Chapter 2

The Evolution of Human Rights in International Law

I. Introduction

An assessment of the evolution of human rights in international law may indeed be seen as no more than an historicist account of the subject’s growth and change over time, taking account of its point of entry into the international law family and its evolving normative structure. However, such a timeline can be more than a record of dates and places; it also enables the verification of original ambitions, its dynamic growth and expansion over time and an account of the factors of change. The diversity of characteristics and their individual contribution to the moulding of the subject at various points along this evolutionary timeline helps to define its nature and character.

This chapter proposes an alternative starting point for international human rights in early international law. It explains a gradual evolution in terms of an incremental transfer of power and autonomy in human rights matters from municipal law to international law, initially for the convenience of States, but later evolved into ‘objective’ standards. This explanation of the evolution of international human rights places the subject alongside and as a part of the evolution of mainstream international law. The chapter argues that the evolution of both human rights and international law are affected by similar opportunistic factors in time and unpredictable circumstances. Progress is largely reactive instead of proactive, with a predictable consequence of a lack of coherence and co-ordination that remains evident today. This is compounded by the absence of a central authority in international law.

A full appreciation of the legal character of international human rights can be discerned from a contextual review of its evolution. This requires an explanation of the relationship between national regimes and the emerging international normativity by way of careful assessment of the factors that
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trigger change in international affairs, such as the collapse of the Papal authority and the emergence of autonomous nation states, the need for States to interact and the changing norms of international morality. In such a review, it is also important to establish the terms of governmental relationship with individuals – either as citizens or as aliens for the guarantee or protection of their rights. An understanding of the backup or the fall back strategy in the event of the failure of the terms of government with its people in this relationship is also important in this process of assessment.

In this exercise, one thing is clear. In the society after the Peace of Westphalia, neither international law nor the idea of human rights in it had an automatic or inevitable place. Each stage in the development of international human rights has depended on concessions granted by States. Not all concessions were voluntary. Most were made reluctantly because the alternatives to relying on international law seemed less attractive. The internationalisation of individual rights has not therefore been a natural phenomenon. Rather, it is a product of gradual social transformation in response to dynamic challenges over time. The legal consequences of the complex processes involved in this exercise of social engineering may be represented in two broad stages: the facilitative and the legalisation stages referring, respectively, to the period up until the UN Charter and the period thereafter [i.e. legalisation stage from 1945 onwards]. In practice, it is not so easy to separate the two stages as they blend seamlessly into one evolving continuum.

II. The Facilitation Stage

The first stage in the internationalisation of human rights (the so-called facilitation stage) was no more than a forum shift for the processing and management of individual rights from the domestic to the international forum. This was a limited adjustment necessitated by a combination of factors including the structural inadequacies [and limitations] of the domestic law framework and the ‘inconvenient’ consequences of the conflict between territorial sov-

1 National regimes and strategies for individual rights tended to be rhetorical statements of political ideals in national constitutions largely for defining the limits of public authority. The link between these political ideals and justiciable individual entitlements is not so easily or directly established from the constitution. Constitutions are employed as a guide to selected aspects of public law including administrative law and criminal law. The relationship in private law is, at best, a complicated one, precisely because of a lack of an acknowledgement of the relevance of public law standards in private law affairs. In the domestic law context, private law is often distanced and separated from human rights standards that are seen generally as public law.