debate over the content and legitimate scope of human rights and the priorities claimed among them, it is useful to note that the second generation of economic, social and cultural rights finds its origins primarily in the socialist tradition that was foreshadowed among the Saint-Simonians of early 19th century France and variously promoted by revolutionary struggles and welfare movements ever since. In large part, it is a response to the abuses and misuses of capitalist development and its underlying, essentially uncritical, conception of individual liberty that tolerated, even legitimated, the exploitation of working classes and colonial peoples. Historically, it is a counterpoint

⁶ United Nations, *Human Rights: A Compilation of International Instruments*, 3^d ed. (Austin, Tex.: University of Texas Press, 1978).

to the first generation of civil and political rights, with human rights conceived more in positive (right to) than negative (freedoms from) terms, requiring the intervention, not the abstention, of the state for the purpose of assuring equitable participation in the production and distribution of the values involved. Illustrative are the claimed rights set forth in articles 22-27 of the *Universal Declaration of Human Rights*, such as the right to social security, the right to work and to protection against unemployment; the right to rest and leisure, including periodic holidays with pay, the right to a standard of living adequate for the health and well-being of self and family, the right to education and the right to the protection of one's scientific, literary and artistic production.

In sum, different conceptions of rights, particularly emerging conceptions, contain the potential for challenging the legitimacy and supremacy not only of one another but, more importantly, of the political-social systems with which they are almost intimately associated. As a consequence there is a sharp disagreement about the legitimate scope of human rights and about the priorities that are claimed among them.⁷

On final analysis, however, this liberty-equality and individualist-collectivist debate over the legitimacy and priorities of claimed human rights can be dangerously misleading. It is useful, certainly, insofar as it calls attention to the way in which notions of liberty and individualism can be and have been used to rationalize the abuses of capitalism; and it is useful, too, insofar as it highlights how notions of equality and collectivism can be and have been, alibis for authoritarian governance. But in the end it risks obscuring at least three essential truths that must be taken into account if the contemporary worldwide human rights movement is to be objectively understood.

First, one-sided characterizations of legitimacy and priority are likely to undermine the political credibility of their proponents and the defensibility of their particularistic values. In an increasingly interdependent and interpenetrating global community, any human rights orientation that does not support the widest possible shaping of all values among all human beings is likely to provoke widespread skepticism.

Second, such characterizations do not accurately mirror behavioral reality. In the real world, despite differences in cultural tradition and ideological style, there exists a rising and overriding insistence upon equitable production and distribution of all basic values.

Finally, none of the international human rights instruments currently in force or proposed say anything about the legitimacy or rank-ordering of the rights they address, save possibly in the case of rights, that by international covenants are stipulated to be nonderogable and therefore, arguably, more fundamental than others (for example, freedom from arbitrary or unlawful deprivation of life, freedom from torture and from inhuman or degrading treatment and punishment, freedom from

⁷ J.A. Joyce, *Human Rights: International Documents*, vol. 3 (Oxford: Clarendon Press, 1978).

slavery). There is disagreement among lawyers, moralists and political scientists about the legitimacy and hierarchy of claimed rights when they treat the problem of implementation. Such disagreements, however, partake of political agendas and have little if any conceptual utility. As the UN General Assembly has repeatedly confirmed, all human rights form an indivisible whole.

In short, the legitimacy of different human rights and the priorities claimed among them are a function of context: these issues ultimately depend on time, place, setting, level of crisis, and other circumstance.

II. Human rights in the UN

The *Charter of the United Nations* (1945) (hereinafter *Charter*) begins by reaffirming a «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.» It states that the purposes of the UN are, among other things, «to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...and to achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion...»⁸

Moreover, although typical of major constitutive instruments, the *Charter* is conspicuously general and vague in its human rights clauses, among others.

Thus, not surprisingly, the reconciliation of the *Charter's* human rights provisions with the *Charter's* drafting history and its «domestic jurisdiction» clause has given rise to not a little legal and political controversy. Some authorities have argued that, in becoming parties to the *Charter*, states accept no more than a nebulous promotional obligation toward human rights and that, in any event, the UN has no standing to insist on human rights safeguards in member states. Others insist that the *Charter's* human rights provisions, being part of a legally binding treaty, clearly involve some element of legal obligation.

Primary responsibility for the promotion of human rights under the *Charter* rests in the General Assembly and, under its authority, in the Economic and Social Council and its subsidiary body, the Commission on Human Rights, an intergovernmental body that serves as the UN's central policy organ in the human rights field. Much of the Commission's activity, initiated by subsidiary working groups, is investigatory, evaluative and advisory in character, and the Commission annually establishes a working group to consider and make recommendations concerning alleged «gross violations» of human rights referred to it by its Sub-Commission on Prevention of Discrimination and Protection of Minorities (on the basis of communications from individuals and groups, pursuant to Resolution 1503 [1970] of the UN Economic and Social Council, and sometimes on the basis of investigations by the sub-commission or one of its working groups).

⁸ P. Alston, *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992).

In addition, the Commission, together with other UN organs such as the International Labour Organisation (ILO), the UN Educational, Scientific and Cultural Organization (UNESCO), and the UN Commission on the Status of Women, drafts human rights standards and has prepared a number of international human rights instruments. Among the most important are the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976).

Collectively known as the *International Bill of Rights*, these three instruments serve as touchstones for interpreting the human rights provisions of the *UN Charter*.

- *Universal Declaration of Human Rights*: The catalogue of rights set out in the *Universal Declaration of Human Rights* is scarcely less than the sum of all the important traditional political and civil rights of national constitutions and legal systems. Also enumerated are such economic, social and cultural rights. The *Universal Declaration*, it must be noted, is not a treaty. It was meant to proclaim «a common standard of achievement for all peoples and all nations» rather than enforceable legal obligations. Nevertheless, it has acquired a status juridically more important than originally intended: it has been widely used as a means of judging compliance with human rights obligations under the *Charter*.⁹

- *International Covenant on Civil and Political Rights*: The civil and political rights guaranteed by this covenant incorporate almost all of those proclaimed in the *Universal Declaration*. Pursuant of the Covenant, each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant «without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.» In addition, the covenant calls for the establishment of a Human Rights Committee, an international organ of 18 elected by the parties, serving in their individual expert capacity and charged to study reports submitted by the state parties on the measures they have adopted that give effect to the rights recognized in the covenant.¹⁰

- *International Covenant on Economic, Social and Cultural Rights*: The covenant is essentially a «promotional convention» stipulating objectives more than standards and requiring implementation over time rather than all at once. One obligation is, however, subject to immediate application: the prohibition of discrimination in the enjoyment of the rights enumerated on grounds of race, colour, sex, language, religion, or political or other opinion. Also, the international supervisory measures that apply to the covenant oblige the state parties to report to the UN Economic and Social Council on the steps they have adopted and the progress they have made in achieving the realization of the enumerated rights.

⁹ J. P. Humphrey, «The Universal Declaration of Human Rights: Its History, Impact and Judicial Characters» in B.G. Ramcharan, (ed.), *Human Rights, Thirty Years After the Universal Declaration* (The Hague: Nijhoff, 1985) 116.

¹⁰ H.R.S. Ryan, «Seeking Relief under the UN International Covenant on Civil and Political Rights» (1980-81) 6 *Queen's L.J.* 408.

- Other UN human rights conventions: The two above mentioned covenants are by no means the only human rights treaties drafted and adopted under the auspices of the UN. Indeed, because there are far too many to detail even in abbreviated fashion, it must suffice simply to note that they address a broad range of concerns, including the prevention and punishment of the crime of genocide, the status of refugees, the abolition of slavery, the elimination of all forms of racial discrimination, the promotion of the political rights of women.¹¹ Many of these treaties are the work of the UN specialized agencies and many also provide for supervisory and enforcement mechanisms.

III. Human rights and the Helsinki process

Post-World War II concern for human rights also has been evident at the global level outside the UN, most notably in the proceedings and aftermath of the Conference on Security and Cooperation in Europe, convened in Helsinki on July 3, 1973 and concluded there on August 1, 1975. Attended by representatives of 35 governments that included the NATO countries, the Warsaw Pact nations, and 13 neutral and nonaligned European states, the conference had as its principal purpose a mutually satisfactory definition of peace and stability between East and West. In particular, the Soviet Union was concerned with achieving recognition of its western frontiers as established at the end of WW II. In sum, like the *Universal Declaration of Human Rights* and other such declarations, the *Helsinki Final Act*, though not a treaty, has created widespread expectations about proper human rights behaviour.¹²

IV. Regional developments

Action for the international promotion and protection of human rights has proceeded at the regional level in Europe, the Americas, Africa and the Middle East.

- European human rights systems: On November 4, 1950, the Council of Europe agreed to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the substantive provisions of which are based on a draft of what is now the *International Covenant on Civil and Political Rights*. Together with its five additional protocols, this convention represents the most advanced and successful international experiment in the field. The *Charter's* provisions are implemented through an elaborate system of control based on sending of progress reports to, and the appraisal of these reports by, the various committees and organs of the Council of Europe. The instrumentalities of the *European Convention* have developed a considerable body of case law on questions regulated by the convention

¹¹ C. Tinker, «Human Rights for Women, the UN Convention of the Elimination of All Forms of Discrimination Against Women» (1981) 3 *Hum. Rts. Q.* 32.

¹² A. Bloed & P. Vandijk, *Essays on Human Rights and the Helsinki Process* (Dordrecht, Netherlands, Nijhoff, 1985).

and the provisions of the convention are deemed part of domestic constitutional or statutory law.

- Inter-American human rights system: In 1948, the Ninth Pan-American Conference adopted the *American Declaration on the Rights and Duties of Man*, an instrument similar to the *Universal Declaration* of the UN and setting out the duties as well as the rights of the individual citizen. In 1959, a meeting of consultation of the American Minister for Foreign Affairs created the Inter-American Commission on Human Rights. In 1969, the Inter-American Specialized Conference on Human Rights adopted the *American Convention on Human Rights*, which made the existing Inter-American Commission on Human Rights an organ for the convention's implementation and established the Inter-American Court of Human Rights.¹³

- African human rights system: In 1981, following numerous pleas by the UN Commission on Human Rights, the Eighteenth Assembly of Heads of State and Government of the Organization of African Unity adopted the *African Charter on Human and Peoples' Rights*. Like its European and American counterparts, the *African Charter* provides for the establishment of an African Commission on Human and Peoples' Rights, with both promotional and protective functions and with no restriction on who may file a complaint with the commission. In contrast to the European and American procedures, however, concerned states are encouraged to reach a friendly settlement without formally involving the investigative or conciliatory mechanisms of the commission.¹⁴ Also, the *African Charter* does not call for a human rights court. African customs and traditions emphasize mediation, conciliation, and consensus rather than the adversarial procedures that are common to Western legal systems.

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Whatever the current attitudes and policies of governments, the reality of popular demands for human rights is beyond debate. A deepening and widening concern for the promotion and protection of human rights, hastened by the self-determinist impulse of a post-colonial era, is now woven into the fabric of contemporary world affairs.

Formidable obstacles attend the endeavors of human rights policymakers, activists and scholars. The implementation of international human rights law depends for the most part on the voluntary consent of nations; the mechanisms for the observance or enforcement of human rights are yet in their infancy. Still, it is certain

¹³ T. Buergenthal, «The Inter-American System for the Protection of Human Rights» in T. Meron, ed., *Human Rights and International Law Legal and Political Issues* (Oxford: Oxford University Press, 1985) 79.

¹⁴ M.G. Ahanhanzo, «Introduction à la Charte africaine des droits de l'homme et des peuples», in *Mélanges Colliard*, Paris, Pedone, 1984, 178.

that a concern for the advancement of human rights is here to stay, out of necessity no less than out of idealism.

Despite the emphasis by the international community on the protection of individual human rights, without reference to the problems of minorities and indigenous peoples, there are several specific documents included in the text¹⁵. The reasons for the focus on the individual are historical, political, and for the purposes of uniformity of international legal instruments for the protection of human rights¹⁶. Historically, the system of protections of minorities established by the League of Nations were concerned expressly with individual rights of persons belonging to minorities. Politically, it was feared by many States that the granting of minority rights to the community or collectivity itself would increase friction between the minority community and the majority community of the State, perhaps leading to imbalances and threats to peace within the State. It was feared that there could also be threats to international peace and security.

From the point of view of uniformity of international legal instruments, the trend following World War Two was to emphasize the protection of human rights for all persons. This is reflected in the attempts to maintain uniformity within the Charter of United Nations¹⁷, the Universal Declaration of Human Rights¹⁸, and the International Covenant on Civil and Political Rights¹⁹.

I think that it is important to note the third part of the text – Documents d'intérêt canadien, québécois et comparé- concerning the formal application of international human rights law to aboriginal entities. If aboriginal peoples invoke their right to self-determination under international law, international human rights standards should also apply to the entity exercising the right to self-determination or to self-government. As Humphrey notes, albeit not with reference to aboriginal peoples, «if the principle of self-determination is worthy of respect, it carries with it the corollary that a people that succeeds in determining its political future has the duty to protect any minorities that remain with its jurisdiction»²⁰. I believe that this statement can be extended to the protection of individual rights generally.

The I.C.C.P.R. as an instrument protecting the right to self-determination and individual human rights is an international treaty to which Canada as a State is party, and which has to be implemented by legislation. Its application to aboriginal governments, if the latter do not fall under Parliament's authority, would have to be

¹⁵ Convention relative au statut des réfugiés, Doc. 8, 51; Convention internationale sur l'élimination de toutes les formes de discrimination raciale, Doc. 9, 63; Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, Doc. 10, 75; Convention n° 169 sur les peuples indigènes et tribaux de pays indépendants, Doc. 14, 121; Convention-cadre pour la protection des minorités nationales, Doc. 29, 253.

¹⁶ C.A. Macartney, «League of Nations Protection of Minority Rights» in E. Luard (ed.), *The International Protection of Minority Rights* (New York : Praeger 1967), 27.

¹⁷ Doc. 1, 3.

¹⁸ Doc. 2, 7.

¹⁹ Doc. 3, 13.

²⁰ J. Humphrey, «Preventing Discrimination and Positive Protection of Minorities: Aspects of International Law», (1986) 27 *C. de D.*, 23.

effected through an act of incorporation by the aboriginal governments, since aboriginal peoples do not as yet have any capacity under international law to accede to international treaties and are correspondingly under no international obligation to respect individual human rights²¹. In view of the recent developments in international law in relation to indigenous peoples, it may be necessary to re-define the relationship between States and indigenous peoples. The possibility for indigenous peoples to become parties to international human rights treaties would be another possible facet of their international subjectivity. These examples point towards a new direction in international law.

After a general consideration about the documents concerning the most relevant issues at international and comparative law, I would quote Schabas and Turp as final comment: «Le recueil que nous présentons aujourd'hui est un instrument perfectible et nous apprécierons recevoir, ... tout commentaire ou suggestion qui permettraient d'en améliorer le contenu et la présentation»²².

²¹ J.B. Marie, "Relation Between People's Rights and Human Rights: Semantic and Methodological Considerations", (1987) 7 *H.R.L.J.*, 195.

²² Préface, VIII.