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The Influence of the Universal Declaration as Law

JOHN DUGARD*

INTRODUCTION

The Universal Declaration of Human Rights, as we—as opposed to many politicians and students!—all know, was a non-binding resolution of the General Assembly of the United Nations. It has no binding legal effect except insofar as it has become customary international law or been translated into treaty form. Consequently, in assessing its influence as “law,” it is necessary to determine which provisions of the Universal Declaration of Human Rights have become custom or treaty law.

I do not wish to embark on an examination of which provisions of the Universal Declaration of Human Rights (UDHR) qualify as customary rules. Clearly, some, such as the prohibitions on torture, detention without trial, and discrimination, have become customary rules. Clearly some, such as the right to leisure in Article 24, have not. Instead I wish to focus on the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social and Cultural Rights, which were drafted, and have been implemented, with a view to giving effect to the UDHR “as law.” Today it is pointless to examine the UDHR as “law” without an examination of its legally binding offspring, the Covenants. They, together with the UDHR and the Optional Protocol to the Covenant on Civil and Political Rights,¹ constitute the International Bill of

* Professor of Law, Centre for Human Rights, University of Pretoria; Visiting Professor of Law, Duke University School of Law.

1. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

Rights.

I could embark on a study of the manner in which these Covenants have been ratified and monitored by their respective monitoring committees. But I shall not do so. Instead I shall argue that the UDHR and the Covenants together constitute a body of human rights law that gives substance to the rights enshrined in the human rights provisions—Articles 55 and 56—of the United Nations Charter. As a consequence, their substantive principles, as opposed to the procedural rules for implementation in the Covenants, are binding on all member states of the United Nations under the Charter itself.

It will be recalled that in the years following the adoption of the UDHR it was argued that the UDHR gave legal substance to the human rights provisions of the Charter. This argument was generally rejected on the ground that it was not possible to amend the Charter by resolution of the General Assembly. Also it was pointed out, rightly, that the language of the UDHR was exhortatory and too imprecise to impose legal obligations. The same cannot be said of the Covenants. They were drafted as legal instruments and describe with clarity and qualification the rights they seek to protect. On the other hand, the Covenants do not purport to amend the Charter, nor have they followed the required procedure for amendment to the Charter.

Today there is no doubt that the human rights provisions of the Charter are legally binding. The International Court of Justice confirmed this in the Namibia Opinion of 1971.² It is also clear that the human rights provisions are too broadly drafted, too general in their language to give a clear indication of the rights protected. This means that U.N. bodies charged with the task of applying human rights standards and human rights law must have regard to some lodestars. The sweeping provisions of the UDHR are too vague and imprecise for this purpose. But their offspring, the Covenants, are not. Consequently, the political and judicial organs of the U.N., in applying the human rights provisions of the Charter and in being guided by human rights standards, must be guided by the substantive provisions of the Covenants, the International Bill of Rights.

In my brief intervention I cannot provide a comprehensive over-

2. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 57 (June 21) [hereinafter "Namibia Opinion"].

view of how the political organs of the United Nations, particularly the General Assembly, the Security Council, and the Human Rights Council (previously the Commission on Human Rights), as well as the judicial organ of the United Nations, the International Court of Justice, have applied human rights law. That they have all been guided by human rights law on occasion is incontestable. The General Assembly has adopted numerous resolutions that seek to advance civil and political, economic, social, and cultural rights. The Security Council has likewise adopted resolutions that express concern about human rights violations. Most of these resolutions have been adopted under Chapter VI of the Charter but several have been adopted under Chapter VII. Witness the resolution referring the situation in Darfur to the International Criminal Court and Resolution 418 of 1977 imposing a mandatory arms embargo on South Africa because of its policy of apartheid.³ The Commission on Human Rights and now the Human Rights Council are committed to promoting and defending human rights. And the International Court of Justice, which is not a human rights court, has handed down many decisions that assert the rights and obligations of States in respect of human rights.⁴

All is not well, however, with the state of human rights in the world today. And in part the political organs of the United Nations, and its Secretariat, are to blame. Of course, the political organs are only as committed to human rights as their member States allow. Consequently, insofar as blame attaches, it is to the majorities in these organs. In my intervention I will focus on three issues that augur ill for human rights: first, the movement of the Security Council away from the notion that the violation of human rights can constitute a threat to international peace under Chapter VII of the Charter; second, the failure of the Security Council and Secretariat (that is, the Secretary-General) to implement an Advisory Opinion of the International Court of Justice on a particular human rights matter; and third, the failure of the Human Rights Council to concern itself sufficiently with human rights violations in the developing world.

3. In March 2005, France proposed a resolution to the U.N. Security Council that would refer Darfur to the International Criminal Court. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). U.N. Resolution 418 imposed a mandatory arms embargo against apartheid South Africa. S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

4. See SHIV R. S. BEDI, *THE DEVELOPMENT OF HUMAN RIGHTS LAW BY THE JUDGES OF THE INTERNATIONAL COURT OF JUSTICE* (2007).

THE SECURITY COUNCIL, INTERNATIONAL PEACE, AND
HUMAN RIGHTS

It seems trite, at least to the lay person, that a human rights situation in a particular State can threaten international peace and security. For years the Security Council resisted such a conclusion as it sought to balance Chapter VII with Article 2(7) of the Charter. But in 1977 the Security Council at last resolved that the excesses of apartheid in South Africa—a purely internal situation—constituted a threat to international peace under Chapter VII that warranted measures under Article 41.⁵ Resolution 418 was couched in language that suggested that some external element might possibly be involved. Accordingly, paragraph one of the resolution reads that the Security Council: “Determines, having regard to the policies and acts of the South Africa government, that the acquisition by South Africa of arms and related materiel constitutes a threat to the maintenance of international peace and security.”⁶

There was also passing reference in the second preambular paragraph of Resolution 418 to the fact that South Africa’s military build-up and attacks on neighboring states disturbed international peace.⁷ However, this was mere window dressing designed to appease those who might still have had doubts as to whether an internal situation might constitute a threat to international peace. The Security Council debates make it clear that the real reason for the resolution was the suppression of political opposition by the apartheid regime in the wake of the killing of Steve Biko. That is, it addressed a purely internal human rights violation.

Despite the victory for the proposition that an internal situation might constitute a threat to international peace, there has been an attempt to deny this proposition and to return to the primacy of Article 2(7). Surprisingly, such an argument has been advanced by

5. S.C. Res. 418, *supra* note 3. Article 41 of the U.N. Charter states: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

6. S.C. Res. 418, *supra* note 3, ¶ 1.

7. *Id.* pmbl. (“Recognizing that the military build-up by South Africa and its persistent acts of aggression against the neighboring States seriously disturb the security of those States.”).

the African National Congress government of South Africa, the same political body that lobbied hard for the notion that an internal situation—apartheid—constituted a threat to international peace and security.

This argument forms the basis of South Africa's protection of the rule of Robert Mugabe from international scrutiny. However, it was more publicly aired when, in 2007, South Africa cast its vote against a draft resolution before the Security Council, under Chapter VI of the Charter, that sought to condemn the violation of human rights by the military regime of Myanmar/Burma. The resolution, introduced by the United States and the United Kingdom, was killed by the vetoes of China and the Russian Federation. But South Africa also voted against the resolution on the ground that the draft resolution did not "fit with the Charter mandate conferred on the Security Council, which is to deal with matters that are a threat to international peace and security."⁸ That is, an internal human rights situation could not constitute a threat to international peace and security.

This decision has been explained by Dire Tladi of the South African Department of Foreign Affairs Legal Affairs—in an article that does "not necessarily reflect the views of the Department of Foreign Affairs"—as follows.⁹ A purely internal situation cannot constitute a threat to international peace. There must, in addition, be some armed conflict or potential for armed conflict between States.¹⁰ Apartheid, says Tladi, was condemned by the Security Council because of the threat it posed to neighboring States and not because of the internal situation in South Africa itself.¹¹ However, as pointed out above, the debates in the Security Council make it clear that Resolution 418 was prompted by internal repression and not external aggression.

South Africa, under President Mbeki, took upon itself to lead the developing world by identifying the lowest common denominator of opinion among such States and to exalt this opinion to a foreign policy position. South Africa's argument that the Security Council

8. U.N. SCOR, 62d Sess., 5619th mtg. at 3, U.N. Doc. S/PV.5619 (Jan. 12, 2007) (statement of Ambassador Kumalo of South Africa).

9. Dire Tladi, *Strict Positivism, Moral Arguments, Human Rights and the Security Council: South Africa and the Myanmar Vote*, 8 AFRICAN HUM. RTS. L. J. 23, 30 (2008).

10. *Id.* (citing ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 144 (2004)).

11. *Id.* at 34.

should not, and cannot, concern itself with internal human rights situations is, unfortunately, shared by many other States in the developing world. In part, it reflects hostility to the skewed composition of the Security Council, and in part, hostility to human rights and the idea that the violation of human rights is of concern to all States. One hopes that the new government in South Africa will abandon this policy and return to the more enlightened philosophy of the Mandela era.

There have been important developments in international law since the adoption of Resolution 418 in 1977. That certain norms are peremptory and that certain obligations have an *erga omnes* reach is now accepted. Moreover, the notion of an international duty to protect in situations involving a serious violation of human rights is accepted by the United Nations.¹² These developments have all been inspired by the International Bill of Rights. In these circumstances, there can be no substance in the argument that an internal situation cannot threaten international peace for the purpose of Security Council action.

The Mbeki doctrine seriously undermines the international protection of human rights and must be repudiated.

THE REFUSAL OF THE SECRETARY-GENERAL TO ATTEMPT TO
IMPLEMENT THE ADVISORY OPINION OF THE INTERNATIONAL COURT
OF JUSTICE ON THE WALL

In 2004 the International Court of Justice found, in an advisory opinion, that the wall Israel is constructing within Palestinian territory violates norms of international humanitarian law (IHL) and human rights law.¹³ It stated that the construction of the wall “constitutes breaches by Israel of various of its obligations under the applicable IHL and human rights instruments.”¹⁴ The human rights instruments in question were the two Covenants and the Convention on the Rights of the Child.¹⁵

12. See, for example, the General Assembly’s acceptance at the World Summit of the High Level Panel’s recommendation in the Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2004).

13. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 193–94 (July 9).

14. *Id.*

15. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, 1577

The Opinion is advisory and therefore not binding on States, particularly those that have persistently objected to it (notably Israel and the United States). Thus Israel may be faulted for failing to desist from violating its obligations under IHL and human rights law but not for failing to comply with the advisory opinion. The position of the United Nations and its Secretary-General is less defensible. The Opinion was requested and subsequently approved by the General Assembly, adopted by 150 votes in favor (including the European Union (EU) and Russian Federation), with six against and ten abstentions.¹⁶ It is therefore the law of the United Nations¹⁷ and as such must be implemented by the Secretary-General, who acts as the executive officer of the United Nations. But, despite this, the Secretary-General, both in his public statements (for instance at the Annapolis meeting in 2007) and in words and deeds on behalf of the Quartet (the U.N. body charged by the Security Council with promoting peace in the region), refuses even to acknowledge the Opinion. This is starkly illustrated by the most recent statement of the Quartet on September 26, 2008,¹⁸ which, like its predecessors, makes no mention whatsoever of the Advisory Opinion and the need to persuade or compel Israel to comply with the Opinion—as the law of the U.N.!

The failure of the U.N. in general, and its Secretary-General in particular, to even attempt to implement the Advisory Opinion on the wall compares unfavorably with the response of the U.N. to the 1971 Advisory Opinion on Namibia.¹⁹ This Opinion was treated by the U.N. as the legal framework for Namibian independence. The Secretary-General symbolizes the U.N. He is its leader. His unwillingness to uphold an Opinion by the judicial arm of the U.N. shows a lack of commitment to the Rule of Law in general and, in this case, to human rights in particular.

THE FAILURE OF THE HUMAN RIGHTS COUNCIL

The Human Rights Council (HRC), like its predecessor, the Commission on Human Rights, owes its existence to the International

U.N.T.S. 3.

16. G.A. Res. ES-10/15, U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

17. *See* Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, 1956 I.C.J. 23, 46–47 (June 1) (Lauterpacht, J., separate opinion).

18. Statement, The Quartet, No. S319/08 (Sept. 26, 2008).

19. Namibia Opinion, *supra* note 2.

Bill of Rights. The HRC is designed to promote and protect the rights enshrined in the UDHR. Whether it acts in an even-handed manner to achieve this goal is, however, open to serious doubt. The HRC consists of the representatives of States and is a political body. Nevertheless the politicization of the HRC, and so of human rights, has surpassed expectations. It is common knowledge that the HRC has devoted too little attention to human rights violations in the developing world—such as Zimbabwe, Darfur and Burma—and devoted too much attention to Israel and Palestine. Critics of the HRC from the West focus on this phenomenon without addressing the cause. They fail to ask the question whether the West's protection of Israel in the Security Council, the Quartet, and the EU may explain the determination of the developing world to use the HRC as an instrument for attacking Israel. They fail to ask whether the West's double standard on Israel may explain the double standard applied by the developing world in respect of its members.

As Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territory, I have had a unique opportunity to observe the behavior of States in the HRC. I have experienced the frustration of the developing world over the failure of the West to take Israel's violations of IHL and human rights seriously. I have heard delegates from the developing world ask how the West can refuse to hold Israel to account for its violations of numerous U.N. resolutions, ranging from the illegality of settlements to violations of the most basic freedoms. How can the West, they ask, which claims to respect the Rule of Law and human rights, completely ignore the 2004 Advisory Opinion of the International Court of Justice on the wall? How can the West, which controls the Quartet, allow the Quartet to completely ignore Israel's violations of IHL and human rights as a factor to be considered in the peace process?

At the same time, I have heard delegates from the West complain, rightly, about the manner in which the developing States protect their own members from scrutiny on human rights grounds and about the manner in which the HRC fails to show sufficient concern about issues such as Zimbabwe, Sudan's Darfur, and Burma/Myanmar. I do not have a solution to this problem. However, I do believe that if the West were to take Israel's violations of human rights more seriously, both in word and deed, it might be easier for the West to persuade the developing world to be less protective of its own member States. The West must face the fact that the Palestinian issue

is the litmus test for human rights as far as the developing world is concerned. If the West fails to show concern for human rights in the Palestinian Territory, the developing world will conclude that human rights are a tool employed by the West against regimes it dislikes and not a universal and objective instrument for the measurement of the treatment of people throughout the world.

CONCLUSION

As a component of the International Bill of Rights, the UDHR is “law.” In particular, it is the law of the U.N. As such, it should guide State delegations in their decision-making in the U.N. As the law of the U.N., it is legally binding on the Secretary-General. The above three issues show that the International Bill of Rights ceases to be the “law” when there is no political will to enforce and implement it. In some situations, politics prevails over the law. Of course, this occurs in national societies too, but the international order, without effective enforcement and compulsory adjudication, is more prone to political “override” and manipulation. The task facing the international human rights lawyer today is not to establish that the International Bill of Rights is “law”—that is no longer seriously questioned—but to ensure that it will be respected as law across the board by political decision-makers.