

SOME THOUGHTS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE “GENERATIONS” OF HUMAN RIGHTS

FAUSTO POCAR*

In recent legal literature on human rights, a commonly accepted approach has been to classify such rights in terms of generations, divided into three tiers.¹ Scholars often divide and ascribe human rights to their corresponding generation. In this practice, first generation rights comprise civil and political rights and freedoms, second generation rights include economic, social, and cultural rights, and third generation rights implicate such diffused rights as more recently identified in international human rights law, such as the right to peace, development, a safe and healthy environment, sufficient and safe food for all, or the use of natural resources. This classification is formally based in existing international legal instruments adopted within the framework of the United Nations since the Universal Declaration of Human Rights of 10 December 1948, which contained the first comprehensive catalogue of fundamental human rights without any classification of them.² On the one hand, the first and second generation rights are

* Professor Emeritus of International Law, University of Milan; Appeals Judge and former President, International Criminal Tribunal for the former Yugoslavia.

¹ The proposal for this classification is generally attributed to Karel Vasak, *Human Rights: A Thirty-Year Struggle. The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 11 (1977). The classification is commonly referred to in legal writings on human rights. More recently, the proposal has also been made to add a fourth generation of human rights comprising the rights connected with information technology.

² U.N. General Assembly, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). *See, in particular*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS. A COMMENTARY (Asbjørn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof, Allan Rosas & Theresa Swinehart eds., 1992) [hereinafter COMMENTARY]. Although the Declaration is contained in a General Assembly resolution which does not have binding force under the United Nations Charter, its provisions may be regarded as being currently part of customary international law. *See* Fausto Pocar, *Considerations on the Legislative Function of the Universal Declaration of Human*

essentially dealt with, respectively, in the two International Covenants of December 16, 1966.³ Whereas, on the other hand, the third generation rights are reflected in different specific instruments, mainly General Assembly declarations,⁴ as their emergence in humanitarian law is more recent and uncertainties in their identification have prevented the adoption of a comprehensive legal instrument dealing with their protection.

I.

It goes without saying that, like any classification, the proposed one cannot be regarded as a rigid one. As the two Covenants show, the distinction between the first and the second generation rights lies in the direct application of the first ones, while the second generation rights entail an obligation to ensure their progressive application, according to a State's resources and through international cooperation.⁵ However, it cannot be denied that not all of the Covenants' rights may come within this distinction. The same applies for some third generation rights, like the right to development; these rights present features that may, at least in part, characterize rights belonging to the other categories.⁶ However, these

Rights in International Law, U.N. CENTRE FOR HUMAN RIGHTS (*Bulletin of Human Rights. Special Issue*) 64-71 (1988).

³ The International Covenant on Civil and Political Rights would include the rights of the first generation. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. The International Covenant on Economic, Social and Cultural Rights would refer to the rights of the second generation. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴ It is impossible here to list all the General Assembly declarations which mention human rights. Reference may be made to: A Compilation of International Instruments, Office of the High Commissioner for Human Rights, U.N. Doc. ST/HR/1/Rev. 6 (Vol. I/Parts 1 & 2).

⁵ See International Covenant on Civil and Political Rights, *supra* note 3, at Art. 2; International Covenant on Economic, Social and Cultural Rights, *supra* note 3, at Art. 2.

⁶ See, e.g., Philip Alston & Mary Robinson, *The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours*, in HUMAN RIGHTS AND

2015] “GENERATIONS” OF HUMAN RIGHTS? 45

inconsistencies would not constitute of themselves a suitable argument for a critical approach to the above-mentioned classification.

Moreover, I do not discredit the fact that there may be merit in the above-mentioned classification, due to the fact that defining human rights in a “generations” approach reflects the progressive identification of human rights while demonstrating the need for distinct measures of implementation. However, it remains questionable whether a “generations” approach is desirable for an accurate understanding of the nature and essence of fundamental human rights. I humbly submit that, in this area of law, it is misleading.

First, it is important to note that the term “generation” is manifestly inaccurate when describing categories of human rights. It implies a succession of existences whereby, when a new generation comes to life, the previous one becomes outdated. In this scheme, the older generation is progressively set aside in favor of the new generation, which will eventually replace it. It is, or at least should be, self-evident, however, that in the field of human rights, when a so-called new generation emerges, the new rights identified must be regarded in addition to those previously identified and protected for a prior “generation.” This results in a succession of rights, from the first generation to the second, along with the emergence of additional rights which begin at or prior to the birth of the second generation.

The main concern with the “generations” approach is not merely one of terminology. It is the fear of abuse which may lead, and indeed sometimes has led, to maintaining views according to which new rights, in particular collective rights, should be protected by setting aside or deleting former generations’ rights, or at least granting priority over them.

Secondly, although a “generations” approach would appear *prima facie* as a proper classification from a historical perspective, a closer consideration reveals that such an approach is historically inaccurate. This inaccuracy is due to an incorrect reading of the Universal Declaration of Human Rights. The Declaration, as

maintained by authoritative jurists, cannot merely be regarded as the first disaggregated list of rights, split into distinct groups of rights which come into existence when their protection progressively develops in the domestic and international framework.⁷ Rather, the Universal Declaration must be viewed as a coherent document where all the enumerated rights are indivisible, interrelated, and interdependent.⁸ As proclaimed in the first recital of its preamble, the Universal Declaration represents a legal expression and specification of the recognition of the inherent human dignity and of the equal and inalienable rights of all members of the human family, as the foundation of freedom, justice, and peace in the world. In this context, the rights of the so-called first and second generations are expressly and simultaneously listed in the document, while the so-called third generation rights, although not expressly described in a detailed text, may largely, and perhaps entirely, find their recognition under the general provision in Article 28. This Article states that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”⁹

Furthermore, a reference to “generations” appears to overlook the notion that human rights, as described in the Universal Declaration, are not established by law, but are inherent in all human beings and, as such, should be recognized and protected under the law. The opening consideration of the Declaration intentionally

⁷ See, e.g. Judge A. A. Cançado Trindade, *Universal Declaration of Human Rights*, Introductory Note, U. N. AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2014), available at <http://legal.un.org/avl/ha/udhr/udhr.html> (last visited July 27, 2015); Emmanuel Decaux, *La Charte internationale des droits de l'homme, coherence et complementarité?*, in COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME, 1948-2008: RÉALITÉ D'UN IDÉAL COMMUN?: LES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS EN QUESTION, LA DOCUMENTATION FRANÇAISE 41 (2009).

⁸ The coherent nature of the Universal Declaration has been repeatedly affirmed in General Assembly resolutions on human rights, as well as in other international documents, like the World Conference on Human Rights, June 14-25, 1993, Part I, ¶ 5, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (July 12, 1993).

⁹ Universal Declaration of Human Rights, *supra* note 2, at Art. 28.

2015] “GENERATIONS” OF HUMAN RIGHTS? 47

refers to the “*recognition . . . of the equal and inalienable rights of all members of the human family,*”¹⁰ thus presupposing that these rights do not draw their existence from the law, but rather pre-date their legal identification and protection. There is an intimate contradiction in referring to “generations” of rights, while at the same time maintaining that human rights are inherent to human beings as such, i.e. that everyone is entitled to them by the mere fact of his or her birth. A reference to generations would imply that human rights may vary according to the generation to which they belong, and thus the entitlement to them may also differ. Such a reference would misconstrue both the essence of the entitlement to human rights and the protection that may be accorded under the law. While the first does not change, the latter is undeniably subject to variation, as the extent to which human rights are recognized and afforded protection depends on the recognition and protection they receive in the applicable law at a certain point in time and space.

In light of the foregoing considerations, it appears more appropriate to abandon a reference to “generations” of rights and rather deal with them as different and subsequent phases or stages in the progressive legal recognition of human rights and in the degree of protection afforded to them under domestic and international law.

II.

Turning now to the interrelation between the groups of rights as mentioned above, I will not dwell on the interplay between civil and political rights on one hand, and economic, social and cultural rights on the other hand. Their interdependence has been largely explored by social and legal doctrine, and is clearly established under the Universal Declaration, which, as mentioned earlier, does not classify the protected rights, and does not list them in a systematic order. It is also widely accepted that the distinction between the two groups of rights cannot simply rely on a time consideration which would place their recognition in a temporal sequence, although it is

¹⁰ *Id.* at Preamble (emphasis added).

true that the initial declarations of human rights adopted in the eighteenth century, the 1776 American Declaration¹¹ and the 1789 French Declaration,¹² only referred to the first group. Nor can it be explained in political doctrine terms by maintaining, as was usual during the Cold War, that the first group of rights was consonant with the Western tradition and liberal thinking while the second group better reflected the Eastern socialist approach. Rather, the reason for splitting the rights enshrined in the Universal Declaration into two groups as set forth in the two Covenants of 1966 is to be found in the need for distinct mechanisms of implementation. While States were immediately prepared to undertake the task of respecting and ensuring civil and political rights to all individuals, this was not the case in regards to economic, social and cultural rights. With respect to the latter category, States felt that the full realization of economic, social, and cultural rights would have to be realized only progressively and also through international assistance and cooperation. Thus, in reality there is no distinct conceptual or ideological approach behind the separation of the two categories of rights: both continue to constitute a single set of rights as in the Universal Declaration; however, they were separated based on the obligations surrounding their implementation.¹³

The analysis of the interrelation between the two above-mentioned categories of rights taken together and the third category consisting of diffused rights, improperly called third generation rights, raises more difficult issues. First, can these rights be appropriately regarded as inherent rights of human beings, thus as individual rights? Second, can any mechanism of enforcement of these rights be envisaged, which would be available to individuals or groups of individuals? Finally, is any remedy available or can it be provided to individuals for their violation?

As to the first question, there is no doubt that, in light of their diffused nature, the rights at issue present a collective dimension,

¹¹ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

¹² DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (Fr. 1789).

¹³ Fausto Pocar, *Universal and Regional Implementation of Human Rights*, in *UNIVERSALISM AND REGIONALISM IN THE ESTABLISHED INTERNATIONAL SYSTEM*, XXV *THESAURUS ACROASIMUM* 163-190 (Thessaloniki 1994).

which appears to prevail over their individual features. There is also always a danger, in the field of human rights, in recognizing collective rights. The danger is that individual rights are diluted to make them dependent on the superior interest of the society. If it goes without saying that individual rights must harmonize with the collective interest, they should not be given a subordinate role that would nullify their essence and their inherent nature. Harmonization may not cross the threshold of sacrificing individual rights entirely for a collective interest or right, as the latter would deserve protection only as far as it is the result of a consideration of the individual rights of all the members belonging to the group. In the case of most diffused rights at issue, and without prejudice to the identification of smaller groups, the membership belongs to all human beings, as the group is represented by all mankind, or, as the Universal Declaration describes it, by the “human family.” Thus, the harmonization process should lean towards making the collective interests functional to ensuring individual rights.

In order to avoid the risk of diluting individual rights beyond an unreasonable point, one may wonder whether a prudent approach should be followed in characterizing these diffused rights as human rights comparable with the rights set forth in the Universal Declaration and the Covenants, as well as in the legal instruments that describe them in more detail. As a matter of fact, the rights of the so-called third generation may be regarded more as a means to ensure the respect for and the enjoyment of individual human rights than as human rights themselves. Peace, a safe and healthy environment, development, and an equitable distribution of resources are definitely necessary conditions for the enjoyment of all individual human rights and freedoms, but it may be doubted whether it is correct to define them as additional human rights, inherent in human nature. There may be merit in regarding them as prerequisites for ensuring the rights which can be immediately associated with human nature. However, should such an approach be followed, the emphasis would inevitably be put on the duty of the society, in particular, but not limited to the international community, to ensure the existence of these prerequisites so that individual human rights may be exercised.

This approach is not incompatible with the identification of possible mechanisms and procedures whereby individuals may seek measures capable of enforcing the maintenance of peace, the preservation of the environment, the adoption of policies of development, or an equitable distribution of resources. It is not necessary, for this purpose, to define these situations as the object of human rights, their relationships with individual rights as conditions for their protection being sufficient to justify mechanisms and procedures of this nature. The provision of the remedy, which is a necessary consequence of the violation of human rights, makes such a definition even more problematic. In most cases, and with the possible exception of some instances concerning the preservation of the environment, it would be difficult to identify appropriate and specific remedies for an alleged violation of the obligation to ensure these conditions for the enjoyment of individual rights, which would not coincide with the remedy available for the latter.

III.

The consideration of the so-called third generation rights as conditions for ensuring the enjoyment of individual rights rather than as additional rights themselves, and the emphasis put on the obligation to implement such conditions, raises the issue of the definition of the scope of this obligation. The latter is clearly related to the implementation of the Universal Declaration and to the meaning that has to be given to the term “universal.” This term is generally understood as indicative of the recognition of human rights as inherent to all human beings without distinction of any kind, including the status of the country or territory to which a person belongs. Article 2 of the Universal Declaration itself points to this understanding, and there is no doubt that the term “universal” implies that everyone is entitled to the rights proclaimed therein.¹⁴

¹⁴ Under Article 2, everyone is entitled to all the rights and freedoms set forth in the Declaration, “without distinction of any kind”, the list of grounds for discrimination that follows being clearly a non-exhaustive one; furthermore, no distinction may be made on the basis of the political, jurisdictional or international

2015] “GENERATIONS” OF HUMAN RIGHTS? 51

However, it is legitimate to question whether universality should be regarded only as a concept having a horizontal dimension, which would entail the applicability of the Declaration to everyone, everywhere, at any specific point in time. Or rather, should universality also be given a vertical dimension, which would imply the recognition of the rights of future generations, thus entailing an obligation to ensure the preservation of the conditions for their enjoyment as well?

I advocate for this dual dimensional approach, maintaining that the second dimension also forms part of the concept of universality. If it is accepted that human rights are inherent to human beings, they cannot only belong to current members of society but must also correspond to members of future generations, and the Universal Declaration must be regarded as also aimed at protecting these future generations in anticipation of their existence on Earth.¹⁵ It goes without saying that the duty of ensuring respect for and enjoyment of the rights will only become tangible when the persons entitled to such rights are born. However, the obligations related to maintaining and preserving the conditions which are essential for allowing both the enjoyment of the rights and the effective discharge of the duty to ensure them must be understood as having a vertical, or diachronic, meaning and dimension, and thus apply, at any point in time, not only with respect to the then present individuals, but also to the future members of the human family.

One may further argue that these obligations impose a special responsibility for any present generation, a responsibility that brings

status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Universal Declaration of Human Rights, *supra* note 2, at Art. 2.

¹⁵ See also in favor of the recognition of a temporal dimension of the Universal Declaration which brings all generations within its scope the fundamental study, EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS (1989), who, however, reaches her conclusion on the basis of the reference in Article 2 of the Universal Declaration to “all members of the human family,” rather than, as maintained here, of the scope of the concept of universality. See also, for a concise presentation of her views, Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. INT’L L. REV. 19, 21 (1992).

us back to the implementation of what are improperly characterized as the rights of the third generation. The disregard of these obligations goes clearly against the Universal Declaration and should be regarded as a violation thereof, without the need for creating new categories of rights. Rather, the emphasis should be put on the responsibilities that existing human rights carry with them in their universal dimension understood in the vertical dimension as maintained above.

If the violations of the obligation to implement the conditions for the guarantee of human rights entail the responsibility of States' and other international actors under international law, it should not be overlooked that the international community has during the last decades stressed that, in appropriate circumstances, egregious violations of human rights also entail the individual criminal responsibility of the persons who are liable for the violations when the relevant conduct or omission is intentional.¹⁶ In this perspective, the notion of crimes against humanity should not be limited to systematic or widespread denial of fundamental human rights against existing human beings, but may also refer to such denial when it will affect future generations.

IV.

In conclusion, there are a number of reasons to believe that it is not now, nor has it ever been appropriate to refer to human rights in a "generations" approach. It is more beneficial to the progressive identification of human rights to expand the definition of universality as dual dimensional while categorizing the so-called third generation rights as conditions for ensuring the enjoyment of individual rights rather than as additional, independent rights. A continuous proliferation of new categories of rights does not contribute to their increased protection, but rather distracts from the real issue in this domain – the implementation of the bill of human rights as expressed

¹⁶ For this recent trend in international law, see among others, Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals*, 2 J. INT'L CRIM. J. 304-308 (2004).

2015] “GENERATIONS” OF HUMAN RIGHTS? 53

in the Universal Declaration and the International Covenants.