Human Rights and the United Nations: Taking Human Rights as Seriously as Security and Development [1]

Marcia V. J. Kran[2]

Honorable Chief Justice of Canada, Honorable Justices, lawyers, friends and family:

I am extremely honored to receive the Walter S. Tarnopolsky Human Rights Award today. I am grateful to Justice Lynn Smith and Allan McChesney for nominating me for this significant award, and to my husband, Luis Molina, for being flexible and adventurous enough to support me in the many places we have lived so I could work in the field of human rights. As well, I am glad that my sister Janice, other members of my family, friends and former colleagues from Vancouver are here to celebrate this award with me. I am especially happy that my father, Emil Kran, who is 90 years old, summoned the energy to fly from Manitoba to be here for this special occasion. Just last Christmas, my father was in critical care as a result of an emergency operation, and today he is here. It is his courage of spirit that helps inspire me to do the work I do.

---

[1] Address to the International Commission of Jurists (Canada) Annual Meeting on 15 August 2005 in Vancouver, Canada on accepting the Walter S. Tarnopolsky Award.

[2] B.A., LL.B., Dipl. Soc. Science, M.A., Manager, Democratic Governance, United Nations Development. Program (UNDP) Bratislava Regional Center, Bratislava, Slovakia. Email: marcia.kran@undp.org. Thanks are due to Aaron Miller for contributing to the research for this presentation.

Now is a dynamic and remarkable time to work with the United Nations in promoting human rights. Perhaps it is even more challenging than when Justice Walter Tarnopolsky was alive. I'd like to share with you why I believe that is the case.

Setting standards

When the United Nations was founded it quickly tackled the task of setting universal human rights standards. Human rights were proclaimed as a mandate of the Organization. The *Charter* of the United Nations states that one purpose of the United Nations is "[t]o achieve international cooperation (including)…in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[3]

The rights that were to be protected through the United Nations were subsequently defined in the *Universal Declaration of Human Rights*. The *Declaration* was developed at the UN Commission on Human Rights, led by late Canadian jurist John Humphrey, an esteemed former Dean of McGill Law School. He worked as a staff member of the UN for twenty years, from the time of its founding in 1946 to 1966.[4]

As you might expect, the negotiation of the content of the IHRL was highly politically charged, with national interests playing a role in the debates. The dairies of John Humphrey detail that the Soviet Union emphasized economic and social rights, the so-called "collective," rights, and Western states privileged civil and political rights. Some Islamic nations demurred at the equality given the sexes and, especially, the right to change religion. South Africa pondered various degrees of equality. Nations debated

[3] http://www.unhchr.ch/html/menu3/b/ch-chp1.htm Article 1.
[4] Fontanus vol. IV 1991 from the collections of McGill University

about the universality of the standards that were being set. Countries started to ask themselves if they were prepared to accept that measures they would happily support against another country might, in a different context, be applied against their own.[5]

Ultimately, the *Declaration* set out the human rights that states were to protect within their own sovereign territory. The concept of sovereignty, that is the exclusive power of states to act within their territory and reject interference by other states in their internal matters, dates back to 1648 and the Treaty of Westphalia. The concept is reflected in the UN *Charter*. But the meaning of the concept is changing and I will say more on this later. In 1948, 48 countries with diverse political regimes voted for the *Universal Declaration of Human Rights* at the General Assembly. The Honorable Lester Pearson, then Secretary of State for External Affairs, chaired the Canadian delegation that voted in favor. He noted that the *Declaration* "would mark a milestone in humanity's upward march." No votes were cast against the *Declaration* but 8 nations abstained. [6]

Between 1948 and 1989 international agreement was successively reached on rights protection in almost every sphere of human life, generally broken down into six areas: civil and political rights; economic and social rights; freedom from torture; from discrimination, including against women; and the rights of the child.[7]

The body of international human rights law developed at the United Nations Commission on Human Rights is extensive. In fact, setting universal standards has been

---

[5] Steiner, Henry J. and Phillip Alston. "Comment on Enforcement and UN Organs Involved" in International Human Rights in Context: Law, Politics, Morals 1996 at p.348 Note that, for the purposes of this presentation, the description of the UN human rights machinery is not comprehensive. For details and nuances, refer to Steiner, Henry J. and Philip Alston above.

[6] No votes were cast against the Declaration but 8 countries abstained, i.e., Saudi Arabia, South Africa, Soviet Union, Ukraine, Czechoslovakia, Yugoslavia, Poland and Byelorussian S. S.R. At the time, the UN had 56 member States compared with 191 today. See Human Rights inside the United Nations: The Humphrey Diaries 1948-1959 at p 156. The Diaries are held by McGill University.

[7] http://www.unhchr.ch/html/intlinst.htm

counted as one of the UN's main achievements in the area of human rights. The standards are understood and virtually universally accepted. States have voluntarily committed themselves to achieving the agreed standards by signing and ratifying human rights treaties. As a result of these undertakings by states this universal legal system applies to over 6 billion people.[8]

Establishing Institutions

Much as we wish that these entitlements would be respected, it requires more than agreement on normative standards to give life and meaning to the universal principles. The best avenues for recourse of rights violations are national ones but these are not always used or effective. Members of the United Nations selected two sorts of mechanisms to promote and protect the full range of human rights at the international level.

Commission on Human Rights

The first was the Commission on Human Rights. It was set up under the UN *Charter* to respond to rights violations, in addition to its role in setting standards. The Commission is made up of representatives of states rather than independent members, who meet annually for six weeks.[9] At the yearly session special rapporteurs report to the Commission on particular subjects or countries. As an example, my former colleague at the Faculty of Law, University of British Columbia, Maurice Copithorne, was UN Special Rapporteur on Human Rights in Iran for several years. The Government of Iran was willing to cooperate by inviting him to the country for a first visit, but he was not

[8] http://www.bayefsky.com/report/finalreport.php, p. i.

invited a second time. For subsequent reports to the Commission, he collected information from sources outside Iran.

The Commission operates in a number of ways. One is through criticism during a debate that can embarrass a country and put pressure on it to rectify rights violations. Or the Commission might adopt a formal resolution calling upon a country to take certain measures to remedy a situation.

The Commission also confidentially considers complaints of serious and consistent rights violations and pursues these complaints with the governments concerned, but in private. This confidential procedure is based on the assumption that a constructive dialogue with governments is useful to advance the protection of human rights.[10]

Treaty bodies

The second UN mechanism to implement human rights is a group of six committees. Each committee corresponds to a particular human rights treaty. For instance, the Committee on the Rights of the Child scrutinizes the implementation of the *Convention on the Rights of the Child.* These treaty bodies review the performance of those countries that have ratified the particular treaty. The Committees are made up of experts. States submit reports to a committee about their internal implementation of human rights obligations, and committees make authoritative recommendations for action.

---

[9] Between sessions, the Commission conducts studies on problematic issues. Based on the findings, it makes recommendations on how to realize human rights.

[10] Steiner, Henry J. and Philip Alston op. cit. "Intergovernmental Enforcement - UN System" at pp. 357 – 390. Complaints are investigated, and states can be kept under review for as many years as is necessary. The Commission usually takes on no more than 6-8 countries at a time under this process. The confidential "1503 "technique can also be used to place gradually increasing pressure on offending governments.

By 2005 this treaty process is well known. But when it was established, it was a revolutionary idea that a large number of countries would periodically submit reports to an international Committee about the relationship between the government and its citizens, and participate in a discussion of the report with human rights experts from around the world! This evolution cast a new light on the concept of sovereignty – states voluntary assumed legal duties and acceded to international supervision, assessment and accountability.[11]

Since 1976 the United Nations Human Rights Committee, one of the six committees, has observed how states implement civil and political rights. 104 countries have agreed to have their human rights records scrutinized by this Committee.[12]

As you know, Justice Walter Tarnopolsky sat on the Committee from 1977 to 1983. I knew of Justice Tarnopolsky as a respected jurist who increased the credibility of the fledgling Human Rights Committee during his membership. He was very influential in the formative years of the Committee, insisting on a liberal interpretation of its mandate, and assisting in establishing its procedures. [13]

Interestingly, he joined the HRC without a specialized background in international law and, in his own words, with no international experience. He said that "I started to gauge the actions of different countries by my own standards in Canada." But another member of the Committee told him that they were not going to transform

[11] Edward Morgan writes that this is an exercise of sovereignty in favor of comity in international relations: see his "Retributory Theatre" in *American University Journal of International Law and Policy* 3: 1-64.
[12] http://www.unhchr.ch/pdf/report.pdf The HRC is composed of persons of "high moral character". As above, there are now 191 Member States of the United Nations. http://www.un.org/Overview/growth.htm
[13] http://www.chrf.ca/english/programs/downloads/ihrtp-proceedings/22nd/unhr-system.pdf

countries into Canada overnight. Justice Tarnopolsky concluded that it was best to progress forward bit by bit. “If we don’t push at all, we won’t get anything.”[14]

Justice Tarnopolsky noted that “the Human Rights Committee is the only international forum from which the Warsaw Pact countries have accepted questioning on their human rights record and to which they have responded.”[15] Thirty years ago Justice Tarnopolsky was keenly aware of the importance for all countries, including Canada, to participate in United Nations human rights mechanisms. He was a strong advocate of universal participation in this international legal system. In 1986, at a university symposium in Ohio, he said:

> “We have a general responsibility, between ourselves, in terms of standards to try to raise the level of human rights protection in the whole world. But one loses any kind of moral authority, in condemning Chile or Czechoslovakia, if one says that we are just too good for this international standard. One has to be part of that, or no one will listen.”[16]

Some of you may recall the persuasive power on Canada of the Committee's view on *Lovelace* in 1983 that resulted in, among other things, amendments to the Canadian *Indian Act.*[17]

Those of you who have worked in international human rights know about these traditional implementation mechanisms. Generally, their approach is to expose or shame countries for human rights violations. They do so in a less direct or hard hitting way than non-governmental organizations, such as Human Rights Watch or Amnesty International.

---

[14] *Akron Law Review* November 1986 at p. 709.
[15] Ibid. p. 613
[16] Ibid, p. 706
[17] For a concise review of the process and effect of *Lovelace* see Luis Molina's "Can States Commit Crimes: The Limits of Formal International Law" in Ross, Jeffrey Ian (ed.) Controlling State Crime (Garland, New York, 1995) at pp. 363-64.

The essence of their enforcement power of is the pressure of world public opinion. The idea is that governments can be persuaded to address shortcomings in guaranteeing human rights if they are subject to the international spotlight.[18] A former member of one Committee wrote that "enormous energy has been invested in hotly contested efforts to establish institutions and procedures capable of securing enforcement."[19]

Assessment

These UN human rights institutions, the Commission and the Committees, however, have not fulfilled the potential I described earlier.

One view is that that the international human rights "implementation scheme … was drafted during a period of history when effective international monitoring was neither intended nor achievable [by all states]."[20] Today, the Commission is seen as operating according to the national self-interest of members who represent their own countries. The six week sessions in Geneva are often politicized. Fear of being criticized can squelch justifiably negative comments against other states' human rights records. At worst, the Commission process is seen as as riddled with selectivity. I certainly agree with High Commissioner Louise Arbour who, two weeks ago, commented that "the Commission has performed extremely poorly leading to a perception of using double standards and being very politically driven."[21]

As for the six human rights Committees, they have achieved some of their goals. On one hand, the preparation of reports for the treaty bodies has required states to

---

[18] Of course, this approach relies heavily on the media playing an effective role.
[19] Steiner, Henry J. and Philip Alston op.cit. p.347
[20] http://www.bayefsky.com/report/finalreport.php, p 1

intensively review and reflect upon their human rights records. The Committees have served as a platform for dialogue with countries on human rights. They have provided progressive input into the development of new national laws, policies and programmes that aim to protect human rights.

But another Canadian, Anne Bayefsky, who evaluated them, found them inadequate in many respects. Many international lawyers share her views. There are overdue reports and extremely long delays: Bayefsky observed that "[t]here are twelve hundred reports overdue, but only sixteen hundred have ever been considered in the 30 years of treaty body history". [22] States often refuse to provide remedies to individuals when violations of rights are found. Procedures are duplicated, with little attempt to consolidate them.

A major shortcoming of the treaty process is the failure to achieve the universal participation that Justice Tarnopolsky advocated so strongly: not enough states participate in the review process.

Future steps

In order to overcome these gaps in securing human rights and address major global challenges, the United Nations system is under review.

---

[21] UN News Service July 29, 2005 "UN Human Rights Commissioner Sees Need for More Emphasis on Implementation": www.ohchr.org/english/bodies/icm-mc/docs/stat4thmeeting.doc.

[22] http://www.bayefsky.com/report/finalreport.php Universal membership has been lacking in some of the human rights treaties, especially the optional protocol, which often contain binding mechanisms for UN intervention. In Anne Bayefsky's critical report on the reform of Human Rights Treaties *Universality at the Crossroads*, she observes that "[i]n theory, the subsidiary nature of international implementation to national mechanisms should permit a reduction of the burdens at the international level. In our time, however, this programme remains unachieved. Firstly, there remain lingering lacunae in participation." Unfortunately by the numbers Dr. Bayefsky is accurate, "The percentage of states which have ratified one of the human rights treaties without ratifying the complaint procedures associated with them: 33% in the case of the CCPR (Optional Protocol), 66% for CAT (individual, Art. 22), 79% for CERD (Art. 14), 92% for CEDAW

The current plan for reform of the United Nations is set out in the report titled *In Larger Freedom* ("Report"). In this Report the Secretary General outlines a vision for the United Nations as an effective instrument to secure three fundamental values: freedom from want, freedom from fear, and freedom to live in human dignity. He recommends upgrading the importance placed on human rights, making them one of the three central concerns of the Organization, together with security and development.

Development is the core mandate of the United Nations Development Program, where I work.[23] Generally speaking, uni-dimensional development has been a significant cause of human rights denials and abuses in some countries.[24] Recognizing this, over the last ten years, UNDP has become increasingly active in advancing human rights. *Human development* is the mandate of UNDP, and we have now policies to ensure that our development efforts result in the promotion and protection of human rights.

UNDP tends to concentrates on long term structural dimensions of human rights reforms, such supporting the establishment of capable institutions, building the capacity of officials obliged to protect human rights, and raising public awareness about human rights. As you would expect, these changes cannot be brought about without governments being involved and playing a positive role. Some governments in the region where I work find this difficult. But in other places there are unique openings to strengthen human rights. For example, in Ukraine, the country of Justice Tarnopolsky's ancestors, last year's Orange Revolution brought into power a government that has a pro-human rights agenda. UNDP is sponsoring a Ukrainian-Canadian lawyer who is advising the President

---

(Optional Protocol)." Other specific problems include on time reporting and dealing with the reports that are received.

[23] www.undp.org; www.undp.org/europeandcis

and Prime Minister on reforms of the Ukrainian administration that advance human rights.

Kofi Annan has said that "No drive for development will be successful unless [it is] based on the sure foundation of respect for human dignity." To help achieve this he proposes that the UN institutions that are devoted to human rights matters be vastly revamped to reduce selectivity, arbitrary enforcement and breaches of human rights without consequence. He specifically recommends that the Human Rights Commission be replaced by a smaller standing Human Rights Council.[25] Members would be elected by a 2/3 majority of the Security Council which should filter out the most abusive states.[26] The Council would be on par with the Security Council and be able to meet any time to deal with imminent crises and take action when serious situations develop.[27] This is important in view of past crises where many lives were lost when decisive action was not taken to protect them.

The Report favors the Security Council considering human rights much more actively in its deliberations.[28] As you know, the Security Council has exclusive power to authorize the use of force internationally, and force may be needed to effectively address violations of human rights such as genocide, ethnic cleansing and crimes against humanity.

---

[24] Personal notes taken at Dr. Clarence Dias' presentation at the UNDP Bratislava Regional Centre for Europe and the CIS on May 23, 2005.
[25] http://www.foreignaffairs.org/20050501faessay84307/kofi-annan/in-larger-freedom-decision-time-at-the-un.html
[26] International Commission of Jurists, Geneva, *Reforming the United Nations System: A Chance for the United Nations to Fulfil its Promise* 2005 p IV.
[27] The description of the proposal is drawn from the United Nations *UN Human Rights Council Explanatory Note* April 2005 www.globalpolicy.org/reform/hrc/o4explanatory.htm
[28] *Ibid.*

The proposed Human Rights Council would exercise universal scrutiny of human rights performance through a peer review system. The performance of all states on their human rights commitments would be subject to assessment by other states. The Secretary General noted that, "[t]he UN's universal membership is a precious asset in advancing human rights. The fact that non-democratic states often sign on to the UN's agenda opens an avenue through which other states, as well as civil society around the world, can press them to align their behavior with their commitments."[29] Universal participation, the feature that Justice Tarnopolsky believed was so important, is emphasized in the report.

The International Commission of Jurists in Geneva has prepared a response to the human rights proposals of *In Larger Freedom*.[30] They go further and suggest eliminating the confidential procedures of the Human Rights Commission because they are not transparent. And they argue for consolidating the six treaty bodies, a recommendation that echoes Anne Bayefsky.

In September, world leaders will meet at United Nations Headquarters in New York to agree on a collective response to global challenges including the need for improved respect for human rights. They will decide on the Secretary General's proposals, for example, on the authority the UN will have to protect against genocide, ethnic cleansing and crimes of humanity; on whether the Commission on Human Rights will be replaced by a smaller, elected Council; and on the precise relationship of this Council to the Security Council. These decisions may redefine state sovereignty to meet contemporary global realities.

---

[29] *Ibid.*

If these and other proposals are endorsed by member states, development, security and human rights will become the integral and interrelated purposes of the United Nations. And it will be remolded to achieve these objectives. With overall institutional reform -- including the establishment of an effective and accountable Human Rights Council -- the United Nations will be equipped to achieve better results in improving respect for human rights globally.

[30] International Commission of Jurists, Geneva, op.cit. at p III. http://www.icj.org/ IMG/pdf/ summaryICJUNreformreport.pdf